103RD AMENDMENT OF THE CONSTITUTION OF INDIA: PRO-EQUALITY OR ANTI-EQUALITY CODE?

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ABSTRACT:

Since time-immemorial, the reservation policies adopted by our Legislation have been subject to various debates. The question whether Reservations are Pro-discrimination or Anti-discrimination have always been persistent. With the establishment of the 103rd Amendment which gave way to 10% reservations for Economically Weaker Sections (EWS), there was a significant rise in the opposition against the idea of Affirmative Action. This research paper essentially analyses the historical background of such measures and the judicial pronouncements made over the years to reveal how such measures are not against the essence of Equality. The findings of multiple commissions are also used in this paper to discuss why Reservations were required to give certain advantages to those who were severely and economically disadvantaged and socially handicapped. This paper aims to unveil how Affirmative Action actually works towards attaining the Principles of Equality, Justice and Fraternity and abides by the basic structure of the Indian Constitution. The addition of several provisions and judgements of various landmark cases, conclusively, highlight an effort by the Judiciary and Parliament to maintain a balance in the Indian society while attempting to achieve the Equality code.

Introduction:

The Constitution of India is truly a masterpiece created by the former leaders of this country. Several years of hard work, determination and debate have been put into forming the vast and intricate provisions on different subjects that are a testimony to the fact that many genius minds were behind its making. The makers of the Constitution kept in mind the historical background of societal challenges while creating the frameworks that would be followed by the citizenry and lead the country. One such basic structure of our Constitution was the formation of Article 14[1] – Right to Equality that not only implied equal treatment but rather, paved the way for reasonable and rational classification[2]. Article 14 promised the public that every person would be considered equal in the eyes of Law and thus, it laid down the Principle of Equality. The next two sections, Article 15[3] and Article 16[4] were established specifically to lay down provisions about the prohibition of discrimination on varied grounds and equal opportunities in matters pertaining to public employment.

Considering the prevalent Caste System that infested the Indian Society, getting rid of inequality and discrimination became one of the top priorities of the leaders. The Caste System was based on stratification based on one's caste (*Varna* and *Jati*). During the timeline of the *Rigveda* (1500-1200 BCE), there were two existing varnas – *Arya* varna and *Dasa* varna. Eventually, the division further branched into four categories – *Brahmins* (priests and teachers; top of the strata), *Kshatriyas* (warriors and soldiers), *Vaishyas* (farmers, traders and merchants) and *Shudras* (untouchables; lowest in the strata). This Jati System was a major hinderance towards attaining progress and while some classes took advantage of this and benefitted, the remaining suffered and were severely oppressed. There was an extreme gap in the opportunities provided to the classes considered "intellectual" and the classes who were considered to be at the lowest strata of the society. Thus, certain provisions were introduced in order to tackle the societal classification and the inequality that came with it. This was the beginning of what was called 'Affirmative Action' or 'Positive Discrimination'. The inclusion of Article 13[5], Article

[1] India Const. art. 14.
[2] Aditi Sharma and Tanvi Garg, *Supremo Amicus,* ISSN 2456-9704, "Reservation for EWS: A Move Anti or Pro Discrimination?" Page 40.
https://supremoamicus.org/wp-content/uploads/2020/09/A5-2.pdf.
[3] India Const. art. 15.
[4] India Const. art. 16.
[5] India Const. art. 13.

332[6] and Article 332[7] were the first few steps taken in order to take action against the unjust societal divisions. Removing the ill-effects of discrimination was aimed to be done at the grass-root level and thus, the three aspects to tackling it were in the fields of Education, the Government and Political Parties. The challenges faced by the Economically weaker and Backward classes were recognised by the Government and thus, the idea of creating reservations for them was put into consideration. The idea of 'Positive Discrimination' was formed as a measure to uplift the socially challenged classes and give them an opportunity to be placed on the same pedestal as the other classes were automatically or naturally placed on. The essence of 'Positive Discrimination' is to provide opportunities to the marginalized or backward classes by relaxing a few standardized norms or rules. This is ideally done in the form of reducing the required number of marks for admission into educational institution or by lowering the qualification bar for getting jobs[7]. Although, on the face of it, it seems like an ideal good move, but a closer analysis of it highlights an array of issues which must be taken into consideration. Those who oppose the idea of 'Positive

Discrimination', often critic it by saying that such policies create permanent differences in the society and harm the very structure of the Constitution[8]. In their opinion, such provisions go against the spirit and essence of the basic structures such as Equality, Liberty, Secularism and Fraternity and thus, create reverse discriminations. As a result, there has been a lot of debate around the topic of Affirmative Action and the Indian courts have observed various cases challenging such a practice. Till date, the discussion around this theme is not unusual and can be seen happening in schools, universities, round-table conferences, news debates, court rooms and high-profile meetings amongst the politicians of the country. So, is the idea of creating reservations in the first place, a move Pro-Discrimination or Anti-Discrimination?

Historical Background:

On November 1, 1858, Lord Canning announced Queen Victoria's proclamation. She promised

[6] India Const. art. 330.
[7] India Const. art. 332.
[7] Dipankar Gupta, *Economic and Political Weekly*, Vol. 32, No. 31 (Aug. 2-8, 1997), pp. 1971-1973+1975-1978 (7 pages), "Positive Discrimination and the Question of Fraternity: Contrasting Ambedkar and Mandal on Reservations".
https://www.jstor.org/stable/4405708?casa_token=5YhZt0rkFasAAAAA%3ATbQPWM5NiWq77pC5qi5a7o6ASzEOps5Hp5sYRfBU_lJDtWzSF1ol9vmrkIJgbADxXFI6C6blvilDUqDzVYkfeM8tg5oyUURH4BMm9krxG5FbZfTGRU&seq=2.
[8] Gupta, *supra* note 8, at 1975-1977.

racial equality of opportunity and this was the very beginning of the action being taken against the unjust societal practices of caste divisions. In 1902, Kolhapur *Darbar* was one of the first institutions to preserve reservations in government jobs. There were similar efforts in Mysore and such efforts were recognised and influenced other states to take action as well. In Madras, the reservation policy followed was based on a caste-based division, wherein for a bunch of every 15 seats in Governmental jobs and Government services, a certain fixed number was allotted to persons representing different backgrounds. By 1909, reservations for Mohammedans was a usual phenomenon. The British Raj continued to introduce provisions and elements as measures to advocate for Reservation. On 16 September 1921, the first Justice Party Government passed the First Communal Government Order (G. O. # 613), thereby becoming the first elected body in the Indian legislative history to validate reservations. As the trend for reservations became a common phenomenon, the need to filter it became necessary. In order to do so, the Hutton Commission led by John Henry Hutton, was established in 1931 to rely on Anthropological studies to determine which classes were to be recognized as backward and socially challenged[9]. In 1932, during the Round Table Conference of June, the Prime Minister of Britain, Ramsay MacDonald proposed separate representation to be provided for Muslims, Sikhs, Indian-Christians, Anglo-Indians and Europeans. The depressed classes, roughly corresponding to the Scheduled Tribes (STs) and Scheduled Castes (SCs), were allotted a number of seats through which only they could vote[10]. After negotiations, the Poona Pact[11] was enforced wherein Gandhi and Ambedkar mutually agreed on having a single Hindu electorate, with Dalits having reservations within it; electorates for other religious sections such as Islam and Sikhism remained separate[12]. By this time, the Constitution was contemplated, in which, Article 292 in the Draft Constitution underlined that there would be reservations for people practising Islam, Sikhism, Christianity and people who belonged to the Scheduled Castes. It is important to note that the idea of creating reservations to benefit all persons was contemplated on the basis of caste as a means to recover from the social injustices created by the Caste System. Therefore, Article 292 was substituted by what currently are Articles 330[13]

[9] J. H. Hutton, *Journal of the Royal Society of Arts*, Vol. 82, No. 4226 (NOVEMBER 17th, 1933), "The Census of India, 1931: Marital Conditions Caste and Race, , pages 26-38 (13 pages). https://www.jstor.org/stable/41359999.
[10] V. P Menon (1957). Transfer of Power in India(Reprinted ed.). Orient Blackswan. pp. 49–50. ISBN 978-81250-0884-2.
[11] Poona Pact, 1932.
[12] Menon, *supra* note 11, at 49.
[13] India Const. art. 330.
[15] India Const. art. 332.

and 332[15] in our Constitution which provide reservations for only Scheduled Castes and Scheduled Tribes. This is what concludes the historical background of the Reservation Policies in a nutshell. What followed were several case judgements, amendments and advances regarding such policies and the idea of reservations as a whole.

Major Case Judgements and Amendments: A timeline - The Gradual Change in the Criteria for Reservations

The First Amendment, 1951 – Article 15(4)

Following the community-wise Reservation policy in Madras, the Communal G.O was introduced in 1921 which aimed to act as a "leveler to non-Brahmins" and give them the opportunities they deserved in the fields of Administration and Politics[14]. It sought to increase the number of posts reserved for non-Brahmins, which included Indian Christians, Muslims and Adi-Dravidars. This was challenged in one of the earliest cases challenging Reservation, *State of Madras v. Champakam Dorairajan, 1951*[15], wherein such reservation policies were finally struck-down and invalidated. The Court held that the idea of community-wise reservation was violative of Article 15(1)[16] since caste could not act as a sole indicator and this, led to the very First Amendment of the Indian Constitution in 1951. The very first step taken to extend the Affirmative sort of action was the addition of clause 4 in Article 15[17] which gave the powers to the State to make provisions for reservations for SCs and STs.

Findings of the Kaka Kalelkar Commission – Caste cannot act as sole criteria for Reservation

Another positive measure was setting up the Kaka Kalelkar Commission in 1953, whose task was to determine other communities that would classify as being oppressed or backward. The committee submitted certain recommendations highlighting the fact that there were a whole array of communities who were oppressed other than what were traditionally considered as "oppressed" (the *Shudras* , in favor of whom the practice of Untouchability was totally abolished). What the committee essentially did was further the findings of the Hutton

[14] B. Kolappan, *The Hindu*, "A Government Order that heralded the social justice movement 100 years ago", September 6 202. https://www.thehindu.com/news/national/tamil-nadu/a-government-order-that-heralded-the-social-justicemovement-100-years-ago/article36486308.ece.
[15] State of Madras v. Champakam Dorairajan AIR 1951 SC 226.
[16] India Const. art. 15(1).
[17] India Const. art. 15(4).

Commission and evaluate the communities which were equally oppressed as the ones initially thought as subjugated. Later, this was also taken up by the Mandal Commission. However, what came prior to the findings of the Mandal Commission was another judgement of *M. R. Balaji v. State of Mysore, 1963*[18] wherein it was ruled that the government's 68% reservation on college admissions was deemed excessive and unreasonable, and was capped at 50%. Additionally, the Court also held that caste of a group of persons could not act as the sole or the only factor to determine "backwardness"[19]. By this time, the idea of capping of limiting reservations was also contemplated in various courts as it was much needed to create a balance for all people in the society. As a consequence, all states except Tamil Nadu and Rajasthan began abiding by the 50% capping. In another case judgement of *R Chitralekha v. State of Mysore*, *1964*[20], the Government of Mysore laid down that classification of the SEBCs should be made on the basis of 1) economic conditions, and 2) their occupations[23].

Recommendations by the Mandal Commission – Economic Criteria is necessary to consider

In addition to this, the recommendations given by the Kaka Kalelkar were picked up by the Mandal Commission whose first report came in the year 1980. The assessment made by the Commission included that the total number of the communities that classify as "backward and subjugated" constitute as 52% of the total Indian population. Another very important submission of the commission was 11 indicators that included the social, economic and educational background of the people to determine whether they could classify as people needing a reservation[21]. The Mandal Commission emphasized on the need for the economic criteria to be taken into consideration as well. This was the genesis of what we refer to as 'Other Backward Classes' (OBCs). The Government accepted the Mandal Commission in the form of two Memorandums. These sought to implement 27% Reservation for people which was later challenged in the famous controversial case of *Indra Sawhney vs Union of India, 1993*[22].

[18] M. R. Balaji v. State of Mysore, AIR 1963 SC 649.
[19] V.N Shukla, Constitution of India, 210 (Eastern Book Company 2020).
[20] R Chitralekha v. State of Mysore, AIR 1964 SC 1823: (1694) 6 SCR 368.
[23] Shukla, *supra* note 21, at 102-103.
[21] Shukla, *supra* note 21, at 91.
[22] Indra Sawhney vs Union of India, AIR 1993 SC 477.

Indra Sawhney vs Union of India – The Concept of "Creamy Layer"

In this landmark case, the lead petitioners were advocated by Nani Palkhivala, K.K. Venugopal, Mr. P.P. Rao, and Smt. Shyamala Pappu, who argued that the reservation system "fueled the evil caste system and divided the Indian society into two halves – the Forward classes and the Backward classes"[23]. It was further argued that the implementation of the Mandal Commission Report would amount to re-writing the Constitution by striking the Right to Equality. The judgement included several submissions out of which one included the analysis of the Constitution and the need to look at what it prescribed. It prescribed Reservation as a tool for emancipation of certain classes, who will always categorize as the lowest of the lowest societal strata. Secondly, the extent of the Reservation was looked at wherein, a good chunk was already reserved previously and if it were to further increase by 27%, the number would reach almost 50% implying that half of the total opportunities available would be reserved. This would absolutely go against the aims of the Constitution because the whole idea of equal opportunities would be struck down. And it was in this light, that certain criteria were established such as the determination of "creamy layer" and the two-fold test. The judges in this case law held that even in the group of the backward classes, there was a pre-existing hierarchy and there were certain groups that were subjugated more than their counter-parts (backward and more backward classes) and the two-test fold established the "Test of Backwardness" and "Test of Inadequate Representation", which would act as parameters to determine people who actually required reservations and would qualify to avail them. The idea behind the "creamy layer" was to determine those people who are challenged economically and thus, need reservations to avail opportunities that they would not be able to avail naturally.

The 103rd Amendment, 2019 – Does it strike the Equality Code?

Following this was the 103rd Amendment in 2019[24] which introduced us to what we now refer as the "Economically Weaker Sections" (EWS) – it sought to ensure advantages given to the the communities that were economically considered backward and challenged. Reservations based on the economic criteria were considered important and were also seen to be taken up during several judicial pronouncements earlier. The Economic standing of people became the

[23] Satyaki Deb, *BlogPleaders*, "Indra Sawhney vs Union of India: Case Analysis", September 16 2022. https://blog.ipleaders.in/indra-sawhney-v-union-of-india-and-ors-1992-case-analysis/#The_ninejudge_bench_of_the_Indra_Sawhney_case.
[24] *Ins*. By the Constitution (One-hundredth Amendment) Act, 2019.

criteria for availing reservations through this amendment. As a result, Article 15(6)[25] was added as a provision specifically created for the above-mentioned category. Implementation of a similar idea led to the enforcement of Article 16(6) [26] – which enforced reservations upto 10% for the Economically Weaker Sections (EWS) of the society. This provision was created to provide opportunities in Education and Employment and did not apply to the SCs, STs and the OBCs (SEBCs). Many argued that this was violative of the basic structure of securing Equality since, the 10% addition to the pre-existing reservations norms, would lead to an excessive amount of allotted reservations. Since its implementation, more than 20 petitions have been filed challenging the constitutional validity of the 103rd Amendment. However, the counter-arguments that advocated for positive discrimination argued that the idea behind taking such measures were based on principles of Social, Economic and Political Justice and Equality. A landmark judgment on the validity of the 103rd Amendment was *Janit Abhiyan vs Union of India, 2019*[27] wherein the five-judge bench upheld its constitutional validity. There were mainly three questions that came across the judges to be answered; (1) Can reservations be granted solely based on the economic criteria, (2) If States can provide reservations in private educational institutions which do not receive government aid, as provided in the Amendment, (3) If EWS reservations are invalid for excluding Scheduled Castes, Scheduled Tribes, Other Backward Classes, and Socially and Economically Backward Classes from its scope?[28]. The judgement was made on November 7, 2022 wherein the major reasoning was as followed: (a) Affirmative action aims to move towards an egalitarian society by acting upon the inequalities and thus, the shift on understanding of when a reservation is needed from caste-based to the economic criteria is not violative of the basic structure of the Constitution, (b) Exclusion of SEBCs or classes covered in Article 15(4)[32], 15(5)[29] and 15(6)[34] is not valid since, this reservation is unaffected as 10% is over and above the 50% of ceiling limit, (c) Lastly, the court ruled that the 50% capping is not inflexible; reservation cannot be indefinite. Ever since the reservation policies have been contemplated and enacted, there have been multiple oppositions to them. However, judicial pronouncements have led the way for parliamentary actions taken

[25] India Const. art. 15(6).
[26] India Const. art. 16(6).
[27] Janhit Abhiyan v. Union of India 2022 SCC OnLine SC 1540.
[28] Ojaswini Gupta, *LawBhoomi*, "Janhit Abhiyan v. Union of India: Case Analysis", December 10, 2022. https://www.scobserver.in/cases/janhit-abhiyan-union-of-india-ews-reservation-case-background/.
[32] India Const. art. 15(4).
[29] India Const. art. 15(5).
[34] India Const. art.15(6).

towards granting advantages to people who truly deserve it. Judicial Activism has acted as a riding beacon in India ever since it has become an independent nation.

Conclusion – Need to Uplift the Economically Weaker Sections

Reservations have acted as an instrument to not only include the socially and educationally backward classes but also to any section of the mainstream society that is severely economically disadvantaged. The Reservations are structured to maintain a balance in society and that is why they do not go against the basic structure of the

Constitution. Ever since their establishment, their sole aim has been to attain Justice and Equality. While many would argue that such policies are a sort of "reverse discrimination" to limit the opportunities available to the masses to compensate for those who have lost out on them since decades, what essentially Reservations do is put people on the same level as the group of people who do not fall into the subjugated or disadvantaged categories. The spirit of "Positive Discrimination" lies in the basic structure of Equality and Fraternity. As Dr. B.R Ambedkar rightly mentioned in his speech on November 26, 1949, India strives to be a nation where its citizenry is united by a sense of brotherhood. The Indian Constitution, itself, advocates for Affirmative Action in the spirit of Fraternity, Justice and Equality and that is why, measures to provide opportunities to the economically weaker sections of the society are deemed necessary. It is not as if the implementation of Reservation policies would eradicate inequality in totality, however, what it would result in is merely the elimination of the social handicaps that infest the Indian society.