

“Critical Analysis of Constitutionality of EWS Reservation and its Basis”

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ABSTRACT

The framers of our constitution envisaged the only social backwardness in lieu of economic backwardness in order to grant Reservation. It is provided in three sectors: Political, Education and Employment. By the passage of time, after the commencement of constitution, the circle of beneficiaries of Reservation were enlarged as OBC has been granted reservation. In the very famous I.R. Sawhney case the reservation limit was set not to exceed 50%. Also the Hon'ble Supreme Court has decided that no Reservation be granted on the basis of economic backwardness. The Reservation on the basis of economic basis is unconstitutional, it is against the basic tenet of It is arguable and researchable that present government allowed the EWS even after our apex court has very aptly decided against EWS.

Literature Review-

1. SOCIAL JUSTICE AND THE CONSTITUTION OF INDIA, Author(s): S. Waseem Ahmad and M. Ashraf Ali Source: The Indian Journal of Political Science , OCT. - DEC., 2006, Vol. 67, No. 4 (OCT. - DEC., 2006), pp. 767-782

In this paper, authors have lamented and highlighted the plights of forward class of persons relating to their poor economic status. Various case laws and constitutional provisions have been elaborated in this wais paper. In this way authors tried to figure out the true meaning of social justice.

2. EWS Reservation Is a Kind of Counter-Revolution, editor: Ajaz Ashraf, published in Jnata Weekly Magazine, 18 sept.2022.

In this paper, writer collected critics of EWS from various sources including political sector. It specifically emphasized the intention of the present government and the then government. A comparative aspect has been scrutinized.

Statement of Problem- At present, 103rd constitutional amendment inserted the basis of economic backwardness in Art. 15 & 16 in the constitution which disturbs the equality code provided under part 3rd of Indian constitution. It is not in consonance with vision of framers of Indian constitution.

Hypothesis- EWS Reservation is against the basic tenets of Reservation scheme provided in the constitution of India.

Research Questions-

1. Whether EWS Reservation violates the basic structure of India Constitution?
2. Whether Reservation can be provided on the basis of sole economic criterion?
3. Whether constitution allows State to determine the economic backwardness?
4. Whether the ceiling limit of Reservation is being crossed after EWS?

Research Objectives-

1. To analyze the nexus between Reservation and Basic structure of constitution.
2. To analyze the EWS quota case which is in dispute.
3. To examine the power of State Government in selection and identification of economic backwardness.
4. To observe ceiling limit of Reservation.

Research Methodology- The research methodology used for this paper is purely doctrinal including analysis of research papers, law books, cases and online resources.

Reservation Policy from Primordial to Present

Granville Austin defined Indian constitution as the document of governance, which means that such document envisages the socialistic pattern of governance. Indian constitution has mandate to protect the vulnerable group in the society, for that it comprises fundamental rights as well as DPSP to conserve the human values and human dignity. Reservation has been chosen as an affirmative action in the effort of enhancement of socially underprivileged section of society so that such group could come in the main streamline of the society. The framers of Indian constitution were of the view that affirmative action can be granted only on the basis of social-educational backwardness. India is a country of multi-religions, multi-class and multi-castes. It has been the history of caste based discrimination in the society. The caste based discrimination can be found in each and every fabric of Indian society whether it is urban or rural. The fact can be derived on the basis of Indian experience that poverty does not amount to social backwardness; however economic ability of backward person cannot eradicate the low caste stigma. Ironically, in this way a poor person can struck out the poverty by raising its economic standard, however a low caste person cannot remove its backwardness by raising its economic standard. In this way, it may be understood the distinction between social backwardness and economic backwardness. The affirmative action of economic reservation is the

new step taken by the Government to remove the plights of poor section of General category of persons in society. It is necessary to understand the object, meaning, nature and scope of such Reservation in order to realize the importance of EWS. It will enhance the corrective measures. Dr. Ambedkar, the architect of the Indian Constitution has highlighted the then existing injustice and inequalities in our society in his speech delivered in the Constituent Assembly as follows -We must begin by acknowledging first that there is complete absence of two things in Indian Society. One of this is 'equality'. On the social plane, we have in India a society based on privilege of graded inequality, which means elevation for some and degradation of others. On the economic plane, we have a society in which there are some with immense wealth as against many who are living in utter poverty, In politics we have equality and in social and economic life, we have inequality. We must remove this contradiction at the earliest possible moment, or else those who suffer from inequality will blow up the structure of the political democracy which this Assembly.¹

The recent development in Reservation policy came into existence through 103rd historical and politically motivated constitutional amendment which mainly added clause 6 in both article 15 & 16. That preferential treatment may be given to EWS class even in the matter of education as well as public employment. The explanation provided in these provisions empowers the state government to give EWS status on the basis of family income and other relevant indicators as it deems fit. It also provides caution that EWS class should be excluded from SEBC (Socially and Educationally Backward Class) and SC/ST, therefore; only General category can claim EWS reservation. The impact of such policy invariably affects the General pool of education and public employment in terms of reservation.

It is relevant to mention the **vision of framers of our constitution** regarding the *sentential legis*. The framers categorized Indian people on the basis of their caste, religion, place of birth etc. preferential treatment was given either on the basis of their caste, class or religion. Primarily SC and ST were given preferential treatment on the basis of discrimination and deprivation respectively. India is multi-religion and multi- community state, therefore it was mandatory to give Minority status to other religious minorities. The essential part was able to be noted that Minority cannot take the benefit of reservation as much as SC/ST/SEBC could take except some castes in Sikh minority. Therefore our framers classified vulnerable group in SC/ST/ SEBC and women. Minority was not on the basis of discrimination or deprivation; they were given minority status only on religious or linguistic basis. Clause (3) of Article 10 (clause 4 of Art. 16 of the present constitution) prepared by the drafting committee read “Nothing in this Article shall prevent the State from making any provision for the reservation of appointment or posts in favor of any backward class of citizens who, in the opinion of state, are not adequately represented in the services under the State. Such Draft was circulated for

¹ C. Basavaraju, Reservation Under the Constitution of India: Issues And Perspectives, available at <https://www.jstor.org/stable/43953443>

eliciting opinion. R.R. Diwakar and S.V. Krishnamoorthy Rao proposed the addition of the expressions, 'Economically or Culturally' before the word backward. Sir B.N. Rao commented on it that though there was no great objection in doing so, such addition was unnecessary.² It is unambiguous that framers did pay low attention on economic backwardness rather than social backwardness. It was of the view of constituent assembly that reservation is not a measure of anti-poverty; therefore the benefit of reservation is only access to those who are socially vulnerable. At present the constitution provides reservation in three sectors- Political, Education and Public employment. Other provisions are provided for preferential treatment for those whom the state government deems fit. However such reservation, preferential treatment and affirmative action can be provided within the constitutional limits. The aims and objective of such reservation, preferential treatment and affirmative action to attain the equality provided in article 14 of the Indian constitution. By the passage of time Indian Judiciary had occasion to scrutinize the Mandal formula under which the beneficiary of reservation was expanded. Resultantly widespread protest started in the nationwide. In this era, Indian Judiciary was finally in a mood to finalize the parameter of reservation scheme provided under Indian constitution. In this case, Hon'ble Supreme Court imposed ceiling on reservation up to 50 percent as well as put the restriction on reservation on the economic basis. It vehemently denied the reservation on the economic basis. As of now, we have arrived on conclusion that framers of our constitution was not in the favor of reservation of Economic Weaker Section.

Constitutional Scheme of Reservation

The Indian constitution provides Reservation in three sectors: Political seats, Education and Public employment. Basically reservation in education and employment are provided under part 3 of Indian constitution. Article 15 specifically provides reservation in educational institution except Minority institutions. Gradually it expanded reservation in government aided as well as non aided educational institutions. However Article 16 deals with reservation in public employment sector. The time limit of reservation has not been provided yet in the constitution especially in Education and Public employment, so it is not arguable. The objective behind the unlimited period is to attain the Equality among the society. However reservation in political seats was set for 10 years, but it is keeping amended again and again after each 10 years. The objective might be political hence arguable. Next is debatable point is beneficiary of Reservation. At the commencement of Indian Constitution, SC and ST was declared by Presidential order³. The Minorities were not provided any benefit of Reservation, rather they were given liberty to choose and administer their educational institution with a view to preserve the community ethics. Recently 103rd constitutional amendment⁴ moved by

² Aniruddh Prasad & Dr. Chandra Sen Pratap Singh, Reservation: Policy, Practice And Its Impact on Society volume 1, published at Kalpaz Publications.

³ The Constitution (Scheduled Castes)[(Union Territories)] Order 1951.

⁴ The Constitution (One Hundred And Third Amendment) Act, 2019.

Government of India and passed by Indian Parliament expanded the horizon of beneficiary of Reservation. It added clause 6 in Article 15 & 16 under Indian constitution. Art 15(6) provides that nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) Any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5)

It also added an explanation in both provisions:- Explanation.—for the purposes of this article and article 15 & 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.' In this Way State government is empowered to identify and select the economic backward class in the society. It is sole discretion of state government to identify and select the universe of economic backwardness. The parameters can be varied by the government; however it cannot breach the constitutional basis of amendment. Such parameters shall be related to property, house property, annual income, plot etc. The benefit of such Reservation is not as much fixed as SC & ST Reservation is fixed. Such class can take the advantage periodically; it may depend upon the State government to identify such class periodically. It will prevent the misuse of EWS Reservation as the economic status of person does not remain static. It keeps changing by the passage of time. Reservation may have two types, Vertical and Horizontal. SC, ST, OBC caste based Reservation are under the purview of vertical while Physically Handicapped and women come under the purview of Horizontal. EWS is considered as vertical reservation as it has been provided on the basis of economic backwardness. Reservation based on any kind of backwardness will be under the vertical Reservation.

Importance and Problems of EWS Reservation

The importance of this reservation scheme is for poor class in General category of persons. Since the time of commencement of Indian constitution only SC & ST and OBC were getting the benefit of Reservation scheme. Apart from them women, physically handicapped persons and others were in the race of getting such benefit. No relaxation for poor class in General category of persons was thought. However DPSP provide the provisions for poor in the society but that is not sufficient for them in their social and educational enhancement. In spite of their intelligence and merit they are confined in general pool of Reservation. Therefore such Reservation on economic basis is the strong step towards social justice as well as economic justice. It would improve the conditions of poor class in the society.

The chief concern with EWS is that it is creating another class of beneficiary of Reservation which is reducing the benefit of General category of persons. Such Reservation is not in compliance with

visions of framers of our constitution. Also in pursuant of the judgment⁵ it was opined by Supreme Court that Reservation cannot be provided on purely economic basis. In such case it was also decreed that Reservation cannot exceed the limit which is 50%. Further the court also suggested that economic basis can be parameter in declaring OBC in both creamy and non creamy layer. However such concept of creamy layer is not applied on SC & ST. therefore in view of the present circumstances, such EWS Reservation is not in consonance with very famous Mandal case. The other problem with EWS Reservation is that the beneficiaries have to renew the certificate each after one year which puts additional burden on them. The most significant problem is with parameters of EWS which is in challenge. Following are the parameters:-

1. Candidate's annual family income must be less than Rs. 8 Lakhs per annum.
2. Their family must not own more than 5 acres of agriculture land.
3. The residential flat area should be below 1000 sq ft.
4. The residential plot's area should be below 100 square yards if in a notified municipality sector.
5. The residential plot's area should be below 200 square yards if in a non-notified municipality sector.

The above parameter aims to decide the economic backwardness of the person. Also it attracts the persons belonging to general category of person. In the case **Youth for Young Equality v. Union of India**, such EWS Reservation was challenged before Supreme Court of India. It was allowed by the Supreme Court of India.

Analysis of Mandal commission and Major Sinho commission Report-

The Mandal Commission of 1979 and the Major Sinho Commission of 2006 present a study in contrasts. The Mandal Commission examined social and educational backwardness, with its 1980 report forming the basis for the introduction of 27% reservations for Other Backward Classes in higher education and public employment in 1991. The Major Sinho Commission studied economic backwardness among the 'general category'. The Union Government has used the Sinho Commission Report to justify reservations of 10% for Economically Weaker Sections in higher education and public employment. However, the two Commissions did not just differ in terms of their scope and terms of reference. Rather, there were marked differences in composition and methodology. The principal recommendation of the Mandal Commission was the introduction of reservations of 27%

⁵ *IR Sawhney v. Union of India*

for socially and Economically Backward Classes in higher education and public employment. These reservations were introduced in 1991 by the VP Singh Government.

The Major Sinho Commission, constituted by the UPA Government to study economic backwardness among the general category, consisted of Retired Major General S.R. Sinho, Narendra Kumar, and Mahendra Singh, an IAS officer. The Major Sinho Commission recommended that the limit for taxable income should be used to determine whether a candidate is economically backward. It said that affirmative action other than reservations should be thought of, such as education and skill-building, and improvement in health and sanitation.

Judicial Responses

“State of Madras v. Champakam Dorairajan”⁶ The Madras government issued an order providing reservation to non-Brahmin community in professional college and employment. This communal order was challenged by state government in the court. The Supreme Court struck down the Communal G. O. laying that the classification was made on the basis of religion, race, caste, and opined it to be contrary to Article 29 (2). However, the Government argued that, this classification was based on article 46 which enjoined upon State to promote the educational and economic interest of weaker sections, but court did not consider it. This judicial pronouncement gave rise to make first amendment in the Constitution.

‘M. R. Balaji v. State of Mysore’⁷ In this case the Karnataka Government had passed an order to keep the 50% seats reserved for other backward classes, in addition to 15% for Scheduled Castes and 3% for Scheduled Tribes, it goes to 68% in total. The Court observed that, “speaking generally and in a broad way, a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case”. Further court observed that, clause (4) of Article 15 is an exception to clause (1). Hence the order of the government was struck down.

Indra Sawhney v. Union of India⁸, the 9 Judges bench finally resolves the issues arising out of Reservation. In their verdict, it was decided that Reservation cannot go beyond the limit of 50 % except in exceptional cases. Further, Reservation cannot be give on the sole economic criterion.

Therefore the Reservation is only on the social and educational basis not economic basis.

⁶ AIR 1951 SC 226

⁷ AIR 1963 SC 649

⁸ AIR 1993 SC 477

In case of M Nagrajan the issue of Reservation in promotion was resolved. It was directed to government to identify the quantifiable data of backwardness and adequacy of merit. In the EWS case⁹ it was decided by Supreme Court to refer it to constitution bench.

Conclusion

By and large Reservation should be provided where any kind of disability arises due to social status, educational level or economic status. Normally every civilized country in the world has system of granting affirmative action to needy people. Poverty is the basic problem in India or anywhere in the world. Poverty is common. Poverty and social backwardness has nexus too. However in India, some section of society is socially and educationally poor. They need betterment for their enhancement. It is but natural for beneficiary of reservation to enhance his economic status but it is not necessary that it will eradicate his social stigma. It can be derived that economic status may change it may accrue by the passage of time. But social change is required a long path in society. Indian constitution and its framers did not establish any measure in which poverty could be removed through the Reservation. Relaxation, concession can be provided to poor for its partial advantage but seats cannot be reserved for them. It is also the direction in article 38 and 39 to provide social as well as economic justice. Therefore government is directed to do good in favor of poor through DPSP. According to the article 15 & 16 Reservation can only be given to SEBC (Socially and educationally backward class). Also it has been clearly mentioned in the Indra Sawhney judgment that economic basis cannot be ground of Reservation at any cost. Also EWS has exceeded the ceiling limit which is again against the judicial decisions. In my opinion EWS Reservation is purely against the basic tenets of the constitution and violates the basic structure of constitution.

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⁹ *Youth for Equality v. Union of India*

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