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"CHANGING CONTOURS OF RESERVATION IN INDIA."

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I. ABSTRACT:

*Reservation, as described by **P.N. Bakshi** is a concept entangled in a cobweb, itself hanging in a labyrinth the key to which lies in a hidden box. Its boundaries have transmuted over the years since its inception. From the genesis of the fifty percent cap to its disruption, action based solely on caste to being impervious to it, pre-requisition of quantifiable data to its inconsequentiality, the provisions for reservation in India have witnessed quite the jaunt as the perennial change transpires.*

In this paper, the researcher have laid out an analysis of the jurisprudence that paved the way to the reservation as we see it now; transitioning from pre-constitutional era to post-constitutional era, encompassing the life of reservation up till the very present. The researcher has also elaborated upon the various types of reservations granted under the Indian scheme. A concise study has been made of all the disparate spheres of reservations and further, the. An attempt at devising the viable policies that could be advanced to better the approach to a reservation has also been made.

II. INTRODUCTION:

Reservation or affirmative actions are not terms that are anymore unfamiliar with, being a source of constant debate and controversies, especially in India. Reservation is when the governing authority creates certain specific measures for the uplifting of historically downtrodden and hence 'behind the curve' communities. This is done by giving them certain additional benefits to give them a seemingly pertinent edge over the others, but in actuality, it brings them at a similar

footing as the others. The principle of unequal treatment for unequal forms the foundation upon which such policies are brought about. The repressed portion of a country's populace may exist in any form and sphere and may be denied all kinds of rights for which such State driven policies become a necessity.

Sixty-nine years ago, countrymen from all over the nation including numerous great minds came together to lay down the fundamental law of this land and agreed upon certain essential principles that must be secured to every individual, which will then enable him to enjoy the 'human' part of life and have an opportunity to develop his own personality to the fullest. One of these principles was equality which was deemed to be the ***primus inter pares*** as it wasn't possible to enjoy any other right or freedom given to an individual if all of them weren't equally enjoyable by all in the same degree and manner. Equality being laid down as the foundation, it had to be made strong enough to hold all the pillars of other rights and liberties, so it was deemed necessary and hence, for ensuring equality in India which might as well be called as the land of inequality or 'land of hierarchy', it was almost unanimously agreed that the government's role does not end with ensuring present equality. The Constitution makers had to take into consideration not just the present but the years of marginalization which had turned certain sections of the society into such disadvantaged groups that they needed some legal measure so as to be placed among the society as equal, and that method was reservation.

A large group of social activists with the renowned Dr. B.R. Ambedkar at the helm worked for and achieved the constitutionalizing of the reservation system in India. This was just the beginning of a system which was to be debated, researched upon, amended over the years and it still remains as dynamic a system as ever. State-policy favouring a certain section of society was nothing new. It has been followed over the years in various countries, however, not consistently. A system of state-policy with a significant social dimension was bound to be thoroughly dynamic, changing with the change in social values, culture and thinking and also the change in governing authorities. For example, in America the situation initially was of industries rejecting people of certain races from employment in skilled industry and restricting their opportunities, this was supported by various State policies, but with the presidential order of John F. Kennedy

in the year 1961 which stated that any industry in a contract with the government must "take *affirmative action* to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, colour, or national origin."

As Lelah Dushkin observes about India, *"Nowhere else is so large an underprivileged minority granted so much special treatment."* And with such intricate, complex and enormous beneficial policy, it is inevitable that in a democracy, in which the policies are reflections of society's thinking, such a policy would be constantly debated and revised the deliberations range from two extremes, whether the system should be completely removed and removed because it had already served its purpose, or it shouldn't have been there in the first place, or if it must stay, and if it must stay then for how much longer. The boundaries of reservation policies have gone through various changes and are still being amended.

It is for this reason that it is something of much importance to study and understand so as to have clarity regarding one of the most discussed strategies to ensure equality, a principle integral to life as a member of the modern world.

III. CHANGING CONTOURS:

STATE OF MADRAS VS. SMT. CHAMPAKAM DORAIRANJAN[1]:

The dispute in the present case arose in response to the government order of 1927 passed in the Madras presidency which provided for caste-based reservations in government jobs and in college seats. It was observed that the petitioner would have received admission into the college, if there wasn't any reservation and admission was on the basis of merit alone. This case also established that Fundamental Rights supersede Directive Principles of State Policy. The judgment had covered two appeal cases, *State of Madras v. Champakam Dorairajan* and *State of Madras v. C.R. Srinivasan*[2]. It was observed that the Communal G.O. of 1927 was reproduced in 1950 and hence, was still followed by the State, even after Constitution.

[1] State Of Madras v. Smt. Champakam Dorairajan, AIR 226 S.C (1951).
[2] State of Madras v. C.R. Srinivasan, AIR 226 S.C (1951).

The bench made the following points:

1. Keeping in mind Article 29, if the admission was denied on the grounds of lack of academic qualifications, the State would supersede but it is clear from the circumstances that the seat was denied due to reservation and this is in violation of Article 29(2). This Article will supersede the Article 46 because DPSP are unenforceable and have to run subsidiary to fundamental rights.
2. While recognising Article 16(4), the Court held that, "It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds." This consideration wasn't considered necessary in the case of admission into an educational institution.
3. The court held that it is evident that the basis for the denial of admission stemmed from the caste of the petitioner which clearly violated Article 29 and hence, declared communal G.O. void under Article 13.

FIRST AMENDMENT:

Following this, Periyar challenged the decision and called the Constitution "the handmaiden of Brahmins". Jawahar Lal Nehru had encouraged the Parliament to pass this Amendment with the support of Ambedkar and the masses who replied by bringing the state to a halt on August 14th. Thereby the first Amendment came about which referred to Article 46 and inserted Article 15(4) that allowed the state to make special provisions for the advancement of socially and educationally backward classes, SC and ST without being questioned under Article 15 and Article 29(2).

KALEKAR COMMISSION:

Following this, the first ever Backward Classes Commission (Kaka Kalekar Commission) was appointed under Article 340 in 1953 that identified 2399 backward classes based on various grounds, most importantly, the position in the Hindu caste system. Interestingly, three members and even the Chairman had second thoughts about the use of caste as an effective determinant of social backwardness and thus Kaka Kalelkar in his covering letter disowned the report stating

that the remedies suggested by the Commission were worse than the evil it sought to combat since it was once again premised on caste[3]. No meaningful action was taken on the basis of their report as it was considered vague and of little practical value[4].

It was then left to the states to develop their own criteria to ascertain the groups for whom reservation was sought.

D.P. JOSHI VS. MADHYA BHARAT[5]:

This case was the first instance of the perusal of domicile-based reservation by the Supreme Court of India. In this, a clear violation of Article 14 and Article 15 (discrimination was based on 'place of birth') was felt when students from Madhya Bharat receiving an exemption of capitation fee while the others didn't. The Supreme Court in this landmark judgment held that there is a considerable difference between 'place of birth' and 'place of residence' and in this case, it was based on the place of residence and thus, it wouldn't attract the provisions of the aforementioned sections. Domicile means a place of permanent home.

The court also held that there was no violation of Article 14 as the state was just working towards one of its aims, i.e., promotion of education within its geographic boundaries. Keeping this in mind, various states have angled towards domicile-based reservations due to the Sons of Soil principle. Following D.P. Joshi, a line of judgments has ruled in favour of this policy; one of the most important ones being ***Dr.Pradeep Jain v. Union of India[6]*** in the year 1984. ***The court had come up with two main justifications for such reservation:***

a) financial assistance by the state, meaning that the state provided assistance to universities within its borders and this money is derived from the taxes that the people of that region pay
b) backwardness of a particular region, premised on the compelling interest of a state to provide opportunities to the weaker sections

[3] H.M. Seervai, Constitutional Law of India, Volume 2, lviii (4th edn. 2008 reprint).
[4] M. L. Mathur, Encyclopaedia of Backward Castes: Mandal, media and aftermath, 198.
[5] D.P. Joshi v. Madhya Bharat, AIR 334 S.C (1955).
[6] Dr.Pradeep Jain v. Union of India, AIR 1420 S.C (1985).

Justifying these, the Supreme Court had given the reasons that since some do not possess adequate resources to travel to far off places to pursue education and since lack of resources render them incapable to compete with those from advanced states, domicile reservation is a must. Since the different states of India differ in terms of backwardness, different states reserve a different percentage for domicile. In 2017, NLSIU Bangalore passed an Amendment bill providing 50% domicile reservation and following this, Karnataka, Odisha and Rajasthan did the same. All this is well and justified but the broader topic of regional diversity and universities providing a social platform for interactions between people from different communities takes a backseat, as does social inclusivity and diversity. There is a constant debate on which of the two must overhaul the other that does require engaging in.

However, educational development cannot be brought about by making it easier for the residents to avail opportunities but by reforming the educational institutions from the primary level till the higher educational institutions so that the residents of the State can avail admission by merit and also achieve much more than just getting admitted to a university. This will not only improve the intellectual ability of the residents but also the State and if practiced by all then the Nation's education system, which is a need at this point.

M.R. BALAJI VS. MYSORE[7]:

In this case, the SC analysed the Article 15(4). This judgment followed a governmental order by the state of Mysore wherein backward classes were identified solely on the basis of caste and were provided with 68 percent seats' reservation. This was considered as a fraud on the constitutional policy of reservations. The five-judge bench of the Supreme Court had then struck down this classification for several reasons, on of which was the Court's interpretation of the words in Article 15(4) as being "classes of citizens", not as "castes of citizens". The caste test was rejected on multiple grounds like the plight of Muslims and Christians going unnoticed and it being detrimental to the ultimate end of eradication of caste. While interpreting Articles 15(4) and 16(4), the Supreme Court balanced the competing interests by affirming that reservations

[7] M.R. Balaji v. State of Mysore, AIR 649 S.C (1963).

cannot exceed 50 percent, since that would deprive meritorious candidates of a fair opportunity and also, by acknowledging the role of caste in social inferiority but at the same time, cautioning against the exaggeration of such role.

This decision was reiterated in subsequent judgments like ***T. Devadasan v. Union of India[8] and Chitralekha v. State of Mysore[9],*** where the use of caste was questioned. However, the change in this soon became apparent with the Supreme Court passing recurrent judgements reiterating the veracity of using caste as the sole criterion for determining backwardness. The first in these series of cases was the ***C.A. Rajendran v. Union of India[10]*** case in 1968 where the Supreme Court upheld the identification of backward classes exclusively on the basis of castes, holding that the castes identified were in fact socially and educationally backward.[11] However, in 1974, in ***State of Uttar Pradesh v. Pradip Tandon[12],*** the Court forbid the use of caste altogether and stated that it is impermissible to use it as a basis for determining backwardness. Even on the ground of the 50 percent cap, the Balaji judgment was not followed to the word.[13] Thus, by the late 1980s, there was a great deal of ambiguity and perplexity regarding the reservation policy of the Indian constitution.

MANDAL COMMISSION:

In 1979, ***Prime Minister Moraji Desai*** constituted the second Commission on Backward Classes. Headed by B.P. Mandal, its primary purpose was to determine the criteria for defining the country's *"socially and educationally backward classes"* and to recommend measures for advancement of such classes. In its report, it applied eleven relative indicators, grouped under the broad titles of economic, social and educational to ascertain which classes were backward. The

[8] T. Devadasan v. Union of India, 1964 AIR179.
[9] R. Chitralekha & Anr. v. State of Mysore, 1964 SCR (6) 368.
[10] C.A. Rajendran v. Union of India, 1968 SCR (1) 721.
[11] Following this were numerous other cases like *A. Peeriakaruppan v. State of Tamil Nadu & Ors* (1971 SCR (2) 430) and *Triloki Nath v. J. & K. State*(1967 SCR (2) 265).
[12] State of Uttar Pradesh v. Pradip Tandon, 1975 SCR (2) 761.
[13] In the year 1975, in *State of Kerala v. N.M. Thomas* (1976 SCR (1) 906) , a few judges opined that reservations may exceed 50 percent in proportion with the actual population of the backward classes. Additionally, in *K.C. Vasanth Kumar v. State of Karnataka* (1985 SCR Supl. (1) 352) , the applicability of the 50 percent ceiling was not surely decided upon.

Commission ultimately found 3743 "OBCs" and 2108 underprivileged "depressed backward classes". Using the population survey of 1971, the Commission concluded that 52 percent of the population of India comprised of OBCs. Considering the 22.5 percent reservation for SCs and STs, the Commission recommended 27 percent reservation for the Other Backward Classes and this was to be applicable to civil services, public sector undertakings, nationalised banks, government aided firms in the private sector, etc. at the centre and state level. It was also to govern the admission of the students to scientific, technical and professional educational institutions funded by the government. The belief that this report would meet the same result as the Kalekar Report was broken when the Prime Minister announced on 7 August 1990 that he would implement the suggestions given by the Commission. Violent objections ensued. While some criticised its fundamental methodology of relying on caste figures dating from 1931, the upper castes in the Northern India, worried for their access to higher education. The response in southern states was considerably milder, considering that many of them had already approached the 50 percent reservation for backward classes.

Two office memorandums were issued to implement some of the Mandal Commission's recommendations. They gave 27 percent reservation of the civil posts to the OBCs, that included caste/communities common to the state government's list of backward classes and Mandal commission report. Preference was to be given to the poorer and if even after that, seats were vacant, they were to be allowed to the backward classes. Also, OBCs recruited on the basis of merit wouldn't be accommodated in the 27 percent. Lastly, 10 percent of the vacancies were to be reserved for other economically backward sections. This led to the contest of them as invalid through a PIL by Indra Sawhney. This PIL clubbed with other writ petitions challenged the constitutionality of the memorandums. The largest bench of that time, a nine-judge bench, gave the landmark judgment that gave shape to the reservation policy of the country. Currently, a panel headed by G Rohini, that is to submit its report on 31 July may suggest splitting these 27 percent seats into three bands. It has used the 1931 Census for such as no Census published since then has ever counted OBCs. The next census, in 2021, is slated to count OBCs for the first time in 90 years.

INDRA SAWHNEY & ORS V. UNION OF INDIA:

The judgment laid down fundamental principles elaborating the extent and implementation of reservation policies. Firstly, the Court took up the contention that reservation may be granted solely on an economic basis. While some believed that reservation must be restricted to the cap imposed by the Supreme Court and such would be exceeded if economic based reservation would be provided additionally to the existing one, others believed that it must be provided additionally to the existing provisions. The Court stated that there can be no economic based reservation as there was no provision in the Constitution to justify the same. The Constitutional pundits never intended for reservation to be, as stated by Senior Adv. Ram Jethmalani, "a measure of economic reform nor a poverty alleviation programme."[14]

Secondly, the Court took up the contention that reservation may be provided in promotions. Those supporting this view believed that even if individuals belonging to the weaker sections availed the opportunity, still the residue of casteist ideals present in those holding important positions in State institutions would deny their advancement. Those against this view believed that either reservation must not be provided at all or it must only be provided to the extent that the individual is not to be given further support. This advancement must be based only on his capability and merit. As such the Court held that no provision of reservation may be provided for the socially backward classes in cases of promotion. This part of the judgment faced legislative overruling by the 77th Constitutional Amendment in 1995, whereby the Congress government extended the provision of reservation to SCs and STs provided in Article 16 of the Constitution to promotions in employment under the State.

The 77th Amendment was challenged in 2006 in the famous Nagaraj case[15], in which the Supreme Court upheld the Amendment as constitutionally valid. However, the Court said that the State needed to prove the inadequacy in the representation of the SCs and STs to exercise 'this discretion'.[16] This stance was recently overruled by the five-judge bench of the Supreme

[14] Indra Sawhney & Ors v. Union of India, AIR 477 SC (1993) (Para 63).
[15] M.Nagaraj & Others vs Union Of India & Others Writ Petition (civil) 61 of 2002.
[16] *Ibid* Pg. 39

Court which stated that the Court directing the State to provide quantifiable data to exercise the provision is wrong.[17] Hence, presently there are special provisions for the promotions of individuals belonging to the Scheduled Tribes and Castes.

Next, the Court in the Indra Sawhney case, decided upon the contention which questioned the provision for reservation to the well-off sections of the backward classes. The view was that if an individual is in a significantly secure financial position, then he may avail all opportunities required to fully develop and grow. As social equality was guaranteed by Constitution as well as statutory provisions, and the individual is not economically backward, there remained no ground for giving that individual any special provision. The Court then directed the State to implement the Creamy Layer Principle. This principle was first used in the case ***State of Kerala v. N.M. Thomas***[18] wherein Justice Krishna Iyer observed that "the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake."[19]

The Apex Court only applied this to the OBC reservation in 1992. However, in the ***Jarnail Singh v. Lachhmi Narain Gupta***[20] case, the Court extended it to SCs and STs justifying it as establishing equality among those receiving benefits of reservation. The Creamy Layer cap has not been constant, it has been evolving with respect to the changes in income levels, inflation etc. In 1993, the limit was Rs 1 lakh. It was raised thrice– to Rs 2.5 lakhs in 2004, Rs 4.5 lakhs in 2008 and Rs 6 lakhs in 2013. In 2017, it was raised to 8 lakhs per annum[21] due to the prevailing inflation.

"The State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335."

[17] Jarnail Singh v. Lachhmi Narain Gupta SLP (CIVIL) NO.30621 OF 2011. S.C (2018).

[18] State of Kerala v. N.M. Thomas .

[19] *Ibid* (Pg. 48).

[20] Jarnail Singh v. Lachhmi Narain Gupta SLP (CIVIL) NO.30621 OF 2011. S.C (2018). .

[21] Press Trust of India 'Creamy layer income cap for OBCs raised to Rs 8 lakh per annum.' The Economic Times, (June 17, 2019 ; 14:55), https://economictimes.indiatimes.com/news/politics-and-nation/creamy-layer-income-cap-for-obcs-raised-to-rs-8-lakh-per-annum/Articleshow/60497593.cms.

Finally, the Court upheld the 50% cap and that it may be exceeded in special circumstances which various States are exploiting for providing reservations over the prescribed limit. There are States that have made provisions for reservations based on local demographics which are neither in congruence with what has been directed nor in accordance with the judicial guidelines as the percentage of reserved seats overshoot the 50% mark. Tamil Nadu, one of the first States to surpass the mark and the State with the Union assent, inserted the law into the 9th schedule which makes it significantly immune to judicial scrutiny. The State has almost 69% seats reserved.[22] Maharashtra has 78% reservation due to the recently introduced 16% reservation for Maratha Caste after protest by Maharashtrian 'visionaries' mobilised the masses with the little-known political motive underlying it all. This is not the extent of it, Haryana has reserved up to 70% of the seats with the OBCs divided into Backward Class A, Backward Class B and Special Backward Class with 16%, 11% and 10% reservations respectively. The State prior to the recent Amendment for reservation to the Economically Backward, had its own reservation policy for them from the Open class (10% reserved).

Additionally, if the Kamal Nath government goes ahead with the proposed 27% OBC reservation in Madhya Pradesh, the caste-based reservations will reach 63 percent. Finally, the North-Eastern States have 80% seats reserved for STs in governmental institutions. Even certain Central universities, like North-Eastern Hill University have around 60% seats for STs. Usually when Apex Court gives guidelines regarding legislation which are not made to be strict and inflexible, the law makers get an opportunity to work it for their own political or social benefit.

The subordinate Courts do not have much hold over the same due to lack of a limiting precedent. This in turn is what hurts the right to equality of the general citizens. Hence there should be a ceiling set by the judiciary after considering present-day demographics, leaving little or no scope for exceptions. There was a concatenation of Amendments that led up to them being challenged in the famous Nagaraj case.

[22] It divided the OBCs into Backward Classes (BCs) and Most Backward Classes (MBCs) giving 30% and 20% reservation respectively. This alone totalled up to 50%. Additionally, the STs have 1% and SCs 18%.

These Amendments included,

i) The 77th Constitutional Amendment:

This Amendment, as previously mentioned, legislatively overruled the Indra Sawhney judgment and introduced reservation for SCs and STs in matters of promotion by inserting clause 4A to the already existing Article 16(4).

ii) The 81st Constitutional Amendment:

The 81st Amendment brought about the 'Carry Forward rule'. The carry forward rule was initially declared as unconstitutional in 1964 in the Devadasan case.[23] In contrast this Amendment inserted clause 4B to Article 16(4) which provided that if the total seats reserved in an institution are not filled then the vacancies can be carried forward and added to the next year's reserved seats. This could be called an exception to the fifty percent ceiling as for example if an institution has 10 seats and 5 of them are reserved, however only 4 are filled then the remaining vacant 1 seat will be carried to the next year bringing the total of reserved seats to 6.

iii) The 82nd Constitutional Amendment:

This amended Article 335 to enhance the provision for reservation in promotions and facilitate Article 16(4A). The Apex Court held in the ***S. Vinod Kumar judgment***[24] in 1996 that there should be no relaxation in matters of promotion for reserved categories with respect to Indra Sawhney judgment and the Court struck down certain provisions regarding relaxation of qualifying marks in departmental examination. The 82nd Amended included the clause which enabled the State to make provisions for relaxation of qualifying marks in matters of jobs and promotion.

[23] Devadasan v. Union of India , S.C. AIR 179 (1964).
[24] S. Vinod Kumar v. Union of India S.C 6 SCC 580 (1996).

Further, the 1996 judgment was said to be *per incuriam* in the fairly recent ***Rohtas Bhankar v. UoI***[25] judgment.

iv) The 85th Constitutional Amendment:

This brought about the provision of 'consequential seniority' as an additional facet to the provisions of Article 16(4). Consequential seniority is a concept which gives the reserved categories an edge over others at the place of employment in matters of promotion. For instance, if from X and Y both working in a governmental department and from reserved and general category respectively, X is promoted to a post that Y too is eventually promoted to then due to consequential seniority, X will retain his seniority.

M. NAGARAJ VS. UNION OF INDIA:

The aforementioned constitutional Amendments were challenged in this case. The main highlight of the case was the Apex Court holding that it is a requirement for State to produce 'quantifiable data' if it wishes to exercise the 'discretion' in providing reservations in promotions. The Court held the view that the provision was not to be compulsorily applied but only in cases where the State felt that the backward classes were not adequately represented in various governmental institutions.

The bench stated that there was a difference between equality in law and equality in fact and to establish equality in fact the ground reality must be taken into consideration and this was the only way to ensure a balance between the provisions for the backward classes and the curtailment of equality for the general class. The requirement of data to show the inadequacy in representation of the backward classes which is one of the three requirements among backwardness and overall efficiency.[26] The requirement, as the Court stated, would vary from case to case basis, prerequisite being the Court being satisfied regarding the inadequacy and

[25] Rohtas Bhankar v. Union of India S.C Civil Appeal nos. 6046-6047 of 2004.

[26] As mentioned in Article 335 of the Indian Constitution.

existence of compelling reasons for the power to be exercised. All of the above being with respect to the 50% ceiling and creamy layer principle. The Court principally aspired to restrict the powers of the State by imposing certain limitations while upholding the constitutional Amendments.

VIVEKANAND TIWARI VS. UNION ON INDIA[27]:

In this judgment, the Allahabad HC decision of 2017 allowing the teaching posts in universities to be reserved department-wise and not according to the total number of posts available at a university, was challenged by the petitioner and the decision was upheld by the Supreme Court It was challenged on the grounds of reduction in the number of reserved posts in the universities. The UGCs May 2018 order followed the High Court verdict. Although in March 2019, the Cabinet approved the "The Central Educational Institutions (Reservation in Teachers' Cadre) Ordinance, 2019" which allows treating the university as the unit for reservation instead of the department and thus, the decision was overruled.

JARNAIL SINGH V LACHCHMI NARAIN[28]:

The Court held that as it was already established in the Indra Sawhney judgment that once the backwardness of a particular section of society has been entrenched by virtue of being included in the presidential list under Articles 341 and 342 of the Indian Constitution then there shouldn't be requirement of proving their backwardness afresh. Further the Court had stated the application of creamy layer principle when exercising powers to grant reservation in promotion, however, even though now it has been extended to SCs and STs at the time the Nagaraj judgment was passed, its application was limited to OBCs only as formulated in the Indra Sawhney judgment, and as the provision was only for SCs and STs, there arose no question of the creamy layer principle.

This would essentially lead to significant elbow room for the State to exercise the power of granting reservation in an unethical manner. One of the issues regarding the provisions of

[27] Vivekanand Tiwari v. Union of India, (2017) 7 ADJ 738.
[28] Jarnail Singh v. Lachhmi Narain Gupta SLP (CIVIL) NO.30621 OF 2011. S.C (2018).

reservation is the fact that it has been granted on the basis of archaic statistics and the requirement of collecting data regarding whether reservation was in fact required could significantly plug up that leak in a seemingly watertight provision which the constitutional bench axed in Jarnail Singh.

BK PAVITRA I AND BK PAVITRA II:

After the verdict given in the aforementioned case, it was clear that any action that failed to show quantitative exception before giving reservations in promotions would be in violation of Article 14 and 16. The consequent cases of BK Pavitra 1[29] and BK Pavitra 2[30] dealt with the principle of consequential seniority along with reservations in promotions given by the Karnataka 2002 Act[31]. The BK Pavitra 1 case in 2017 declared the above-mentioned act void on the grounds of non-existence of any quantifiable data, which was made compulsory by the Nagaraj case[32]. After this case, the Karnataka government relied on the provisions of the Ratna Prabha Committee and revived the provisions of the Act. BK Pavitra 2 seemed to question this revival as the Act had already been declared unconstitutional. The court validated the revived provisions while relying on judgments like Indra Sawhney[33] and Barium Chemicals[34], holding that that 'inadequacy of representation' of the SCs and STs in the public services is a matter forming the part of 'subjective satisfaction'' of the state. The court also summarily debunked the position on the opposition to reservation claiming that merit and efficiency are diluted by the existence of it. The judgment pointed out the non-existence of empirical proof that the candidates selected through quota are inefficient compared to those selected through merit and that administrative efficiency is an outcome of the actions taken after appointment and thus the selection process should not matter. The court also held that a meritorious candidate is one whose appointment pushes towards the achievement of the constitutional goals.

[29] B.K. Pavitra & Ors. v. Union of India & Ors., 9 February 2017.
[30] B.K. Pavitra I v. Union of India, 10 May 2019.
[31] the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act.
[32] M.Nagaraj & Others vs Union Of India & Others Writ Petition (civil) 61 of 2002.
[33] Indra Sawhney & Ors v. Union of India. AIR 477 SC (1993).
[34] The Barium Chemicals Ltd. And Anr vs The Company Law Board And Others, 1966 SCR 311.

The judgment powerfully captures this understanding: "If this benchmark of efficiency is grounded in exclusion, it will produce a pattern of governance which is skewed against the marginalised. If this benchmark of efficiency is grounded in equal access, our outcomes will reflect the commitment of the Constitution to produce a just social order. The disagreement with this has also been evident through the very recent "Save Merit Save Nation" rally where thousands of students from the unreserved class came to the streets to advocate dilution of merit through the increasing proportion of reserved seats.

RESERVATION FOR DISABILITY:

Provision of reservation for people with disability is clearly the odd one out in the reservation domain as it is the only one which is not given on grounds of social disability. Reservation for the differently abled can be justified even to those opposing reservation policies as their reduced opportunities are due to natural causes which cannot be ameliorated by any means. The first provision was the Persons with Disability (PwD) Act, 1995 which provided for 3% of the total seats in government employment and educational sector. The degree of disability was defined by an experts' committee and the disorders for which it was available were listed– a total of 7 types. This was replaced by the Rights of Persons with Disability Bill, introduced and passed in the Rajya Sabha in 2016, immediately accepted by the Lok Sabha as well. It increased the 3% reservation to 4% dividing the types of disabilities into 4 groups (A, B, C, and D type) and provided 1% for each.[35] It also included more disorders increasing the initial 7 types to a total of 21 (including intellectual disability and acid attack victims).

At present, even though the rights of the differently abled have been secured by such provisions, there are many instances where individuals with slight or, in some cases, no disability, obtain fraudulent certificates showing an exaggerated and false degree of disability which allows them to avail the benefits of reservation. Hence, there should be a preliminary examination by a government appointed medical professional before granting admission to people availing such benefits in any employment or educational institution. The premise of

[35] 1% for disability concerning vision, 1% for individuals who are deaf (Partially or fully), 1% for loco motor disabilities and 1% for intellectual disabilities.

affirmative action lies on the foundation of uplifting those who either do not have the means to enjoy or are actively being denied their rights by the community. However, providing reservation to children of freedom fighters or children of martyrs does not seem to conform to the ideal of the Indian Constitution as according to Article 16(2), there is to be no discrimination on basis of descent. Also, if support is to be provided to children of martyrs because of losing the sole bread earner then it can be covered under reservation for economically backward. This is exactly what is needed as a total overhaul of the reservation system.

RESERVATION FOR WOMEN:

Affirmative action or reservation extends to women as well, owing to their history of being viewed as subservient to men and consequently, being denied rights and opportunities. What was handy for the male population, had to be battled and struggled for by the other half. Even for a right as basic as the right to vote, they had to resort to suffrage movements and therefore the governing authorities all over the world ensured that they be provided appropriate legal protection so as to end the years of discrimination and suppression and ameliorate its persisting effects. For instance, Argentina provides the '*Ley de cupo'* or the 'Quota Legislation' ensures minimum representation of women in the ballots of each party. To counter this, the numerous Constitution makers provided certain constitutional provisions to secure the women's position equal to any other citizen of the nation. In regard to reservation, the original draft of the Constitution has mentioned the powers of the State to make special provisions for women under Article 15. This was not done for reservations as by using such powers the State has furnished women with securities which not only help their educational, social and economic positions but also general safety. For instance, there are legislations made specifically for women, like the Equal Remunerations Act, 1976, The Protection of Women from Domestic Violence Act, 2005, The Indecent Representation of Women's (Prohibition) Act, 1986 etc. There also exist non-legislative measures[36] such as quota system in educational institutions, exclusive train compartments etc.

[36] Recently, the AAP government in Delhi announced that women will no longer have to pay for some public transportation systems like Metro and government buses.

The first major Amendment at the central level was in the year 1993 with democratic decentralization implemented throughout the nation with the 73rd and 74th Amendments. With these Amendments, a provision was made for reserving 1/3rd seats in all local self-governments and their institutions. There were historical examples to follow in applying these provisions, as prior to these Amendments some States in India had passed legislations for reserved seats for women in the local self-government institutions. Karnataka reserved 25% of seats in 1987 and Maharashtra reserved 30% seats before the Amendments. In 2011, the Maharashtra State Assembly unanimously agreed to increase the women's local government quota to 50% of the total seats.

There was an attempt at the Central Level with the Women's Reservation Bill (108th Amendment Bill) to reserve 33% Seats in the Lok Sabha. This bill was introduced and passed by Rajya Sabha. However, Lok Sabha never voted on the bill resulting in its lapse. The reasons given were that reservation may not be given only on the basis of gender. Other criteria like the economic, social and educational position must also be considered. On one hand their claim may be considered correct as women in India have held key positions in the Country including being the President and Prime Minister. On the other hand, it had been made clear in the Constitution that any special provision made for women is solely on the basis of gender and that the present representation of women in the parliament is inadequate. India had only 12.5% women occupying seats in the parliament which is nearly half of the world average. Even conservative countries like Saudi Arabia (19%) and Pakistan (20%) fared better in world rankings on representation of women in the Parliament in which India stood 149th.[37] Even in the 2019 Lok Sabha elections, women comprise only 8% of the contesting seats.[38] This being the scenario at the Central level, the States have reserved seats for women either directly or by using the principle of horizontal reservation. Horizontal reservation is a practiced to increase the 50% cap on reserved seats in educational institutions, without exceeding it directly. This is done by keeping a minimum number of

[37] http://archive.ipu.org/wmn-e/classif.htm. (Situation as of February, 2019).
[38] History's biggest election has no place for women By Itika Sharma Punit April 11, 2019 Quartz India.

female students per batch. If the requirement is fulfilled by open candidates then the reservation is not invoked. For instance, The National Law Institute University, Bhopal has a requirement fixed at 30% women students. This kind of reservation is also present in cases of government jobs at the State level. Maharashtra has parallel reservation for women, up to 30% in the Maharashtra Public Service Commission examination. Certain States also have provided for direct reservation in all government jobs notwithstanding the 50% cap.[39]

So, presently even if the Central Government has not passed a legislation for a uniform rule of reservation for women across the nation, the states individually have increasingly made sure that the representation for women at various posts in government institutions remains adequate.

ECONOMIC RESERVATION:

Economic reservation came about through The Constitution (103rd Amendment) Act, 2019 on 14 January 2019. By inserting clause (6) in Articles 15 and 16 of the Constitution, economic reservation in jobs and education is to be provided. The proposed Article 15(6) enables the state to make special provisions for the advancement of economically weaker sections, especially reservation in educational institutions, including private institutions, whether aided or unaided, except those covered under Article 30(1). Regarding jobs, Article 16(6) enables state to make provisions for reservation in appointments, in addition to the existing reservations. This reservation can exceed to as much as ten percent. At present, reservations accounted to 49.5%, with 15% for SC, 7.5% for ST and 27% or OBCs. This Act leaves around 40.5% seats for selection on the basis of merit, in which candidates from SCs, STs, OBCs, EWS and general category contest. In accordance to the Act, the 'economically weaker sections' shall be decided by the state from time to time on the basis of 'family income' and 'other indicators of economic disadvantage'. As per the report, the bill envisaged people from upper caste households as those with an annual income of 8 laws or

[39] Gujrat State Government, which had initially provided for 30% reservation for women has once again amended the Gujrat Civil Services (Reservation of posts for women) Rules-1997 to increase the reservation to 33% of all government jobs.

less to be eligible for reservation. However, as per recent researches like that of French economist, Thomas Pikkety, wealth and not income is a more serious criterion for inequality considerations. The object of the bill is based on the DPSP contained in Article 46 of the Constitution and while fulfilling its mandate, to ensure that the poor sections receive a fair opportunity. It was reckoned inexorable, due to the numerous observed instances of the so called 'forward caste' not being represented adequately in the institutions. The hunter has indeed become the hunted. For instance, Karnataka minister in the State Assembly had announced that the per capita income of the Brahmins is less than all communities including scheduled castes and scheduled tribe.[40] While introducing it, it was justified saying that a large section of the economically weak have remained excluded from attending higher educational institutions and public employment due to their financial incapability in competing with those more privileged.

This Act has led to a lot of disagreement and debate among the masses. It had been challenged on various grounds, one of which is a claim as serious as it violating the basic structure of the constitution, being contradictory to the logic of the existing Article 15 and 16. Considering that caste-based reservation was introduced as a way of helping people oppressed by the traditional caste system in order to break its shackles, giving reservation on the basis of economic factors is considered anti-constitutional. It exceeds the 50 percent cap set by judicial precedents withal. Another argument propounded the Act as arbitrary, as "other indicators of economic disadvantages" haven't been made lucid and left to the state's accord and will. It is said that economic differentiation within and between castes blunts the sharp distinction between social and economic backwardness; and that in a random draw from the unreserved general category, the quota benefits are likely to accrue more than moderately to the less economically backward and thus undermine the case for uplifting the most deprived.[41] The Harayana government used to provide such reservation under the

[40]Francois Gautier, "Are Brahmins the Dalits of today?", Rediffmail.com (June 10, 2019 ; 20:15), http://us.rediff.com/news/2006/may/23franc.htm?q=tp&file=.htm

[41] Vani S. Kulkarni , Raghav Gaiha, Reservations based on economic deprivation are an aberration, LiveMint, (7th June, 2019), https://www.livemint.com/opinion/online-views/opinion-reservations-based-on-economic-deprivation-are-an-aberration-1549560469870.html.

Economically Backward Persons in General Caste Category (EBPG) but this was recently withdrawn on account of EWS reservations. Additionally, the Gujarat government had earlier passed an ordinance providing such reservation quota in 2016, which was then quashed by the Gujarat HC. The appeal is currently pending before the Supreme Court and its decision will determine if the act will stay valid or will be declared null and void. If reliance is placed on various judicial pronouncements by the court over time, in the case of Indra Sawhney, the Supreme Court had discarded economic backwardness as a criterion stating that it finds no justification in the constitution. The Court could either rely on its own decisions or rewrite history by allowing the Act to be valid. Either way, the supporters and critics await the dialogue and dissension.

RELIGION BASED RESERVATION:

The Constitution of India ensures that there must be no preferential treatment to be given to any section of society based on religious grounds and it is due to this very reason that there is no reservation in Central government institutions in India. Reservation has since its origin had been centered on uplifting Hindu minority and the other minorities neglected even though Hindus consist of almost 80% of Indian population. It is owing to this that a few individual States have formulated certain reservation policies for other religious minorities. For example, in the state of Tamil Nadu the government has provided both Muslim and Christian minorities 3.5% reservation each by including them in the OBC list which is essentially only for Hindus. The West Bengal government has included certain backward sections belonging to the Muslim community into the OBC list which is divided into OBC-A and OBC-B. The State of Andhra Pradesh had applied a 4% reservation for the Muslim backward classes which was initially debated upon but later allowed by the Apex Court. In 2017, the Telangana government increased reservations in education and jobs for Muslim minorities to 12% from the existing 4% which resulted into exceeding of the Supreme Court set limit of 50%. The question stands that how exactly these provisions escape the test of constitutionality when it is black letter law that there shall be no discrimination based on religion. The rationale is that the reservation is not provided on the basis of religion, it is on the basis of the community being socially and educationally backward and that community

happens to belong to a religion which is not eligible for reservation. In 2011, when the Union government tried to introduce a sub-quota of approximately 4% for Muslim minorities among other Hindu OBCs because of the Muslim community's claim that it couldn't compete with the Hindu OBCs. Now, this sub-quota being based solely on religion was quashed almost immediately by the judiciary. Similarly, in the 1953 case of ***Nain Sukh Das v. State of Uttar Pradesh***[42], the apex court of the country invalidated an Act of the state legislature that provided for elections on the basis of separate electorates for different religions.

THE SACHAR COMMITTEE REPORT:

In the year 2005, upon the recommendation of ***Dr. Manmohan Singh,*** a committee for analyzing the social standing of the Muslim community in India. Once, the report concluded that in terms of backwardness the Muslims were behind the SCs and STs which definitely called for reforms across the nation. The literacy rate was lower than the national average and public as well as private employment rates were lower than the SCs and STs[43] hence the committee recommended *inter alia* steps for inclusion of Muslims in public employment, the setting up of a backward commission etc. However, until now no major steps have taken place in accordance with what the committee stated as a requirement.

IV. CONCLUSION:

Reservation has experienced quite the tide of change since its inception and the change doesn't halt. From the genesis of the fifty percent cap to its disruption, action based solely on caste to being impervious to it, pre-requisition of quantifiable data to its inconsequentiality, the provisions for reservation in India have witnessed quite the jaunt as the perennial change transpires. The transition of the country over the years from the enactment of the Constitution to the repeated Amendments as a response to the changing times reflects the exigency for change. People react differently to said change. Some receive it favorably while others

[42] Nain Sukh Das v. State of Uttar Pradesh AIR 384 SC (1953).
[43] Public Employment- SCs/STs (39%); Muslims(23%).
Private Employment- SCs/STs (9.5%); Muslims (6.5%).
Education- National Average (64.5%); Muslims (59.1%).

retaliate. When one browses the internet about the reservation, millions of links pop up listing and expounding on its disadvantages and advantages. Such debates are deeply polarised with both sides resenting the other. One of the dimensions of this debate is recorded by P.M. Bakshi as, "The real contest is between two rival philosophies, namely, (i) equality of opportunity in regard to admission in educational institutions; and (ii) reservation of seats in those institutions for backward classes" and which of these two policies may override each other by virtue of Constitutional provisions in clash with the changing societal rationale. While some assert it to be a political necessity, others contend that it is the biggest enemy of inclusivity and diversity. On one hand, it is criticised for being against meritocracy and creating a divide by emphasising on caste in a so-called 'casteless' society, others applaud it for focussing on substantive equality and social justice. It is protested again citing its inefficacy to end caste discrimination, discrimination being an offence having to be dealt with punishment whereas, at the same time, it is justified on grounds of slowing down the process of rich becoming richer and poor becoming poorer. The general category talks about reservation being a form of oppression when the reserved hold on to their seats and call the "anti-reservation demands a weapon of inequality masquerading as a noble hogwash of equality."[44] Anti-discrimination laws and reservation policies were brought in to make sure that the formerly disadvantages were prevented from being subject to the same prejudices in the areas of education, employment and also political representation. The object was to give them economic justice and address the denial of rights and oppression meted out to these groups and to ensure that similar instances do not transpire again. An often-voiced opinion is that reservation has achieved that objective by helping them but at the same time, made it more difficult for the general class and that caste through generation of resentment against those who avail its benefits of acts as a deterrent to progress and fractures the society. Needless to say, the environment concerning the issue of reservation has always, still does and will always undergo change. Such would then affect the policies and the reform that transpires pertaining to such issues.

[44] P. Sainath, Discrimination for dummies, The Hindu, (June 8, 2019 ; 17:23), https://www.thehindu.com/todays-paper/tp-opinion/Discrimination-for-dummies-V.-2008/Article15145628.ec.