



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2024

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

ANALYSING THE CONCEPT OF 'CREAMY LAYER'

INTRODUCTION

The Indian Constitution, effective from January 26, 1950, ensures equality of opportunity by providing fundamental rights and reservations for underprivileged communities. There are two views on reservations: one believes it increases inequality by favoring certain groups, while the other sees it as necessary affirmative action to correct historical injustices.¹

Reservations in public employment have been controversial, with the Supreme Court interpreting them diversely. The "Creamy Layer" concept excludes higher-income candidates from SC/ST quotas. The Narendra Modi government's request to review a Supreme Court decision in the "Jarnail Singh vs. Lachhmi Narain Gupta" case has renewed focus on this exclusion, leading to significant legal debate and differing viewpoints.²

CONSTITUTIONAL HISTORY OF RESERVATION IN PROMOTIONS IN INDIA

The debate over reservations in equality jurisprudence centers on two main perspectives. One view argues that reservations, such as job quotas, can worsen inequalities by favoring certain groups, leading to resentment and further division. On the other hand, proponents see reservations as a form of affirmative action, aiming to rectify historical injustices and level the playing field. This approach, also termed compensatory discrimination, seeks to provide marginalized populations with a boost to achieve equality."³

¹ Nehmat Kaur., (June 4, 2024). *Constitutional history of reservation in promotion in India*, The Leaflet constitutional first. <https://theleaflet.in/constitutional-history-of-reservation-in-promotions-in-india/#:~:text=Article%2016%20%284A%29%20was%20inserted%20in%20the%20Constitution%2C.its%20application%20to%20Scheduled%20Castes%20and%20Scheduled%20Tribes>

² Jarnail Singh v. Lachhmi Narain, 2018 S.C.C. OnLine SC 1641

³ Nehmat Kaur., (April 15, 2019). *Constitutional history of reservation in promotion in India*, The Leaflet constitutional first. <https://theleaflet.in/constitutional-history-of-reservation-in-promotions-in-india/#:~:text=Article%2016%20%284A%29%20was%20inserted%20in%20the%20Constitution%2C.its%20application%20to%20Scheduled%20Castes%20and%20Scheduled%20Tribes>

During the constituent assembly debate on Article 16 and Article 10 of the Draft Constitution, Dr. B R Ambedkar highlighted the distinction between two schools of thought in equality jurisprudence. He acknowledged that while theoretically guaranteeing "equality of opportunity" was desirable, it wouldn't be practical without exceptions for historically disadvantaged groups. Ambedkar explained that granting reservations for these groups was necessary to ensure their inclusion in public services, which had been historically dominated by certain communities.⁴ However, he cautioned against excessive reservations, arguing that they could undermine the principle of equality of opportunity. Ambedkar's remarks underscore the complexity and sensitivity of the issue of reservations in public employment, which has remained contentious over the decades.⁵

NEED TO ANALYSE THE RESERVATION SYSTEM

The demand for quotas in promotion by Scheduled Castes and Scheduled Tribes, even after 70 years of the Constitution's existence, reflects the government's failure to effectively implement the reservation system. Affluent sections within these groups often benefit the most from reservations, leaving behind those truly in need. Reservations were intended as temporary measures, but allowing continual exceptions contradicts equality principles. It's time to reconsider reservation policies to ensure that the most disadvantaged within these communities receive the benefits. This includes excluding the affluent "creamy layer" from reservation benefits. Currently, the advantages of reservations are not reaching the most vulnerable, perpetuating a cycle of poverty and inequality.⁶

CONSTITUTIONAL AMENDMENTS RELATING TO RESERVATION

1. The 77th Constitution Amendment:

Reservations for promotions have been available to Scheduled Castes and Scheduled Tribes since 1955. However, in the Indra Sawhney case on November 16, 1992, the Supreme Court ruled that reservation of appointments or positions under Article 16(4) of the Constitution is

⁴ Dr. Giriji Bhusan Joshi., (September 17, 2020). Creamy layer in Schedule Caste and Schedule Tribes: Reservation need to be analysed. <https://thelawbrigade.com/constitutional-law/creamy-layer-in-scheduled-castes-and-scheduled-tribes-reservation-needs-to-be-analyzed/?amp>

⁵ Ibid

⁶ Dr. Giriji Bhusan Joshi., (September 17, 2020). Creamy layer in Schedule Caste and Schedule Tribes: Reservation need to be analysed. <https://thelawbrigade.com/constitutional-law/creamy-layer-in-scheduled-castes-and-scheduled-tribes-reservation-needs-to-be-analyzed/?amp>

limited to initial appointments and cannot extend to promotion⁷. This decision was seen as detrimental to the interests of these groups.⁸

2. The 81st Constitution Amendment:

In 2000, the 81st amendment introduced Article 16(4B),⁹ permitting reservation in promotions for SC/STs to surpass the 50% cap by carrying forward unfilled reserved vacancies from previous years. This led to the creation of the 'Carry Forward Rule,' treating these vacancies as a separate class, not included in the annual 50% reservation limit. Additionally, the 82nd Constitution Amendment¹⁰ allowed the state to lower qualifying standards for SC/ST reservations in promotions. This nullified the performance requirement upheld by the Supreme Court's Vinod Kumar decision, which had prohibited lowering qualifying marks for promotions.

3. The 85th Constitution Amendment:

Supreme Court decisions in the Virpal Singh Chauhan and Ajit Singh cases negatively impacted the seniority of Scheduled Caste (SC) and Scheduled Tribe (ST) government employees. To protect their interests, the government reversed the effects of a 1997 order and revised Article 16(4A) of the Constitution to restore seniority benefits retroactively from June 17, 1995.¹¹

THE MANDAL COMMISSION VIEW

*The Mandal Commission, established in 1979 by the Indian government, aimed to identify socially and educationally disadvantaged groups. It recommended increasing quotas for lower castes in government jobs and universities by 27% to a total of 50%, excluding the "creamy layer."*¹²

The Morarji Desai administration established the Mandal Commission in 1978 under Article 340 of the Indian Constitution. Officially formed on January 1, 1979, and chaired by B.P.

⁷ Shyam Lal Yadav., (August 7, 2021). *Explained: How creamy layer among OBCs is determined; why its revision is stuck*, The Indian Express. <https://indianexpress.com/article/explained/creamy-layer-obc-reservation-quota-7430996/>

⁸ <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-seventh-amendment-act-1995>

⁹ The Constitution (EIGHTY-FIRST AMENDMENT) Act (2000).

¹⁰ The Constitution (EIGHTY-SECOND AMENDMENT) Act (2000).

¹¹ <https://blog.studyiq.com/constitutional-amendments-84th-85th-86th-explained-indian-polity-free-pdf-download/>

¹² M.P. Jain, Indian Constitutional Law (LexisNexis, Eighth Edition 2018) 1033-1034

Mandal, the Commission developed 11 indicators to determine social backwardness through a thorough scientific examination. These indicators cover social, educational, and economic factors.¹³

SOCIAL

- Others believe castes/classes to be socially backward.
- Castes/classes whose major source of income is manual labor.
- Castes/classes where the proportion of married women under 17 is 25% higher than the state average in rural regions and 10% higher in urban areas, and where the percentage of married males is 10% higher than the state average in rural and urban areas, respectively.
- Castes/classes whose female labor participation is at least 25% higher than the state average.

EDUCATIONAL

- Castes/classes where the percentage of children aged 5 to 15 who have never attended school is at least 25% higher than the state average.
- Castes/classes with a student dropout rate of at least 25% higher than the state average in the age span of 5-15 years.
- Castes and classes whose proportion of enrolled students is at least 25% lower than the state average.

ECONOMIC

- Castes/classes whose average household asset value is at least 25% lower than the state average.
- Castes/classes in which the proportion of families living in kachcha (temporary) residences is at least 25% higher than the national average.
- More than half of the homes in castes/classes where the source of drinking water is more than half a kilometer away.

¹³ Arkoday Roy., *Creamy layer: the Mandal Commission view*. Legal Service India. <http://www.legalservicesindia.com/article/535/Creamy-Layer:-The-Mandal-Commission-View.html>

- Castes/classes where the number of households who have taken out a consumer credit is at least 25% greater than the average.