

Creamy layer among SCS/STS: Need to exclude from quota benefits?

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Abstract

In India, reservation on the basis of caste has been deeply rooted that cannot be eliminated. As per the judgment of Supreme Court of India in *Indira Sawhney v. Union of India* famously known as Mandal Commission Case, court held that the reservation cannot be more than 50%, Hon'ble Court fixed the reservation criteria i.e., for OBC 27%, SC 15% and 7.5% for ST.

For reservation in OBC court applied the rule of creamy layer, which means whose parents are gazette officer/ first class officer/IAS/IPS/IFS etc. or having annual income more than 6lakhs, their children's are not entitled to get the benefit of reservation in matters of public employment or admission in educational institution and that candidate must be considered as a general because he has already been uplifted and their parents have sufficient means to look after him.

In the matter of reservation for SC and ST, the provision of creamy layer has not been applied to them, which resulted in deteriorating effect of the importance of reservation. Real essence of the reservation is to uplift the downtrodden but not to give special privilege to the elite class. Therefore, in this research paper our main focus is on the implementation of the creamy layer provision in the reservation policy for SC/ST.

Keywords: creamy layer, SCS/STS, quota benefits

Introduction

"It is against the fundamental principles of humanity, it is against the dictates of reason that a man should, by reason of birth, be denied or given extra privileges"

Mahatma Gandhi

We live in a free country and this freedom is a gift of democracy to us. Our constitution gives us the right to freedom and most importantly to exercise this freedom in an equitable manner. At the same time it is incumbent on the part of the state to ensure that equality prevails in all sections of the society. However in today's time one of the major roadblocks to this equality is the Reservation System.

In the social sphere, our society is still ridden with the curse of birth based caste system, with its emphasis on high and low social status purely on the basis of the accident of birth in particular caste. With all modern industrial and technological advancement which has made vocational castes redundant, the caste system is so deeply rooted, that even today you find even the educated persons advertising in the matrimonial columns for suitable boys or girls on caste basis ^[1].

India being a developing nation is currently facing many challenges and the reservation system being one of them. The biggest question that lies in front of us is whether implementing this reservation system has really helped the downtrodden. The current scenario clearly depicts that the 'lower' castes are still discriminated in their daily lives.

To uproot casteism, it is important that we fight the reservation system which alone will lead us to development, competency, equality and unity.

The reservation system finds its origin in the age-old caste system of India. The caste system at its birth was meant to divide people on the basis of their occupation like teaching and preaching (Brahmins), kingship and war (Kshatriya) and lastly business (vaish) etc. but soon it became an instrument to divide the society on caste-basis, creating various walls between different sections of the society. Today we stand divided widely into Hindu, Muslim, SC, ST & OBCs with newer reservations coming up for other different sections of the society like Christians, Kashmiris, Jats, Kashmiri Pandits, Tribals etc.

Firstly we need to understand that the reservation system only divides the society leading to discrimination and conflicts between different sections. It is oppressive and does not find its basis in casteism. It is actually the antithesis of a communal living ^[2].

In India, reservation on the basis of caste has been deeply rooted that cannot be eliminated. As per the judgment of Supreme Court of India in *Indira Sawhney & Others v. Union of India* ^[3]. Famously known as Mandal Commission Case, court held that the reservation cannot be more than 50%, Hon'ble Court fixed the reservation criteria i.e., for OBC 27%, 15% SC and 7.5% for ST respectively.

For reservation in OBC court applied the rule of creamy layer, which means whose parents (elite class) are gazette officer/ first class officer/IAS/IPS/IFS etc. or having annual income more than 6lakhs, their children's are not entitled to get the benefit of reservation in matters of employment or admission in educational institution and that child must be consider as a general because he has already been uplifted

¹ Dr Subhas C. Kashyap, *Constitution of India, Review & Reassessment*, Universal Publication Co. p.66

² <http://www.youthkiawaaz.com> visited on May 11, 2016

³ AIR 1993 SC 477

and their parents have sufficient means to look after him. In the matter of reservation for SC and ST, creamy layer provision has not been applied to them, which resulted in deteriorating effect of the importance of reservation. Real essence of the reservation is to uplift the downtrodden but not to give special privilege to the elite class.

Provisions under constitution of India for SC/ST

The following are the measures prescribed in the Constitution for the welfare of the Scheduled Castes and Scheduled Tribes:

- According to the Article 15, the state should not discriminate against any citizen only on the ground of cast creed, etc. More positively, Article 15(4) further states that the state may (in spite of right to equality) make special provisions for the welfare of socially and educationally backward classes. Thus, if the State takes any measures in favour of these castes and communities it would not be challenged on the ground of right to equality.
- Article 16(4) provides the special provision for the reservation of appointments or posts in favour of any backward classes of citizens, which is in the opinion of the state are not adequately represented in the services under the state.
- According to provisions of Article 19, the state can impose reasonable restrictions on the freedom of movement and residence of people, in the interest of Scheduled Tribes.
- Article 46 of Constitution directs the State to protect the educational interests of weaker section of society especially the Scheduled Casts and Scheduled Tribes.
- According to the provisions of Article 330, 332 and 334, the seats are reserved in the Parliament and State Legislatures in favour of the Scheduled Casts and Scheduled Tribes in proportion to their number in the population.
- Article 335 provides that the State shall consider the claim of members of SC/ST for making reservation in services, keeping in mind the efficiency of the administration.
- The Article 338 of the constitution (as amended in 1990 by 65th Amendment) provides for the establishment of National Commission for the Scheduled Castes and Scheduled Tribes, which is assigned such duties as to investigate and monitor all matters related to the safeguards provided for the SC/ST in the constitution, to advice on the planning process of the development of SC/ST and to recommend suitable measures for the effective implementation of these safeguards and for the protection, welfare and advancement of the Scheduled Castes and Scheduled Tribes.
- As per the provisions of Article 339, the President is authorised to appoint a Commission after 10 years of the commencement of the Constitution to report on the administration of Scheduled Area and the welfare of Scheduled Castes. The Government of India is also empowered to issue suitable directions to State for the welfare of Scheduled Area and Scheduled Tribes.
- Article 275(1) of the Constitution makes provision that the Union of India shall make grants to States for

implementing welfare schemes in Scheduled Areas and for Scheduled Tribes.

- The Fifth and the Sixth Schedules of constitution (with reference to article 244) make special provisions for the administration and welfare of Scheduled Areas and Scheduled Tribes.
- As per the provision of the Constitution, there shall be a separate Ministry in few states viz Jharkhand, Chhattisgarh, Orissa etc. which will be charged with the responsibility for the welfare of Scheduled Castes in the States.
- The 85th amendment of the Constitution restores reservation in promotion in government jobs to member of Scheduled Castes and Scheduled Tribes ^[4].

Caste cannot be the sole criteria for the implementation of reservation system

Today when a student applies for an admission in any university, the admissions forms are filled with questions like 'Are you SC/ST or OBC or General Category?' How does it matter which category does he belong to, what matters is his merit. A category cannot decide whether he is eligible for admission or not. There many economically worse off children belonging to the forward classes but they cannot get the fruits of such reservation merely by virtue of belonging to the 'general' category. Sometimes these children belonging to the backward classes do not even deserve and still possess the necessary merit as against a child who studied very hard for months to get a seat, thereby snatching away that seat just because he comes from a particular religion or caste for which our government provides reservation.

Reservation should be purely made on the basis of the economical conditions of the applicant and nothing else. The kind of reservation policy that our government currently follows does nothing but divide the society into different sections.

When the then HRD minister Mr. Arjun Singh introduced 27.5% reservation for OBC in centrally funded educational institutes including IIMs and IITs a petition was moved to the President and the Prime Minister stating that such a reservation will take India back from where she is today. Further *"everyone understands the need for all sections of the Indian Society to get an opportunity to be a part of this economy but reservation based on caste is not an answer to this. These policies have been in India since the last 50 years and they have failed to meet their objectives. The government should go into the reasons of the failure. Many students don't make it to the institutes because of the economic reasons and those who do not fall in the reservation criteria do not get a fair opportunity too"*.

To remove this evil it suggested the following:

- Make education mandatory and free for all till age of 15
 - Propose reservation based on economic status
 - Provide opportunity to students to earn while they study.
- Instead of introducing reservations for these backward classes what is required is to bring about revolutionary changes in our education system at the grass-root level. When proper education is not provided to children belonging to such categories during the primary stage itself then on what basis are the reservations provided at a subsequent stage.

⁴ <http://ias.org.in> visited on May 12, 2016

Reservations are nothing but means to prosper the vote banks of politicians. They are hindering the country's growth, development and competency in all aspects. On one hand the preamble of our constitution states that we are a free, democratic and sovereign nation and on the other hand reservation system is chaining all these aspects into its clutches. It is creating disparity and differences amongst the people. The constitution lays down that every child has a right to education and nowhere expresses that any child belonging to a backward class has a little more of this right than the general category. By reserving one category against another creates a feeling of division which is now resulting in a chaos with every small section of the society asking for it.

Reservations on the basis of caste and not on the basis of condition are bad and unacceptable. Fair and just reservations to uplift the people with poor conditions of life, those who don't have meals to eat, clothes to wear and no home to live in. They shall be made on the basis of factors such as gender as women are more disadvantaged than men since primitive times, domicile, family education, family employment, family property, family income and if any disabilities and traumas. The process of reservation should be such that it filters the truly economically deprived individuals and bring them all to justice.

Thus reservations are anti-thesis of development and equality. We don't need reservations based on castes or religion but only to actually provide aid to those who have minimal resources; and merit should be given equal and due importance in admission procedures as well employment opportunities. This way we would be successful in removing caste discrimination and unite the economically rich together. Although the Indian Constitution permits the reservation of seats for person belonging to SC/ST, but it does not make obligatory that this reservation should be made in every case for government services or admission to educational institutions^[5]. Even if the government really wants to uplift particular class by providing reservation benefit to make such class/caste at par with general category, government should provide the benefit of the reservation to the really needy or downtrodden person by not giving reservation benefit to creamy layer among the SC and ST.

Exclusion of creamy layer from reservation to sc/st

The word "Creamy Layer" is not present in constitution. This term was first used by Sattanathan Commission in 1971 to say that the financially well-off people from OBC (Other Backward Classes) category should not be given reservation^[6]. This provision of creamy layer does not apply to SC/ST category^[7].

Following the Supreme Court judgment on reservations, government was forced to exclude the creamy layer from the protection of reservations. Creamy Layer essentially excludes children of privileged citizens belonging to the OBC from getting the protection of reservations. Creamy layer OBCs are considered to be well-off Indians.

Criteria to find out Creamy Layer

- Annual income above 6 lacs - professionals, agriculturists, landowners etc

- Top government posts - Group A/B employees (with few exceptions)
- Constitutional posts such President, Governors, Supreme Court judges etc.

The Mandal commission was established in 1979 by the central government to identify the socially or educationally backward people. It was also set up to consider the question of seat reservations and quotas for people to redress caste discrimination. It used social, economic, and educational indicators to determine backwardness. But today are these reservations actually being utilized on the above mentioned factors? The answer is prima facie 'NO' because the benefits are being stolen away by the creamy layer.

In the case of *Balaji v. State of Mysore*, the court held that the classification of backward classes into more backward was not warranted by art 15(4). However, in the case of *Indra Sawhney v. Union of India*, the Supreme Court has made it clear that classification of the backward into more backward is constitutionally permissible. This interpretation taken with reference to cl. (4) of art 16 is equally applicable to cl. (4) of art 15 as the word backward class of citizen in art 16(4) includes the SC/ST and other socially and educationally backward classes. Thus on this point the view expressed in the case of Balalji has been disproved. The view of the SC in *Indra Sawhney v. Union of India* is better. Such classification is necessary to provide the benefit of the reservation to the more backward classes^[8]. In the same way the real benefit of the reservation can be provided to the SC & ST by excluding the creamy layer.

The 93rd Constitutional Amendment allows the government to make special provisions for "advancement of any socially and educationally backward classes of citizens", including their admission in aided or unaided private educational institutions. Gradually this reservation policy is to be implemented in private institutions and companies as well. This move led to opposition from non-reserved category students, as the proposal reduced seats for the General (non-reserved) category from the existing 77.5% to less than 50.5% (since members of OBCs are also allowed to contest in the General category).

Article 15(4) of our constitution empowers the government to make special provisions for advancement of backward classes. Similarly Article 16 provides for equality of opportunity in matters of employment or appointment to any post under the State^[9].

"Clause 2 of article 16 lays down that no citizen on grounds of religion, race, caste, sex, descent, place of birth, residence or any of them be discriminated in respect of any employment or office under the State"^[10].

However clause 4 of the same article provides for an exception by conferring a certain kind of power on the government:

"It empowers the state to make special provision for the reservation of appointments of posts in favour of any backward class of citizens which in the opinion of the state are not adequately represented in the services"

⁵ P.M. Bakshi, *The Constitution of India*, 10th Ed. 2010 pg. 31s

⁶ Supra note. 3

⁷ http://en.wikipedia.org/wiki/Creamy_layer visit on May, 11 2016

⁸ Prof. Kailash Rai, *The Constitution of India*, 5th Ed. 2003, p. 136

⁹ Supra note.

¹⁰ Dr. J. N. Pandey *"The Constitution of India"* 47th Ed. 2010

Thus two conditions have to be satisfied:

- The class of citizens is backward
- The said class is not adequately represented.

In a case *Balaji v/s State of Mysore*^[11], it was held that 'caste of a person cannot be the sole criteria for ascertaining whether a particular caste is backward or not. Determinants such as poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. The court further held that it does not mean that if once a caste is considered to be backward it will continue to be backward for all other times. The government should review the test and if a class reaches the state of progress where reservation is not necessary it should delete that class from the list of backward classes.'

There is no doubt that the constitution maker assumed. That while making adequate reservation under art 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation, therefore like the special provision improperly made under article 15(4), reservation made under article 16(4) beyond the permissible and legitimate limits would be able to challenge as a fraud on the constitution^[12].

Conclusion

Persons from the Scheduled Caste and Scheduled Tribes communities, who occupy high positions or have been successful in their field, and their families, should be left out of the reservation system. Intended benefits of the reservation system being diluted, and only a few could take advantage of it, because of the inclusion of the creamy layer. We need to ask whether, for example, the children of Dalit leaders such as State Minister for Minor Irrigation Govind M. Karjol, Union Minister for Labour M. Mallikarjun Kharge, and Congress Opposition leader Motamma should be included in the reservation system? Answer should be no, because these leaders are already uplifted and can give all the facilities to their children to compete in general category. Instead, those who are downtrodden among the SC and ST community should be identified to avail the benefit of the reservation system. There is need to focus to give benefit of the reservation only to the economically-backward sections of the Scheduled Castes and Scheduled Tribes by excluding creamy layer person to take benefit of reservation system.

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¹¹ AIR 1963 SC649

¹² Dr. D. D. Basu, *Introduction to the Constitution of India*, 19th Ed. Reprint 2004, p.95