

EWS Amendment: Changing Trajectory of Caste Reservation in India.

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The debates around reservation have unique importance in Indian politics. It won't be an exaggeration to say that these debates are one of the most important discourses around which Indian politics is shaped. Even a short preliminary look at contemporary Indian politics will reveal the influence of these discussions on the polity.¹

This paper is an attempt to understand the changing trajectory of positive discrimination on caste in India in the light of the 103rd amendment also known as 'economically weaker sections' reservation (EWS).

Initially, the paper outlines the historical background of caste reservation debates in India. Subsequently, it tries to explain the 103rd amendment and its legal provisions in detail. The logic behind the EWS reservation and its veracity are discussed in the further subheadings. The paper argues that the 103rd amendment is altering the constitutional vision of reservation by creating a category that has no constitutional or empirical basis to become eligible for reservation.

The High Moments in Caste Reservation Debates.

In India, the reservation or the positive discrimination in favour of weaker sections and underrepresented sections in the society started at least from the time of British Raj.² In every phase of history, these debates had high moments. The tussle between Gandhi and Ambedkar over communal awards³ proposed by the second-round table conference is, perhaps, the first such moment.⁴ As Bipan Chandra notes,

“The Award allotted to each minority a number of seats in the legislatures to be elected on the basis of a separate electorate, that is Muslims would be elected only by Muslims and Sikhs only by Sikhs, and so on. Muslims, Sikhs and Christians had already been treated as minorities. The

¹ Anand Teltumbde, *Republic of Caste: Thinking Equality in the Time of Neoliberal Hindutva* (Navayana 2014).

² Bhagwan Das, 'Moments in a History of Reservations' (2000) Vol. 35 Economic and Political Weekly.

³ As Bipan Chandra notes,

⁴ Bipan Chandra et al., *India's Struggle for Independence* (Penguin UK, 2016).

*Award declared the Depressed Classes (Scheduled Castes of today) also to be a minority community entitled to separate electorate and thus separated them from the rest of the Hindus.”*⁵

This moment had a very deep ideological conflict as the effort to separate the Depressed Classes from the rest of Hindus by treating them as separate political entities were reserved by nationalists including Gandhi as an effort to attack Indian unity and nationalism.⁶ The making process of constitution again witnessed serious concerns from various corners on the role of reservation in the future republic.⁷

The leadership of lower castes including Ambedkar had serious conflicts and doubts about the intention of Congress leadership during constituent assembly debates.⁸ There was resistance from upper-caste Hindus in the constituent assembly against Scheduled caste reservation.⁹ The members of the constituent assembly belong to scheduled castes were at one point was fearful of losing the provisions for reservation as many dominant members including president Sardar Vallabh Bhai Patel stood against reservation provisions.¹⁰ Nevertheless, as a result of a series of consensus finally, the constituent assembly adopted a scheme of reservation.

The promises made to the leaders of scheduled castes for the compromise they made in ‘Poona Pact’¹¹ was pivotal in the process of realising lower caste rights in the constituent assembly.¹² As a result, the constitution of India came out with several provisions for the protection and welfare of scheduled tribes and scheduled castes. Constitutional provisions we shall discuss in detail in the coming passages. Independent India again witnessed a series of events on the reservation. The case *State of Madras vs Champakam Dorairajan*¹³ which led to the first constitutional amendment is one among them. The petitioner in the case challenged the reservation policy of the Madras

⁵ Bipan Chandra and others, *India's Struggle for Independence* (Penguin UK 2016).

⁶ *ibid.*

⁷ Das (n 2).

⁸ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (11. impr, Oxford University Press 2007).

⁹ Das (n 2).

¹⁰ *ibid.*

¹¹ Poona Pact was an agreement Dr. Ambedkar and Mahatma Gandhi signed on September 24, 1932. On 20 September 1932, Gandhi sat on Fast unto Death in Yarrowada Jail where he was lodged at that time against the communal award to depressed classes proposed by British government. It was also signed by Madan Mohan Malviya and some other leaders.

¹² Das (n 2).

¹³ AIR 1951 SC 226

government on the ground of discrimination against upper castes. As a result of this case Article 15(4), which allows the state to make any special provision for the advancement of any socially and educationally backward classes of citizens or the scheduled castes and scheduled tribes, was inserted into the constitution.

The Mandal Commission report¹⁴ and the political upheavals it created when VP Singh government decided to implement other backward class (OBC) reservation in central government employment in 1991 is perhaps the biggest political moment of reservation debates in recent history.¹⁵ The agitations against and for the implementation of Mandal commission report has had noteworthy importance in the shaping of political parties and discourses in India, especially in the Hindi heartland.¹⁶

The 103rd constitutional amendment and the plethora of debates it created and the future impact it is going to create are the recent such high moment in the grand history of reservation debates that were briefly surveyed above.

What is the EWS Amendment of the Indian Constitution?

The 103rd constitutional amendment which creates a reservation for 'Economically Weaker Sections' was introduced in Loksabha by the Minister of Social Justice and Empowerment, Mr Thaawar Chand Gehlot on January 8, 2019.¹⁷ Subsequently, the bill was introduced in Rajyasabha, the upper house of the parliament on January 9, 2019. Finally, the bill was approved by the President of India and completed its legislative journey.¹⁸

A close reading of the amendment along with its statement of object and reason indicate certain key points on the subject matter. They are,

¹⁴ The Mandal Commission, or the Socially and Educationally Backward Classes Commission (*SEBC*), was established in India on 1 January 1979 by the Janata Party government under Prime Minister Morarji Desai with a mandate to "identify the socially or educationally backward classes" of India.

¹⁵ NS Gehlot (ed), *Current Trends in Indian Politics* (Deep & Deep Publications 1998).

¹⁶ Christophe Jaffrelot, *Religion, Caste, and Politics in India* (Primus Books 2010).

¹⁷ Thaawarchand Gehlot, The Constitution (One Hundred and Twenty-fourth amendment) Bill, 2019 2019 [3 of 2019].

¹⁸ 'Parliament Passes Bill to Provide 10% Quota for Poor' *The Hindu* (New Delhi, 9 January 2019) <<https://www.thehindu.com/news/national/parliament-approves-10-reservation-for-poor-in-general-category/article25953023.ece>> accessed 27 April 2019.

1. The 124th Amendment inserts two new clauses to the constitution. One each in Article 15 and 16. It creates a new category eligible for reservation. It's called economically weaker sections (EWS).
2. Thus, created category is other than the classes mentioned in Article 15 and Article 16 such as SC, ST and socially and educationally backward class. And most importantly the existing eligible reservation categories are excluded from the benefit of this new category.¹⁹
3. 10 per cent is the maximum limit that is allowed for EWS reservation.
4. For Article 15 and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time based on family income and other indicators of economic disadvantage.
5. The statement of object and reason points towards the existence of a section of people who have largely remained excluded from attending the higher educational institutions and public employment due to their economic weakness.
6. Since the amendment provision is not aimed at any sections of the society who are already mentioned in Art 15 and 16 such as SC, ST and socially educationally backward class, we can infer easily that the 'excluded section' due to their economic background is upper castes. So the bill text states that there is backwardness exist among upper castes due to economic weakness.
7. The bill text, without doubt, uses the Article 46 of directive principles of state policy which says about the Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections, to legitimise the creation of a new category.²⁰

The criteria for EWS reservation's eligibility is complex. The states as well as the centre would be able to fix criteria according to the circumstances. These criteria are also supposed to be revised from time to time. The central government's criteria at present can be assessed from a notification

¹⁹ For a detailed look at the eligible categories of reservation in India refer, Vinay Sitapati, 'Reservations' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford handbook of the Indian Constitution* (Oxford University Press 2016).

²⁰ The Article 46 reads, "*The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*"

which was issued by the Ministry of Personnel, Public Grievances and Pensions mentions the criteria for EWS reservation.²¹ They are,

Whose family has a gross annual income below Rupees 8 lakh is to be identified as EWS for the benefit of reservation? Income shall also include income from all sources i.e. salary, agriculture, business, profession, etc. for the financial year before the year of application.

Also, persons whose family owns or possesses any of the following assets shall be excluded from being identified as EWS, irrespective of the family income: -

1. 5 acres of agricultural land and above;
2. Residential at of 1000 sq. ft. and above;
3. Residential plot of 100 sq. yards and above in notified municipalities;
4. The residential, plot of 200 sq. yards and above in areas other than the notified municipalities.

The Logic of EWS Reservation.

I would like to begin this section by introducing the logical background of economic reservation. The logical background of EWS reservation is rooted in the anti-reservation rhetoric. Put it simply, the economic reservation argues that instead of caste, the economic condition of an individual should be the basis of his/her eligibility to get a reservation. The argument logically develops into disregarding caste as a necessary indicator of social backwardness. Which means an individual can be socially backward irrespective of their caste background. In Indian context the arguments of economic reservation are anti-reservation arguments such as reservation has bypassed the poor, that it has reduced efficiency, that economic criteria are better than caste and that there should be a time limit for the application of reservation policies.²²

To understand the changing trajectory of positive discrimination in India regarding caste, one should ask, in the first place, the question why India is having positive discrimination between different castes? The Indian constituent assembly had clear historical reasons for incorporating

²¹ See the notification no. No.36039/1/2019-Estt (Res) issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training at January 31, 2019, <https://dopt.gov.in/sites/default/files/ewsf28fT.PDF>

²² Sukhadeo Thorat, Nitin Tagade and Ajaya K Naik, 'Prejudice against Reservation Policies' 9.

reservation provisions and other protective provisions in support of lower castes in the nascent state's constitution.²³ The affirmative action for the lower castes was incorporated as a policy measure to bring compensatory justice to those classes of people who have been subject to historical oppression due to their caste background. The exact beginning of the caste system is a continuing debate for academics especially anthropologists. Whatever the outcome of such debate, one can, without doubt, easily identify that the caste system is prevailing in India for centuries.²⁴ The caste system which is the institutional form of oppression has resulted in deep disparity among lower and higher sections of caste hierarchy in every form. This disparity is evident in the form of representation among different castes of the system's hierarchy. This lack of representation among the lower castes was the most significant motive of the constituent assembly to incorporate reservation provisions in the constitution.²⁵ Hence the constitutional logic for reservation is historical. It is social oppression and lack of representation as a result of it.

The EWS bill text is using Article 46 for its legitimacy. The article reads,

“Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”

Even a plain reading of the Article indicates that the provision is intended to ensure the educational and economic interest of the SC, ST and other weaker sections. It is not an Article which proposes economic backwardness as the centrality of reservation. Being socially backward is the criteria to be included under the ambit of this section. It talks about the already weaker sections and their need for advancement in the economic and educational spectrum. Using this section to justify a reservation policy based upon economic background would be an ahistorical reading of the constitution. On this account, the bill text of the EWS reservation does a flawed reading of the constitution. It indicates the fragile constitutional ground on which the amendment is justifying its constitutionality.

²³ Ashwini Deshpande and Rajesh Ramachandran, ‘Is Caste Still an Indicator of Backwardness?’ [2019] Economic and Political Weekly 6.

²⁴ BR Ambedkar, *Annihilation of Caste* (Annotated critical edition, Verso 2014).

²⁵ Deshpande and Ramachandran (n 23).

Along with the constitutionality, the very premise, that is this reservation is providing reservation to the economically weaker sections of the society is also questionable. The concept of economic reservation is, as we have seen above, is the consideration of the economic status of an individual over his caste or other social indicators for the eligibility of reservation. The new amendment makes it crystal clear that the existing reservation categories in Article 15 and Article 16 are excluded from the new reservation. Which means categories such as SC, ST and OBC are excluded. As a result, the present EWS reservation is a reservation for Upper Castes who does not belong to SC, ST and OBC.

So is there any real under-representation for upper castes in India's public education and public employment systems? Nobody will be able to answer this question without sufficient data. Since there has been no serious effort from the government to substantiate their position with the help of such data, let's try to figure out the veracity of claimed underrepresentation of upper castes.

As per the claims of the government, a combined data received from 78 ministries and departments, including their attached and subordinate offices, the representation of SCs, STs and OBCs in the posts and services of the Central government as on January 1, 2016, is 17.49%, 8.47% and 21.57% respectively.²⁶ Which indicates a huge disproportional representation of upper castes irrespective of their meagre numeric population compared with lower castes. The level of over-representation of upper castes is significantly higher in category jobs in category A and B.²⁷ The empirical data indicates that there is under-representation of upper castes in public employment or public education.

The EWS reservation makes a very dubious distinction. That distinction as many commentators have been mentioning is not about lower caste and higher caste. Of course, there is such a distinction. But the most dubious distinction is the distinction it makes on poor people among eligible and non-eligible categories for EWS.

A huge number of underprivileged section of people due to their economic weakness is living in India. India indeed is one of the most unequal societies in the world. According to the World

²⁶ 'OBC Representation in Central Jobs Less Than Actual Quota: Government' (*The Wire*) <<https://thewire.in/rights/obc-representation-in-central-jobs-less-than-actual-quota-government>> accessed 5 May 2019.

²⁷ Thorat, Tagade and Naik (n 22).

Inequality report 2018, the top 10% of Indians are controlling 55% of the total wealth, up from 31% in 1980.²⁸

Even if one agrees with the logic of EWS, that is economic weakness can be the criteria for reservation, the question why economic reservation is only for the poor in upper castes not for the poor in other castes remains unanswered. A comparison of poor people among different caste groups according to the Tendulkar Committee poverty line, clearly indicates that poor Dalits are worse off than poor Brahmins and poor Upper Caste in terms of income and wealth.²⁹ Then why the perks of economic reservation are only given to the poor in upper castes? This question again makes the EWS fragile in its claims.

The criteria discussed in the above notification further dilutes the economic reservation argument. India Human Development Survey (IHDS) data reveal that 98.26% of Brahmin, 97.93% of Upper Caste families report an annual income under the stipulated criteria of eight lakhs. Which means almost everyone is eligible for EWS reservation. Same time, the 99.75% of SC families who has the same income status of eight lakhs below is excluded from EWS.³⁰

The criteria determining 8 lakhs as the threshold is highly questionable. The government has not released any justification for using these thresholds. Even a preliminary look at the data shows the level of irrationality in the criteria. As per the seventh pay commission, the minimum monthly income is 18,000 rupees. Even that looks unattainable for the lion share of the workforce.³¹ The rationality of the criteria must be understood in this statistical context.

As we have discussed above, the real poor are already excluded from the purview of economically weaker sections. Now the criteria further make the EWS reservation flawed and make the usage of the term economically weaker section in a wrong connotation.

²⁸ Shreehari Paliath, 'Vast Income Inequalities Within Castes: Study. Top 10% Among Forward Castes Own 60% Wealth' (*IndiaSpend*, 14 January 2019) <<https://www.indiaspend.com/vast-income-inequalities-within-castes-study-top-10-among-forward-castes-own-60-wealth/>> accessed 5 May 2019.

²⁹ Deshpande and Ramachandran (n 23).

³⁰ *ibid.*

³¹ Tish Sanghera, 'Daily Wages In India Doubled In 18 Years, But Wage Inequalities Grow' (*IndiaSpend*, 27 August 2018) <<https://www.indiaspend.com/daily-wages-in-india-doubled-in-18-years-but-wage-inequalities-grow-20098/>> accessed 11 May 2019.

The Changing Trajectory of Caste Reservation.

All the high points of caste debate we have discussed above placed lower castes who have faced oppression having a long historical background as the centre point of the debate. Whether they deserved reservation or not and other merits of reservation policies etc. were all vociferously debated. But the centre point remained the same; the lower caste with a historical background of oppression. Here that centre point has been shifted to economic backwardness. That backwardness as we have seen multiple times above is limited to the upper castes alone. As we have seen above the constitutional and empirical justifications for the EWS reservation are based upon fragile grounds.

The reservation policy has helped the poor in lower castes to climb up the ladder of social hierarchy. It also helped in their increased representation.³² But at the same time, one should note that the coverage of government jobs is negligible comparing private sector. That negligible part also has been reducing over the years due to market-friendly policies. Data shows that the number of central government civilian regular employees decreased by 8,46,998 between 1991 and 2013, which represents a decline of 22%.³³ The possible positive impact of the reservation is reduced as a result. The impact of EWS should be explored in this context.

EWS reservation reads the constitutional text ahistorical and thus violates the constitutional scheme of reservation. On such constitutional analysis, the class created for reservation is on wrong justification since there is no underrepresentation among upper castes due to their economic weakness. The empirical basis of EWS is also highly questionable.

³² Thorat, Tagade and Naik (n 22).

³³ Deshpande and Ramachandran (n 23).