



## REDEFINING AFFIRMATIVE ACTION: A STUDY OF CONSTITUTIONAL POLICIES IN PRACTICE

**Chepuri Prem Kumar**

Research scholar  
Osmania University-Hyderabad.  
chepuripremkumar@gmail.com

**Prof. Y.F Jayakumar**

Ex- Professor, Dean, University college of  
law  
Osmania University- Hyderabad.

### ABSTRACT

*The study identifies emerging trends, such as the shift from caste-based to income-based affirmative action, the global influence of diversity and inclusion initiatives, and the need for broader social empowerment measures beyond reservations. It calls for a balanced approach that ensures equity while fostering societal cohesion.*

*In conclusion, affirmative action remains a vital tool for achieving social justice, but its implementation requires continuous adaptation to address evolving societal dynamics. Policymakers must strike a balance between addressing historical injustices and fostering an inclusive, meritocratic society. This critical study aims to contribute to the discourse by providing insights into the new dimensions of affirmative action and proposing pathways for its reform in India's constitutional framework.*

**Keywords:** Affirmative Action, Social Justice, Constitution, Reservations, EWS, Caste, Equality, Inclusion, Policy Reform.

### 1. INTRODUCTION

Social stratification in the society is based on caste, ethnic and racial groups. Priority is given to the group instead of the individual. Insecurity in life makes the individual acknowledge his tie to his family, caste, village and others in that order. A person still prefers to classify his fellowmen in terms of his closeness to, or distance from, his family, caste, etc. Social interactions and political relationship too are dominated by an equivalent consideration.<sup>6</sup> Though the character of caste and community interactions has changed over time, but considerations along ascriptive lines still remain important markers, both at the public and private domains. People feel a way of solidarity once they belong to an equivalent community and therefore the feeling of distance which separates members who belong to different communities. The sense of community is often based on the feeling that its members have a common origin.

The old order supported hierarchical social order in which each group occupied a place in the social ladder. There were four broad groups; Brahmins (priests and teachers), Kshatriyas (warriors, often royalty), Vaisyas (traders, retailers, money lenders), Sudras (manual jobs). It had been held that the Shudras did the foremost menial jobs. These were therefore regarded below the line of ritual purity and were considered as untouchables. Polluting jobs are still done by the Shudras to which they were traditionally assigned. They were denied the right to property, business, education, and all civil, cultural and religious rights, except manual labour and service to castes above them. They also suffered from residential segregation and social isolation<sup>8</sup> An unemployed Brahmin would rather remain unemployed instead of becoming a scavenger, this stigmatized them a lot. Groups like the Adivasis officially known as Scheduled Tribes (STs) suffered from isolation, neglect, underdevelopment and exclusion

due to their geographical and cultural isolation. In their case, exclusion came in the form of denial of the right to resources and displacement induced by economic development.<sup>10</sup> Mindset of caste affinity and prejudice (casteism) has deepened the differences. Religious competence and disabilities attributed to varied social layers, without much rational justification, have influenced its iniquitous growth. Sociologists find caste divisions amidst Muslims, Christians, Sikhs and other religious minorities but not amidst tribal people. The system is segmentary since caste is normally divided into various sub-castes or upjatis. Like sex or age, caste has become person's individual and social identity in a very real sense because in any locality every body knows the caste of everybody else. In this particular order certain groups are believed to possess particular abilities and they too are hereditary. As a result, ascription instead of merit became a rule of the day. It is these centuries of historical wrongs in the Indian society that the reservation policy aims at doing away. Though the policy has been in existence and implemented for more than half a century, it has been facing many difficulties as well as twists and turns. In the process a variety of contours are emerging including the reverse discrimination and the more recently the economic criteria of Reservation which came into effect on January 14, 2019, which has amended Article 15 and 16 of the Constitution by adding two new clauses which empower the state to provide a maximum of 10% reservation for 'economically weaker sections (EWS) of citizens other than the Scheduled Castes (SC), the Scheduled Tribes (ST) and the non-creamy layer of the Other Backward Classes (OBC-NCL).

Even before the Independence, the Princely states of Kolhapur (1902); Mysore (1921) and Travancore (1936), the Madras Presidency (1921) and the Bombay Presidency (1931) took the lead in implementing reservations for SC/ST and backward classes. When India became free and framed its own Constitution, the goals to be pursued and the means to be adopted for their achievement were re-defined clearly.

The Constitution of India, starts with a Preamble, where the people of India have solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and committed ourselves to secure to all citizens social, economic and political justice; liberty of thought and expression, belief, faith and worship; equality of status and opportunity and fraternity assuring the dignity of the individual and the unity and integrity of the Nation.

## **2. CONCEPTUAL FRAMEWORK OF AFFIRMATIVE ACTION**

### **Important Aspects of Reservation in Employment India:**

(a) Carry Forward and Exchange: If a sufficient number of SC/ST candidates fit for appointments against reserved posts are unavailable, such vacancies can be de-reserved and filled by candidates from other communities. Such being the case, reservation can be carried forward to the subsequent three recruitment years, except in the case of promotion by selection from Group 'C' to Group 'B' and from Group 'B' to the lowest rung of Group 'A', wherein the carrying forward of reservation is not permitted. While filling up reserved posts, the oldest carried-forward vacancy is to be filled first.



Vacancies reserved for SC/STs may be exchanged, in case no suitable candidates are available from the respective community for which the vacancy is reserved. The normal provision, then, is that exchange is possible only for the reservation that has been carried forward to the third year of recruitment.

(b) Concessions and Relaxations: Concessions and Relaxations are applicable to the following:

1. Reservation in services/posts in government and public sector undertakings (PSUs) to be filled up by direct recruitment or promotion.
2. Relaxation of maximum age limit for direct recruitment and posts to be filled up by promotion.
3. Concessions in recruitment, examination fee, etc.
4. Separate interviews for SC/ST candidates for direct recruitment
5. Relaxation of qualification, experience and other criteria for appointment
6. Travelling allowance for attending written tests and interviews for recruitment.
7. Extension of zone for consideration for promotions to SC/ST employees.
8. Reservation in general residential accommodations.
9. Provisions in Central Civil Services (CCS) (Conduct) Rules against harassment of SC/ST employees.
10. Reservation in dealerships of PSU products and concessions in conditions related to dealership.

(c) Procedural Safeguards:

1. Roster for Reservation in posts.
2. Annual inspection of roster.
3. Annual statement on reservation.
4. Monitoring and ensuring the proper implementation of concessions.

(d) Institutional Safeguards:

1. Provisions of liaison officers and special cells to assist them to monitor and ensure the proper implementation of concessions for SCs/STs.
2. Establishment of an NCSCST with purposes and functions as delineated under Article 338.
3. Establishment of a committee of Parliament on the welfare of SCs/STs to examine the representations of SCs/STs in services and to make suitable recommendations for improvements.
4. Establishment of NCSCST, National Scheduled Caste Finance and Development Corporation (NSCFDC), National Safai Karamchhari Finance and Development Corporation (NSKFDC), National Commission for Safai Karamchhari (NCSK) and Dr. Ambedkar Foundation.

The reservation policy as envisaged in the Indian Constitution, and Affirmative Action in the United States resemble each other to a remarkable extent. In both cases, the express intention



is to rely on preferential policy to uplift those communities that have been historically disprivileged. The Scheduled Castes and the Tribes in India and the Native Indians and Blacks in America have been victims of discrimination and prejudice for long periods of time. The Malay Bumiputras on the other hand were the dominant political community and depend on the preferential policy to combat the prosperous Malays of Chinese origin in the urban sectors.

Caste based quotas which are used in Reservation in India and Malaysia are illegal in the United States, where no employer, university, or other entity may create a set number required for each race. Quotas are fixed, numerical limits with discriminatory intent of restricting a specified group from a particular activity. Goals on the other hand, are numerical target aims which a contractor tries to achieve. The aim is not discriminatory but affirmative in intent, to help increase the number of qualified minority people in the organization.

### **3. HISTORICAL PERSPECTIVE ON RESERVATION POLICY**

#### **Context of Caste and the Caste System before the Colonial Rule:**

Social stratification in a traditional society is based on caste, ethnic and racial groups. Priority is given to the group rather than to the individual. Insecurity in life makes the individual acknowledge his tie to his family, caste, village and others in that order. A man classifies his fellowmen in terms of his closeness to, or distance from, his family, caste, etc. Social interactions and political relationship too are dominated by the same consideration. The specific form of ascriptive hierarchy and unequal distribution of power in India is known as the caste system. The word caste is derived from the Portuguese word *casta*, which denotes breed, race and kind. In India, caste is the most important basis of social categorization. Caste hierarchy, religious traditions and patriarchy are three most ancient and stubbornly resilient social institutions in this land. Though caste is believed to have originated in a division of people on the basis of their natural inclinations and occupations, it has turned out in course of time to be hereditary. It has created social groups based on kinship and ethnicity. The hereditary occupations have created vested interests in the form of socio-economic monopolies and have bred an extreme form of exploitation. The caste system is overburdened with considerations of ritualistic purity, and this in turn has engendered inflexibility, rigidity and feelings of superiority and inferiority.

Although the social scientists have done much work on the Indian caste system, they have found it difficult to define it. They also differ on the meaning of caste. Some scholars hold that caste is a particularly rigid form of class and think its existence to be worldwide. Others believe it to be a system peculiar to India and its environment.

Edmund R Leach<sup>4</sup> considers caste as a cultural or a structural phenomenon. Max Weber<sup>5</sup> regards caste as a fundamental institution of the Hindus and of the other communities native to India. Louis Dumont looks upon caste as a part of the pan Indian civilization. Caste is ingrained in Hindu religion, culture and society so much so that Dumont calls the Hindu *homo hierarchicus* on the basis of its four characteristics, namely, 1) hierarchy, 2) commensality, 3) restrictions on marriage and 4) hereditary occupation. He rejects all

materialistic interpretations of caste in which social relations and norms of individual behaviour change with the economic structure. He explains caste as an ideological or cultural system based on conceptions of purity and pollution derived from the scriptures.

Refuting Dumont's view, Dipankar Gupta argues that caste does not imply any 'hierarchy'. Castes are, according to him, 'discreet' groups, each with an independent ideology of its own. The notion of 'hierarchy' is a part of the upper-caste ideology.<sup>7</sup>

H.H Risely defines caste as 'collection of families or groups of families bearing a common name, claiming a common descent from a mythical ancestor, human or divine, and professing to follow the same hereditary calling; and regarded by those who are competent to give an opinion as forming a single homogeneous community.' He finds the caste name as generally associated with a specific occupation. J.H Hutton questions this definition on the ground that descent from a mythical ancestor is claimed rather by the gotra, the internal exogenous division of the endogamous caste, than by the caste as a whole. Caste is usually defined in terms of cultural characteristics or traits. E.A. H Blunt characterizes caste in terms of hereditary, endogamy and restrictions on commensality.

On the other hand, G.S Ghurye says that caste is strictly limited to the Hindus. He gives six outstanding features of the caste system:

- 1) segmental division of society;
- 2) hierarchy;
- 3) restrictions of feeling and social intercourse;
- 4) civil and religious disparities and privileges of different sections;
- 5) lack of unrestricted choice of occupation; and
- 6) restrictions on marriage.

The caste system is one of the oldest and the most elaborate systems of social organisation. The position of an individual in the ritually determined hierarchy defines the entire course of his life. Kingsley Davis gives seven features of the caste system. These are hereditary caste membership, fixed membership of caste, endogamy, commensal restrictions, caste ethnocentrism, common traditional occupation, and hierarchy.

M.N Srinivas summed the caste system as an all India phenomenon in the sense that there are everywhere hereditary, endogamous groups which form a hierarchy. Everywhere there are Brahmins, untouchables and peasant, artisan, trading and service castes. Relations between caste are invariably expressed in terms of pollution and purity. Certain Hindu theological ideas such as Samskara, Karma and Dharma are woven into the caste system, the ordering of different varnas is clearly intended to support the theory of Brahminical supremacy.

The above hierarchical structure of ascriptively segmented occupational and endogamous castes is endowed with different privileges and disabilities got spreaded unevenly with the Brahmins at the top and with the Shudras at the bottom for more than a millennium. What is important is that the hierarchies of different spheres of social relations coincided with the religious hierarchy of purity and pollution. This hierarchy was a rough reproduction of production relations and ownership patterns which expressed itself in an unequal

privilege/disability structure in public life. The foundation of the entire edifice was status determined by birth, legitimised and sanctified by the dominant Brahminic religio-cultural symbol and belief traditions.

#### **4. PRESENT STATUS OF RESERVATION POLICY IN INDIA**

More recently, Supreme Court in Ram Singh v. Union of India, defined social class as ‘an identifiable section of society which may be internally homogeneous (based on caste or occupation).’ Hence, homogeneity is a pre-requisite for a class and their social and educational backwardness is essential while declaring them as SEBCs. The basis of inclusion of transgender community within the SEBCs by the court was to remedy the ‘injustice done to them for centuries’ on the basis of gender. Hence, the court considers them as a class on the basis of gender (more specifically gender based discrimination). But, there is a lack of homogeneity even on the basis of ‘gender’. Therefore, there is the need for more assessment and data otherwise it would go against the spirit and intent of the Constitution.

##### **Women's Reservations**

The Women's Reservation Bill, officially known as the Constitution (One Hundred and Twenty-Eighth Amendment) Act, 2023, is a transformative step in India's legislative history aimed at enhancing the political representation of women. This Bill reserves one-third of seats for women in the Lok Sabha, State Legislative Assemblies, and the Legislative Assembly of Delhi. It seeks to address historical gender disparities in politics and governance.

##### **Key Features of the Bill**

###### **Reservation of Seats:**

One-third reservation in:

Lok Sabha (Lower House of Parliament).

State Legislative Assemblies.

Delhi's Legislative Assembly.

Includes seats already reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs).

###### **Implementation:**

The reservation will come into effect only after the next Census and subsequent delimitation (redrawing of constituency boundaries).

This means the provisions will not be immediately operational but will follow these administrative processes.

###### **Duration:**

The reservation is valid for 15 years from its commencement.

It can be extended further through parliamentary approval if necessary.

###### **Rotation of Reserved Seats:**

Reserved seats for women will rotate among constituencies after each delimitation exercise to ensure broad and equitable representation.

###### **Historical Background**

###### **Early Advocacy:**



The idea of gender quotas was first discussed during debates over women's suffrage before independence.

Local Bodies Representation:

The 73rd and 74th Amendments (1992) introduced 33% reservation for women in Panchayati Raj Institutions and Urban Local Bodies, which has significantly increased women's participation at the grassroots level.

Previous Bills:

Attempts to introduce similar reservation bills in 1996, 1998, 1999, and 2008 failed due to lack of political consensus.

Recent Developments

Introduction in 2023:

Introduced in the Lok Sabha on September 19, 2023 by the Government of India.

Parliamentary Approval:

Passed by the Lok Sabha on September 20, 2023.

Passed by the Rajya Sabha on September 21, 2023.

Presidential Assent:

Signed into law by President Droupadi Murmu on September 28, 2023.

Significance of the Bill

Gender Equality:

Aims to address the underrepresentation of women in legislative bodies.

Promotes gender-balanced decision-making and inclusive governance.

Women's Empowerment:

Strengthens the role of women in politics and public life.

Encourages more women to actively participate in elections and leadership roles.

Global Benchmark:

Aligns India with several countries that have implemented gender quotas in their parliaments, such as Rwanda, Sweden, and Norway.

Challenges and Criticisms

Delayed Implementation:

The Bill is tied to the next Census and delimitation, delaying its immediate impact.

Exclusion of Upper Houses:

The reservation does not extend to the Rajya Sabha or State Legislative Councils, limiting its scope.

Demand for Sub-Quotas:

Some groups demand sub-quotas within the reserved seats for Other Backward Classes (OBCs) and minorities to ensure equitable distribution among disadvantaged groups.

Rotation of Seats:

Frequent rotation of reserved seats may disadvantage incumbents and affect long-term political continuity for women.

## **5. LAW AND THE ROLE OF THE JUDICIARY IN THE MATTERS OF EMPLOYMENT**

Due to the lapse of the Bill, the M. Nagaraj dictum continues to govern reservation in promotion. The court unapologetically struck down reservation in promotion on the ground of absence of objective proof as was seen above in Suraj Bhan Meena and U.P power Corporation.

In Suresh Chand Gautam v. State of Uttar Pradesh<sup>134</sup> the court issued a writ of mandamus to ensure that state government or its instrumentalities collect quantifiable data to implement Article 16(4A) and Article 16(4B) of the Constitution, or while framing rules and regulations for reservation in promotions.

Subsequently in S. Panneer Selvam v. State of Tamil Nadu<sup>136</sup> it was held that exercise for determining 'inadequacy of representation' 'backwardness' and 'overall efficiency' is a matter exercise of power under Article 16(4-A). Mere fact that there is no proportionate representation in promotional post for the population of SCs and STs is not by itself enough to grant consequential seniority to promotes who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised.

On a similar note the Delhi High Court in All India Equality Forums and Others v. Union of India also restrained the Government from granting reservation, in promotion to SC/ST in exercise of the power conferred by Article 16(4A) of the Constitution, without, in the first instance, carrying out the necessary preliminary exercise of acquiring quantifiable data indicating inadequacy of representation.

In Jarnail Singh v. Lachhmi Narain Gupta the core question was whether constitutional reservation for Scheduled Castes and Scheduled Tribes (SC/STs) applies at the entry level or at all ranks, to ensure their adequate representation at various levels of public employment. Moreover, it raised the question, can the claim of a fundamental right to reservation in promotion be made without States.

The Court in Jarnail Singh held that the Nagaraj judgment did not need reconsideration by a 7-judge bench, but it did extend the so-called 'creamy layer' exclusion test to SC/STs seeking reservation in promotion. Previously inapplicable to SC/STs, the 'creamy layer' exclusion entails denying an individual reservation on the basis of their high income. Nevertheless, the judgment modified Nagaraj in so far as it dispensed with the need to collect quantifiable data to demonstrate current backwardness of the prospective beneficiaries.

Thus, it was held in this case that the government need not collect quantifiable data to demonstrate backwardness of public employees belonging to Scheduled castes and Scheduled Tribes to provide reservations for them in promotions. The court set aside the requirement to collect quantifiable data that was stipulated by its 2006 verdict in M. Nagaraj v. Union of India as it ignored the reasoning of a nine judge bench in Indra Sawhney v. Union of India





that any discussion on creamy layer has no relevance in the context of Scheduled castes and Scheduled Tribes. The debate surrounding what limits should be placed on reservations continues to stay. Looking at the Supreme Court's model of *modus vivendi* in *Jarnail Singh* might be severely strained, and data collection might make a re-entry soon.

Again, in *State of Maharashtra v. Vijay Ghogre*<sup>140</sup> the Supreme Court allowed the Centre to go ahead with the reservation in promotion for employees belonging to the cadre of SC/ST in the government jobs, holding that the states were not required to 'collect quantifiable data' reflecting the backwardness among these communities. The bench headed by Chief Justice Dipak Misra held that the conclusion arrived at in the *Nagaraj* case that the states have to collect quantifiable data showing backwardness of SCs and STs was 'contrary' to the nine-judge bench judgment in the *Indra Sawhney* and is held to be invalid to this extent. The Bench further clarified that the judgment in *Nagaraj* does not need to be referred to a seven-judge bench.

To conclude this chapter, we have seen that the judiciary's role has not been easy when these contested measures have come up for adjudication. Judiciary has also not been consistent in its judgments over the years. Nonetheless, Judiciary has accounted for social realities, and has grounded its decision within the sacred framework of the Constitution. On the whole the Supreme Court has been realistic in interpreting Article

16. But Parliament has responded to the judiciary by amending the Constitution to reverse or overcome the inconvenient judicial pronouncements. Therefore, the present reservation system is succumbing to sectarianism, separatism and communal divisiveness instead of advancing humanism, egalitarianism, meritocracy and equality over all.

It is worth to reiterate here the fact that reservation was purely an ad hoc arrangement for 10 years made under the Constitution for the generation of few underprivileged classes who had been backward either socially or educationally or in both. It was never intended to be a perpetual benefit to those for their generation after generation as it is now. Every time the period expires, it is re-extended and 10 years have come to be more than 70 years. Those less privileged have come to be privileged class and reservations that were evolved as transitory arrangements have come to stay almost on a permanent basis. It has become counterproductive and that results in reverse discrimination. This is a great challenge to reservation provision.

## 6. CONCLUSION

The focus of affirmative action in India has been on reservation policies, but the core issue is addressing poverty and deprivation among these groups in their multiple dimensions. The Court also routinely held that Article 16(4) and Article 15(4) which laid the foundation for affirmative action by the State should reach out to the most deserving social groups and therefore there needs to be continuous evolution of new social groups. The recognition of the third gender as a socially and educationally backward class of citizens is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, should not blind itself to the existence of other



forms and instances of backwardness. But the present system of reservation has engendered a spirit of self-

## REFERENCES

1. Radhakrishnan, P. "Backward Classes in Tamil Nadu: 1872-1988." *Economic and Political Weekly* (1990): 509-520.
2. Rahul Tripathi, *Historical Background and Development of Reservation In India: An Analysis*, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 23, Issue 1, Ver. 6 (January. 2018) PP 09-13.
3. Rajagopal, B. "Compensatory Discrimination: Judicial Response in India and America." *Cochin University Law Review* 15 (1991): 32-66.
4. Raju, Kh Cheluva. "Backward Classes in India: Issues and Trends." *The Indian Journal of Political Science* 47.4 (1986): 473-485.
5. Rao, J. Laxmi Narasimha. "Affirmative Action in India: Emerging contours." *The Indian Journal of Political Science* (2008): 483-492.
6. Rohidekar, Gautam. "Article 16 (4) A: An Amendment or an Overhaul." *Student Advoc.* 8 (1996): 92.
7. Sarkar, Arpita. "Judicial Review of Reservation in Promotion: A Fading Promise of Equality in Services Guaranteed by the Indian Constitution." *NUJS L. Rev.* 11 (2018): 1.
8. Shah, Ghanshyam. "Caste, Class and Reservation." *Economic and Political Weekly* (1985): 132-136.
9. Singh, Maanvender, *Reservation amidst the Din of 'Development'*, *Economic and Political Weekly*, September 17, (2016), Vol LI No 38.
10. Singh, Parmanand. "Equal Opportunity 'and' compensatory Discrimination': Constitutional Policy and Judicial Control." *Journal of the Indian Law Institute* 18.2 (1976): 300-319.
11. "Some Reflections on Indian Experience With Policy Of Reservation." *Journal of the Indian Law Institute* 25.1 (1983): 46-72.
12. "Reservations, Reality and the Constitution: Current crisis in India." *Cochin University Law Review* 11 (1987): 284-318.
13. Singh, Vikram. "Indra Sawhney v. Union of India: A Review." *Student Advoc.* 5 (1993): 72.
14. Sönmez, Tayfun, and M. Bumin Yenmez. *Constitutional Implementation of Vertical And Horizontal Reservations In India: A Unified Mechanism For Civil Service Allocation And College Admissions*. No. 978. Boston College Department of Economics, 2019.
15. Stephanopoulos, George, Christopher F. Edley, and Peter Yu. *Affirmative Action Review: Report to The President*. Executive Office of the President, 1995.
16. West, Martha S. "The Historical Roots of Affirmative Action." *La Raza LJ* 10 (1998): 607.
17. Thimmaiah, Gujjarappa. "Caste and class in Karnataka." *Social Scientist* (1983): 31-42.
18. Wad, S. *Caste and Colonial Laws in India*, Documentation Centre for Business and Policy Research, New Delhi, 1984.
19. Weisskopf, Thomas E. "Consequences of Affirmative Action in US Higher Education: A Review of Recent Empirical Studies." *Economic and Political Weekly* (2001): 4719-4734.
20. Yadav, Sushma. "Reservation and Inclusive Growth." (2010).