

## **Reservations and the Complexities of Judicial Remedy**

Diganta Ghosh

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Historically, the term 'reservations' has evoked widespread emotions among the country's populace – for the beneficiaries it has been a vehicle of economic prosperity and social mobility, while for some sizeable others, particularly from the upper castes, it is broadly regarded as a tool of deprivation and vote bank politics. On one hand, this system has given rise to a robust Dalit and Adivasi movement and voice to a section of the population that have faced extreme exploitation through generations; on the other hand, it is seen as unjust to merit and a burden on the exchequer. These complexities have led to conflicts on various fronts from the Parliament to social media. The courts of India have been a primary arena of conflict and also a testimony to the complexities involved in these issues. The scope of this paper is to discuss two cases from two spectrums of thought that underscore the complexities of India's reservation policy.

Reservations based on identity is unique to India: though many heterogeneous societies with sizeable disadvantaged minorities have propagated and practised affirmative action – the most notable being the United States – nowhere is it more structurally and institutionally weaved into the socio-economic system with full constitutional might in the form of 'quotas' as in India. The term 'affirmative action', it is well-known, was first used in one of the presidential executive orders of John. F. Kennedy and then again in another such order of Lyndon B. Johnson to execute non-discrimination in job hiring based on race, colour, country of origin etc.; in recent years, however, the term has evolved to refer to a form of "positive discrimination" that proactively scaffolds entry – and promotion – of disadvantaged minorities in education, jobs and the legislature. However, there are some differences between what constitutes affirmative action in the US and the reservation policy of India. Most importantly, the American Constitution guarantees equality – consequently, it

is easier to brand affirmative action as discriminatory; whereas, reservations for the Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC) are enshrined in the Indian Constitution. Also, in the US, affirmative action primarily targets racism, which has plagued the American society for the last three centuries or so; whereas the extreme backward castes of India have faced discrimination and deprivation for thousands of years. This has been happening for such a long time that discrimination has become deeply entrenched in social values and is accepted as normal. The issue of reservation has proved to be way more complex than the acceptance of affirmative action in the US.

In this paper we discuss two cases from two spectrums of thought that underscore the complexities of India's reservation policy. One is the *Jarnail Singh & Others vs. Lacchmi Narain Gupta & Others* case (2011) in the Supreme Court (SC) and the other is the *Jishri Laxmnarao Patil & Others vs. State of Maharashtra* (2018) in the Bombay High Court (HC). Among the numerous cases related to quotas have undergone judicial scrutiny, and many others are still pending before our learned courts, these two cases are remarkable for the differing views of the judiciary in dealing with the issue of reservation – one deals with exclusion while the other deals with inclusion.

While there is near unanimity at the legislature and judicial levels regarding the need for affirmative action for the uplift of the Dalits, Adivasis and OBC, perhaps the most concerted criticism is that the welfare measures do not reach the intended people, that they benefit a group of emancipated few. Being alive to such criticism, the government and the courts have tried in their own ways to overcome this, and economic criterion emerged as the most potent remedy.

As such, the principle of 'creamy layer' was introduced in 1993 by the Supreme Court (SC) in the *Indira Sawhney & Others v. Union of India* (1993) case where the court ruled in favour of reservation of 27% jobs for the OBC, but excluded the 'creamy layer', whom they defined as "socially advanced members" within the class. This principle, however, did not apply to the Dalits and the Adivasis. This subject was again revisited in the *Jarnail Singh & Others vs. Lacchmi Narain Gupta & Others* case (2018) where a five-judge Constitution bench of the SC examined, in the course of reviewing an earlier order on promotion in government

jobs for SC/STs, issues like how is backwardness determined; whether backwardness is obliterated once an individual reaches a certain service post; and whether the creamy layer concept should be applied to the SC/ST communities also; and while doing so laid the framework for the introduction of 'creamy layer' to reservation for SC/STs. Justice Rohinton Nariman, who penned the order, wrote: "...the whole object of reservation is to see that backward classes of citizens move forward so that they march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were." (ibid) He further wrote that the creamy layer exclusion as an ingrained principle of Equality in determining contours of reservation policy, and specifically overruled the observation by former Chief Justice of India K.G. Balakrishnan in another case where he held that the creamy layer principle is merely a principle of identification and not a principle of Equality. This judgement, well-meaning as it is, does not take into consideration that social uplift, and not liberty from economic backwardness is the primary objective of reservations. An article in *Scroll.in* puts it succinctly, quoting P. S. Krishna, secretary in the Union Ministry of Welfare (later renamed as Ministry of Social Justice and Empowerment) when reservation for the Other Backward Classes was implemented in 1990 and an expert in the field of social justice, says that backwardness in the case of Dalits and Adivasis cannot be judged using the creamy layer framework, but is based on the fact that they are subject to untouchability. (Daniyal, 2018)

Dissatisfaction of the general/open castes with reservations regarding entry into educational institutions and public service, and subsequent promotions, have been going on for long, with many flash points, such as the one during the implementation of the Mandal Commission. Many communities within the general castes have started using their numerical strength as a bargaining electoral asset. Now, this is a power that no political party worth its salt can ignore. Apart from seeking judicial remedy, the upper castes have also taken recourse to social movements to address their perceived sense of injustice with the philosophy – if you can't beat 'em, join 'em. Dominant communities in different parts of India have employed similar strategies by building mass movements by the sheer strength of their ability to influence electoral results in order to persuade, or coerce, the government to accept

their community into the OBC list – the Gujjars in Rajasthan, the Jats in Haryana and Punjab, the Patidars in Gujrat and the Marathas in Maharashtra. Several studies have shown that by various parameters these are the dominant communities in their respective regions and do not pass the test of backwardness (cf. Jaffrelot & Kalaiyarasan, 2019; Deshpande, 2019).

Of these, the movement of the Marathas had achieved considerable success when the Maharashtra government promulgated first the Educationally and Socially Backward Category (ESBC) Ordinance, 2014, followed by the Educationally and Socially Backward Category (ESBC) Act, 2014 providing 16% reservation for the Maratha community in education and public employment; but both were stayed by the Bombay High Court (HC) on the grounds of insufficient evidence of the Maratha community's backward status. The Maharashtra government then set up the Maharashtra State Backward Class Commission (MSBCC) that established the backwardness of the Maratha community as well as their inadequate representation in public service, following which the Maharashtra government enacted the Socially and Educationally Backward Classes Act (SEBC) in 2018, providing benefits similar to the previous ESBC Act. The validity of the SEBC Act was challenged by Jishri Laxmanrao Patil and others on the grounds that the Act was against the spirit of the order of the Bombay HC passed in the ESBC Act case; that the government based their Act on insufficient quantifiable data; and on the point of law whether a court decision can be invalidated by enacting a law. However, the Bombay HC upheld the SEBC Act as the grounds for rejection in the previous case had been met. The verdict has been challenged in the SC and is yet to be heard; the SC has not stayed the Act as of date.

Though the jury is still out on this case, it can be surmised that many other communities see this case as a touchstone for their future endeavours. Upholding the Act has the potential of opening floodgates to similar demands from across the country. The central government, in the meanwhile, has amended Articles 15 and 16 of the Constitution via Constitution (One Hundred and Third Amendment) Act, 2019 that enables the State to make reservations of up to 10% in higher education and public service on the basis of economic criteria alone, independent of ceilings on existing reservations (whether economic criterion alone can be the basis of reservations is fodder for another debate).

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## **Author Information**

**Dr. Diganta Ghosh** is an Assistant Professor in Moyna College. He has done his M.Phil from the English and Foreign Languages University, and Ph.D from Savitribai Phule Pune University. His areas of interest are language, philosophy and politics.