

Constitutional Yardstick of Reservation Policy in Higher Education in India

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Abstract

Education is the backbone of national development. Its access as a right is always a preferable way for a welfare nation like India. To secure such rights for backward people, the reservation policy plays a pivotal role under the present academic structure. However, the eternal applicability of the reservation policy in higher education raises questions about a merit-compromising attitude, unequal distribution of reserved seats among sub-groups, and the use of the system for political benefits. In this context, this paper seeks to ascertain the constitutional yardstick for this reservation policy in higher education in favour of SC, ST, OBC, and EWS people.

Key Words: *Fundamental Right, Reservation, Higher Education, Protective Discrimination, Merit.*

I. Introduction

The acquisition of knowledge and wisdom is a lifetime effort with unlimited benefits, and thus, education is a relentless process of becoming.² Increasingly complex economies demand a better-educated and technically efficient workforce. Moreover, in this era of globalization, the nation is increasingly expected to take over the duty of educating citizens.³ In India, under the Constitutional framework, primary education is a fundamental right, but higher education till now depends upon the economic resources of the State. However, to secure the rights of the backward people and to put them on equal footing with

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² V. NARAYAN KARAN REDDY, *MAN EDUCATION AND VALUES* 50 (B. R. Publication 1979).

³ John W. Meyer, et. al. *World Expansion of Mass Education, 1870-1980*, 65(2) *Sociol Educ* 128 (1992).

others,⁴ primarily the members of the legislative assembly took the path of reservation for these people. The three major justifications for taking reservation as a policy in relation to education were compensatory justice, redistributive justice and diversity. The emphasis on 'extreme social, educational and economic backwardness' arising out of 'traditional practice of untouchability' was reiterated as the principal criterion for inclusion of caste groups into the protective people.⁵ The reservation system in the context of Indian higher education basically means that a set percentage of seats will be reserved in all universities and colleges for students who belong to socially and educationally backward categories or belong to different castes, such as the Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes. Thus, the story of the reservation is part of a larger saga of balancing between the haves and have-nots, which gains the attention of both.⁶

Today in India, a great national debate is going on about the issue of reservation as a means to battle against group inequalities.⁷ As per the 2011 census, SCs and STs comprises of 16.63% and 8.63% of the total population in India. Similarly, as the report of the Ministry of Social Justice and Empowerment, the Other Backward Class population comprises of 44% of the total population in India.⁸ Thus, it is evident that more than half of the country's population is constituted by the SCs, STs, and Other Backward Class. The supporters of reservation in higher education urge that educational expansion does not lead to a reduction in educational inequalities based on social origin.⁹ More so, it lies across caste,

⁴ For discussion on theoretical aspect of equality see, Om Prakash Sharma, *Equality and Protective Discrimination under the Constitution of India*, 1(1) IJLJ 92 (2010).

⁵ Tanweer Fazal, *Scheduled Castes, Reservations and Religion: Revisiting a Juridical Debate*, 51(1) CIS 1, 22 (2017).

⁶ Satish Deshpande, *Caste Quotas and Formal Inclusion in Indian Higher Education*, in SATISH DESHPANDE & USHA ZACHARIAS (eds), *BEYOND INCLUSION: THE PRACTICE OF EQUAL ACCESS IN INDIAN HIGHER EDUCATION* 13, 14 (The Routledge 2013).

⁷ M. N. SRINIVAS, *SOCIAL CHANGE IN MODERN INDIA* 109 (Orient Longman India 1972).

⁸ MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, *HANDBOOK ON SOCIAL WELFARE STATISTICS* 238 (Government of India 2018).

⁹ Sonalde Desai & Veena Kulkarni, *Changing Educational Inequalities in India in the Context of Affirmative Action*, 45(2) *Demography* 245, 246 (2008).

religion, and ethnic boundaries.¹⁰ So they are convinced that reservation policy is required not because it is the picture-perfect instrument to rectify long-standing discrimination, but because it is the most workable system to move in that direction.¹¹ But the opposite arguments are also there. The opposers believe that reservation cannot be the path to overcome the inequalities, as it has a tendency to create separation between reserved and non-reserved people and encourage differences among them.

In this connection, this particular article deals with the constitutional yardstick of the reservation policy in India. The commencement of this article starts with a general introduction regarding reservations in higher education, which will provide an elementary notion of the reservation policy. Afterwards, this article provides the definitional scheme of the term 'education' and describes its importance from a right based attitude. In this article, the researcher also explored the constitution assembly debate regarding educational rights and reservation policy. Now, some of the vital questions that arise are: Whether reservation in higher education will result in compromising the quality of education? How far are constitutional provisions effective in securing reservations in higher educational institutions for backward class people? Is the reservation policy applicable to the unaided educational institutions? What are the ways to address the adversarial impacts of the reservation? Thus, this paper makes an attempt to look into the fundamental issues of these questions and tries to suggest the best possible answers for the same. The present article also critically assesses the reservation policy and seeks to advance certain suggestions to do away with reservations in higher education.

II. Constitutional Recognition of the Right to Education in India

Now, Right to Education has been recognised as an enumerated fundamental right under Part III of the Constitution of India. The Indian Constitution owes a lot to the Irish Constitution, 1937 and the right to education was enshrined as a

¹⁰ For detail discussion see, KRISHNA KUMAR (ed.), *ROUTLEDGE HANDBOOK OF EDUCATION IN INDIA: DEBATES, PRACTICES, AND POLICIES* (The Routledge 2018).

¹¹ Jayati Ghosh, *Case for Caste-based Quotas in Higher Education*, 41(24) EPW 2428, 2428 (2006).

fundamental right in Article 42 of the Irish Constitution,¹² thus enforceable in a court of law. But in India, primarily, Constituent Architects did not give education a place in the fundamental right. The educational directives were inserted in the Directive Principles of State Policy under Part IV of the Constitution.¹³ It is pertinent to mention here that these directives are dependent on the economic resources of the State and not justiciable in nature.¹⁴ The Constituent Assembly debate showed that primarily, the provision started with “every citizen is entitled to free primary education and the State shall endeavour to provide ...”¹⁵ which is a more fundamental right in nature. Thus, Pandit Lakshini Kanta Moitya, a member of the Constituent Assembly, rightly suggested that the first part of this phraseology contains the significance and forcefulness of justiciable right, which is against the principle of Directives, hence it is to be deleted.¹⁶ Mr Nasiruddin Ahmed, another member of the Constituent Assembly, preferred the term “primary education” over the term “education”. Mr Ahmed argued this as he portrayed that the objective of the rest of the clause is restricted to free primary education. Dr B. R. Ambedkar, thus, by rejecting this argument, stated that harmonious construction between the fundamental rights deals with the prohibition of employment of a child below the age of 14 years and this provision of securing education to child reveals that if the child is not to be employed below the age of 14, the child must be kept occupied in some educational institution. That is the objective of this article. Hence, the debate finally favoured using the term “education” rather than the drafted “primary education” as every child shall be kept in an educational institution

¹² For detail discussion regarding right to education under Irish Constitution see, Aoife Nolan, *The Battle(s) over Children’s Rights in the Irish Constitution*, 22(4) *Ir Political Stud.* 495 (2007).

¹³ The Constitution of India, Article 45. Primarily it states as, “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years”. It is substituted by the Constitution (86th Amendment) Act, 2002. The Amendment Act states “The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years”. However, It is yet not in force.

¹⁴ See A. David Ambrose, *Directive Principles of State Policy and Distribution of Material Resources with Special Reference to Natural Resources – Recent Trends*, 55(1) *JILI 1* (2013).

¹⁵ See Article 36 of Draft Constitution.

¹⁶ CONSTITUENT ASSEMBLY DEBATE, Vol VII, 538.

under training until the child is 14 years old.¹⁷ Hence, the provision took its present shape.

However, through the Constitution (86th Amendment) Act, 2002, this concept was inserted in the fundamental rights category. Thus, Article 21A states that the State shall provide free and compulsory education to all citizens between the ages of six and fourteen years. Thus, it is evident that Article 21A was enacted by slightly modifying Article 45 of the Directives. It also added a new clause (k) under Article 51A of the fundamental duties, and it stated that the parent or guardian is responsible for providing opportunities for education to their children between six and fourteen years. Before this Amendment, by expanding the horizons of Article 21, the Supreme Court of India, in *Bandhua Mukti Morcha v. Union of India*,¹⁸ observed that the right to education is implicit in and flows from the right to life guaranteed by Article 21. Similarly, in *Mohini Jain v. State of Karnataka*,¹⁹ the Court held that the right to education is a fundamental right guaranteed under Article 21 of the Constitution and that the dignity of individuals cannot be assured unless accompanied by the right to education. Now the question is how much and what level of education is necessary to make life meaningful? To answer this question, the Supreme Court in *Unni Krishnan v. State of Andhra Pradesh*,²⁰ held that the right to education, which is implicit in the right to life and personal liberty guaranteed by Article 21, must be construed in the light of the directive principles of the Constitution. The three Articles 41, 45 and 46 are designed to secure educational security among others. Thus, in the light of these articles, the content and parameters of the right to education have to be determined. A harmonious construction of these Articles reveals that under the Constitutional framework: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes the age of 14 years, his right education is circumscribed by the limits of the economic capacity of the State and its developments. By accepting all these provisions related to the right to education, in *Vinod Sharma v. Director of Education (Basic) U.P.*,²¹ the Supreme Court further observed that

¹⁷ *Id.*, 539.

¹⁸ AIR 1984 SC 802.

¹⁹ AIR 1992 SC 1858.

²⁰ AIR 1993 SC 2178.

²¹ (1998) 3 SCC 404. *State of U.P. v. Pawan Kumar Divedi*, (2014) 9 SCC 692.

the State has an obligation to provide grant-in-aid to basic education or basic schools (Classes I to VIII), corresponding to the students of six to fourteen years. Thus, the State is required to spread educational opportunities and establish schools in remotest areas, and the budgetary constraints or financial implications can never be an accepted ground for violation of the fundamental rights of a citizen.²² With the development of time, the right to education is interpreted in the light of the right to development as a human right also.²³

In addition to these judicial pronouncements, in 1997, the Committee of State Education Ministers proposed to make elementary education a fundamental right, under the chairmanship of Muhi Ram Saikia, the then Minister of State for Human Resources Development and accordingly, in July 1997, the Eighty Third Constitutional Amendment was introduced in the Rajya Sabha to make elementary education a fundamental right. When the same was considered by the Parliamentary Standing Committee, it strongly recommended amending the Constitution to make elementary education a fundamental right. However, it has been urged that sufficient importance should also be given to the quality of the education, including that of teacher training, instead of quantifying the same. Further, the Standing Committee believed that the proposed amendment should provide a fundamental right to free and compulsory education to children in the age group of 6-14, thus wanted to limit the periphery of Article 45, which seeks to provide free education up to the age of 14 years. However, it was felt that Article 45 should be retained in the Constitution to take into account the object and philosophy of the Constitution to take care of children in the age group of 0-6 as well. Along with these, the Law Commission of India, in its Report No. 165, dealt with “Free and Compulsory Education for Children” and highlighted the need to declare the right to education as a fundamental right. Along with the Constitutional amendment, the Law Commission also demonstrates the need for immediate central legislation to give effect to the right to education. Thus, Article 21A was inserted into the Constitution to provide an explicit right to education to citizens of India.

Nevertheless, a professional degree or higher education does not fall within the ambit of Article 21A. Thus, no Article of the Constitution of India recognised

²² State of Bihar v. Bihar Secondary Teachers Struggle Committee, Munger, AIR 2019 SC 2521.

²³ Dipak Kumar Mukherjee v. Kolkata Municipal Corporation, AIR 2013 SC 927.

professional degree or higher education under the fundamental right to education.²⁴ Further to implement the object of Article 21A, in the year 2009, the Right of Children to Free and Compulsory Education Act, 2009 was enacted. One of the objects of this Act was in terms of the object of Universal Elementary Education for strengthening democracy and to provide equal opportunity to all. Section 3 of the Act enjoins that every child between the ages of six and fourteen years shall have a right to free and compulsory education in a neighbourhood school.²⁵ Thus, in India, both constitutional and legislative protection are available to the right to education for every child between the ages of six and fourteen years. But the scope of higher education is always dependent upon the State's economic capacity.

III. Constituent Assembly Debate on Educational Rights and Reservations

Reservation policy and the role of the Constituent Assembly in India are always a major concern for understanding the historical development of the subject from the Indian socio-legal aspect. However, the reservation systems in various aspects favoured certain communities before independence as well. Shahu, the Maharaja of the princely State of Kolhapur, introduced reservation in favour of non-Brahmin and backward classes in 1882 and 1891, much of which came into force in 1902.²⁶ He provided free education to everyone and opened several hostels to make it easier for the subjects to receive it.²⁷ The Maharaja preferred this reservation to secure a class-free India and to abolish untouchability. His efforts created a 50% reservation for backward classes. But this primary notion of reservation was not available in the case of Higher education. The Constituent Assembly in India, for the first time, met on 9 December 1946 and took three years to frame the Constitution of India. The members of the Assembly were indirectly elected by the members of the provincial assemblies that existed during that time under the British Raj. Majorly, the members of the Constituent Assembly considered the reservations policy as a political safeguard for securing the representation of minorities. Primitively, Mr B. N. Rau made an attempt to

²⁴ Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178.

²⁵ Anil Kumar Yadav v. State of U.P., (2014) 4 UPLBEC 2871.

²⁶ Shrikant Nityanath & S. P. Melkeri, *Reservation Policy in India and Development of Its Implement*, 2(3) Int J Adv Educ Res 221 (2017).

²⁷ See Rupak Das & Khaleeq Ahamed, *Constitutional Law and Reservation: A Critical Study*, 6(1) IJRAR 730 (2019).

work out a Constitutional scheme by stating that India shall take responsibility to maximise educational facilities to promote equal opportunity in the educational sector.²⁸ In the meantime, Professor K. T. Shah also sent a note to the President of the Constituent Assembly by stating that every citizen has and is hereby guaranteed the right to free education up to a standard prescribed as the minimum by the Union Legislature, or the Legislature of any part thereof.²⁹ He was of the opinion that unless you make these preemptory obligations mandatory duties of the State, the State may not at all attend to these duties. Thus, Mr Shah favoured making a justiciable right to education. Whereas, M. Ananthasayanam Ayyangar, another member of the Constituent Assembly, was in favour of making education a non-justifiable right. Speaking on draft Article 36 (Original Article 45), he stated “the State should, within a period of ten years, introduce free compulsory education”.³⁰ He argued that “making all the rights justiciable is impossible. There is no use being carried away by sentiments. We must be practical.” He further supported his argument with the statement that “It is not a court that can enforce these provisions or rights. It is the public opinion and the strength of public opinion that is behind a demand that can enforce these provisions....That is the real sanction, and not the sanction of any court of law.” This notion of M. Ananthasayanam Ayyangar was also supported by Shibban Lal Saksena, who gave a proposal to make the right to education a fundamental right after a period of ten years.³¹ Concerning the debate between the word ‘education’ and the words ‘primary education’, Dr Ambedkar expressed his view by referring to Article 18,³² which forbids any child being employed below the age of fourteen. He argued that obviously, if the child is not to be employed below the age of fourteen, the child must be kept occupied in some educational institution, and that is why the word ‘primary’ is quite inappropriate in that particular

²⁸ 1 B. SHIVA RAO, THE FRAMING OF INDIA’S CONSTITUTION 155 (Universal Law Publishing 2004).

²⁹ 2 B. B. SHIVA RAO, THE FRAMING OF INDIA’S CONSTITUTION 48 (Universal Law Publishing 2004).

³⁰ CONSTITUENT ASSEMBLY DEBATES, Vol. VII, 475.

³¹ *Id.*, 482.

³² Ar. 18, as it stood in the Draft Constitution and corresponding to Article 23 in the Original Constitution.

clause.³³ Ultimately, this contention of Dr Ambedkar was accepted by the Constituent Assembly.

Further, in the Drafts made by K. M. Munshi, K. T. Shah and Harnam Singh, there was a guarantee to safeguard the cultural and educational rights of linguistic and religious minorities.³⁴ Mr Munshi, in his draft on the fundamental rights, stated as follows: “All citizens shall have equal opportunities of receiving education. Nothing herein contained shall preclude the State from providing special facilities for educationally backward sections of the population”.³⁵ In his draft, the right to education was in Article VII, which is symmetric in nature and seeks to provide the right in equal measure to all citizens of the country.³⁶ However, finally, the Fundamental Rights Sub-Committee adopted it as “The State shall promote with special care the educational and economic interests of the weaker sections of society (in particular, of the SCs and aboriginal tribes), and shall protect them from social injustice and all forms of exploitation”.³⁷ Further, Prof. K.T. Shah proposed that for the advantage, safeguard or betterment of scheduled castes or backward tribes, they should be added to this clause. But the strong opposition came from Dr Ambedkar as he took the view that such a provision would result in further seclusion of SCs and STs, resulting in a “separate but equal”³⁸ treatment which was in reality not in their interests at that time. In this regard, Dr Ambedkar stated that “The object which all of us have in mind is that the general public, for instance, none of us, I think, would like that a separate school should be established for the scheduled castes when there is a general school in the village open to the children of the entire community.” If these SCs and STs people are added, then the State can take such measures, which is not desirable at all.³⁹ Thus, the reservation policy has a chance to encourage

³³S. D. Sharma, *Education Is Basic Human Right of Human Being*, AIR 285, 285 (2001).

³⁴Faizanur Rahman, *Education, Minorities and Constitution of India*, 1 J LJ 46, 48 (2016).

³⁵ B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, *Op. Cit.* 345.

³⁶*Id.*, 74.

³⁷*Id.*, 34.

³⁸In *Plessy v. Ferguson*, 163 U.S. 537 (1896) the U.S. Supreme Court upheld the ‘separate but equal’ doctrine in the context of a Louisiana statute that segregated railway coaches. Further, the U.S. Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) struck down segregation and the ‘separate but equal’ doctrine.

³⁹ B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION , *Op. Cit.*, 661.

social tensions, which is against the process of social integration, instead of removing the caste distinctions.⁴⁰

IV. Reservation and Its Evolution: A Debate on Expansion

The position started to change with the passing of the Constitution (First Amendment) Act 1951. Through this Amendment, Article 15(4) was inserted after Article 15(3), which specifically deals with some special provisions for the advancement of Backward classes. This Amendment was the result of the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*⁴¹. The case was with regard to the admission of students to the Engineering and Medical Colleges of the State of Madras. The then Province of Madras had issued an order which fixed the number of seats for particular communities in certain proportions on the basis of religion, race and caste. The State argued that the order is correct because Article 46 charges the State to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the SC and the STs, and to protect them from social injustice and all forms of exploitation. The Supreme Court observed that as the selection was on the basis of religion, race and caste, it is violative of Articles 15(1) and 29(2). The Court further held that the directive principles of state policy cannot in any way override the fundamental rights. As a result, the Parliament brought the Constitution (1st Amendment) Act 1951. In the meantime, the Bombay High Court also in *Jagwant Kaur Kesarsing Dang v. State of Bombay*,⁴² declared that the establishment of the Harijan colony is against the policy of Article 15(1), though Article 46 states that the State is entitled to promote with special care the educational and economic interests of the SC people.

Thus, to modify the effects of these two decisions, Article 15 was amended, and clause (4) was added to it. Article 15(4) of the Constitution provides:

“Nothing in this Article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and

⁴⁰ R. L. CHAUDHARI, CONCEPT OF SECULARISM IN INDIAN CONSTITUTION 184 (Uppal Publications House 1987).

⁴¹ AIR 1951 SC 226: [1951] 2 SCR 525.

⁴² AIR 1952 Bom 461: ILR 1953 Bom 44.

educationally backward classes of citizens or for the scheduled castes and scheduled tribes.”

Historically, it is an accepted phenomenon that disadvantaged groups must be given special protection and help so that they can be uplifted from their poverty and low social status.⁴³ The legislature has to make such attempts so that such incumbents are protected with more rigorous provisions than those of the general law available to others.⁴⁴ It is interesting to note that though the Constituent Assembly rejected the plea of reservation, the Parliament, which was constituted of the same members as the Constituent Assembly, approved the reservation policy. Thus, through Article 15(4), the persons belonging to socially and educationally backward communities are legitimately given reservations since they are at a disadvantageous position when they compete for selection to educational courses.⁴⁵ Article 15(4) envisages a method of protective discrimination for any socially and educationally backward classes of citizens and the SCs and STs.⁴⁶ The object of Article 15(4) is to secure equal advancement by providing protective discrimination in favour of the weaker sections so that they may become more solid and be able to compete equally with others more fortunate, and further, one cannot ignore the wider interests of society while devising such special provisions.⁴⁷

In the case of *M. R. Balaji v. State of Mysore*,⁴⁸ the Supreme Court considered the very question relating to the extent of special provisions which it would be competent for the State to make, under Article 15(4). This Court observed that when Article 15(4) refers to the special provisions for the advancement of certain classes or SCs or STs, it must not be ignored that the provisions which qualify it as a special provision. Article 15(4) is not a provision which is exclusive in character, so that, in looking after the advancement of those classes, the State would be justified in ignoring the advancement of the rest of the society

⁴³ *Kailas v. State of Maharashtra*, 2011 (1) SCC 793.

⁴⁴ *Prathvi Raj Chauhan v. Union of India*, 2020 (1) KLT 810.

⁴⁵ *K. Krishna Murthy v. Union of India*, (2010) 7 SCC 202.

⁴⁶ For understanding the concept of socially and educationally backward classes and the scheduled castes and scheduled tribes, See C. M. Jariwala, *Reservation in Admission to Higher Education: Development and Directions*, 42(2-4) JILI 204, 206 (2000).

⁴⁷ *Preeti Srivastava v. State of Madhya Pradesh*, (1999) 7 SCC 120.

⁴⁸ AIR 1963 SC 649.

altogether. However, it is an admitted fact that the interests of society at large would be served by promoting the advancement of the weaker elements in society, which Article 15(4) authorises. But if a provision which is like an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4), the Parliament intended to provide that where the advancement of the Backwards Classes or the SCs and STs was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored. This Court further observed that a special provision contemplated by Article 15(4) must be within reasonable limits and it should be adjusted with the interest of the community as a whole. The Court also said that while considering the reasonableness of the extent of reservation, one could not lose sight of the fact that the admissions were to institutes of higher learning and involved professional and technical colleges. The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by the wholesale reservation of seats in all technical, medical or engineering colleges or institutions of that kind. Therefore, consideration of national interest and the interests of the community or society as a whole cannot be ignored in determining the reasonableness of a special provision under Article 15(4).⁴⁹

Thus, it must be remembered that exceptions cannot overrule the rule itself by running riot or by making reservations as a matter of course in every university and every course.⁵⁰ Sometimes it has been argued that at higher levels of education, it would be dangerous to depreciate merit and excellence. The higher you go in the ladder of the educational system, the smaller the reservation should be.⁵¹ Applying this principle, in *Post-Graduate Institute of Medical Education and Research v. K. L. Narasimhan*,⁵² the Supreme Court held that the reservation of seats of the post-graduate and doctoral courses in medicine should not lead to loss of efficiency. Hence, primarily Article 15(4) was treated as an exception to

⁴⁹ Fazal Ghafoor v. Union of India, AIR 1989 SC 48.

⁵⁰ Jagadish Saran v. Union of India, AIR 1980 SC 820.

⁵¹ Mohan Bir Singh Chawla v. Punjab University, Chandigarh, AIR 1997 SC 788.

⁵² AIR 1997 SC 3687.

Article 15(1), but an overbroad and liberalised approach has given Article 15(4) the label of an enabling Article and integral part of Article 15(1).⁵³

V. Current Reservation Policy in Higher Education

With the passing of time, even after the abovementioned cautions from the judiciary, the State interference to specify reservation is the reality in India. The judicial pronouncement in *P. A. Inamdar v. State of Maharashtra*,⁵⁴ again prompted the legislature to bring a new amendment by adding Article 15(5) to the Constitution. In this case, the Supreme Court dealt with the application of the state reservation policy in the unaided professional educational institutions. The Court observed that merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available based on a reservation policy to less meritorious candidates. As the unaided institutions are not deriving any aid from State funds, they can have their own admissions if fair, transparent, non-exploitative and based on merit.⁵⁵ Thus, the debate related to the reservation in the unaided private institution was still open for legislative consideration.⁵⁶ Ultimately, to impose the authority of the State over the unaided educational institutions, the Parliament passed the Constitution (93rd Amendment) Act, 2005⁵⁷ and inserted clause (5) in Article 15 of the Constitution.⁵⁸ This Article 15(5) does not specifically provide any specific reservation as such. It is only an enabling provision which empowers the State to lay down by law special provisions in the matter of admission to educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred

⁵³ Prakash Kiran v. State of Bihar, AIR 1989 Pat 235; Nivedita Jain v. State of Madhya Pradesh, AIR 1981 MP 129.

⁵⁴ AIR 2005 SC 3226.

⁵⁵ T.M.A. Pai Foundation v. State of Karnataka, AIR 2003 SC 355; Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697.

⁵⁶ Virendra Kumar, *Dynamics of Reservation Policy: Towards a More Inclusive Social Order*, 50(4) JILI 478, 514 (2008).

⁵⁷ The Act came into force w.e.f. 20.1.2006.

⁵⁸ Arjoo Tailor & Snigdha Pimprikar, *Extension of Reservation in Private Educational Institutions*, 4 APLPR 8, 20 (2018).

to in clause (1) of Article 30. Thus, the choice of the unaided institutions regarding admission of the students has been withdrawn.

However, taking the advantage of this constitutional provision, the Union Government brought forth specific legislation namely, the Central Educational Institutions (Reservation in Admission) Act, 2006 under which the following scheme of reservation has been provided: (i) SC - 15%;⁵⁹ (ii) ST - 7.5%;⁶⁰ (iii) OBC - 27%⁶¹ in certain educational institutions like central universities, institution of national importance, deemed universities.⁶² It excludes institutions of excellence, research institutions, institutions of national and strategic importance specified in the Schedule to this Act, minority educational institutions and courses or programmes at high levels of specialisation.⁶³ Nevertheless, the validity of the Constitution (93rd Amendment) Act, 2005, and the Central Educational Institutions (Reservation in Admission) Act, 2006, was put under judicial review in *Ashok Kumar Thakur v. Union of India*⁶⁴. The Supreme Court in this case finally upheld the validity of the Constitutional Amendment Act as well as the Central Act and declared that they are not violative of the basic structure of the Constitution. By harmoniously studying the amendment and the Central Act, the Court observed that OBCs must be determined by keeping the purposes of the Act in mind by the Central Government. On the same guideline, in *P. V. Indiresan v. Union of India*,⁶⁵ the Supreme Court clarified the procedure to be followed for admissions of OBC candidates to Central educational institutions. Apart from these reservations, the validity of other reservations like

⁵⁹ The Central Educational Institution (Reservation and Admission) Act, 2006, Section 3(1).

⁶⁰ Id., Section 3(2).

⁶¹ Id., Section 3(3).

⁶² Jyothi Vishwanath & Srinivas C. Palakonda, *Indian Constitution and the Reservation Policies in India: A Review of the Position with Special Reference to the OBC Creamy Layer Criteria*, 3 KLE LJ 51, 62 (2017).

⁶³ The Central Educational Institution (Reservation and Admission) Act, 2006, Section 4.

See also, *AIIMS Students Union v. AIIMS*, AIR 2001 SC 3262.

⁶⁴ (2007) 4 SCC 361.

⁶⁵ (2011) 8 SCC 441.

reservation in favour of girl students,⁶⁶ children of government employees,⁶⁷ residents of particular territories,⁶⁸ children of defence personnel,⁶⁹ etc., is also upheld by the judiciary from time to time.

Further, in recent times, the Parliament enacted the Constitution (103rd Amendment) Act 2019,⁷⁰ which enables the State (i.e. both the Central and State Governments) to provide reservation to the Economically Weaker Sections of society. Whether or not to provide reservations to the Economically Weaker Sections of the society for admission to State Government educational institutions, as per provisions of the newly inserted Article 15(6) of the Constitution, is to be decided by the concerned State Government. Further, this new Article 15(6) specifically stated that the reservation for Economically Weaker Sections would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.⁷¹ However, this addition to the existing reservation is violating the 50 per cent ceiling rule as laid down by the Supreme Court in *M. R. Balaji v. State of Mysore*,⁷² and upheld again in *Indira Sawhney v. Union of India*⁷³. Thus, this Amendment Act is still waiting to get clearance from the judicial review test. But as of now, it is in operation and includes citizens with an annual income of less than Rs. 8 Lakh or families who own agricultural land below 5 acres or a house smaller than 1000 sq. feet or a plot less than 100 yards or any other criteria which shall be notified by the State from time to time.

⁶⁶ *Controller of Examination, Bihar Combined Entrance Competitive Examination v. Nidhi Sinha*, AIR 2017

Pat 1; *Ashok Kumar Malpani v. State of M.P.*, AIR 2010 MP 64.

⁶⁷ *Vishakha v. State of Gujarat*, (2013) 1 GLR 11; *Chinnaiah v. Government of Andhra Pradesh*, 2000 (1) SCT 15 (AP).

⁶⁸ *Kushal Ravindrakumar Pandey v. State of Gujarat*, AIR 2018 Guj 25; *Kumari Chitra Ghosh v. Union of India*, AIR 1970 SC 35.

⁶⁹ *Payal Sawhney v. Meenakshi Suri*, AIR 1995 J&K 36; *D. N. Chanchala v. State of Mysore*, AIR 1971 SC 1762.

⁷⁰ The Act came into force w.e.f. 12.1.2019.

⁷¹ The Constitution of India, Article 15(6)(b).

⁷² AIR 1963 SC 649.

⁷³ AIR 2000 SC 498.

VI. Adversarial Effect of Reservation in Higher Education

Hence, it is clear that in the present situation, the total quantity of reservations is around sixty per cent of the total available seats in the higher education institutions. But such a high quantity of reservation of seats in the educational institutions is creating a negative impact on the majority section of society, which is evident from the comparison of the total number of seats and the reservation percentage. It is hard to believe that reservations are the only answer for uplifting the socially and educationally backward classes of society. Proper allocation of social welfare measures, the right strategy for securing access to education, more educational institutions in rural areas, flow of money or livelihood for poor people may comprehensively change the scenario. Further, only relying on the reservation policy for SC and STs and socially and educationally backward communities might have been the correct approach 73 years back, but now there is a need to reconsider the same and take approaches to eliminate this policy in the near future. In addition to this, the non-changeable criteria for defining this preferred class of people in the educational sector are also a major concern. Some of the groups, which were backward during the time of drafting policy, may not remain in the same criteria as of now. So re-evaluation of criteria with the change of time and social needs Figure 2 should be the guiding principle of implementing the reservation policy. In this regard, it may be worthwhile to mention that in *Ajay Kumar Singh v. State of Bihar*,⁷⁴ the Supreme Court held that a class or caste may be backward in the present time, but it may not be so in the coming years due to their socialisation with society and job opportunities. Once a caste is a socially and educationally backward community, it cannot remain so for all time to come. It requires a periodical review. Further, the reservation in higher education has the tendency towards rigidity that can invert its social function, turning it into a device for the safeguarding of privilege rather than the inclusion of the dis-privileged.⁷⁵

⁷⁴ (1994) 4 SCC 401.

⁷⁵ Satish Deshpande, *Social Justice and Higher Education in India Today: Markets, States, Ideologies, and Inequalities in a Fluid Context*, in MARTHA NUSSBAUM & ZOYA HASAN (eds), EQUALIZING ACCESS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN INDIA, UNITED STATES AND SOUTH AFRICA

The light of education has helped us to abandon many of the social evils. Now, with the decrease in the untouchability practise and after having a specific statute to protect the interests of SCs' and STs', such as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the scenario has taken a step toward change. Even the National Commissions for Scheduled Caste and Scheduled Tribe are already there to look after their well-being. As a result, reservation as a developmental tool has already started losing its importance too. Moreover, before the Constitution (103rd Amendment) Act 2019, at least 50% of the maximum available seats for admission in higher education institutions were open for the unreserved category, which utilises merit-based admission.⁷⁶ This scope is also narrowed again. Another challenge to the current model of reservations is from within the beneficiary groups themselves. It is now widely recognised that the benefits of the reservation have not been evenly distributed among the beneficiary groups and that some sub-groups have gained a disproportionate advantage. Thus, there is a demand for the creation of a sub-reservation within the reserved people. More importantly, the existing policy fails to address the gender gap among the backward class people.⁷⁷ The gender gap in education is higher among the Other Backward Classes than among the upper castes. These lacunas have to be resolved in the coming days with a more systematic approach and specific women-centric educational policy.

Further, sometimes it has been argued that the policy of reservation compromises merit and efficiency. However, in *B. K. Pavitra v Union of India*,⁷⁸ the Supreme Court observed that providing reservations for SCs and STs is not at odds with the principle of meritocracy. The concept of "Merit" must not be limited to narrow and inflexible criteria such as one's rank in a standardised institutional exam, but must flow from the actions a society seeks to reward, including the promotion of equality in society and diversity in public administration.⁷⁹ Apart

212, 230 (Oxford University Press 2012).

⁷⁶ Subir Bhaumik, *Muslim Minority Representation in Higher Education*, 20(2) J Eco Serv 137 (2009).

⁷⁷ Satish Deshpande & Yogendra Yadav, *Redesigning Affirmative Action: Castes and Benefits in Higher Education*, 41(24) EPW 2419, 2420 (2006).

⁷⁸ AIR 2019 SC 2723.

⁷⁹ Amartya Sen, *Merit and Justice*, in K. J. ARROW (ed), MERITOCRACY AND ECONOMIC INEQUALITY

from these, it has become visible over the years that the reservation policy is prone to misuse. Faking of caste certificates and undue appeasement of various communities within the favoured criteria, irrespective of their social or educational backwardness, with the motive of political gain, are events incidental to the reservation.⁸⁰ Thus, to curb this tendency, the regulating mechanism should be implemented strictly. The major fallacy lies in the terms of the original Constitution, which allowed the reservation policy only for 10 years after independence for the upliftment of SCs and STs and gave discretionary power to the parliament to increase the same by reviewing the situation. But till now it continues, and no one has taken any step to amend it, revise it or change it with the modernisation of social structure.⁸¹ Further, nowadays there is a growing belief that the benefits of reservation in higher education are snatched away by upper layers among the specified groups at the expense of the really needy and deserving. It is for the state to vigilantly avoid such a situation.⁸² The newly added reservation to the Economically Backward Class people also creates doubts among the non-reserved section. Research shows that already this section has 28% representation in higher educational institutions.⁸³ Thus, the very motive of inclusion of this section with others within the reservation policy is already under the scanner.

VII. Conclusion and the Way Forward

Education and its related rights can remove prejudices and complexes transmitted through the social environment and the accident of birth. By appealing to the universal principles of non-discrimination, inherent human dignity and equality, a sense of brotherhood can be nurtured and strengthened in the hearts of students

5, 14 (Princeton University Press 2000).

⁸⁰ Aman Verma, *Caste-Education Syndrome Impact of Reservations on Institutions of Higher Education*, 2(6) IJISS 139, 146 (2013).

⁸¹ S. Yesu Suresh Raj & P. Gokulraja, *An Analysis of Reservation System in India*, 2(10) Int J Res 1038, 1045 (2015).

⁸² V. P. Bharatiya, *Egalitarian Differentiation for Job Reservation*, in D. R. SAXENA (ed), LAW, JUSTICE AND SOCIAL CHANGE 158, 168 (Deep and Deep Publications Pvt. Ltd. 2008).

⁸³ Bheemeshwar Reddy, et. al., *New Reservation Policy: Is It Empirically Justifiable?*, 54 (23) EPW 12, 14 (2019).

as a part of society.⁸⁴ Thus, possession of education enables awareness of the interests and empowerment of the rights.⁸⁵ The basic policy of equality is always there. The Constitution of India prohibits discrimination on caste, religion, sex or language by the State in matters relating to education and employment. On the other hand, it recognised protective discrimination as an interim measure in favour of specific groups on grounds of social justice.⁸⁶ Thus, if Article 15 is to be implemented in the spirit in which it was enacted, it is necessary to identify the groups that are really socially and educationally backwards and ensure that the benefits of reservation reach them.⁸⁷ There are enough studies to indicate that the creamy layer portion of the educational and social backward class, till now, has been consuming the substantial benefits of reservation. The above analysis has shown that the policy, as it stands today, is violating the essential conditions that make it acceptable to the majority of the non-preferred groups who are no better than those preferred. Similar to the above, curtailing the creamy layer portion from the benefited section under the reservation policy will make the reservation of the backward class more acceptable to the unreserved section. Instead of being a temporary means of promoting equality, the reservation policy has become a permanent feature. Hence, there is a near-universal clamour for getting special privileges.⁸⁸ This attitude has proved that this reservation policy in higher education is only a crude strategy of social reconstruction, which, if mismanaged, will lead society to traumatic tension. Our governments, both Central and State, should take more effective steps to implement the directive principles of the policy set out in Articles 41, 45 and 46 rather than continuing to reserve indefinitely. The governments should be more prone to secure adequate livelihood for citizens, and social welfare measures should be implemented more effectively, which will, in the long run, ensure betterment of the socio-economic

⁸⁴ Ezekial Jarain, *Human Rights Education: A Reliable Instrument to Promote and Protect Human Rights*, 16 NCLJ 113, 121 (2017).

⁸⁵ Jainder Kharb, *Reservation in Education - A Tool of Social Transformation? Critical Analysis of the Caste Based Reservation as Exhibited in the Indian Education System*, 9(9) IJSER 138, 139 (2018).

⁸⁶ B. Shiva Ramayya, *Protective Discrimination and Ethnic Mobilization*, 22(4) JILI 480, 480 (1980).

⁸⁷ Arvind P. Datar, *Our Constitution and Its Self-Inflicted Wounds*, 1 IJCL 92, 111 (2007).

⁸⁸ Parmanand Singh, *Some Reflections on Indian Experience with Policy of Reservation*, 25(1) JILI 46, 72 (1983).

status of the backward people and thus will decrease the necessity of the reservation policy to bring them on equal footing with the general people. Seventy-three years is too long a period to continue reservation without undertaking promotion of the educational and economic interests of the weaker sections in a time-bound manner.

In addition to this, the proper identification of these specified groups, like the backward classes of society and the economically backward class, is also a major concern. To avoid this issue and to make the reservation system in higher education more transparent, poverty, geographical location, educational level, family structure and occupation may be considered as relevant criteria. The application of the Central Educational Institutions (Reservation in Admission) Act, 2006, is also under the scanner. The reservation available to Other Backwards Class people under the Act should be reviewed, as the majority of them are enjoying these benefits generation by generation, which was not the motto of the drafting committee of the Constitution. Further with the evolution of the Economically Backwards Class, a more comprehensive statute should be enacted by the Parliament with strong vigilance to avoid misuse. The certification procedure with regard to the determination of these people has to be scrutinised thoroughly. To address the economic needs of these people in pursuing higher education, the governmental agencies should be more proactive in granting and disbursing scholarships to these people and the students at large. More and more inclusion of backward class people within the primary and secondary institutional educational system to secure eligibility for higher education is another area which the government should look after seriously. Along with this, it has also been proven that providing reservations exclusively in the educational institutions cannot change the social scenario single-handedly. Emphasis should be given to ensuring that all the welfare facilities reach those who deserve them.⁸⁹ Thus, India, as a nation, has to travel miles before it can secure higher education as a right for every citizen and secure social justice for everyone.

⁸⁹ Kaushik Ghosh, 'Reservation Policy' Facilitated the Reserved Category People in India: A Reality or Myth?, 1(1) IJLJ 100, 101 (2010).