

RESERVATION IN HIGHER EDUCATION: Validity of Constitution (Ninety-third) Amendment Act, 2005 and the Central Educational Institution (Reservation in Admission) Act, 2006.

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Abstract

The Constitution (Ninety-third Amendment) Act, 2005, has inserted clause (5) in Article 15 enabling the state to make special provisions, by law, for the advancement of any socially backward classes of citizens or for the scheduled castes or scheduled tribes, insofar as such special provisions related to their admission in educational institutions, including private educational institutions, whether aided or unaided by the State. Minority educational institutions referred to in clause (1) of Article 30 were, however, excluded from the purview of the newly inserted clause.

But today with the changing scenario, reservation has become a part of politics and not a matter of right to secure social solidarity. Political leaders just in the greed of votes and stability are using this sensitive issue as a weapon. If each and every caste will demand reservation then there will be nothing like a general class and every one will be in a reserved class which in turn will abolish reservation or just join hands together to curb nepotism and corruption existing in the present system and work hard to show your abilities in such a manner that inspite of reservation one may stand in a distinct position because even the reservation is not reaching to the one who really need reservation.

Our Constitution apart from being federal has uniquely taken its ambit principle of equity, prohibition on discrimination of people on the ground of religion, race,

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caste, sex or place of birth. However, soon after the Constitution was carved out an amendment was made. The amendment being the first one was taken to be a compromise in the Constitution. The amendment was in the year 1951 whereby a clause was added to Article 15 saying that the state could make special provision “for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

The time when the said insertion was made, it was made keeping in mind the centuries old practice of humiliating the untouchables and the extreme backward classes. That time the thought was not to create an unusual gap between different sects of the society, which we were proud of. Therefore, the step was more than welcome.

Years later the same insertion came into limelight. Reason was seats for other backward classes in national institutions of India. After long lasting political tussle the Supreme Court was forced to step in. The Apex Court observed that the emphasis on quotas would divide the country on caste basis. In spite, of the Apex Court’s interference nobody has been able to understand the reason why at this point, must any government disrupt the cohesion of a stabilizing society? Therefore, the court has asked the government to explain the basics of its reasoning justifying quotas for OBCs, adding that “these issues would have serious political and social ramifications.”

For a democratic Government, it is very important to please its people with rights and by doing away with wrongs. Achievement of social, economic and political justice and equality of status and opportunity is one of the preambular objectives of our Constitution.

The Constitution of India also provides that in order to achieve the socio-economic equality among all citizens, the state is required to implement various

1. Art.17 says that ‘Untouchability is abolished’: Performance of Untouchability in any form is an offence punishable under the Law.
2. II Ambedkar’s Writings and Speeches 184-87.
3. Arts. 15 (4) & 16 (4) of the Constitution of India. Art. 15 (4) says, ‘nothing prevents the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled tribes’. Art. 16 (4) says, ‘nothing in this Article shall prevent the State from making any provision of appointment or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State.’

Directive Principles of State Policy. In order to bring about equality in society, the social evil like 'Untouchability' is abolished in the Constitution.¹

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:²

[W]e must begin by acknowledging first that there is complete absence of two things in Indian Society. One of these 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 has so laboriously built up.

The above observation made by Dr. Ambedkar clearly shows that equality should be secured to all persons even in socio-economic life through State's intervention. This can be achieved through the means of reservation of seats in educational institutions and public employment, which has been provided in the Constitution of India.³ The Constitution has also directed the state to secure adequate means of livelihood to all citizens and to promote with special care the educational and economic interests of the weaker section of the people and in particular, of the scheduled castes and scheduled tribes and they should be protected from social injustice and all forms of exploitations.⁴

The Constitution has provided reservation of seats in educational institutions and in public employment to three categories of people:

4. Arts. 39 and 46 of the Constitution of India.

5. Art. 15 (5), which provides that 'nothing in Article 15 or sub clause (g) of clause (1) of Article 19 would prevent the State from making any special provision for the Advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions, whether aided or unaided by the State Ministry Educational Institutions, referred to in clause (1) of the Article 30 to be excluded.'

6. 'Hereinafter the Act'.

- (i) Persons who are socially and educationally backward classes of citizens,
- (ii) Scheduled castes, and
- (iii) Scheduled tribes.

The Constitution has obligated the State to protect the interests of the above groups through 'affirmative action'. Through this, a percentage of seats are reserved for the OBC, SC and ST in the public sector units, government departments and all public and private educational institutions. The reservation policy is also extended to legislature (both Parliament and legislatures) for the SC/ST's. The framers of the Constitution believed that due to caste system, scheduled castes and scheduled tribes were historically oppressed and denied respect and equal opportunities in Indian society and were thus under-represented in nation building activities.

The Constitution (Ninety-third Amendment) Act, 2005, has inserted clause (5) in article 15⁵ enabling the State to make special provisions, by law, for the advancement of any socially backward classes of citizens or for the scheduled castes or scheduled tribes, insofar as such special provisions related to their admission in educational institutions, including private educational institutions, whether aided or unaided by the state. Minority educational institutions referred to in clause (1) of Article 30 were, however, excluded from the purview of the newly inserted clause. The said amendment, which became effective from 30.1.2006, along with the newly enacted Central Educational Institutions (Reservation in Admissions) Act, 2006⁶ came to be challenged before the Supreme Court in *Ashoka Kumar Thakur v. Union of India*⁷. Section 3 of the Act provided for 15% reservations for scheduled castes, 7.5 % for scheduled tribes and 27% for other Backward Classes in 'Central Educational Institutions'. The Act, however, did not provide any reservation in any private unaided institution.

The Supreme Court has upheld the 93rd Constitutional Amendment and the Central Educational Institution Act as valid as they facilitate for social justice to the OBC's and SC /ST's. The other question which was raised in the instant case was whether creamy layer is to be excluded from socially and educationally backward classes? The court answered positively and held that creamy layer should be excluded from the purview of reservation. However, this is not applicable to the members of

7. (2008) 6 SCC 1.

scheduled castes and scheduled tribes. The justification given by the court for excluding creamy layer from socially and educationally backward classes is that they are economically advanced or educationally forward. This principle of creamy layer is also applied for the purpose of identifying the socially and educationally backward classes from providing them reservation benefit. The 'creamy layer' principle cannot be applied to SC/ST's as they are separate class by themselves.

The judgment is a resounding of our Constitutional values and is rooted in the history of the struggle for Independence and the major concern of our constitution for the abolition of discrimination based on caste, which characterized our society.

What was at stake was future directions in a country beset with caste prejudice and social stratification. The judgment gives a clear signal that the future lies in inclusive growth, inclusion of SC/ST and backward classes in the halls of higher learning.

What is more important, it rejects a facile notion of 'equality' as requiring equal treatment of those unequally situated. Rather, it is based on a notion of equality that recognizes the vast inequality that exists in Indian society, an equality of status and opportunity in all fields of life.

This interpretation of 'equality' holds great potential for social change in the matter of distribution of national resources, based on need and historical disadvantages, rather than on market forces. It also has important implications for women who have been demanding reservations in Parliament, in State legislatures and will put to rest any argument that any such reservations will result in inequality of results.

Considering the law was unique, in that it actually increases capacity in these institutions, by increasing the number of seats, one wonders, what was behind the objection to the law. The forward classes stood to lose no seats, something that is commonly objected to.

This was a law that created an additional 27 percent seats to be filled in by the backward classes. It actually proposed the building of a new capacity in the institutions to be made available to OBC candidates. Clearly, therefore, the petitioners were demanding that this newly built capacity should also go to the

open general capacity.

Though dressed in Constitutional rhetoric and political cynicism, the bottom line was a fight over national resources and how they should be distributed. It was a battle to defend class and privilege closing the doors to those other excluded, to enter the realm of higher education.

The Supreme Court wisely avoided answering the question whether reservations can be made in private institutions, stating that the question will be decided only as and when a law is made making reservations in private institutions. This means, the issue is left open for an appropriate day.

Besides, a question also arose before the Supreme Court regarding no time limit prescribed for the operation of the Act. The contention of the petitioner was that as there is no time limit prescribed and the affirmative action would continue for an indefinite period that would ultimately result in reverse discrimination rather than protective discrimination. But the court struck down the contention and upheld the Act as constitutionally valid and the court has directed the central government to review the situation of the backward classes after ten years.

In this stunning decision of Supreme Court of India, one recognizes the power of a Constitutional Court. The judgment is a vision statement, a road map for development, a road map for inclusive growth. It is time for us to acknowledge frankly that the so-called benefits of globalization and privatization have not reached the lower level of society, but remained in the privileged hands of a few, for whom the world begins and ends with fashion, Bollywood and cricket.

At a time when prestigious foreign universities are looking to set up shop in India, it is only natural that they need to know where they stand on the reservation issue as it will impact deeply on their finances. Education will become more out of reach than it is already for the backward classes. The Supreme Court judgment corrects an existing imbalance in this regard.

The court has been able to separate the grain from the chaff and look at the reality of the situation. The judgment will change the lives of many formally excluded sections from the halls of higher learning and privilege.

Reservation acted as a boon for our country's development and individual

rights. A member of a scheduled caste who was not earlier even allowed to attend a panchayat can now become a **Sarpanch**.

Although, it was for the purpose of carrying a democratic revolution in the arenas of education and employment, but it has not achieved its targeted change. One of the reason include the idea that the recipients of reservation are drawn from the 'creamy layer' e.g. children of highly educated and well employed parents belonging to the backward and scheduled castes. Another important concept responsible for acting as a wall stopping the effective reach of the reservation policy is the 'Merit Syndrome', which support that reservation policy destroys merit deprived classes. But the problem not ends here, there are many loopholes in the present reservation system, the trend has shifted to reverse discrimination. Some backward class elites have gained political and economic power based on this reservation. However, a majority of backward classes is not living any differently than before. Their subsistence in rural lifestyles does not provide them with any of the benefits. Thus, a distinct economic class system exists within the backward classes. Since economic status is not a test used, undeserving people gain the advantages and the deserving ones are still without a significant change in their situations. Creamy layer must also act as criteria among the schedule castes and scheduled tribes also.

A statement by **Mr. Bainsla(Gujjar Leader)** states that either eliminate the whole reservation system or give **Gujjars** a scheduled tribe status. This agitation is a fight against the whole defective piece of reservation policy in the present scenario.

Some support these agitations on the basis of that even Jaats were given a backward class status in Rajasthan inspite of their better political and economical conditions. The government of our country is still taking effective measures for no riots on the basis of religion but this reservation controversy has led to difference between castes of same religion – can we still call INDIA with 'UNITY IN DIVERSITY'.

Well causing any kind of public nuisance and destroying the public property by harming public peace and morality through unlawful assemblies is not at all legal. But as the constitution guarantees freedom of speech and expression and democracy and public opinion forms an important part to keep a check on government policies, ³⁰ such demands can be termed to be justified. It is the fault of political leaders who initially in order to fill their vote banks just make fake promises, and afterwards

