

# THE AMBIGUITY OF RESERVATIONS FOR THE POOR

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

The 103rd Constitution Amendment Act introducing special measures and reservations for 'economically weaker sections' (EWS) has been perceived as being obviously unconstitutional. This article is sceptical of such a reading and takes the view that a constitutional challenge to the amendment will take us into unclear constitutional territories. The strongest constitutional challenge might not be to the amendment itself but to the manner in which governments implement it. There is no foregone conclusion to a potential challenge and we would do well to start identifying the core constitutional questions that arise. To be clear, I am here concerned only with questions that arise within constitutional law.

Quota questions: on 10% reservations

Article 15 stands amended enabling the state to take special measures (not limited to reservations) in favour of EWS generally with an explicit sub-article on admissions to educational institutions with maximum 10% reservations. The amendment to Article 16 allows 10% reservations (and not special measures) for EWS in public employment and does so in a manner that is different from reservations for Scheduled Caste/Scheduled Tribes and Other Backward Classes. The amendment leaves the definition of 'economically weaker sections' to be determined by the state on the basis of 'family income' and other economic indicators. Also critical to this amendment is the exclusion of SC/STs, OBCs and other beneficiary groups under Articles 15(4), 15(5) and 16(4) as beneficiaries of the 10% EWS reservation.

A good point to start the constitutional examination is the Supreme Court's view on reservations based purely on economic criteria. Eight of the nine judges in *Indra Sawhney* (November 1992) held that the Narasimha Rao government's executive order (and not a constitutional amendment) providing for 10% reservations based purely on economic criteria was unconstitutional. Their reasons included the position that income/property holdings cannot be the basis for exclusion from government jobs, and that the Constitution was primarily concerned with addressing social backwardness.

However, the decision in *Indra Sawhney* involved testing an executive order against existing constitutional provisions. In the current situation, we are concerned with a constitutional amendment brought into force using the constituent power of Parliament. The fact that we are not concerned with legislative or executive power means that the amendment will be tested against the 'basic structure' and not the constitutional provisions existing before the amendment. The pointed question is whether measures based purely on economic criteria violate the 'basic structure' of the Constitution? I do not think it is a sufficient answer to say that 'backwardness' in the Constitution can only mean 'social and educational backwardness'. Citing the Constituent Assembly debates is not going to take the discussion much further either. It is difficult to see an argument that measures purely on economic criteria are per se violative of the 'basic structure'. We can have our views on whether such EWS reservations will alleviate poverty (and they most certainly will not), but that is not really the nature of 'basic structure' enquiry. Providing a justification for these measures as furthering the spirit of substantive equality within the Indian Constitution is not very difficult.

The Hindu Explains: The new 10% quota, its implications, and more

Economic criteria (if seen as poverty) forms the basis for differential treatment by the state in

many ways and it would be a stretch to suddenly see it as constitutionally suspect when it comes to 'special measures' and reservations in education and public employment. Poverty inflicts serious disadvantages and the prerogative of the state to use special measures/reservations as one of the means to address it (however misplaced it might be as a policy) is unlikely to fall foul of the 'basic structure' doctrine.

A challenge to the amendment may lie in the context of Article 16 by virtue of shifting the manner in which reservations can be provided in public employment. Under Article 16(4), reservations for backward classes (SC/STs, OBCs) are dependent on beneficiary groups not being 'adequately represented' but that has been omitted in the newly inserted Article 16(6) for EWS. The amendment through Article 16(6) ends up making it easier for the state to provide reservations in public employment for EWS than the requirements to provide reservations for 'backward classes' under Article 16(4). In a sense that is potentially a normative minefield for the Supreme Court. On the one hand, it is confronted with the reality that 'backward classes' like SC/STs and OBCs are disadvantaged along multiple axes and on the other, it is now far more difficult for the state to provide reservations to these groups compared to the EWS. The response might well be that 'representation' is not the aim of EWS reservation and questions of 'adequacy' are relevant only in the context of representation claims like those of the backward classes under Article 16(4).

In many of the responses to the amendment, breaching the 50% ceiling on reservations has been cited as its greatest weakness. It is hard to see the merit of that argument because the amendment by itself does not push the reservations beyond 50%. While it might be a ground to challenge the subsequent legislative/executive actions, the amendment itself is secure from this challenge. But even beyond this narrow technical response, the 50% ceiling argument is far from clear. In *Indra Sawhney*, the majority of judges held that the 50% ceiling must be the general rule and a higher proportion may be possible in 'extraordinary situations'. Fundamentally this argument stems from an unresolved normative tension in *Indra Sawhney*. While committing to the constitutional position that reservations are not an 'exception' but a 'facet' of equality, the majority in *Indra Sawhney* also invokes the idea of balancing the equality of opportunity of backward classes 'against' the right to equality of everyone else. When governments implement the EWS reservations and push quotas beyond 50%, the Supreme Court will be forced to confront this normative tension. If reservations further equality, what then are the justifications to limit it to 50% when the identified beneficiaries constitute significantly more than 50%? The answer to that question might lie in *Indra Sawhney's* position that the constitutional imagination is not one of 'proportional representation' but one of 'adequate representation'. However, as discussed above, if abandoning the 'adequacy' requirement per se is upheld for EWS reservations, the basis for a 50% ceiling becomes unclear.

10% quota for poorer sections in general category challenged in Supreme Court

While the constitutional amendment by itself might survive the 'basic structure' test, the hardest test for governments will be the manner in which they give effect to the amendment. The definition of 'economically weaker sections' will be a major hurdle because the political temptation will be to go as broad as possible and include large sections of citizens. But broader the definition, greater will be the constitutional risk. For example, if beneficiaries are defined as all those with family income of less than 8 lakh per annum, it must necessarily fail constitutional scrutiny. To justify that an individual 'below poverty line' and another with a family income of 8 lakh per annum belong to the same group for purposes of affirmative action will involve constitutional jugglery at an unprecedented level. But then, the history of our constitutional jurisprudence has prepared us well for such surprises.

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