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# Analyzing the 103rd Constitutional Amendment

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## ABSTRACT

*Amendment of Constitution of India, is making changes to what is written in the constitution. The method or process is given in Part XX (Article 368) of Indian Constitution. This provision given in the constitution helps to maintain the sanctity of the constitution and helps to keep the powers of Parliament in check. As of now the Constitution of India has already been amended 105 times. The first amendment of the Constitution took place on 18th June, 1951. In this numerous sections of the Constitution were amended including Article 15, 19, 85, 87, etc. Here we would be dealing with the 103rd Amendment of the Indian Constitution.*

*The One Hundred and Third Amendments of the Indian Constitution, officially known as the Constitution (One Hundred and Third Amendment), Act, 2019. It got its assent on 12th January, 2019 and commenced from 14th January, 2019. This amendment introduced 10 percent reservation for India's Economically Weaker Sections (EWS). It was brought in for giving admission to this class of people to Central Government run institutions and also the private institutions. The exception to this list was institutions run by minority groups.*

**Keywords:** *Amendment, Constitution, Reservation, Minority, EWS.*

## I. INTRODUCTION

The 103rd Constitutional amendment act got assent of the President of India on 12th January, 2019. By this amendment, the lawmakers have inserted article 15 (6) and 16 (6) in the Indian constitution. These newly added articles provide for up to 10% reservation to economically weaker sections of the society for getting admission in higher educational institutions and initial appointment in government jobs. The unique feature of this amendment is that it is applicable to economically weaker sections of the society. other than the schedule, caste, scheduled Tribes and other backward classes. The next remarkable feature of this amendment is that this 10% reservation to the economically weaker section of the society applied not only to government educational institutions and government aided educational institutions but also to private unaided educational institutions. But this reservation is not applicable to those educational

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institutions which are run by minority educational institutions.

If we look into the provisions under article 15 and 16 of the Constitution. It appears that the earlier amendment to these parts of the Constitution already provided for reservation in admission of the citizens of India in government aided and private educational institutions to socially and educationally backward classes of the SC and ST community and their initial appointment in government jobs. By the instant amendment, the government has only extended the benefit to one more class of citizens. As per the law makers, like the socially and educationally backward classes of SCs and STs, the economically weaker person of the society, who were below the poverty line also needed promotion by the government so that all round development of the society can be achieved. The lawmakers have justified this amendment on the ground that by bringing this amendment. The state has performed his duty by applying the recommendations of Economically Backward Classes Commission which had suggested to make reservation in educational institutions and also reservation in public appointment as it will provide equal opportunity to a large number of poor Indians who are excluded from getting admission in higher education institutions or fail to get employment in government jobs

## II. CRITERIA FOR RESERVATION

- EWS reservation is only for General Category citizens. People in other categories are already excluded from it. It includes OBC (27%), SC (15%), ST (7.5%)<sup>3</sup>.
- A family of General Category, having annual income less than Rs. 8 Lakh comes under the category for EWS reservation<sup>4</sup>
- To fall under EWS category one should not own agricultural land of size 5 acre or more<sup>5</sup>.
- To come under EWS reservation, a family should not be in possession of a residential flat whose area is 1000 sq. Feet or higher<sup>6</sup>.
- To fall under EWS category, a family should not own a residential plot of 900 sq feet in notified municipalities or a residential plot of area 1800 sq feet in areas which do not come under notified municipalities<sup>7</sup>.

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<sup>3</sup> Sangeeta Nair, Constitution (103rd Amendment) Act, 2019: 10% reservation for economically weak in general category comes into force, Jagran Josh, (Jan 15, 2019 10:06 IST), <https://www.jagranjosh.com/current-affairs/union-cabinet-approves-10-per-cent-reservation-for-economically-weak-among-upper-caste-1546925703-1>

<sup>4</sup> Id

<sup>5</sup> Id

<sup>6</sup> Id

<sup>7</sup> Id

### III. CRITICAL ANALYSIS

Reservation eligibility is based on historical injustice, educational underachievement, and social exclusion. Each community has areas that are economically less stable. EWSs are not a result of social prejudice. Instead, the emergence of economically disadvantaged groups is due to poor economic policy, unemployment, and other factors. Even while there is economic backwardness, caste-based discrimination—not economic backwardness—is what drives social inequality, as shown by the predominance of upper castes in political, social, and cultural arenas<sup>8</sup>. Examining the Right of Children to Free and Compulsory Education Act of 2009 can help us better understand the folly of the reservation for EWS through the constitutional amendment of 2019. "Child belonging to disadvantaged group" is defined in Section 2(d) of the Act as a child who belongs to one of the groups mentioned in Article 15(4) of the Constitution, namely SCs, STs, SEBCs, or to any other group that is disadvantaged due to social, cultural, economic, geographic, linguistic, gender, or any other factors that may be specified by the relevant government through notification. The term "child belonging to weaker section" is defined in Section 2(e) of the Act to include a kid whose parent or guardian's yearly income is below the minimal threshold established by the relevant authority. According to the RTE, the definition of an economically weaker group is purely dependent on the family's income<sup>9</sup>. The children covered by Sections 2(d) and 2(e) of the Act overlap according to these definitions. The economically less strong segments of the socially backward strata are not specifically excluded by the definition under Section 2(e). This means that a class cannot be defined solely by economic identity.

Article 46 of the Constitution provides a comparable illustration<sup>10</sup>. The weaker groups of the population are not defined by the Constitution. The Constituent Assembly similarly gave up on such an endeavor. Due to this, the Supreme Court used a means test to evaluate EWS using annual income in the 1990s<sup>11</sup>. However, the *Indra Sawhney*<sup>12</sup> case made it clear that "weaker portions of people" go beyond SCs, STs, SEBCs, and "backward class of citizens" and encompass all social groups that are made weak owing to a variety of factors, such as poverty and physical as well as natural deficiency. The Court did not state that economically depressed

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<sup>8</sup> Shinjinee Namhata, *Caste Based Reservations In Education- The Never Settled 'Bone Of Contention' In India*, 32 International Journal of Advanced Legal Research 475, 490-491(2020).

<sup>9</sup> Professor B. Errabbi, *Protective Discrimination : Constitutional Prescriptions and Judicial Perceptions*, Delhi Law Review Vols. 10 & 11, 1981-82, 72.

<sup>10</sup> Sandeep Kumar, *Reservation that is Anti-Reservation*, 54 Economic and Political Weekly 570, 585-587(2019).

<sup>11</sup> Id

<sup>12</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217

areas exclude communities from social disadvantage.<sup>13</sup>

Even though backwardness can result from physical impairments, geographic isolation, etc., in addition to social discrimination, the Constitution (103rd Amendment) Act, 2019, which introduces reservation for EWS, expressly excludes SCs, STs, SEBCs, and backward classes from its sections. Therefore, a group formed on the basis of low family income cannot be classified as a class when the SCs, STs, SEBCs, and backward classes are eliminated. They only make up a group of individuals who are only economically backward and so disadvantageous. Reservations cannot be made using an economic standard. The purpose of articles 15(4) and 16(4) is to reduce discrimination based on caste<sup>14</sup>. Reservation is not available to those who were married into notified community members or were born into upper-caste families. The ideas of distributive fairness or utilitarianism are not the foundation of reservation under the Indian Constitution. One can reasonably draw the conclusion that reservation is founded on the idea of compensating justice and is solely intended for those groups who are socially disadvantaged based on records from the Constituent Assembly and via analyses by renowned Indian jurists.

Discrimination based on caste is a widespread issue. Economic mobility does not immediately eradicate caste prejudice. Caste-based prejudice is shown in the Constitution (103rd Amendment) Act, 2019. It is assumed that the economically poorer segments of the upper caste community would have been qualified for entrance to educational institutions and appointments to public offices if it weren't for their financial hardship. Therefore, unlike reservation for SCs, STs, and OBCs, their inclusion in reservation did not lead to discussions about meritocracy. However, in order to be eligible for reservation, a member of one of the backward classes—specifically, the SCs, STs, SEBCs, and backward classes—must not only demonstrate their membership in the community that has been notified of their eligibility but also to show that they are also economically backward and do not fall within the ‘creamy layer’. In addition, it took the Supreme Court 69 years to recognise that, for the socially disadvantaged classes, administrative effectiveness must be evaluated in the context of social fairness rather than a constrained view of skill and accomplishment.<sup>15</sup>

It amounts to delegitimizing the lived reality of the social oppressions encountered by the depressed classes in favor of the economic disadvantages faced by forward societies when

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<sup>13</sup> S.S. Sharma, *Untouchability, A Myth or Reality : A Study of Interaction Between Scheduled Castes and Brahmins in a Western U.P. Village*, 35 *Sociological Bulletin*, 73-75, (1986).

<sup>14</sup> India Const. amend. 103, arts. 15(6) & 16(6).

<sup>15</sup> *Caste or Economic Status? What Should We Base Reservations On?*, EPW Engage, (2019).

economic backwardness is given more weight than social backwardness. The Constituent Assembly agreed, as was covered in the part prior, that the administration did not have unrestricted authority to include any community in this clause as it saw fit. The main criteria for the notification of communities under these laws were social and educational illiteracy. As a result, this amendment departs from the intent of the constitution.<sup>16</sup>

Articles 16(4A) and 16(4B)'s constitutionality was contested before the Supreme Court in the Nagaraj case<sup>17</sup>. The Court established two standards to examine if there is a violation of the constitution's fundamental principles while affirming the legality of these two constitutional changes. The width test prevents going outside the parameters of a provision. The identity test verifies that the features of the provision have not changed<sup>18</sup>. All socially and educationally underprivileged communities have been included in the scope of reservation regulations. Any class established exclusively on the basis of economic illiteracy has been disregarded by the constitutional text's authors as well as by judges in legal proceedings. Reiterating that reservation is not acceptable for the identity test as reservation is not a poverty alleviation scheme. The Constitution has provisions to protect against social discrimination and end social and educational sluggishness in the chapter on fundamental rights. Determining the identification of the Constitution (103rd Amendment) Act, 2019, thus, may not be successful. This suggests that the Constitution (103rd Amendment) Act might be against the fundamental notion of structure.

Finally, Indra Sawhney has already stated that making a reservation exclusively based on economic considerations is a clear violation of the constitution's clause 16(1). Therefore, the conflict caused by Articles 16(1) and 16(6) of the Constitution is not resolved by just converting an invalidated office memorandum into a constitutional amendment. The Supreme Court has received a challenge to the Constitution (103rd Amendment) Act, 2019's constitutionality. The Court's ruling is anticipated. This issue was brought up in a recent Supreme Court decision by a five-judge panel involving a relevant reservation-related issue. Nevertheless, because the matter is still before the court, the court chose not to comment on it.<sup>19</sup>

#### IV. CONCLUSION

An originalist or a functionalist approach may be used to interpret a constitution. The fear that

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<sup>16</sup> Id

<sup>17</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>18</sup> Id

<sup>19</sup> INDIA CONST. arts. 15(6) and 16(6), *inserted vide* the Constitution (One Hundred and Third Amendment) Act, 2019.

certain constitutional interpretations may disturb the majority and the socially dominant classes should not compel courts to continually decide constitutional issues. The rule of law must serve as a guidance for how the constitution should be interpreted. The Supreme Court has frequently had to act as a mediator between those who support the status quo of social hierarchy and those who want social change while interpreting reservation rules under the Indian Constitution.

The court had to strike a compromise between competing demands in order to keep peace. Some notable instances include implementing the "creamy layer" test for backward classes, putting a 50% cap on reservations, and imposing interim injunctions on order implementation. Even though the court made many of these judgements in an effort to keep the peace, jurisprudence has since adopted them.<sup>20</sup>

The CAD, the text of the constitution, and judicial rulings all reveal some fundamental aspects of reservation in India. Only the CAD has remained constant and timeless among these sources. Over time, both the constitutional text and court rulings have undergone character changes. The shifts have been gradual and steady, one step at a time. However, the judiciary and the legislature, respectively, have taken perilous moves that may depart from the fundamental elements of reservation with the creation of the "creamy layer" test for the SCs and STs and the introduction of reserving for EWS among the non-backward classes. The court established the width and identity tests to evaluate the basic structural breach while affirming the constitutional validity of the amendment imposing reservation in promotion. These criteria established in *Nagaraj* demonstrate that a constitutional provision's fundamental qualities cannot be pushed to such length that it loses its identity.<sup>21</sup>

It can seem like only extending current practice to apply the "creamy layer" test to SCs and STs. Similar to the 50% reservation for backward classes, adding a quota for economically weaker parts within non-backward classes may seem like a good idea to help the poorer classes of people. However, it's possible that these two changes modify reservation's fundamental properties. The "creamy layer" test's application to groups seen to be socially and economically backward prioritizes and legitimizes economic backwardness as the root cause of inequality. A subsequent five-judge bench disregarded a nine-judge bench's advice not to apply the "creamy layer" test to SCs and STs.<sup>22</sup>

This represents judicial misconduct. A court-invalidated office memo that introduced

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<sup>20</sup> Mahendra Pal Singh, *Ashoka Thakur v. Union of India* : A Divided Verdict on an Undivided Social Justice Measure, 1 NUJS L. Rev. 194, 197-198, (2008).

<sup>21</sup> *Supra* Note 10.

<sup>22</sup> *Id*

reservation for the EWS has been changed into a constitutional amendment. This is true of the most recent constitutional amendment. Additionally, the CAD shows that the assembly debated and rejected the reserve based on economic backwardness. Both of these phenomena raise the possibility of reestablishing the socio-economic hierarchy that the Constitution meant to eliminate.

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