

# **Caste Reservations: Half Pregnant Constitution, Half Pregnant State**

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## **Introduction**

This paper examines the logic, legality and practice of education and job reservations for the backward castes and classes. There is a lot of confusion, some of it deliberate on the part of the interest groups, about what the Constitution does, or does not say, about reservations. There is also considerable confusion about the difference between a policy of ‘reservations’ and a policy of ‘affirmative action’.

Section 1 discusses the constitutional aspects of reservations, and Section 2 discusses the policy of providing reservation benefits to OBCs (Other Backward Classes). Section 3 delves into the distinction between reservations and affirmative action. Section 4 discusses the simple fact that the one socio-economic group not benefitting from the ill-thought policy of reservations is the section of society that could most benefit from them – the Muslims.

## **1. The Proof is in the Constitution**

The Indian Constitution is correctly seen as a document that concerns itself more with the rights of communities and the state than the rights of individuals. When talking about rights of individuals, it ends up, somewhat embarrassingly, contradicting itself. That is something a legal document like the Constitution is expressly forbidden to do.

The received wisdom, and practice, of caste-based reservations in India consists of three major beliefs. First, the Constitution guarantees that Scheduled Castes (SCs) and Scheduled Tribes (STs) should have reservations in educational institutions and public sector jobs and that

these are the only set of individuals for whom the Constitution makes a guarantee. Second, the Constitution 'allowed', after the acceptance of the Mandal Commission report in 1980, the extension of these rights to OBCs (Other Backward Classes). Third, the reasons Muslims have not been able to obtain anywhere near their fair share of benefits is because the Constitution prohibits discrimination (and hence reservations) on the basis of religion. The truth is that both the first two beliefs are wrong and that the third belief is a half-truth. The rest of this section documents this tragic reality.

The Constitution appears to believe in individual rights. Article 14 of the Indian Constitution clearly states that all are equal before law in India: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' To make sure the message gets through, there is Article 15 that deals with 'Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'

Having established the principle of human rights and equality before the law, the Constitution begins to get into twists. One would think that women and children are also citizens of India. But the social engineering design of the Constitution, supposedly a document to right all wrongs, is revealed by Article 15(3) that states, 'Nothing in this article shall prevent the State from making any special provision for women and children.' What the Constitution is trying to state is that all are equal, but that women and children, who constitute approximately two-thirds of the population, are more equal than others, and state power can be used to enhance their stature and well-being.

The confusion about what should be law (human rights) and what should be policy, is best revealed by the next clause in Article 15(4) that states, ‘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 Castes and

Article 29 has to do with the protection of interests of the minorities and states,

Protection of interests of minorities.

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

In other words, what the Constitution is saying is that all are born equal, but some, especially SCs and the STs are born more equal than the others. In addition, and this is noteworthy, if you are poor and not SC or ST, you have equal rights to whatever reservation policy the government introduces. So the big question that deserves to be examined is how did it come to pass that only SCs and STs were granted reservations in jobs and educational institutions until the imposition of the Mandal Commission?

For clues, we have to read Article 16 of the Constitution, and read it somewhat carefully. As usual, the Article starts off with enunciating the lofty principles of equality. Article 16 of the Constitution is similar to Article 15 except that it deals with employment in the public sector. Article 16(4) is a near identical clause to Article 15(4), and states that ‘

Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.' So far what the Constitution establishes is that the SCs and STs deserve reservations along with other 'socially and educationally backward class of citizens'. But where is the constitutional guarantee for SCs and STs at the expense of the other poor? And where are the OBCs in the Constitution?

For a direct reference to SCs and STs, one has to go to Part IV of the Constitution entitled *Directive Principles of State Policy*, a part of the Constitution meant for guidance to policy, but not law!

Application of the principles contained in this Part (IV) -

37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections -

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

Note that even in the Directive Principles, the constitutional provision of reservations for SCs and STs is, at best, that of first among equals. They comprised the poorest of the poor in 1950 when the Constitution was adopted, and had suffered from centuries of discrimination. The fact that they needed active support of the government in the form of affirmative action is beyond doubt or discussion. The issue on which there should be some debate is whether the state did 'wrong' by not following through on reservations for other economically and socially backward citizens.

The conclusion so far is that the Constitution of India did not grant, and has not granted, exclusive reservations based on caste. If the SCs and STs have been granted this privilege, then it is the political class (along with the Supreme Court) that has done so, not the Constitution. So from where does the impression that SCs and STs have been granted privileges by the Constitution come from? Does it come from Article 330 that talks of the ‘reservation of seats’ in Parliament?

Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People -

(1) Seats shall be reserved in the House of the People for —

(a) the Scheduled Castes;

(b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and

(c) the Scheduled Tribes in the autonomous districts of Assam.

The original intention of the Constitution (and Dr. Ambedkar) was that this granting of reserved Lok Sabha constituencies would last for only ten years. However, this article has been amended every tenth year for another ten years. The 95<sup>th</sup> Amendment to the Indian Constitution, passed in 2009, extended the SC/ST legislative quota up to January 26, 1950.

There are two **inconvertible** facts about the policy of reservations in India. **First**, the group of people comprising the SCs and STs have reservation rights in terms of seats in parliament. In the Lok Sabha, there are 120 such seats (79 for SCs and 41 for STs). The Constitution also grants similar such rights in the state legislatures. This right was set to expire in 1960, but Article 334 of the Constitution has extended this right every ten years, and the latest constitutional provision is for the Parliament to have a relook at it in 2020.

## **2. Reservations for SCs, STs, and Otherwise Backward Classes (OBCs)**

In 1979, the Mandal Commission was set up under the chairmanship of Bindheshwari Prasad Mandal to look into the constitutional provision of reservations for the ‘educationally or

socially backward classes'. There was explicitly no mention of caste in the terms of reference for the Mandal Commission. However, the reality is that the Mandal Commission seems to be all about caste. The Commission came to the conclusion that approximately 54 percent of the population belonged to socially and educationally backward class, that is, Other Backward Classes (not castes)! This backward class was excluding the SCs and STs and since they were backward, they fit into the constitutional guarantee of reservations.

The previous section documented how the interpretation of the Constitution has been contradictory to both the spirit and letter of the Constitution. This section documents how the Supreme Court has gone one step further by implementing the 50 percent limit on reservations.

The 50 percent limit on reservations came with the acceptance of the Mandal Commission report on defining **Other** Backward Classes (OBCs) as being beneficiaries of caste reservations. The Mandal Commission undertook considerable research to document the number of OBCs in the population, and those being **econ**omically backward, reported them as deserving of reservations. According to the Indian poverty line, about 40 to 45 percent of the Indian population was absolutely poor in the early 1980s.

The 'economic' indicators used by the Mandal Commission to determine backwardness were –

- Castes/classes where the average value of family assets is at least 25% below the state average.
- Castes/classes where the number of families living in kachcha houses is at least 25 % above the state average.

- Castes/classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.
- Castes/classes where the number of the house-holds having taken a consumption loan is at least 25% above the state average

The Mandal estimate for OBC was they comprised 54 % of the population. SCs and STs comprised about 26 percent of the population. Acceptance of the Mandal Commission report by the government meant that possibly 80 percent of the population - 54 percent OBCs and 28 percent SCs and STs - was eligible for caste reservations in schools and public-sector jobs.

How accurate is the Mandal estimate of 54 % OBCs? Not very accurate at all. Consider this – the absolute poverty level in the mid-1980s was 45 % of the population. Unless “backward class” meant an income level considerably higher than the absolute poor, the Mandal OBC estimate was questionable. Direct proof that the Mandal OBC estimate was incorrect was provided by the National Sample Survey Organization (NSSO), which in 1999/2000, estimated *that OBC’s were only 36 percent of the population, and most manifestly not 54 percent.* Thus it appears that a massive social policy in India was initiated with complete disregard for the simplest of facts –the *actual* percentage of the OBC population.

The Mandal estimate posed a dilemma for the Supreme Court. Could they decree that reservations should be provided for 80 percent of the Indian population? They couldn’t so the SC took the half-pregnant route – they decreed that while the reservations for OBCs was constitutional, such reservations could not exceed 50 percent. Where does the 50 percent figure come from? Most likely is derived from an earlier Supreme Court judgment (T. Devadasan vs. Govt. of India, 1964), which related to the speed at which vacancies in government jobs were

filled for SCs and STs. Not able to come at an objective standard for the speed, the SC decreed that no more than half (50 % !) of all the government jobs available could be filled by quotas in any given year.

Can one be half-pregnant? No. Neither can one draw an arbitrary line at which past historical wrongs stop. Once on the slippery path of illogic, one stays forever on that path. One amendment follows another, one injury with another, a smaller tinkering (Band-Aid) replaces a bigger one. The Tamil Nadu government wants 69 percent reservations - 30 percent for backward classes, 20 percent for most backward classes, 18 percent for SCs and 1 percent for STs. But the Supreme Court had ruled that quotas cannot exceed 50 percent. However, our lawmakers came up with the 76<sup>th</sup> Amendment in 1994, allowing Tamil Nadu government to operate with 69 percent quotas. Incidentally, given that everything is constitutional, and possible in India, what aspect of the Constitution says that there should not be OBC quotas in the army or in the Parliament?

#### *Re-examining the 54 % OBC estimate*

If absolute poverty is an approximate criteria, then it was shown above that the 54 % OBC estimate was out of the ballpark. Why? Because the NSSO had found OBCs to constitute only 36 % of the population. How accurate is the NSSO estimate? There are two reasons why this estimate is about right. First, this estimate of OBCs in 1999-2000 is very close to the 31 % estimate obtained in the 1931 Census. The difference between 31 % (in 1931) and 36 % (in 2000) can easily be explained by Partition. This is plausible since it suggests that the OBCs had been similar to an “average” Indian, hence the population growth rate should be approximately the same as the average, and hence the share should stay relatively constant at 31 percent or so, which appears to have been the case in 1999/00.



A second reason to doubt the Mandal estimate is to look at the 2004/5 NSSO survey. This survey found that the OBC share of the national population had increased to 41 percent. In the five years, 1999-2000 to 2004-05, the OBC population grew at an annual rate of 4.4 percent.

Is an OBC population growth rate of 4.4 percent a year plausible? No. Because even the Hutterites' (who do not practice any birth control and have an average fertility rate of 9 children per woman) population growth rate has never exceeded 4 percent a year. It is biologically not possible, not even for Mandal fecund OBCs. So what happened? Non-OBCs, in order to obtain the irrational government mandated manna, simply changed their caste! More and more castes, economically deserving or not, joined the umbrella OBC category.

### **3. Affirmative Action versus Reservations**

Policies aiming at decrease in education and income inequality have been geared towards caste based (quota) reservations for education and government jobs, rather than on affirmative action. The distinction between reservations and affirmative action is important. With a quota for education, and/or jobs, the 'color of your skin' matters most, not your need, merit, or competence. With affirmative action, economic disadvantage is paramount (that is, how poor you are and whether in need of state support), and is explicitly based on a 'caste no bar' criteria.

In India, many learned scholars (especially on the Left) keep confusing reservations with affirmative action. The latter policy is one where positive steps are taken (like income transfers and scholarships) to help the integration of formerly excluded members from the mainstream. It does not matter whether the poor, or the discriminated against, are Hindu, Muslim, Sikh, Christian, SC, ST, Buddhist, Jain or Parsi. The poor are economically and socially disadvantaged and it is imperative that they be helped by the state, and helped considerably more than all others.

The following analogy might help in understanding the difference between reservations and affirmative action. When economic reforms were introduced in 1991, there was a movement away from the inefficient (and prone to heavy corruption) industrial licensing and quota system (who can produce what and in how much quantity) to an incentive based price system.

#### Affirmative Action for Education

The stated goal of affirmative action is for the state to provide equal opportunities to all citizens. Since education is the major asset of most individuals, state support is needed to provide the opportunity for education. Provision of education opportunities starts at the primary school level. Poverty deprives individuals from attaining education to the best of their ability. Hence, the need for income support (only one form of which is a scholarship) for the poor. Poverty afflicts all castes and religions, and there is a need to address the concerns of all 'socially and economically backward' citizens, a group which incidentally includes Muslims, non-OBC and non-SC and ST Hindus.

Just as there are very few people opposed to taxation and redistribution (the fact that the rich people pay more in taxes than the poor is a form of redistribution), so there are very few people opposed to some form of affirmative action. The differences arise in the nature of policy, and in the case of reservations or quotas, the policy is at such extreme variance with the principles of universal justice that it should not be considered as belonging to the family of affirmative action.

Affirmative action at the college level is not as straightforward for the simple reason that attendance requires that one have *passed high school*. Reservations for colleges, to be successful and/or have any meaning, means that the school system should have provided equal opportunities *earlier*.

How should one provide equal opportunity at the college level? In the quota system, public universities like the Indian Institute of Technology can set up discriminatory rules in the form of ability or minimum standards. In the present quota system, all quota individuals cannot get into many good colleges. But in a voucher system, where effectively the state guarantees equal opportunity, the non-able SCs and STs will be able to enter some private sector college. She would have the ability to pay the capitation and other fees (via government provided education vouchers) to any university that admits her – and some college will be willing, no matter how unmeritorious the candidate. Note that this means a level playing field for the not so bright kids from both rich and poor families.

#### 4. The Effectiveness of Reservations

It is worth examining the effectiveness of education policy in benefitting the backward classes. Table 1 documents the educational achievement (or attainment) of different castes and classes in India for the period 1983-2011.

Table 1: Index of Educational Attainment for All-India

Group	Index of Educational Attainment					
	1983	1993	1999	2004	2009	2011
SC	2.9	3.8	5.3	6.4	7.6	8.4
ST	2.3	3.2	4.6	5.1	6.9	7.4
SCST	2.7	3.6	5.1	6.1	7.4	8.1
OBC			7.1	8.3	9.9	10.7
Muslim	4.4	5.2	6.4	7.2	8.2	8.6
Others	7.0	7.6	12.4	13.8	14.9	15.3
<b>All</b>	<b>5.7</b>	<b>6.3</b>	<b>7.9</b>	<b>8.9</b>	<b>10.2</b>	<b>10.8</b>

Source: NSSO Employment-Unemployment Surveys, various years

Note: 1. This is calculated by dividing the population aged 15 to 59 into six categories and calculating the percent of each group in each category - illiterate, primary education, secondary education, higher secondary education, graduates and post-graduates. These are then weighted by the years of education to arrive at the final index.

Table 2 documents the rate of change for this period for men and women. The simple result is that SCs, STs and OBCs all show large improvement in educational attainment, regardless of sex and/or the time-period considered, while the improvement in Muslim education is the least.

Table 2: Rates of Improvement in Education, by Sex – 1983-2011

Group	Annual Percentage Change in education (1983-2011)		
	Male	Female	Total
Muslim	1.9	3.7	2.6
SC	2.6	5.8	3.6
ST	3.4	6.5	4.5
SCST	2.8	6.0	3.9
OBC	2.6	4.6	3.4
Others	1.7	3.5	2.4
All	1.6	3.4	2.3

OBC are calculated for 1999-2011

It could be argued that ‘culturally’ Muslims do not have as great a demand for education as the Hindus, and therefore their rate of progress has been lower. But perusal of data for other Muslim countries suggests that this is *not* the case. Every predominantly Muslim country has a higher rate of improvement than India, excepting Indonesia, Malaysia and Bangladesh. The first two have considerably higher levels of educational attainment, and hence show a slower rate of improvement. Bangladesh is a real outlier, at least according to the international data compiled by economists Barro and Lee. In Pakistan, average education (according to Barro-Lee) has increased at a 3.1 % annual rate, 1983-2011 compared to a 2.6 % annual rate for Indian Muslims.

The net result is that, all things considered, there is only one community deserving of any affirmative action in education and employment in India – the Muslims. There is no data to substantiate that the relatively privileged OBCs should get any additional benefits. Indeed, data suggests that the Indian government should make an all-out effort to bring the Muslims at least up to par with the SCs and STs before any passage of any legislation for any other community.

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