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The legal basis for affirmative action in India

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The legal basis for affirmative action in India

Kiruba Munusamy*

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Abstract: The affirmative action policy in India came into practice because of the generations of struggle undergone by the untouchable castes and other backward classes, who were historically excluded from education and administration. As society changed, it was inevitable that the vulnerable groups who had so far been forgotten in terms of social justice should be ‘included’. However, this paper finds that, instead of recognizing this need the judiciary continued to apply illogical limitations and age-old precedents that disrupted the implementation of affirmative action. Although the legal basis of affirmative action comes from the Constitution of India itself, which provides for reservation and enables States to make laws to that end, judicial interference has necessitated ongoing legislative changes to keep the needed affirmative action on track. Progress has been made, but it is often a case of ‘two steps forward, one step back’, and many issues, such as the ceiling on reservations and the categories to be included in it, remain to be resolved.

Key words: affirmative action, reservation, India, judicial interference, social injustice

JEL classification: I32, J15, J62

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1 Introduction

The Constitution of India, which was enacted in 1949¹ and adopted in 1950,² originally provided for ‘reservation’ for the weaker sections of society in public employment (Article 16) and elections (Articles 243-D, 243-T, 330, 331, 332, and 333), while permitting the State to make special provisions for the promotion of the educational and economic interests of Scheduled Castes (SC),³ Scheduled Tribes (ST),⁴ and other weaker sections of society (Article 46).

Reservation was intended to foster equality by ensuring that backward classes had opportunities otherwise unavailable to them. By ‘weaker sections’, the Constitution meant communities that were unrepresented in Indian administration for historical reasons such as caste. Administrative posts had hitherto been dominated by one or a few communities.⁵ However, Article 46, one of the directive principles that guide the government, specifically states that ‘the State shall promote with special care the educational and economic interests of the weaker sections of the people’, which does not mean the *economically* weaker sections.⁶ Irrespective of this, the Union Government under an Office Memorandum issued in 1991 reserved 10 per cent of the vacancies in the Government of India services for other economically weaker sections (EWS)⁷ of the people not covered by any of the reservation schemes. However, since the classification of EWS among the general category is not provided for in Article 16 (4) and the criteria of backwardness cannot be solely income or property based, this decision was declared unconstitutional by the Supreme Court.⁸

When the State of Tamil Nadu continued implementing the pre-Independence policy (introduced in 1921) of reservation in education and employment for the State, however, the Supreme Court, interpreting it as discrimination, which was prohibited under Article 15, scrapped the entire action plan.⁹ Then, in 1951, the First Amendment to the Indian Constitution was made to empower the State governments to make their own laws to implement reservation for the socially and educationally backward classes of citizens or the SC and the ST. Thereafter, the tradition of judicial decisions interpreting and interfering with State policy led to further amendments to the Constitution so as to enable the State governments to implement affirmative action with respect to the unique circumstances of the State. However, the Supreme Court in its judgment in *Indra Sawhney and Others vs. Union of India and Others* dated 16 November 1992 fixed the quantum of reservation at a maximum of 50 per cent and introduced the concept of the ‘creamy layer’,

¹ The Constitution of India was passed and adopted by the Constituent Assembly on 26 November 1949.

² The Constitution of India that was adopted by the Constituent Assembly came into force on 26 January 1950.

³ Article 366 (24) of the Constitution of India defines Scheduled Castes.

⁴ Article 366 (25) of the Constitution of India defines Scheduled Tribes.

⁵ [The Constituent Assembly Debates of Article 16 on 30 November 1948.](#)

⁶ The constitutional provisions relating to reservation show that EWS was never meant to be a category that the State was bound to promote with special care.

⁷ i.e. the upper castes, who have been preponderant in education and employment for centuries. It should be noted that the upper-caste groups have long argued that the social justice framework of caste-based reservation should be economy-based. The government has also invariably attempted to introduce reservation for the upper-caste groups for political benefits, but without success.

⁸ *Indra Sawhney and Others vs. Union of India and Others*, AIR 1993 SC 477.

⁹ See Appendix.

which prevented certain Other Backward Classes (OBCs) from availing of reservations. This became a barrier in accommodating various other disadvantaged groups that had not been a part of any category of reservation. Therefore, horizontal reservation was adopted to bring into the reservation scheme various marginalized sections such as women, people with disabilities, religious minorities, the most disadvantaged De-notified Tribes and manual scavenging castes, and transgender persons.

However, in order to ensure that the social justice aim of reservation to achieve equality in education and employment was met, the State governments subsequently expanded the 50 per cent limit of reservation by the further classification of Most Backward Classes. With the State extensively exercising its power to implement affirmative action and the judiciary curtailing it through judicial review, a tradition of conflict between the Government and the judiciary was created. This was exacerbated when the Union Government and the State Governments included socially dominant castes in the list of Backward Classes with no regard for the report and recommendations of the National and State Commissions for Backward Classes. In addition, the 2018 amendment to the Indian Constitution that centralized power in relation to the Socially and Educationally Backward Classes list in the Union Government provoked a debate on the right of the State to maintain their own lists and the legality of the Union Government's interference in the compilation of these.

In the light of the above, this paper traces the legal basis for affirmative action in India and the developments and changes in the implementation of that policy.

2 Affirmative action and the Indian Constitution

Article 15 of the Indian Constitution prohibits the State¹⁰ from discriminating against any citizen on grounds of religion, race, caste, sex, or place of birth and originally provided the State with the power to make special provisions for women and children. However, it did not directly refer to any form of reservation as Article 16 did in terms of employment. Article 16, which guarantees equality of opportunity in matters of public employment as a fundamental right, allowed the State to make provision for reservation of posts in favour of backward classes of citizens that the State considers are not adequately represented in public services. Nevertheless, both the Articles had to be amended so as to implement affirmative action policy in education and employment.

A demand for representation in educational institutions and public employment was not a post-Independence idea. The historically oppressed Untouchable Castes,¹¹ hereinafter referred to as SC, ST, and the other disadvantaged groups, who can be collectively addressed as non-Brahmins, claimed free and compulsory education, and reservation in government jobs during the late 1800s (Laskar 2010: 29–30), long before Indian Independence. The first reservation policy reserving 50 per cent of the posts in government services for non-Brahmins was introduced in the Princely State of Kohlapur (today's State of Maharashtra) on 26 July 1902 (Sonawane 2014: 2). In the Madras Presidency (modern Tamil Nadu), in 1881–82, there was one candidate for every 125 Brahmins as against one candidate for 5,888 Other Hindus, 11,984 Muslims, and 447 Indian Christians for bachelor's degrees (Sonawane 2014: 1,588). It was only in the 1900s that action was initiated in the limited context of the College of Engineering, Madras. Nevertheless, 79–93 per

¹⁰ The term 'State' can be construed as the State as in the Government of India and also the State governments.

¹¹ The oppressed Untouchable Castes were formerly addressed as 'depressed classes' and were officially designated as SC in the Government of India Act, 1935, and further classified as ST by the Constitution of India.

cent of all students during 1900–03 were Brahmins (Sonawane 2014: 1,588). This was disproportionate to their 3 per cent of the population in the state (Sonawane 2014: 1,588). It was not until 16 September 1921 that the first Communal Government Order (613) ensuring proportional representation was passed by the Justice Party government (Irschick 1969: appendix 2, 368–72).

2.1 First Amendment to the Indian Constitution

The equal representation model established in Communal Government Order 613 of the State of Madras during the pre-Independence period continued to be followed even after the establishment of the Constitution of India in 1950. The rules guaranteeing proportional representation in the selection of candidates in the Medical Colleges enshrined in Government Order 2208 dated 16 June 1950 were based on Order 613. The order of reservation for every 14 seats in the Medical and Engineering Colleges was as follows:

• Non-Brahmins (Hindus)	6
• Backward Hindus	2
• Brahmins	2
• Harijans	2
• Anglo-Indians and Indian Christians	1
• Muslims	1

Order 613 also provided for a 20 per cent reservation for women in each category and allowed a larger number of women candidates to be admitted if they were qualified and eligible for selection on merit.

However, only a few months after the adoption of the Indian Constitution, petitions were filed by Champakam Dorairajan, with respect to admission to Medical Colleges, and Srinivasan, with respect to admission to Engineering Colleges, stating that the implementation of reservation Order 613 violated fundamental rights under Articles 15 (1) and 29 (2), which prohibited discrimination by the State on grounds of religion or caste and denial of admission to State-maintained educational institutions, respectively. Both men were Brahmins, the community that was socially and educationally advanced and that dominated public services. Both petitioners were represented by Alladi Krishnaswami Ayyar,¹² another Brahmin and a member of the Drafting Committee for India's Constitution, who had also been Chief Justice.

Regardless of the fact that Dorairajan had not even applied to a Medical College, both petitioners were promised seats in the Medical and Engineering College, provided that they were found to be qualified and eligible. And the reservations provided in the Medical and Engineering College admissions were scrapped by the High Court of Madras¹³ as being in violation of Article 29 (2). On appeal, the Supreme Court of India unanimously¹⁴ upheld the High Court order. As with education, reservation in public employment implemented through a Communal Government

¹² The decision approving the caste-based custom of denying education to non-Brahmins was undoubtedly strengthened by the presence of Alladi Krishnaswami Ayyar, one of the framers of the Constitution.

¹³ Srimathi Champakam Dorairajan and Another vs. The State Of Madras, 1951 *All India Reporter* (AIR) Mad 120.

¹⁴ The State of Madras vs. Srimathi Champakam Dorairajan and Another, 1951 AIR 226.

Order issued by the Madras government was declared unconstitutional by the Supreme Court¹⁵ in a case filed by B. Venkataramana, another Brahmin petitioner.

In 1949, the Madras Public Services Commission invited applications for District Munsifs (judges) in the Madras Subordinate Civil Judicial Service through a notification dated 16 December, which was published in the *Fort St George Gazette* on 20 December. The notification stated that candidates for the vacant posts would be selected in accordance with the Communal Government Order, in the following proportions: 6 Muslims, 6 Christians, 10 Backward Hindus, 11 Brahmins, 19 Harijans (SC and ST), and 32 Non-Brahmin Hindus. A Brahmin by the name of Venkataramana, who had graduated with a First in Mathematics and a Second in Law and practised Law for over seven years, filed a petition in the Supreme Court complaining that his fundamental right to employment in the State services was violated. Interpreting the proportional representation scheme as basing ineligibility on the ground that he was a Brahmin, the Court declared that it violated Article 16, which guarantees equality of opportunity in the matter of public employment, and Article 13, which covers fundamental citizens' rights.¹⁶

Thus, the State's 30-year-old affirmative action policy was effectively erased by the judiciary, invalidating the entire reservation scheme in both education and public employment, and the courts seemed not to be concerned about the potential consequences of these decisions. However, the two judicial decisions by the Supreme Court of India led to the incorporation of affirmative action in education into the Indian Constitution through the historic First Amendment to the Constitution.¹⁷ In accordance with the Directive Principle of State Policy in Article 46 that requires a 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 ST—and to protect them from social injustice and all forms of exploitation, clause (4) was added to Article 15¹⁸ as follows:

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 educationally backward classes of citizens or for the Scheduled Classes and the Scheduled Tribes.

The above clause empowered State governments to enact reservation laws for themselves according to their circumstances. As a result, affirmative policy was implemented in two distinct ways: (1) by the Union Government in the educational institutions maintained and funded by the Government of India and in appointments to posts in the departments governed by the Government of India; (2) by the State governments in their respective States in educational institutions maintained and funded by the State Government and in employment to posts in the departments governed by the State.

2.2 State reservation policies

Following the insertion of Article 15 (4), State Governments started framing their own reservation policies by classifying socially and educationally backward categories according to the circumstances of their respective States. In 1958, the State of Mysore (today's Karnataka), for

¹⁵ B. Venkataramana vs. State of Tamil Nadu and Another, AIR 1951 SC 229.

¹⁶ B. Venkataramana vs. State of Tamil Nadu and Another, AIR 1951 SC 229.

¹⁷ Interestingly, many other judicial decisions on reservation and representation have been the reason for the continued implementation of reservation through Constitutional amendments to this day, as will be seen.

¹⁸ The Constitution (First Amendment) Act, enacted on 10 May 1951, came into effect on 18 June 1951.

example, categorized all non-Brahmin castes as Socially and Educationally Backward Classes (SEBC) and provided them with 75 per cent reservation along with 15 per cent reservation for SC and 3 per cent for ST in educational institutions. The following year, the State of Mysore passed two more orders. The first order classified all non-Brahmin communities except Baniyas and Kayasts as SEBC and allocated 45 per cent reservation for SEBC, 20 per cent reservation for SC and ST, and the remaining 35 per cent for merit-based candidates. The second order further classified SEBC into different groups according to their backwardness. Both the orders were challenged and held to be violative of Article 15 (4) by the High Court.¹⁹ The State then constituted the Mysore Backward Classes Committee under the Chairmanship of Dr R. Nagan Gowda to assist in formulating the criteria for the determination of SEBC and the special provisions to be adopted for their advancement. Based on the report of the Committee and the judgments of the High Court, the State passed another order that overruled all previous orders, wherein SEBC were further classified into backward and more backward classes; 28 per cent was reserved for the backward classes, 22 per cent for the more backward classes, 15 per cent for the SC and 3 per cent for ST, constituting a total of 68 per cent reservation. However, in the *M.R. Balaji* case²⁰ against the State of Mysore, the Mysore High Court ruled that there was no rationale for the classification of SEBC and, after receiving a series of petitions challenging the order, the Supreme Court held that sub-classification was out of the scope of Article 15 (4) and fixed the reservation cap at 50 per cent in education and public employment.²¹

2.3 Backward Classes Commissions

Although Articles 15 (4) and 16 (4) provided for reservation in favour of SEBC, the unrepresented non-Brahmin groups, now officially categorized as OBC, were left out of the reservation policy of the Union Government. As the demand for reservation for the Backward Classes increased nationwide, a Backward Classes Commission under Article 340 was created on 29 January 1953, under the Chairmanship of Kaka Kalelkar, ‘to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove difficulties and to improve their conditions’ (National Commission for Backward Classes 2012–2013: 1). The Commission recommended a 70 per cent reservation for backward class students in science, engineering, medicine, agriculture, veterinary, and other technical and technological institutions (Backward Classes Commission 1955: 202–03) and representation of backward classes in government and local body services to the order of 25 per cent in Class I services, 33⅓ per cent in Class II services, and 40 per cent Class III and IV services (Backward Classes Commission 1955: 205).²² But the recommendations of the Backward Classes Commission were rejected by the Indian Government on the grounds that they failed to formulate an objective test or criteria to measure the social and educational backwardness of the communities without which the rationale for the percentage of reservation for OBCs could not be justified, as caste was considered as the sole criterion for backwardness, and the report lacked unanimity with five members dissenting (Jayaswal 1992: 39–40). Consequently, the backward classes were left out of

¹⁹ *Ramakrishna Singh Ram Singh and Others vs. State of Mysore and Others*, AIR 1960 Mys 338.

²⁰ *M.R. Balaji vs. The State of Mysore*, 1963 AIR 649.

²¹ *M.R. Balaji and Others vs. State of Mysore*, 1963 AIR 649.

²² The civil service of the Indian Government is organized into four groups: Class I posts carry high administrative and executive responsibilities and include senior management positions in the ministries/departments and field organizations. The middle and junior levels of middle management constitute Class II. Class III posts perform supervisory as well as operative tasks and render clerical assistances in ministries and field organisations. Class IV posts are meant for carrying out routine duties. Today, these classes are classified as Groups A to D.

the reservation policy implemented by the Union Government—except for the State-level reservation policies as allowed by Article 15 (4)—until the creation of a Second Backward Classes Commission under the Chairmanship of B.P. Mandal on 1 January 1979 (Backward Classes Commission 1955: 202–03), whose main objectives were to:

1. determine the criteria for defining the socially and educationally backward classes
2. recommend for the advancement of the socially and educationally backward classes of citizens so identified
3. examine the provision for reservation for such backward classes of citizens which are not adequately represented in public services and posts of the Union or of any State. (Backward Classes Commission 1980)

While recommending reservation for OBCs, the Commission in its report dated 31 December 1980 observed that the SC and the ST were allocated a reservation of 23 per cent in proportion to their population,²³ but that if reservation was to be made for the OBCs, it should be 52 per cent, in accordance with their population. However, in view of the legal constraint imposed by the Supreme Court judgments wherein the total quantum of reservation under Articles 15 (4) and 16 (4) should be below 50 per cent, it was recommended that the remaining 27 per cent be reserved for the OBCs. It was specifically stated that the State reservation of 27 per cent for the backward classes should not be exceeded (Department of Public Enterprises 2016: 58). However, even though the report was submitted in 1980, due to the unwillingness of the government to lose majority support in Parliament,²⁴ the 27 per cent reservation for the socially and educationally backward classes in civil posts and services under the Government of India was officially implemented only in 1990.²⁵ A year later, a memorandum partly modifying the 1990 OBC reservation order was issued.²⁶ This stated that the poorer sections of the socially and educationally backward classes should be given preference in appointments to Government of India services in accordance with the 27 per cent reservation for SEBC²⁷ and the unfilled vacancies be filled by the other SEBC. The basis for identifying the ‘poorer sections’ among the SEBC was, however, not formulated.

²³ According to the [Government of India Resolution of 1943 on Representation of the SC in the Services](#) dated 11 August 1943, a 12.75 per cent reservation in appointments was to be given to the SC in proportion to their population. However, as it would be difficult to find qualified candidates among this community, it was decided to set the reservation initially at 8.3 per cent and to consider raising the percentage as soon as a sufficient number of qualified candidates became available. Later, through a resolution dated 13 September 1950, a separate 5 per cent reservation was provided for the ST. These percentages were increased on 25 March 1970 in accordance with the 1961 Census to 15 per cent for SC and 7.5 for for ST (Department of Public Enterprises 2016: 6–7). Despite constant demands by the SC and ST communities to publish the caste Census and increase the percentage of reservation in proportion to their current population, there has been no action to this end on the part of the government.

²⁴ It is to be noted that the National Front government formed under the Prime Ministership of V.P. Singh that implemented OBC reservation and enacted a special law to protect the SC and ST from violence was dissolved by a vote of no-confidence after just a year of rule.

²⁵ Government Order 36012/31/90-Estt. (SCT) dated 13 August 1990, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training), Government of India.

²⁶ [Government Order No. 36012/31/90-Estt. \(SCT\) dated 25 September 1991](#), Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training), Government of India.

²⁷ Though caste was not the sole criterion in determining social and educational backwardness, this is the first time that economic backwardness was considered in the implementation of reservation—a social justice initiative that was primarily against caste-based social inequality.

2.4 Court decisions and dilution of affirmative action policy

The execution of both orders was stayed by the Supreme Court of India in the face of petitions filed against them. Eventually, a nine-judge bench of the Supreme Court²⁸ ruled that:

1. despite no constitutional restriction on the percentage of reservation, the upper limit should be fixed at 50 per cent and therefore 27 per cent reservation for the SEBC was valid²⁹
2. identification of the backward classes could be done with reference to castes along with other occupational groups, communities, and classes³⁰
3. SEBC could be sub-classified as backward classes and more backward classes³¹
4. reservations could not be made on the basis of economic criteria alone³²
5. an income limit should be imposed as an eligibility criterion for availing reservation and those above the income ceiling amongst SEBC (the 'creamy layer') should be excluded from reservation³³
6. the rule of carrying forward unfilled vacancies to the next year could be made only up to three subsequent years and these could not exceed the total 50 per cent reservation limit for each year³⁴
7. reservation was applicable only to direct recruitment and not permissible in promotions.³⁵

Instead of acting as a compelling force on the Government in committing to social justice and the equality principles of the Constitution, the judiciary itself had therefore erected a number of institutional barriers to the historically oppressed classes and attenuated the efficacy of reservation policy.

2.5 Constitutional amendments

The above decisions were subsequently nullified through various constitutional amendments designed to support the effective implementation of affirmative action.

²⁸ *Indra Sawhney Etc. vs. Union of India and Others, Etc.* AIR 1993 SC 477.

²⁹ *M.R. Balaji vs. The State of Mysore*, 1963 AIR 649, upheld by a larger bench in *Indra Sawhney and Others vs. Union of India and Others*, AIR 1993 SC 477.

³⁰ *Indra Sawhney and Others vs. Union of India and Others*, AIR 1993 SC 477.

³¹ *Virpal Singh Chauhan* (1995) 6 SCC 684 and *Ajit Singh*, I AIR 1996 SC 1189.

³² *R. Chitrlekha and Another vs. State of Mysore and Others*, 1964 AIR 1823; *Minor P. Rajendran vs. State of Madras and Others*, 1968 AIR 1012. A similar view was taken by other Constitution benches in *Triloki Nath and Another vs. State of Jammu & Kashmir*, 1969 AIR 1; *Minor A. Peeriakaruppan and Sobha vs. State of Tamil Nadu And Others*, AIR 1971 SC 2303; *State of Andhra Pradesh and Others vs. U.S.V. Balram Etc*, 1972 AIR 1375; *Janki Prasad Parimoo and Others vs. State of Jammu & Kashmir and Others*, 1973 AIR 930; *State of Uttar Pradesh vs. Pradip Tandon and Others*, 1975 AIR 563; *State of Uttar Pradesh vs. Pradip Tandon and Others*, 1975 AIR 563; *Kumari K.S. Jayasree and Another vs. The State of Kerala and Another*, 1976 AIR 2381; *K.C. Vasanth Kumar and Another vs. State of Karnataka*, 1985 AIR 1495.

³³ *Indra Sawhney and Others vs. Union of India and Others*, AIR 1993 SC 477.

³⁴ *T. Devadasan vs. Union of India and Another*, 1964 AIR 179.

³⁵ *Indra Sawhney and Others vs. Union of India and Others*, AIR 1993 SC 477.

In 1995, Article 16 was further amended by the addition of clause 4A³⁶ to facilitate reservation in promotion for the SC and ST, who had not been adequately represented in the public services. In 2000, Article 16 was amended once more by the addition of clause 4B,³⁷ which considered the unfilled vacancies reserved for a particular year under Article 16 (4) and (4A) as a class of vacancies separate from the fresh appointments of another year, so that the total reservation did not violate the 50 per cent limit fixed by the Supreme Court. A proviso enabling the State to make special provision for relaxation in qualifying marks in any examination or lowering the standards of evaluation in the promotion of SC/ST candidates was also added to Article 335. Article 16 (4A) was amended³⁸ again in 2001 to include consequential seniority on the promotion of SC and ST on the basis of the rule of reservation. Reservation in education had previously been provided only in institutions funded or maintained by the State. As an expansion of affirmative action and in the exercise of the directive principle of State policy under Article 46, private educational institutions that may or may not be funded by the State were brought within the purview of reservation by the insertion of Article 15 (5),³⁹ promoting the educational and economic interests of the weaker sections. However, minority educational institutions were excluded from it.

It will be seen that almost all the amendments carried out to the Constitution of India and the new provisions included in the Constitution with regard to reservation from 1995 onwards were to nullify the impact of previous judicial decisions. Yet the judiciary continued to impose a barrier to their implementation. Interpreting the words ‘not adequately represented in the services’ in Article 16 (4A), the Supreme Court observed that ‘the State is not bound to make a reservation for SC/ST in the matter of promotions’⁴⁰ and if the reservation in promotion for the SC and ST was to be implemented, the State had to collect ‘quantifiable data to show backwardness and inadequacy in representation’.⁴¹ While the concept of the creamy layer and the 50 per cent ceiling on reservations were not constitutionally mandated and followed only with respect to the judicial directives, the Court reiterated them as constitutional requirements and extended the creamy layer, hitherto applicable only to SEBC, to include SC and ST.⁴² Although the collection of quantifiable data to show the backwardness of the SC and ST was declared inadequate, the exclusion of the creamy layer among the SC and ST was not interfered with.⁴³

In a caste-based society like India, economic advancement, at least in the case of SC and ST, does not necessarily mean social advancement. Overlooking this fact has been widespread in the judicial

³⁶ Article 16 (4A) inserted through Constitution (Seventy-seventh Amendment) Act, 1995, s. 2 (w.e.f. 17-6-1995) reads: ‘Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.’

³⁷ Article 16 (4B) added through the Constitution (Eighty-first Amendment) Act, 2000, s. 2 (w.e.f. 9-6-2000) reads: ‘Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.’

³⁸ Inserted by the Constitution (Eighty-fifth Amendment) Act, 2001, s. 2 for certain words (retrospectively w.e.f. 17-6-1995).

³⁹ Inserted by the Constitution (Ninety-third Amendment) Act, 2005, s. 2 (w.e.f. 20-1-2006).

⁴⁰ *M. Nagaraj & Others vs. Union of India & Others* (2006) 8 SCC (Supreme Court case law journal) 212.

⁴¹ *M. Nagaraj & Others vs. Union of India & Others* (2006) 8 SCC 212.

⁴² *M. Nagaraj & Others vs. Union of India & Others* (2006) 8 SCC 212.

⁴³ *Jarnail Singh vs. Lachhmi Narain Gupta*, Supreme Court of India decided on 26 September 2018.

decisions relating to reservation. For example, while deciding the validity of the Uttarakhand State Government Order that denied reservation in promotion for SC and ST, in spite of a Committee report evidencing inadequate representation of SC and ST in the public services, the Supreme Court declared that reservation is not a fundamental right, nor is the State bound to provide it.⁴⁴ Irrespective of the social and circumstantial changes, the judiciary only reiterated its original decision to rescind reservation.

In 2006, the Government of India created the Commission for Economically Backward Classes under the Chairmanship of S.R. Sinho to consider reservation for economically backward classes—as opposed to backward classes—in government jobs and education. In its 2010 report, the Commission submitted that:

this Commission gathers the Constitutional and legal understanding that ‘Backward Classes’ cannot be identified for providing reservation in employment and admission in educational institutions on the basis of economic criteria and hence ‘Economically Backward Classes’ can be identified by the State for extending welfare measures [...] Until a different direction is given by the Supreme Court or a Constitutional Amendment is made, the 50 per cent upper limit for reservation makes a binding on the State for any further increase in the quantum of reservation to any class. (Commission for Economically Backward Classes 2010: vol. 1, p. 20).

Finally, in 2019, reservation for EWS was provided through the One Hundred and Third Amendment⁴⁵ to the Constitution of India. By this amendment, EWS, as may be ‘notified’ by the State from time to time on the basis of family income and other indicators of economic disadvantage, are reserved 10 per cent of the total seats in:

1. admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions⁴⁶
2. appointments or posts in the public services.⁴⁷

However, the State Government of Tamil Nadu, ruled by the regional political party Dravida Munnetra Kazhagam (Dravidian Progress Federation), challenged the EWS reservation in the High Court of Madras and similar petitions were filed in the Supreme Court of India by various parties. The Supreme Court of India rejected these petitions, stating that the matter would be examined in the due course.

3 Types of reservation

3.1 Reservation in elections

The implementation of reservation in elections started with the Morley-Minto Reforms of 1909. Among others, Muslims were ensured the right to elect representatives to the Legislative Councils

⁴⁴ Mukesh Kumar vs. The State of Uttarakhand, Supreme Court of India, judgment dated 7 February 2020.

⁴⁵ The Constitution (One Hundred and Third Amendment) Act, 2019, s. 2 (w.e.f. 14-1-2019).

⁴⁶ Article 15(6)(b) of the Constitution of India.

⁴⁷ Article 16(6) of the Constitution of India.

from their own communities in the Indian Council Act, 1909 (Jensenius 2015: 91). A decade later, the depressed classes, that is the SC, were recognized as a separate community and the nomination of representatives from the depressed classes was established in the Government of India Act 1919 (Jensenius 2015: 93–94). This reservation of seats in elections continued with the adoption of the Constitution of India in a broader manner at levels of administration.

The Constitution of India provides for the reservation of seats in the local body Panchayat (council)⁴⁸ and the Municipality elections.⁴⁹ Of the total seats of the Panchayat and Municipal constituencies:

1. one-third of the seats are reserved for the SC and ST in proportion to their population of the constituencies on a rotational basis to different constituencies⁵⁰
2. one-third of the seats are reserved for women belonging to the SC and ST⁵¹
3. one-third of the seats are reserved for women including the women belonging to the SC and ST and such seats are allotted on a rotational basis to different constituencies.⁵²

Apart from the reservation of seats in the constituencies, the States are empowered to make laws reserving seats for the SC and ST in the offices of the Chairpersons of Panchayats in proportion to their population in the State and one-third of the total number of offices of Chairpersons in Panchayats at each level for women.⁵³ Likewise, the State shall by law reserve seats for the SC, ST, and women in the offices of the Chairpersons in the Municipalities.⁵⁴ The Constitution also allows the States to make laws providing reservation of seats for the backward classes of citizens in any Panchayat (Council) and Municipality or offices of Chairpersons in the Panchayats at any level and Municipalities.⁵⁵

The Indian Parliament has two houses: the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). Of the total 250 seats on the Council of States, the upper house of the Parliament, 12 are directly nominated by the President of India; the rest are indirectly elected by the Members of the Legislative Assemblies (MLA). Members of the House of the People are directly elected by the people, for which reservation of seats is provided for under the Constitution for the SC and ST (except for the ST in the autonomous districts of Assam).⁵⁶ The number of seats thus reserved for the above categories is in accordance with the population of the States or Union Territories.⁵⁷ If in the opinion of the President of India the Anglo-Indian community is not adequately represented, a maximum of two seats is reserved for the community in the House of the People.⁵⁸

⁴⁸ Article 243D of the Constitution of India.

⁴⁹ Article 243T of the Constitution of India.

⁵⁰ Articles 243D (1) and 243T (1) of the Constitution of India.

⁵¹ Articles 243D (2) and 243T (2) of the Constitution of India.

⁵² Articles 243D (3) and 243T (3) of the Constitution of India.

⁵³ Article 243 (4) of the Constitution of India.

⁵⁴ Article 243 (5) of the Constitution of India.

⁵⁵ Articles 243D (6) and 243T (6) of the Constitution of India.

⁵⁶ Article 330 (1) of the Constitution of India.

⁵⁷ Article 330 (2) and (3) of the Constitution of India.

⁵⁸ Article 331 of the Constitution of India.

As with the House of the People, seats are reserved for the SC and the ST in the Legislative Assemblies of the States in proportion to their population.⁵⁹ If in the opinion of the Governor of a State the Anglo-Indian community needs representation and is not adequately represented in the Legislative Assembly of the State, one member of the community shall be nominated to the Legislative Assembly of the State.⁶⁰

3.2 Reservation for disadvantaged groups

In order to keep reservations under the 50 per cent ceiling laid down by the Supreme Court of India, reservations for disadvantaged groups who can be considered as backward classes of citizens are provided horizontally by enacting separate laws, rules, or government orders across the OBC, SC, ST, and General (other) categories. Under the powers provided in Articles 15 (3) and (4) and 16 (1), horizontal reservations are made for the advancement of women (particularly destitute widows), persons with disabilities (benchmark disability and high support needs), and ex-servicemen. Although the Constitution Amendment Bill for providing one-third reservation for women was not passed by Parliament, State governments have been implementing it through State laws. With regard to people with disabilities, 3 per cent reservation is provided in employment, of which 1 per cent is specifically for those suffering from blindness or poor vision, hearing impairment, a locomotor disability, or cerebral palsy.⁶¹ Following the United Nations Convention on the Rights of Persons with Disabilities, the Government of India as a signatory to the Convention implemented it by the passing of the Rights of Persons with Disabilities Act, 2016, wherein 5 per cent seats in higher educational institutions and 4 per cent of total vacancies in employment are reserved for persons with benchmark disabilities, of which 1 per cent is for people with blindness or poor vision, the deaf and hard of hearing, those with a locomotor disability or autism, and those with multiple disabilities.⁶² In addition to this, a 5 per cent reservation in the allotment of agricultural land, housing, and development schemes is provided for women with benchmark disabilities. The reservation for ex-servicemen is provided for in the public services of the Government of India under Ex-servicemen (Re-employment in Central Civil Services and Posts) Rules, 1979.⁶³

3.3 Reservation for transgender persons

The Supreme Court, while recognizing the rights of transgender persons in 2014,⁶⁴ directed the Union and the State Governments to treat all transgender persons, including those belonging to the SC and ST, as SEBC and provide reservations in education and public employment accordingly—a judgment that has since been widely challenged.⁶⁵ Although the Government of India sought clarification from the judiciary, the Transgender Persons (Protection of Rights) Act, 2019, enacted in compliance with the Supreme Court’s direction, was silent about transgender

⁵⁹ Article 332 (1), (2), (3) and (4) of the Constitution of India.

⁶⁰ Article 333 of the Constitution of India.

⁶¹ Government Order 36035/16/91-Estt.(SCT), Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, Government of India dated 18 February 1997.

⁶² Sections 32 and 34 of the Rights of Persons with Disabilities Act, 2016.

⁶³ https://dopt.gov.in/sites/default/files/FAQ_ExServiceman.pdf

⁶⁴ National Legal Services Authority vs. Union of India and others, Supreme Court judgment dated 15 April 2014.

⁶⁵ Transgender individuals and non-governmental organizations have been mobilizing political support and urging members of Parliament to categorize them under the caste they belong to and to provide horizontal reservations in each category.

reservation. However, under the powers of the State government to make special provisions for weaker sections, the Government of Karnataka has provided a horizontal reservation of 1 per cent for transgender persons in appointments to public services.⁶⁶

4 Reservation policy of the States

As the list of SC and ST is ‘notified’ by the President of India, the States cannot maintain independent lists but must follow the Union List. Furthermore, because of the constitutional mandate, SC and ST reservation across the country is proportional to the population as reported by the Population Census of India. With respect to EWS, 10 per cent reservation as allowed by the Constitution is followed by the Union Government, whereas the State governments are at liberty to follow their own policy decisions. Thus, the State Governments have different policies with regard to SEBC, according to their reservation policy and unique social, cultural, educational and economic circumstances, and extend affirmative action for the advancement of disadvantaged groups through horizontal reservations, as detailed in the examples below.

As will be seen, many States have deliberately breached the 50 per cent reservation cap fixed by the Supreme Court to accommodate various communities. Some States have also approached the Supreme Court requesting it to reconsider the restriction imposed on the quantum of reservation.

Andhra Pradesh

The backward classes in the State of Andhra Pradesh (National Commission for Backward Classes 2015) are categorized as Group A (consisting of Aboriginal Tribes, De-Notified Tribes, Nomadic and Semi-Nomadic Communities) with a 7 per cent reservation, Group B (vocational groups) with 10 per cent, Group C (SC converted to Christianity) with 1 per cent, Group D (other groups)⁶⁷ with 7 per cent, and Group E (Socially and Educationally Backward Muslims) with 4 per cent.

Arunachal Pradesh

The State of Arunachal Pradesh is totally populated with indigenous people and SC do not exist.⁶⁸ Therefore, the State provides its entire 80 per cent reservation for the ST.⁶⁹

Assam

The State of Assam provides reservation⁷⁰ for ST by classifying them into Scheduled Tribes–Plain, with a 10 per cent reservation, and Scheduled Tribes–Hills with 5 per cent. The SC are provided with a 7 per cent reservation, and the backward classes, classified as Other Backward Classes and More Other Backward Classes, with 27 per cent.⁷¹ The State provides a separate reservation of 30

⁶⁶ Rule 9 (1D) of The Karnataka Civil Services (General Recruitment) (Amendment) Rules, 2021.

⁶⁷ *Sic.*

⁶⁸ The Constitution (Eighty-third Amendment) Act, 2000, which came into effect on 8 September 2000.

⁶⁹ General Information, Question 8: Details of Percentage of Reservation, Official Website of the Arunachal Pradesh Public Service Commission.

⁷⁰ Commissionerate of Panchayat and Rural Development, Government of Assam, dated 27 August 2020.

⁷¹ Office Memorandum, Department of Welfare of Plains Tribes and Backward Classes, Government of Assam, dated 4 November 2013.

per cent for women,⁷² and 4 per cent for the physically disabled, of which 1 per cent is reserved for the visually challenged, 1 per cent for the hearing impaired, 1 per cent for the orthopedically disabled, and another 1 per cent for persons with autism, learning disabilities, mental illness, etc.

Bihar

The reservation policy of the State of Bihar⁷³ provides 16 per cent reservation for SC, 1 per cent for ST, 12 per cent for Backward Classes, 18 per cent for Extremely Backward Classes, and 3 per cent for Women of Backward Classes. A horizontal reservation of 50 per cent is provided for permanent residents of Bihar and a 4 per cent reservation for the disabled.

Chhattisgarh

The State of Chhattisgarh has the highest percentage of reservation in India. The State provides 13 per cent reservation for SC, 32 per cent for ST, and 27 per cent for Backward Classes.⁷⁴ Separate reservations of 30 per cent for women, 3 per cent for soldiers, and 3 per cent for dependants and descendants of freedom fighters are provided horizontally.⁷⁵

Haryana

The State of Haryana provides 20 per cent reservation for SC.⁷⁶ The Backward Classes in Haryana⁷⁷ are categorized in three groups with a total of 37 per cent reservation, while a horizontal reservation⁷⁸ of 25 per cent is provided for women, 3 per cent for ex-servicemen, 3 per cent for sportspeople, and 3 per cent for the physically disabled.

Jharkhand

The reservation policy of the State of Jharkhand⁷⁹ provides 26 per cent for ST, 10 per cent for SC, and 14 per cent for Backward Classes, which are classified as Extremely Backward Classes (8 per cent) and Other Backward Classes (6 per cent) (National Commission for Backward Classes 2015). Like other States, Jharkhand has asked the Supreme Court of India to remove the 50 per cent reservation ceiling.⁸⁰

⁷² The Assam Women (Reservation of Vacancies in Services and Posts) Act, 2005.

⁷³ Reservation Policy as prescribed by the Government of Bihar, Chandragupt Institute of Management Patna.

⁷⁴ 'With 82 per cent, Chhattisgarh now has highest reservation quota in India', *The New Indian Express*, 5 September 2019.

⁷⁵ *Ashish Sharma and Others vs. State of Chhattisgarh and Others* on 18 August 2003, AIR 2004 Chh 27.

⁷⁶ Note on Reservation Policy, Government of Haryana, 15 July 2014.

⁷⁷ Note on Reservation Policy, Government of Haryana, 15 July 2014.

⁷⁸ Distribution and Reservation of Seats in Various Courses, State University of Performing and Visual Arts, Rohtak.

⁷⁹ 'Jharkhand would recommend SC to remove 50 per cent cap on reservation': *Hindustan Times*, 19 March 2021.

⁸⁰ 'Jharkhand would recommend SC to remove 50 per cent cap on reservation': *Hindustan Times*, 19 March 2021.

Karnataka

The reservations for Backward Classes⁸¹ in the State of Karnataka are in accordance with their backwardness and minority status, categorized as I, IIA, IIB, IIIA, and IIIB. Category I (Other Backward Classes and Nomad Communities) is provided 4 per cent reservation, Category IIA (More Backward Classes) 15 per cent, Category IIB (Muslims) 4 per cent, Category IIIA (agricultural castes) 4 per cent, and Category IIIB (Backward Classes) 5 per cent. As there was a constant demand to increase the reservation for the Other Backward Classes and as the Justice Nagmohan Das Committee recommended a 2 per cent increase in SC and ST reservation, the State of Karnataka decided to extend its reservation above the 50 per cent ceiling fixed by the Supreme Court and has asked for a re-examination of the judgment.⁸²

Kerala

The SEBC reservation in education in the State of Kerala varies from one course to another. The total percentage of SEBC reservation is 30 per cent in professional degree courses, 20 per cent in arts and science courses, 30 per cent in higher secondary courses, and 9 per cent in professional medical postgraduate courses.⁸³ A total of 40 per cent reservation is provided for the Backward Classes in the State Government Services of Kerala.⁸⁴ The State also provides 50 per cent reservation for women in local body elections.⁸⁵

Maharashtra

The Maharashtra State has a total of 68 per cent reservation. Of this, 13 per cent is reserved for SC, 7 per cent for ST, 3 per cent for De-Notified Tribes, 8 per cent for Nomadic Tribes, 2 per cent for the Special Backward Category, and 19 per cent for the Other Backward Classes.⁸⁶ The remaining 16 per cent is reserved for the Educationally and Socially Backward category.⁸⁷

Meghalaya

The State of Meghalaya,⁸⁸ another State mainly comprising an indigenous population, provides 80 per cent reservation for the Major Tribes: 40 per cent for the Khasi and Jaintia Tribes and 40 per cent for the Garo Tribe. 5 per cent of seats are reserved for Other Scheduled Tribes and SC.

⁸¹ [Government Order SWD 225 BCA 2000](#), dated 30 March 2002 (Deputy Secretary to the Government, Social Welfare Department, Government of Karnataka).

⁸² 'Karnataka decides to extend reservation beyond 50 per cent', *The Times of India*, 23 March 2021.

⁸³ Available at the website of [Backward Classes Development Department](#), Government of Kerala.

⁸⁴ Available at the website of [Backward Classes Development Department](#), Government of Kerala.

⁸⁵ Available at the website of [State Election Commission Kerala](#).

⁸⁶ [Maharashtra Public Services \(Reservation for SC, Scheduled Tribes, De-Notified Tribes \(Vimukta Jatis\), Nomadic Tribes, Special Backward Category and Other Backward Classes\) Act, 2001](#).

⁸⁷ [Maharashtra State Reservation \(of seats for admission in educational institutions in the State and for appointments or posts in the public services under the State\) for Educationally and Socially Backward Category \(ESBC\) Ordinance, 2014](#), Department of Law and Judiciary, 9 July 2014.

⁸⁸ [Gazette Notification EDN.69/2010/68](#) issued by the Government of Meghalaya on 6 June 2013.

Mizoram

Mizoram is another State with a predominantly indigenous population whose SC population is only 0.11 per cent as per the 2011 Census of India.⁸⁹ Therefore, the State of Mizoram⁹⁰ provides no reservation for SC, 45 per cent reservation for ST, and 5 per cent for Other Backward Classes.

Nagaland

Like the State of Meghalaya, Nagaland reserves 80 per cent of seats for the majority indigenous population.⁹¹ Reservations are provided for various categories in the following ratios:

1. Indigenous ST of Nagaland	52 per cent
2. Backward Tribes of Nagaland	15 per cent
3. Women of Indigenous ST of Nagaland	10 per cent
4. Indigenous ST of Nagaland with disabilities	3 per cent
5. Children of non-local Indigenous inhabitants of Nagaland, Domiciled Inhabitants of the State, State/Union Government, Employees, Military/Paramilitary Forces	10 per cent
6. Candidates from Other States of India	10 per cent

Puducherry (Pondicherry)

The reservation policy of the Union Territory of Puducherry⁹² provides for the filling of 50 per cent of seats by open competition and 50 per cent by the reserved categories. Of the 50 per cent reserved seats, 2 per cent are reserved for Backward Classes Muslims, 18 per cent for the Most Backward Classes, 2 per cent for Extreme Backward Classes, 0.5 per cent for Backward Tribes, 0.5 per cent for ST, 16 per cent for SC, and 11 per cent for Other Backward Classes. A horizontal reservation of 4 per cent is reserved for the children or grandchildren of freedom fighters, 5 per cent for people with disabilities, 3 per cent for ex-servicemen, and 1 per cent for sportspeople. Overall, 75 per cent of seats are reserved for candidates from the Union Territory of Puducherry and 25 per cent seats for candidates from other States/Union Territories.

Punjab

The State of Punjab,⁹³ which has the largest SC population in India, provides the highest percentage of reservation for SC in the country. Although it is inclusive of ST, the State does not officially record ST communities.⁹⁴ On that account, SC are provided with 25 per cent and Backward Classes with 12 per cent reservation.⁹⁵ Ex-servicemen are provided with 13 per cent, of

⁸⁹ State-wise SC Population, 2011, Department of Social Justice and Empowerment.

⁹⁰ Reservation Register of 2019, Mizoram University.

⁹¹ Reservation Policy, Admission Policy and Document Retention Policy, Office of the Principal Para Medical Training Institute Kohima, Government of Nagaland.

⁹² Reservation Policy of the Government of Puducherry.

⁹³ Reservation Common Weightage Policy-2021, dated 17 August 2021.

⁹⁴ The Union Ministry of Tribal Affairs in its Annual Report for the year 2003–04 stated that Punjab has no tribal population. However, the Punjabi University in its report had noted that a study conducted by a six-member group of the Department of Sociology and Social Anthropology confirmed the existence of De-Notified Tribe communities, some of which were included in the SC category.

⁹⁵ Section 4 of The Punjab SC and Backward Classes (Reservation in Services) Act, 2006.

which 4 per cent is for SC, 2 per cent for Backward Classes, and 7 per cent for others.⁹⁶ The disabled are provided with a 3 per cent reservation, of which 1 per cent is for the visually challenged, 1 per cent for the hearing impaired, and another 1 per cent for the physically disabled.⁹⁷ Dependants and descendants of freedom fighters are provided with 1 per cent and sportspeople are 2 per cent reservation, of which 1 per cent is for sportspeople belonging to the SC. A reservation of 33 per cent is provided for women in every category.⁹⁸

Rajasthan

The reservation policy of the State of Rajasthan⁹⁹ provides 16 per cent reservation for SC, 12 per cent for ST, 45 per cent for the ST of Scheduled Areas, and 21 per cent for Other Backward Classes. A horizontal reservation of 30 per cent is provided for women, 3 per cent for people with disabilities, and 27.5 per cent for ex-servicemen.

Tamil Nadu

The tradition of affirmative action in the State of Tamil Nadu can be traced back to well before the Indian Constitution. The State that was a forerunner in proportional representation and the representation of religious minorities and women in education and employment kept accommodating backward classes of citizens into its reservation scheme. As a result, the total percentage of reservations exceeded the 50 per cent ceiling, leading to a total of 69 per cent backward classes in education and public employment. However, in order to protect the reservation scheme of the State, the Tamil Nadu Government passed the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institution and of Appointments or Posts in the Services under the State) Act, 1993. To protect this Act from judicial review, it was discussed with the Government of India and was approved by the President. Thus, it was brought under the Constitution (Seventy-sixth Amendment) Act, 1994. This exclusivity in reservation extended to horizontal reservation as well.

Of the total reservation¹⁰⁰ of 30 per cent for Backward Classes, 3.5 per cent is reserved for Backward Class Muslims.¹⁰¹ Of the 20 per cent reservation provided for the sub-category of Most Backward Classes and De-Notified Communities, a 7 per cent reservation is allotted to the De-Notified Communities. A 3 per cent reservation from the overall 18 per cent SC reservation is provided for the Arunthathiyar community, which is forced into the occupation of manual

⁹⁶ Reservations for Ex-Servicemen, Department of Defence Services Welfare, Punjab.

⁹⁷ Official Notification dated 2 July 2013 (Department of Technical Education and Industrial Training, Government of Punjab).

⁹⁸ Section 4 of The Punjab Civil Services (Reservation of Posts for Women) Rules, 2020.

⁹⁹ General Provisions regarding reservation in Government Service, Government of Rajasthan, 24 June 2008.

¹⁰⁰ The Tamil Nadu Backward Classes, SC and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services Under the State) Act, 1993.

¹⁰¹ The Tamil Nadu Backward Class Christians and Backward Class Muslims (Reservation of Seats in Educational Institutions Including Private Educational Institutions and of Appointments or Posts in the Services Under the State) Act, 2007.

scavenging.¹⁰² While horizontal reservation of 20 per cent in employment¹⁰³ is provided to those who have studied in Tamil, a regional language of the State of Tamil Nadu, 7.5 per cent seats in medical education¹⁰⁴ and 10 per cent of seats in engineering, agriculture, veterinary, fisheries, law, and allied professional courses¹⁰⁵ are reserved for those who studied in State government schools. The reservation in employment for women is 30 per cent¹⁰⁶ and this has been horizontally increased to a total of 40 per cent in each category.¹⁰⁷

Telangana

The State of Telangana reserves 15 per cent of seats for SC, 6 per cent for ST and 25 per cent for Backward Classes.¹⁰⁸ The Backward Classes are classified as Groups A to E in line with the backwardness of the communities. A horizontal reservation of 33.3 per cent seats for women, 3 per cent for the physically disabled, 1 per cent for visually disabled/hearing impaired/orthopedically disabled, 2 per cent for children of armed forces personnel, 1 per cent for national cadet corps, and 0.5 per cent for sportspeople applies to all categories. The Government of Telangana has supported the extension of reservation over the 50 per cent ceiling imposed by the Supreme Court of India.¹⁰⁹

Uttar Pradesh

The State of Uttar Pradesh provides 21 per cent reservation for SC, 2 per cent for ST, and 27 per cent for Other Backward Classes.¹¹⁰ A 3 per cent reservation is provided for persons with disabilities,¹¹² of which 1 per cent is for the visually challenged, 1 per cent for the physically challenged, and another 1 per cent for persons with hearing impairments. A 20 per cent reservation is provided for women, a 5 per cent reservation for the dependants of freedom fighters, and a 2 per cent reservation for ex-servicemen.¹¹³

¹⁰² The Tamil Nadu Arunthathiyars (Special Reservation of seats in Educational Institutions including Private Educational Institutions and of appointments or posts in the services under the State within the Reservation for the SC) Act, 2009.

¹⁰³ Rule 3 of The Tamil Nadu Appointment on preferential basis in the Services under the State of Persons Studied in Tamil Medium Rules, 2010.

¹⁰⁴ Government Order (Miscellaneous) 438, Health and Family Welfare Department, 29 October 2020.

¹⁰⁵ Tamil Nadu Admission to Undergraduate Professional Courses on Preferential Basis to Students of Government Schools Act, 2021.

¹⁰⁶ Section 26 of The Tamil Nadu Government Servants (Conditions of Service) Act, 2016.

¹⁰⁷ 'Tamil Nadu raises quota for women in government jobs from 30 per cent to 40 per cent', *The Times of India*, 13 September 2021.

¹⁰⁸ Rule of Reservation for Admission as per the Presidential Order 1974.

¹⁰⁹ 'Telangana supports lifting 50 per cent upper cap on reservations', *Deccan Chronicle*, 20 December 2021.

¹¹⁰ The Uttar Pradesh Public Services (Reservation for SC, Scheduled Tribes and Other Backward Classes) Act, 1994.

¹¹¹ A Committee headed by the retired Allahabad High Court judge Raghavendra Kumar in October 2018 submitted its [report](#) to the Government of Uttar Pradesh recommending the sub-categorization of backward classes into Backward, More Backward, and Most Backward with 7 per cent, 11 per cent, and 9 per cent reservations, respectively.

¹¹² Uttar Pradesh State Policy of Reservation for persons with disabilities, National Interactive Web Portal on Disability.

¹¹³ Judgment in Writ Petition 39377 of 2015, *Ashish Kumar Pandey and Others vs. State of Uttar Pradesh and Others*, Allahabad High Court, dated 16 March 2016.

The State of West Bengal¹¹⁴ reserves 22 per cent of seats for SC, 6 per cent for ST, and 17 per cent for Backward Classes, categorized as OBC-A (Most Backward Classes), with a 10 per cent reservation, and OBC-B (Other Backward Classes) with 7 per cent.

5 Sate vs. Union

In 2015, the Supreme Court¹¹⁵ recommended the creation of a commission to investigate the conditions of the backward classes. The National Commission for Backward Classes (NCBC) was duly formed by the Union Government.¹¹⁶ Unlike the National Commission for the SC and the ST, which can investigate and monitor matters relating to the safeguarding of the communities and inquire into complaints against discrimination,¹¹⁷ the NCBC can only examine requests for inclusion of a class of citizens into the backward classes list and hear complaints of over-inclusion or under-inclusion in the list.¹¹⁸ Accordingly, the NCBC will review the backward classes list from time to time and give advice to the Union Government about inclusion or non-inclusion.¹¹⁹ Likewise, the States have the power to draw up the List of Backward Classes in the concerned State and form State Commissions for the Backward Classes.¹²⁰

In this connection, many dominant castes, such as the Kapus in Andhra and Patidars in Gujarat, have demanded to be included to the List of Backward Classes.¹²¹ The Jats, an agricultural caste and socially dominant and politically influential community, demanded to be included in the List of Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, National Capital Territory of Delhi, Rajasthan, Uttar Pradesh, and Uttarakhand. The NCBC, finding that the Jats were not socially and educationally backward, reported that the community had not fulfilled the criteria for inclusion in the Union List of OBCs. But the Union Government, without considering the opposition of the NCBC, included them in the list. However, when this decision was challenged, the Supreme Court invalidated the inclusion of Jats in the backward classes list.¹²²

Similarly, Marathas, a community that the National Commission and the Maharashtra State Commission for the Backward Classes determined as a forward class in the State of Maharashtra, demanded to be included in the Union List of Backward Classes for Maharashtra. But the NCBC, after an inquiry, reported that Maratha is not a socially and educationally backward community but a socially advanced and prestigious community. Nevertheless, the Government of Maharashtra

¹¹⁴ [Gazette Notification, Higher Education Department, Government of West Bengal, 3 January 2014.](#)

¹¹⁵ *Indra Sawhney and Others vs. Union of India and Others*, AIR 1993 SC 477.

¹¹⁶ The National Commission for Backward Classes was constituted under The National Commission for Backward Classes Act, 1993.

¹¹⁷ Article 338 and 338A of the Indian Constitution.

¹¹⁸ Section 9 (1) of the National Commission for Backward Classes Act, 1993.

¹¹⁹ Section 9 (2) of the National Commission for Backward Classes Act, 1993.

¹²⁰ Article 15 (4) and 16 (4) empowers the State Governments to make special provisions for the upliftment of the backward classes of citizens.

¹²¹ [‘Backward march: who are the Jats, what do they want?’](#), *Indian Express*, 22 February 2016.

¹²² *Ram Singh and Others vs. Union of India*, Supreme Court judgment, dated 17 March 2015.

after several attempts passed the Maharashtra State Socially and Educationally Backward Class Reservation Act, 2018, wherein Marathas were included in the State Backward Classes List with 16 per cent reservation in education and public employment. As the total reservation exceeded the 50 per cent ceiling, the High Court of Bombay reduced the Maratha reservation to 12 per cent, but held that the State decision was valid.¹²³

In the meantime, the Constitution was amended¹²⁴ to include Article 338B, incorporating the National Commission for Backward Classes into the Constitution by repealing the National Commission for Backward Classes Act, 1993, and Article 342A that empowers the President of India to specify the socially and educationally backward classes in States and Union Territories and further empowers Parliament to include and exclude the socially and educationally backward classes from the Union List.

On an appeal against the Maharashtra State Reservation for Marathas,¹²⁵ the Supreme Court concluded that the Marathas were adequately represented in public services and therefore the State reservation was invalid, stating that, according to Article 342A, only the President can specify the SEBC list and only Parliament can include or exclude a class from the Union List. It further ruled that the State Governments could only make suggestions and collect data regarding SEBC. If the States had any say in the list of SEBC, it could only be by making recommendations regarding the inclusion or exclusion of castes and communities through the State Commission.

Leaving aside questions of federal governance, the Constitutional amendment that concentrated all the power in the President and the Union Government in the matter of SEBC and the judgment that confirmed its validity were problematic in many ways. First, the purpose of forming the National Commission and the State Commissions for the Backward Classes was defeated, as the role had been taken away by the Union Government. Second, as the Union Government would now decide on behalf of the States, the State governments had lost their authority to make decisions relating to the SEBC in their reservation policy. Third, if the SEBC across the country were unified in the Union List, the criteria for determining backwardness, which vary from one State to another depending on their unique cultural and social histories, would be irrelevant. Fourth, the main role of the Backward Classes Commissions being to investigate backwardness, they had a deep knowledge of the regional specificities of backwardness. Therefore, the welfare of the backward classes would be widely impacted.

In consequence of the opposition from States, the Constitution was amended in August 2021. Recognizing the fact that the States/Union Territories had their own lists even prior to the creation of the Union List of SEBC in 1993, the amendment restored the power of the States/Union Territories to prepare and maintain their own lists of SEBC.¹²⁶

Another recent development in the matter of State reservation policy and judicial intervention is the Supreme Court decision¹²⁷ that invalidated the notifications issued by the State Government of Haryana on 17 August 2016 and 28 August 2018, wherein eligibility for OBC reservation was based not on social and educational backwardness, but purely on an annual income limit. Upon

¹²³ Jaishri Laxmanrao Patil vs. The Chief Minister and Others, Supreme Court judgment, dated 5 May 2021.

¹²⁴ The Constitution (One Hundred and Second Amendment), Act, 2018.

¹²⁵ Jaishri Laxmanrao Patil vs. The Chief Minister and Others, Supreme Court judgment, dated 5 May 2021.

¹²⁶ [The Constitution \(One Hundred and Twenty-Seventh Amendment\) Bill, 2021](#).

¹²⁷ Pichra Warg Kalyan Mahasabha Haryana and Another vs. The State of Haryana and Another, Supreme Court judgment, dated 24 August 2021.

challenge, the notifications were invalidated by the Supreme Court, which stated that the basis for OBC reservation could not be merely economic. Nevertheless, the State of Haryana reportedly issued another notification in November 2021, by which children of parents holding Constitutional and Class I posts will be excluded from reservation, even if the parents have been recruited through OBC reservations.¹²⁸

6 Conclusion

The affirmative action policy in India came into practice because of the generations of struggle undergone by the untouchable castes and other backward classes, who were historically excluded from education and administration. As society changed, it was inevitable that the vulnerable groups who had so far been forgotten in terms of social justice should be ‘included’. However, the process of inclusion should be based upon the principle of social justice and equality, which required the support of the judiciary. Instead of recognizing this need, however, the judiciary continued to apply illogical limitations and age-old precedents that disrupted the implementation of affirmative action. Although the legal basis of affirmative action comes from the Constitution of India itself, which provides for reservation and enables States to make laws to that end, judicial interference has necessitated ongoing legislative changes to keep the needed affirmative action on track. Progress has been made, but it is often a case of ‘two steps forward, one step back’, and many issues, such as the ceiling on reservations and the categories to be included in it, remain to be resolved.

Looking ahead, it is clear that many communities have been entirely left out of the reservation scheme or have been categorized under a group eligible for reservation but have not progressed socially or educationally. This includes indigenous communities such as De-Notified Tribes, erstwhile criminal tribes, or castes identified as SC that are forced to engage in manual scavenging and the removal of dead bodies and animals. On the other hand, there are castes that are land-owning, socially dominant, and educationally and economically advanced that are categorized as OBC in both State and Union Lists.

Laws and policies need to be updated according to social changes. They need to be inclusive and intersectional, accommodating (newly) marginalized communities into the reservation scheme and eliminating from the lists those that have progressed. The continued intervention of the Supreme Court, or the judiciary in general, in the implementation of affirmative action by the Union Government or State Governments, irrespective of the predominance of communities, bending policy to their whims and fancies, will only lead to the dilution and deletion of the historic social justice programme that was result of many generations of struggle.

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¹²⁸ ‘Does Haryana’s New OBC “Creamy Layer” Notification Pass the Legal Test?’, *The Wire*, 23 November 2021.

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Appendix: Education

Despite the fact that the States were providing reservation for OBC in admissions to medical colleges, the All India Quota (AIQ) scheme, introduced in 1986, did not allow reservations. Even when the Union Government introduced the National Eligibility-cum-Entrance Test (NEET) for medical courses (proposed in 2012 but implemented only in 2016), State Governments had to surrender to it 15 per cent of undergraduate places and 50 per cent of postgraduate places at medical colleges funded and maintained by the State Governments. Consequent to the Supreme Court decision in *Abhay Nath vs. University of Delhi and Others*,¹²⁹ a reservation of 15 per cent for SC and 7.5 per cent for ST was introduced, but this was still not implemented in NEET. The Tamil Nadu Government demanded reservation for OBC students and for those who studied in the regional language. Dravida Munnetra Kazhagam, the present ruling party of Tamil Nadu, which was then in opposition, Viduthalai Chiruthaigal Katchi (Liberation Panthers Party), and many other political parties in Tamil Nadu also filed petitions in the Supreme Court demanding OBC reservation in NEET. When the Supreme Court was not willing to intervene, another petition was filed in the High Court of Madras in which OBC reservation was ordered. Later, in July 2021, the Union Government issued a notification reserving 27 per cent of places for OBCs and 10 per cent for EWS, which is still under challenge in the Supreme Court. The stand of the present BJP-led Union Government is that if there is any reservation, it will apply only to EWS. This attitude has been widely condemned and the State of Tamil Nadu has appealed to the Supreme Court, challenging the EWS reservation in NEET.

Since education is in the Concurrent List of issues on which both the Union Government and the State Governments have powers to decide, the debate on the rights of the States and the extent of the interference of the Union continues. But it is significant that the States are demanding that education be moved to the State List so that the States can decide for themselves with no interference.

¹²⁹ Judgment of the Supreme Court dated 31 January 2007, [Writ Petition \(C\) 138 of 2006](#).