

ASSESSING AFFIRMATIVE ACTION IN INDIA: UNDERSTANDING THE FRAMEWORK AND THE UNDERLYING CHALLENGES

*Vijay P. Timar**

*Shivam Tripathi***

Abstract

For more than 70 years there have been numerous statements made, to both support and oppose the reservation policy in India. The objective of this paper is to highlight some of the core issues that remain at the heart of the reservation debates. The paper aims at providing for a comprehensive understanding of the current reservation policy framework of the country as exists in all the three spheres *i.e.*, in education, employment and politics. It seeks to provide insights into the major controversies in effectuating the affirmative action policy framework and discusses the relevant judicial developments in the field to give a comprehensive overview of the issue. Furthermore, with the recently implemented constitutional amendment which provides for additional reservation to the economically backward classes, the submission brings home the point that there is an urgent need to examine the existing framework and plug-in certain loopholes. The paper suggests that the main problem with the reservation policy in India is that it is implemented too late *i.e.*, the benefits of reservation policy are only restricted to higher education, employment and exercise of political rights. In order to achieve better results, the policy should thus be framed in a manner which influences an individual's life from the very beginning.

I Introduction

THROUGHOUT THE course of history there have been multiple instances of humanity suffering at the hands of humans. The disparities in resource allocation resultant upon the 'accidents of birth', which is further perpetuated by the unjust societal mechanisms coupled with the inherent urge of man to exert one's superiority over the fellow beings, has caused much misery to large sections of people, thereby depriving them of their basic right to dignity and equal treatment.

The stratification that developed amongst individuals living within societies as a result of inequitable access to resources further led to the suppression of the weaker sections and the gap between the 'haves' and 'have nots' continued to widen. Thus, due to the inequitable societal structures in which man finds himself bound ever since his birth, discrimination has been at the backdrop of human civilization and it was only around the 20th Century that the notions of equality started gaining significant traction.

With the creation of nation-states, a social contract evolved between individuals and state, wherein the state was entrusted with a duty to enforce individual rights. Thus, the state was accorded a role to prevent discrimination and to facilitate the creation of

* Associate Professor, Maharashtra National Law University, Nagpur.

** Final Year Undergraduate Student, Maharashtra National Law University, Nagpur.

an egalitarian society where the individuals have access to opportunities for their holistic development and capacity building. Affirmative action (also referred to as reservation policy in India) as a method was thereby adopted by various nations in order to uplift these suppressed classes of people, and to thereby help them achieve their right place in the society.¹ These mechanisms place a positive duty on the state to prevent discrimination and uplift suppressed sections. They aim to offer equal access to under-represented groups like women and ethnic minorities.

Affirmative action is thus a set of policy measures, to level the society and bridge up the differences that exist between the less-privileged sections and the main stream. The government adopts various policies to eradicate historical discrimination, which has been the root cause of the social, educational and economic backwardness of certain sections of the society. These policies can also include *suo moto* initiatives taken by institutions and organisations to uplift the socially excluded groups, majorly focusing on employment and education.² Affirmative action³ in higher education institutions and employment sector takes the form of admission or hiring policies that enable sufficient representation of the disadvantaged classes of the society. The reservation/affirmative action policies, however, do attract their own controversies. Any debate against the affirmative action policy in any nation state majorly focuses on three issues, namely: targeting, catch up and mismatch.⁴ The issue of targeting simply entails that, if preference is given solely on the grounds of race and caste it may result into further deprivation of the poorer sections in the minority group. Further, the argument may be broadened to include in its ambit the impact of such targeting on the poorer sections of even the non-minority groups. Thus, there is a common lament that because of the benefits of reservation being hogged up by the rich and influential group amongst the reserved class, the actually poor students/candidates are displaced out of the system. This is also referred to as the creamy layer problem. The second and third issue are somewhat intertwined. The issue of catch-up entails that, even if candidates belonging to the minority group are given preference in admission process, there exists a huge gap between the starting points of the two groups and consequently, if the gap between the two groups is not bridged, then, the favourable treatment so received by way of reservation/affirmative action tends to have a more detrimental impact. The mismatch

1 S. Yesu Suresh Raj, "An Analysis of Reservation System in India" 2 *International Journal of Research* 1038-1045 (2015).

2 Bineet Kedia, "Affirmative actions in India and United States: A challenge to reservation policy in India" 2 *International Journal of Law and Legal Jurisprudence Studies* 1-20 (2018).

3 Affirmative action enjoys no clear definition and this further contributes to confusions and misunderstanding. It has a wide spectrum of meanings, ranging from minority employment programmes to special programmes in hiring on the basis of race or gender or the most commonly cited quota system.

4 Veronica Frisncho and Kala Krishna, "Affirmative Action in Higher Education in India: Targeting, Catch up, and Mismatch" 71 *Higher Education* 611-649 (2016).

issue⁵ contends that, if students are admitted in institutions which are not in accordance with their credentials⁶ then the students have to face an academic environment which does not suits them. The result of these two issues is similar, *i.e.*, it tends to argue that students belonging to the minority sections are left even worse off than before.

In India, more than seventy years have passed after the independence and the conditions of the minority sections still haven't fully improved. Consequently, it has been put forth time and again by scholars across various forums that the policy needs to be adjusted not only for the purposes of training and skill development but also for targeting intra- ethnic income disparities.⁷ The income disparities are indeed closely linked to the issue of access to opportunities for training and skill development which ultimately are expected to translate into better earning opportunities thereby reducing the income disparities. Unfortunately, such a translation does not automatically follow because of multiple reasons. Therefore, it becomes pertinent that research is undertaken into these causes in order to develop a sound framework for affirmative action that can be utilised to effectuate the intended objective of promotion of an egalitarian social structure. The present article looks at the existing framework of reservation policy in the country and analyses the challenges that the implementation of the same presents.

II The Affirmative Action Framework in India: Effectuating the constitutional promise

The constitutional framework

The Indian affirmative action policy is collectively termed as the reservation policy. Unlike other countries, Indian policy is based on reserving seats⁸ for socially and

5 Also known as the mismatch hypothesis. For further reference M.J. Fischer, D.S. Massey, "The effect of affirmative action in higher education" 36 *Social Science Research* 531–549 (2007); Sigal Alon, Marta Tienda, "Assessing the Mismatch hypothesis: Differences in college graduation rates by institutional selectivity" 78 *Sociology of Education* (2005).

6 Walter Fuller Whitt, Regarding the Mismatch Hypothesis and Stereotype Threat in the Debate over Affirmative Action, *available at*: https://dash.harvard.edu/bitstream/handle/1/36853976/walter_whitt_ec_970.pdf?sequence=2&isAllowed=y (last visited on Mar. 21, 2020).; The paper also talks about the Mary Fisher and Douglas Massey's stereotype threat which refers to the notion that students not belonging to the minority class will automatically assume that the students admitted under the affirmative action policy are academically weaker and such negative perception may lead to more harm than good to the minority students.

7 Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (University of Cambridge, 1999):

8 In *M.R. Balaji v. State of Mysore*, AIR 1981 SC 649 it was held that reservations under arts. 15(4) and 16(4) must be within reasonable limits. It declared: "Speaking generally and in a broad way, a special provision should be less than 50%. The actual percentage must depend upon the relevant prevailing circumstances in each case." However, in *Akhil Bhartiya Shoshit Sangh v. Union of India*, AIR 1981 SC 298, the court held that a quota of 64.4% was not excessive and the rule laid down in *M.R. Balaji* was not a strict limit. With the implementation of 10% for the economically weaker section, the total reservation has increased this limit. Nonetheless, the Supreme Court in *Chebrolu Leela Prasad Rao v. State of A.P.*, 2020 SCC OnLine SC 383, held providing 100% reservation is not permissible under the Constitution, and reinstated that the upper limit for implementation of reservation is 50%.

educationally backward classes.⁹ Scheduled castes (hereinafter, SCs),¹⁰ scheduled tribes (hereinafter, STs),¹¹ other backward classes (hereinafter, OBCs)¹² and women are recognised as socially and educationally backward.¹³ This categorisation is based on the ancient classification of the Indian society into four major classes *viz.*, *Bhramin*, *Khastriya*, *Vaisya* and *Shudra's*, under which the current SC and ST, were considered untouchables.¹⁴ The policy aims at bringing the historically deprived class of citizens on equal footing with the rest of the citizens. Reservation in the country is thus given on the following grounds:

- (i) Caste¹⁵- As mentioned above how the Indian society has traditionally been stratified into the four different classes. This categorisation is peculiar to India and thus a separate ground has been carved out keeping in mind the historical disadvantages that have accrued to the members of the lower castes. For a long time, a large number of people belonging to the lower castes, suffered at the hands of the upper caste people and were thus left out from the social scheme, thereby depriving them of an equal chance to reap in the benefits of any societal progress and advancement. To help bring such classes of people to the mainstream, so that they become partners in the country's advancement, reservation is provided on the basis of caste. For the purpose of reservation, there are two main categories:

9 Since the early 20th Century, several terms have been used to describe the same group of people. The earliest and still most widely known terms are "untouchables" and "outcastes"; Mahatma Gandhi, because of the unfavourable connotation of "untouchable," dubbed them as "harijans" which meant children of God.

10 Scheduled Caste (SC) is the constitutional name accorded to the former groups or sections of the society who were considered as untouchable. It is defined under art. 366 (24), Constitution of India, 1950. All the government organisation, the legal system and the official statistics use SC to refer to the minority section of the society.

11 Schedule Tribe (ST) is the constitutional term for tribal populations or *adivasis*, which were considered to be outside the mainstream society in India, defined under art. 366(25) of the Constitution of India, 1950.

12 The backward castes, better known as OBCs or Other Backward Classes are a set of intermediate castes, between the upper castes and the *Dalits*. The variation within the OBCs is sharp, many of the groups within the caste are prosperous due to land reform and political affiliation during the British India, but some groups are still living in extreme poverty.

13 Under existing scheme SCs and STs are not only accorded preference in educational institutions, employment and exercise of their political rights but they are also favoured in land redistribution policies, loan allocation and a large number of official development programs.

14 The classification is based on the *Purshusukta* Theory, according to which these four classes of the people originate from the different body parts of the creator of the universe *i.e.*, Lord Brahma. The *Brahmin* originate from the head, *Khastriya* from the hands, *Vaisya* from the thigh and the *Shudra* from the feet.

15 In the early *Vedic* period, the Indian society was classified according to the *Varna* system, based on occupation. Now, it is all clubbed under the patronage of caste.

SC and ST. Apart from these two categories, OBC are also provided reservation status, though it is not the main category.

- (ii) Religion- Home to multiple religions, the country has immense religious diversity. The deeply religious ethos of the people in the country have sometimes given rise to a tendency of conflicts between the different religious groups over access to resources and opportunities. Thus, reservation on the basis of religion is also granted, however, only in a few states such as Andhra Pradesh¹⁶ and Kerala.
- (iii) Domicile- Some states reserve a few seats only for the domiciles of that state.¹⁷
- (iv) Gender- In many state services and educational institutions, few seats are reserved for women.¹⁸ Conventionally, patriarchal forces in operation since ages have worked to hold women captive in certain gender ascribed roles of nurturing and caring, thereby relegating women to an inferior status to men especially in the realm of educational and employment opportunities. The reservations based on the criteria of gender are aimed at addressing these inequities. While discussing about the discrimination on the basis of gender, it must also be noted that the issue of reservation for the transgender community has also been addressed by the judiciary in the *NALSA* judgment of 2014.¹⁹ The *NALSA* judgment in 2014 had directed the government to take steps to treat transgenders as socially and educationally backward classes of citizens and to extend all kinds of reservation in cases of admission in educational institutions and for public appointments. This was followed by The Transgender Persons (Protection of Rights) Act, 2019 which provides for no discrimination against transgender community in matters of education and employment and further mentions about governmental obligation to formulate welfare schemes for their inclusion into society.²⁰

16 Providing 4% reservation to the Muslims under the Backward Classes of Muslims Act, 2007 was challenged in *T. Muralidhar Rao v. State of Andhra Pradesh* (2010) SCC OnLine AP 69, and the High Court of Andhra Pradesh struck down the provision, however the Supreme Court upheld the validity of the Act.

17 The court in the case of *Saurabh Chaudri v. Union of India* (2003) 11 SCC 146, held that providing reservation on the basis of domicile is not violative of art 15(1). The court differentiated between domicile and place of birth and said that both the terms are not synonymous in nature. The court while deciding the case relied on the constitutional bench judgement of *D.P. Joshi v. State of Madhya Bharat*, AIR 1955 SC 334.

18 Rajeev Dhavan, "Reservation for Women: The Way Forward" 20 *NLSI Rev* 1 (2008); Constitution (108th Amendment) Bill, 2008 (the bill is also known as the women's reservation bill, it proposes to reserve 33% women's reservation at the Lok Sabha and state assemblies).

19 *NALSA v. Union of India* (2014) 5 SCC 438.

20 The Transgender Persons (Protection of Rights) Act, 2019. Chapter II of the Act lists provisions regarding prohibition of discrimination and Chapter IV mentions about the obligation of government to formulate welfare measures for the full and effective participation of transgender persons and their inclusion in society.

- (v) Economic Status- With the recent constitutional amendment, reservation on grounds of economic status was granted. Such type of reservation amounts to a total of 10%.²¹

Since reservation is intended to realise the promise of equality enshrined under the Constitution, the Indian reservation policy is based on a solid constitutional framework. The Constitution provides for reservation at three levels: political, educational and employment.²² The reservation for equal exercise of political rights is guaranteed under articles 330 and 332 of the Constitution, which stipulate that a certain number of seats²³ shall be reserved for the SCs and STs in both the Upper and the Lower House of the Parliament.²⁴ Article 15(4) of the Constitution of India, provides for reservation in the educational institutions. Under this article, the government is empowered to make any law relating to the upliftment and progress of socially and educationally backward classes.²⁵ The third type of reservation is employment reservation which is provided under articles 16(4), 16(4A), 16(4B), 320(4) and 335. These articles empower the government to amend the laws relating to advancement of socially backward classes in governmental institutions as and when required.²⁶ Furthermore, the promise of reservation is not merely a deeply engrained philosophy within the Constitution, there are multiple agencies of the government which have been vested with the duty of securing its proper implementation. However, to what extent these agencies have been successful in achieving this goal and the problems which still plague the country's reservation policy is a different discussion altogether, the answer to which has been furthered through the course of next two headings.

Implementation machinery

Before one turns on to the discussion as to the difficulties in the implementation and enforcement of the affirmative action framework, it is instructive to look at the official machinery that exists in order to implement the different policies as well as to overlook the same. The Indian government administers the implementation of the reservation policy through a number of governmental institutions, namely the Department of

21 The Constitution (One Hundred and Third Amendment) Act, 2019, Ministry of Law and Justice, *available at*: <http://egazette.nic.in/WriteReadData/2019/195175.pdf> (last visited on Dec. 21, 2020).

22 The World Bank, World Development Report: Equity and Development (2006), *supra* note 5.

23 There are total 79 seats reserved for Scheduled Castes.

24 Similar provisions are also made to reserve seats for the SC and ST in the state legislature, Local level bodies at district, Taluk and village level.

25 Tanya Singh, Pramod Kumar Singh, *et.al.* "Reservation Policy: A Socio Legal Perspective" 1 *IJAR* 967-971 (2015).

26 P. Parmar, "Undoing Historical Wrongs: Law and Indigeneity in India" 49 *OHLJ* 491-525 (2012).

Personnel and Training (DoPT), the National Commission for SCs and STs,²⁷ the Committee of Parliament on Welfare of SCs and STs, the Ministry of Social Justice and Empowerment, and the Ministry of Tribal Affairs.

The National Commission for SCs and STs is given the responsibility to investigate all matters relating to the atrocities on SCs and STs and to inquire into any specific complaints with respect to the deprivation of rights and safeguards for SCs and STs.²⁸ Further, the Ministry of Social Justice and Empowerment and the Ministry of Tribal Affairs is also placed with a duty for securing the all-round development of the backward classes. The Committee of Parliament on Welfare of SCs and STs, also makes recommendations for effective implementation of the reservation policy. Lastly, the DoPT is placed with the onus of enforcing all the rules and monitors the fulfilment of quotas.

However, despite multiple agencies being entrusted with the task of ensuring effective implementation, the reservation policy in India has suffered from multiple lacunas. Some core issues that have remained disputed despite efforts at resolution both by the legislators and the judiciary are discussed in the next section, namely, the issue of the constitutional validity of reservations, the difficulty in identification of the OBC category and the ever so contentious issue of reservations in promotion and consequential seniority. Further, with the introduction of reservations on economic grounds, the debate as to the feasibility and desirability of the policy has been refuelled and the same merits a deeper inspection.

After having a preliminary understanding of how affirmative action framework functions in the country, it is only relevant to assess, these issues which have time and again arisen in context of the country's affirmative action policies and how judicial pronouncements have helped in shaping the contours of the reservation policy as is viewed in present times. The following section undertakes the same exercise.

III The implementation conundrum and other issues with India's affirmative action policy and the judicial response

The equality code under the Constitution and the validity of reservations

Perhaps the earliest controversy that arose in the wake of the introduction of the affirmative action framework of the country was regarding the equality code as enshrined in articles 14, 15 and 16. For a long time, affirmative action under articles 16(4) and 15(4) were seen to operate as exceptions to the non-discrimination clauses as contained in articles 15(1) and 16(1) under the constitutional scheme. However, this was soon

27 The commission is formed under art. 338 of the Constitution of India. The provision was amended in 1990 to provide the establishment of the committee, prior to the amendment the article provided for appointment of a "special officer" by the president.

28 Constitution of India, 1950, art. 338(5).

changed when while deciding the validity of reservation policy, the apex court embraced the substantive notion of equality and observed that article 16(4) is not an exception to the rule under article 16(1),²⁹ and further deduced the principle that reasonable classification on the basis of backwardness is permissible.³⁰ This paved the way for the affirmative action policies that were to be adopted by the government in the future.

Therefore, it can be concluded that even though the reservation policy in India, as introduced with the intention to uplift the socially and economically backward classes, is well within the mandate of the Constitution, however, the implementation of the policy suffers from inconsistencies at many levels. The decision of the courts although have provided some relief to the chaos created by an inefficient implementation, but relying on these decisions alone can never be enough. Ineffective implementation of the policy has thus created an exigency which requires redressal. This can essentially be ensured by addressing some of the pertinent issues which have time and again arisen for consideration before the apex court and have been discussed hereunder.

The saga of reservation in promotion and consequential seniority

Introduced by the 77th Constitutional Amendment reservation in promotion has always been a fiercely contested issue. To simply put, the idea behind reservation in promotions is to separate/reserve a fixed number of seats for the SCs and STs in government offices. Since its inception, reservation in promotion has been a challenging issue for both, the legislature as well as the judiciary. It is for this very reason that despite having a series of judgments which have essentially laid down the requisites for ascertaining the validity of reservations in promotions, the issue doesn't seem to have settled just yet. It is this saga of reservation in promotion and *inter-alia* issues involving consequential seniority that have been discussed in this section. Article 16 to the Constitution of India promises equality of opportunity to its citizens in matters of employment. Interestingly, although the provisions for providing reservation in promotion were introduced for the first time in the year 1995, the apex court read in reservation in promotion as a facet to article 16 since the beginning of 1960's. It was during this time that the apex court endorsed the view that reservation in promotion were constitutionally valid through the *vires* of article 16(4) which was to be construed as an exception to the law laid down in article 16(1)³¹ provided it was aimed at harmonising the interests of backward classes *vis-à-vis* others.³² Moreover, it was only after the

29 *State of Kerala v. N.M. Thomas*, 1976 SCR (1) 906, *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

30 The Supreme Court in *State of Kerala v. N.M. Thomas*, 1976 SCR (1) 906 created a legal fiction distinguishing untouchables and Scheduled Castes. The court held that preferential treatment to Scheduled Caste did not violate art. 16(2), as it is in accordance with the constitutional mandate of classification, *i.e.*, on the basis of backwardness.

31 *General Manager, Southern Railway v. Rangachari* AIR 1962 SC 36.

32 *C.A. Rajendran v. Union of India*, AIR 1968 SC 507.

landmark ruling of nine judges in *Indira Sawhney*,³³ that led to the introduction of article 16(4A), to the Constitution³⁴ by the Narasimha Rao Government in the year 1995³⁵ which empowered the legislature to extend benefits of reservation in matters relating to promotion.³⁶

However, soon after the implementation of reservation policy in matters relating to promotion, the major issue which thus arose was what will be the rule to decide the seniority of the candidates. This question first arose in the case of *Union of India v. Virpal Singh Chauhan*,³⁷ wherein the apex court observed that although the candidates belonging to the backward category are promoted on accelerated basis, but such candidates cannot be said to have acquired consequential seniority against the general category candidates. Further the court in *Ajit Singh Januja v. State of Punjab*,³⁸ stated that once the roster is established for the promotion of the SC's and ST's, such candidates cannot claim the benefit of accelerated promotion against the general category candidates.³⁹ However the effect of both these judicial pronouncements was nullified with the introduction of the 58th Constitutional Amendment.⁴⁰

The constitutional validity of this amendment was further upheld in the landmark case of *M. Nagaraj v. Union of India*,⁴¹ where the court taking into account the effects article 16(4A) would have on the society at large, consequently devised a three- prong test to implement the policy enunciated under the article. The court observed that the

33 *Indra Sawhney v. Union of India*, AIR 1993 SC 477. The apex court digressed from its dictum of *Rangachari* case and observed that reservation under art. 16(1) is only intended at the stage of recruitment and not promotion.

34 The amendment was brought in to nullify the effect of the landmark judgement of *Indra Sawhney v. Union of India*, AIR 1993 SC 477, which held that reservation in promotion was in violation of art. 16(1), 16(2) and 16(4).

35 Through the Constitution (Seventy-Seventh Amendment) Act, 1995, available at: <http://legislative.gov.in/constitution-seventy-seventh-amendment-act-1995> (last visited on Feb. 15, 2021).

36 As discussed, even before the amendment was brought the government was providing reservation in public services and in promotions too. The same was also held constitutional in *Southern Railways v. Rangachari*, AIR 1962 SC 36.

37 (1995) 6 SCC 684.

38 (1996) 2 SCC 715.

39 The court ruled that if such principles are not followed, the general category candidates would face reverse discrimination, as the SC and ST would have benefit at two fronts, and such action would ultimately lead to inefficiency in the administration of the offices.

40 The amendment introduced the concept of consequential seniority in art. 16(4A). Consequential seniority refers to the rule which allows a reserved category candidate to retain seniority over the peers belonging to the general category in case the candidate is promoted earlier than the general category candidate because of the reservation in promotion. Thus, for any subsequent promotion, the reserved category candidate retains the seniority.

41 (2006) 8 SCC 212.

state would first have to present data to prove an inadequacy of representation, and backwardness, further the state must also prove that efficiency of administration wouldn't be adversely affected.

Moreover, in *Suresh Chand Gautam v. State of U.P.*,⁴² the apex court observed that article 16(4A) and 16(4B) are mere enabling provisions and they do not impose a duty upon the state to introduce reservation policies. It was also observed that the court does not have jurisdiction to issue writs for effective implementation of such policies. Adding on to the principles laid down in *Suresh Chand Gautam's* case,⁴³ the court in *Mukesh Kumar v. State of Uttarakhand*,⁴⁴ held that reservation in promotion, cannot be claimed as a fundamental right.⁴⁵ Further, the court also clarified that the state is only obliged to collect quantifiable data if the state wishes to implement reservation policies in matter relating to promotions, and not otherwise.

With regard to the requirement of collecting quantifiable data, another recent judgment deserves a mention, that of *Jarnail Singh v. Lachbmi Narain Gupta*,⁴⁶ wherein one of the major questions involved was whether the judgement delivered in the case of *M. Nagaraj*⁴⁷ needed to be reconsidered by a larger bench.⁴⁸ The court rejected the contention,⁴⁹ and observed that if the fruits of the reservation policy are to be distributed in an equitable manner, the creamy layer amongst the SC and ST must be excluded from exercising the benefits enshrined under article 16(4A) and 16(4B).⁵⁰ Thus, through this judgment the apex court upheld the view, that fruits of reservation in promotion cannot be enjoyed by the creamy layer within SCs and STs. This position of law was further crystallised by the apex court's judgment in the case of *Mukesh Kumar v. State of Uttarakhand*,⁵¹ wherein it was *inter-alia* observed that reservation in promotion cannot be claimed as a fundamental right and the government thereby was not bound to provide reservation under article 16(4) and 16(4A).

42 (2016) 11 SCC 113.

43 *Ibid.*

44 2020 SCC OnLine SC 148.

45 The court relied on the decision laid down in *C.A. Rajendran v. Union of India*, (1968) 1 SCR 721 and *Suresh Chand Gautam*, *Supra* note 42.

46 (2018) 10 SCC 396.

47 *Supra* note 41.

48 The contentions were raised on the grounds that the tests laid down in the case were violative of the basic structure of the Constitution, and was in conflict with the judgement delivered in *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394.

49 The court held that the test laid down in the case of *M. Nagaraj* does not in any way violate the power of the President under art. 341 and 342.

50 *Supra* note 41, para 26.

51 *Supra* note 44.

However, the enigma of reservation in promotions doesn't seem to have fully uncovered just yet. The dictum of the Supreme Court in *Mukesh Kumar's* case has not been received well⁵² and it is contended that the judgment requires reconsideration.⁵³ Among others, one of the major arguments that is put forth against the judgment is that the apex court just might have granted excessive discretion to the relevant state authorities through its observation that reservation in promotion cannot be claimed as a fundamental right, and that in doing so the court has closed the doors for challenging any decision of the state government in case it decides not to provide reservation in promotions to a particular community. The apprehension thus is, to what extent, in a country like India, is it justifiable for the states to have a blanket power in such crucial decisions. It is for this very reason that the debate around reservation in promotions just might not be over yet, and the issue is bound to gain significant traction in times to come.

The conundrum of OBC reservations

In India, caste is the main ground for reservation,⁵⁴ which has given rise to many contentious issues. There has been a constant debate around whether or not reservation should be extended to the OBCs, a backward class of people who have not suffered the stigma of untouchability.⁵⁵ Further, the identification of Dalits is easy and non-controversial, but with OBCs, the identification is much more difficult. This is because of the ancient classification based on *Jati* and *Varna*. As the *Jati-Varna* link is very fluid, it is not clear whether each *Jati* demanding reservation is a descendent of *Sudra Varna* or is currently facing serious deprivation. For example, there are several land-owning and prosperous *Jatis* that claim the OBC status.⁵⁶ There is a graded inequality in the OBCs, unlike the sharp distinction existing between the SCs, STs and the other Hindus.⁵⁷ Naturally, all these factors posed a conundrum before the government. So, initially for the purpose of state lists, the government relied on the data from 1949-1950. In 1960,

52 See "Reservation in promotion: Here's why Supreme Court is wrong in this case", *available at*: <https://www.financialexpress.com/opinion/sc-wrong-in-this-case-on-reservation-in-promotion/1863478/> (last visited on Jan. 19, 2021).

53 The Issue of Reservation as Article 16(4A) – Arbitrary or Mandatory? *available at*: <https://www.thecitizen.in/index.php/en/NewsDetail/index/9/18733/The-Issue-of-Reservation-as-Article-164A-Arbitrary-or-Mandatory> (last visited on Jan. 20, 2021).

54 Bineet Kedia, *supra* note 2.

55 Yogendra Yadav "The A to Z of OBC", *available at*: <http://archive.indianexpress.com/news/the-a-to-z-of-obc> (last visited on Feb. 11, 2021).

56 S. Thorat and C. Senapati, "Reservation Policy in India- Dimensions and Issues" 1(2) *IIDS* (2006).

57 In India, factors such as traditionally low caste and low economic status are considered while determining whether a group is considered as an OBC, but these factors hold no ground singularly.

a commission was formed to identify OBCs in various states. But since there was no record of castes available since 1931, to gauge the backwardness of OBCs in the states, the commission had to rely on extrapolations and sample surveys.⁵⁸ This gave rise to certain issues, as according to the general principles of law, reservation can only be granted to the class of people who are educationally and socially backward, however under the current circumstances there is no statistical evidence to support the backwardness of these castes in India.

In *Asboka Kumar Thakur v. Union of India*⁵⁹ the court while deciding upon the validity of the then recently introduced reservation policy for the OBCs, rightly observed that the caste census of 1931 cannot be used as a base for identification OBCs. Resultantly, relying on these key observations of the Supreme Court's the government has had to announce the first census to count OBCs in 2021 (Socio Economic Caste Census).⁶⁰ This census is aimed at providing a statistical backing to the current reservation policy, and possible help improve its implementation.⁶¹

Since reservation can only be granted on the basis of accurate identification based on reliable data and data collection on the prevailing castes in India has remained an uphill task because of the underlying fear of a possible ignition of the bitter feelings of casteism⁶² hence, reservation under the OBC category has remained a contentious issue.

It was in 1981, that the government first made an attempt to resolve the OBC issue through Mandal Commission. This commission, in its report, recommended drastic changes and suggested extension of reservation to the OBC category to 27%.⁶³ This meant that the total percentage under reservation including the share of SCs and STs would now come up to 49%.⁶⁴ As soon as the implementation of the report was announced, students across India unleashed a wave of public protests and although MCR's (Mandal Commission Report) talked about reservation only for the OBCs, but the protests were directed against the general rule of reservation and resulted in the SCs and STs being mercilessly pilloried.

58 S. Thorat and C. Senapati, *supra* note 56.

59 1975 SCR (2) 761.

60 Rahul Tripathi, "OBC count to be part of census 2021, 3 decades after Mandal Commission", *The Indian Express*, Sep. 1, 2018, available at: <https://indianexpress.com/article/india/obc-count-to-be-part-of-census-2021-3-decades-after-mandal-5334643/> (last visited on Jan. 17, 2021).

61 D. Benjamin Oppenheimer, "Understanding Affirmative Action" 23(921) *HCLQ* 921-997 (1996).

62 The World Bank, *World Development Report: Equity and Development* (2006), *supra* note 5.

63 However, several state governments in India like the state of Karnataka and Tamil Nadu had already extended reservation policies to OBC for jobs in state government before the Mandal Commission report was implemented.

64 P. Parmar, *supra* note 26.

Later, in ensuing *Mandal* case⁶⁵ the Supreme Court, resultantly, for the first time, introduced the concept of creamy layer. Creamy layer referred to the elite group among the OBCs.⁶⁶ In this case, the Supreme Court said that the government should not include the creamy layer so that the fruits of reservation actually seep to the grass root levels within the OBCs.⁶⁷

But as it has so happened, in the present scenario, the entire reservation under article 16(4) is hogged up by the elite classes among the OBCs such that the poor ones still remain backward. The case ruled that the exclusion should not be only on economic basis, unless economic standards are so high that it necessarily means social advancement.⁶⁸ The court also pointed out that certain positions should be recognised as socially advanced like becoming an IAS or IPS officer or, for that matter, any All India Service positions. Jeevan Reddy, J. pointed out that after excluding all the elites, the benefits would truly reach the backward people and serve more appropriately the reservation policy's purpose.⁶⁹

Earlier in another high court judgement,⁷⁰ the question of whether a person possessing MBBS could claim to be educationally backward was examined. In this case P.A. Choudhary J. observed that an MBBS cannot be treated as educationally backward. He further went on and opined that reservation is viewed as a scheme which has created a vested interest in backwardness and has become a source of reverse discrimination.⁷¹ He averred that if such section of individuals is not excluded then it will give rise to a new class of untouchables.

Another issue which subsequently cropped up soon after the *Mandal* case, was the issue of cut-off marks for the admission of the OBC students. Since, this issue was left unaddressed in *Mandal* case it created the space for institutions to decide the cut-off marks according to their whims and fancies. However, the court sealed this loophole in the case of *P.V. Indiresan v. Union of India*,⁷² where the court held that the cut-off

65 *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

66 The creamy lawyer is defined as the category of individual whose gross family income per year is more than Rs. 8 Lakh; Office Memorandum, Department of Personnel and Training, available at: <http://www.ncbc.nic.in/Writereaddata/OM8Lakha.pdf> (visited on Feb.11, 2021).

67 P. Parmar, *supra* note 26.

68 S. Aparajita and R. Rhudra, "Right to Equality in India *vis-a-vis* reservation in favour of backward classes" 2(7) *IJLLJS* 302-313.

69 *Ibid.*

70 *M. Narasimha Rao v. Secretary to the Government* (1980) 1 AP LJ 99 (AP).

71 *Id.*, para 27 (It is termed as reverse discrimination because it involves discrimination against those who were not subject to discrimination until now.)

72 (2011) 8 SCC 441.

marks for the OBC candidates will be 10% less than that for the open category students.⁷³

The conundrum of OBC reservations in India is that both sides, whether for or against such reservations vehemently argue their case time and again. Those against this particular category of reservation, like Justice Katju, further their argument on the strength of the abolition of the zamindari system, by way of which most OBCs, for instance, the Kurmis and Yadavas, became bhumidhars, and consequently by way of the income produced from their land, moved upward in terms of economic mobility. The point that has been furthered by Justice Katju is that at the time when OBCs were actually backward, post-independence, (owing to the zamindari system which was prevalent), they weren't accorded the benefits of reservation, but over time they climbed up the ladder and by the time they were offered reservation, they had attained prosperity relatively.⁷⁴ However, proponents favouring OBC reservation simply put forward the unequivocal observation of the apex court that backwardness cannot be merely assessed exclusively from an economic aspect and that centuries of suppression cannot be undone in a few decades.⁷⁵ The overarching point that has thus been conveyed through this issue in the submission is that a particular caste cannot always be backward for an indefinite period. Thus, the need of the hour today in context of India's affirmative action policy is to strike a balance between both these arguments so that the constitutional objective behind reservations is furthered in its true spirit.

Reservation on economic grounds: A Pandora's box or panacea?

The government of India with the recent amendment to the Constitution of India introduced reservation on economic grounds.⁷⁶ The amendment adds two new provisions to articles 15 and 16 of the Indian Constitution.⁷⁷ The amendment has now empowered the government to provide 10% reservation in education and employment sector, in addition to the existing reservation, therefore the total reservation

73 *Id.*, para 52 (The petitioner in this case challenged the constitutional validity of 93rd Amendment and the Central Education Institution (Reservation in Admission) Act, 2006, the court upheld the validity of both the enactments.)

74 Justice Markandey Katju "OBC reservation is pure fraud", *available at*: <https://indicanews.com/2020/06/14/obc-reservation-is-pure-fraud/> (last visited on Dec. 30, 2020)

75 Abdullah Nasir and Priya Anuragini "OBC Reservations: Investigating caste, backwardness and representation", *available at*: <https://www.theleaflet.in/obc-reservations-investigating-caste-backwardness-and-representation/> (last visited on Dec. 24, 2020).

76 The Constitution (One Hundred and third amendment) Act, 2019, Ministry of Law and Justice, *available at*: <http://egazette.nic.in/WriteReadData/2019/195175.pdf> (last visited on Jan 20, 2021).

77 Art. 15, cl. (6) which empowers the government to make any special provision in educational institutions, and clause (6) to the art. 16 which empowers the government to allow reservation in employment.

now amounts to 59.50%.⁷⁸ The office memorandum issued by the Ministry of Social Justice and Empowerment⁷⁹ states that such reservation can be availed by any person whose family income is less than 80 lakhs per annum, or has agricultural land less than 5 acres, or has residential flat less than 1,000 sq. ft, or residential plots less than 100 sq. yards in notified municipalities, or residential plots less than 200 sq. yards in areas other than notified municipalities.⁸⁰ These are the prescribed conditions for availing reservation under the recently introduced constitutional amendment.

Though it has been recognised that poverty remains to be a significant deterrent in realisation of the goals of equality enshrined under the Constitution, and the amendment is aimed at rectifying the same, however, the move has faced some opposition. The same has been challenged by way of a petition filed in the Supreme Court on the ground that the amendment violates the basic structure of the Constitution. The reservation has garnered criticism on the ground that the same shall be in excess of the 50 percent cap on reservations and thus would not be in line with the essence of the objectives behind the policy of affirmative action.

At the same time, it becomes pertinent to mention that reservation based upon economic criteria is arguably a necessity implicit under the Constitution of India, the onus for fulfilment of which is on the state. This duty is based on the premise that every person has a right to not be discriminated against the other and the obligation is on the state to ensure the well-being of its subjects. Further, the Directive Principles of State Policy as contained in Part IV of the Constitution mandate the minimisation of inequalities in income. There are specific directives aimed at ensuring that the ownership and control of the material resources of the community is so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.⁸¹

Periodic review of reservation policy: The need of the hour

The aims and aspirations of the reservation policy are noble, they are designed to uplift the nation's backward classes, elevate them and assimilate them in the mainstream of the country's political, economic and social milieu. But equally important is to review them from time to time, to analyse whether its aims are being achieved in reality

78 This amendment is opposed to the SC decision in *Indra Sawhney v. Union of India*, AIR 1993 SC 477 where the court laid down the maximum cap to reservation upto 50% of the total available seats, and reservation cannot be allowed solely on the grounds of economic status. Currently a petition is pending before the Supreme Court challenging the constitutional validity of the amendment; *Youth for Equality v. Union of India* WP (C) No. 73 of 2019.

79 Office Memorandum no. 20013/01/2018-BC-II dated Jan. 17, 2019

80 *Ibid.*

81 The Constitution of India, 1950, see art. 38 and art. 39.

or not. Otherwise, the entire purpose of reservation will fall flat, for instance, without any periodic review, a caste once included in the backward category would remain backward for eternity. The same would lead to usurpation of the benefits of the policy by a select few, thereby causing the problem of reverse discrimination. Therefore, repeated assessments and periodic revisions of the policy are indispensable. Lack of any such periodic review mechanism is another major loophole in the system.

Early interventions, transparency and awareness for better realisation of emancipatory goals

One of the major problems which is currently being faced by the reservation policy in the country is that the fruits of reservation policy have yet not trickled down to the last person standing. In fact, this issue was also emphasised upon by Justice Mishra, in the landmark judgment of the apex court in *Chebrolu Leela Prasad's*⁸² case, wherein the retired judge observed:

The right to information system has to be strengthened at the village level. People must know how the money meant for development has been utilised. Transparency of administration is vital for the removal of corruption. They are required to be motivated. They must know what has been allocated to them and how it has been spent. There is a need to improve the system, ensuring the implementation of beneficial measures.

Another crucial issue with the existing framework is that the governmental policy regarding reservations in society begins past the point of no return. Holding up until somebody is 18 years of age, to simply put, does not do what's needed to really even the odds. It is because of this very reason that an individual who is brought up in acute poverty, taught in a school with minimalistic amenities and with extremely dismal numbers denoting the high dropout ratio, has already been pushed a step back in relation to others before he/she can finally begin to reap the benefits of reservation. It is for this very reason, that the policy should now be moulded in a manner that it also covers all schools from kindergarten up. In addition to the fact that this would help in development of first-class basic schools and education infrastructure, it would also give a strong base to the marginalised sections for progression to advanced education.

IV Conclusion

The spirit of affirmative action is based on the principles of equality and justice. The problem arises because the incentives accorded to the disadvantaged group is perceived as the snatching of the rightful share of opportunities for the other groups. As affirmative action has remained a contentious issue having multiple layers of arguments both for and against it, the policy framework adopted cannot be limited to targeting

82 *Chebrolu Leela Prasad Rao v. State of A.P.*, 2020 SCC OnLine SC 383.

only a specific area, it needs to be multifaceted to have a fruitful result. Similar to the diverse modes of implementation of the affirmative action principle, the methods to analyse the measures as undertaken under its umbrella, may also be varied and may range from being philosophical to sociological and also economical.⁸³ Despite the clearly laid out constitutional mandate and the implementation machinery comprising several statutory bodies in place, the implementation and execution of the policy has always remained a matter of concern. Due to lack of a comprehensive monitoring agency most of the institutions get away by simply stipulating mandatory quota. Above all, emphasis must now be specially given towards efficient monitoring for facilitating an effective implementation of the policy and creating awareness. As much as it may sound rhetorical, but informing individuals about the benefits of reservation and empowering the last man standing, with true knowledge and awareness is the sole way to begin with.

83 M. Gibelman, "Affirmative Action at the Crossroads: A Social Justice Perspective" 27(1)*JSSW* 153-174 (2000).