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Sub-Categorisation of Backward Classes for the Purposes of Reservation: A Step towards Equitable Apportionment

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ABSTRACT

When the Indian Constitution was framed, the framers of the Indian Constitution had a motto to remove the disparity in society on the basis of religion, sex, colour, caste and race. So to attain equality, provisions were inserted in the Constitution to uplift the down-trodden class and to bring them at par with the upper class of the society. Providing reservation was one of the ways to empower and to ensure participation of the weaker section of the society in the decision-making process. Article 15(4) and 16(4) of the Indian Constitution empowers the State to make special provisions for the advancement of backward classes or Scheduled Caste and Scheduled Tribes so that they can get equal opportunity and status in the society. Giving reservation to the weaker section of the society is considered as positive discrimination because sometimes it is essential to treat people differently to achieve equality.

As John Rawls difference principle says that, "Reservation to be made for the greatest benefit of the least advantaged members of society". However, in India, the implementation of reservation provisions has mostly benefitted the topmost layers of backward class, SCs and STs. The lowest section of the society has received negligible benefits out of these reservation policies.

Researchers have examined various surveys which reflects the inequitable distribution of benefits of reservation policies. To achieve the actual aim to uplift the lower strata of the society, sub-categorization of weaker sections could be done, so that comparatively, that person can get benefit who requires it the most, a person who is certainly backward in term of education and social status can avail the benefit of the reservation system.

I. INTRODUCTION

Professor John Rawls in his book 'A Theory of Justice' gave two principles of justice:

The first principle; (principle of liberty) each person is to have an equal right to the most

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extensive basic liberty compatible with a similar liberty for others.

The second principle of justice (the difference principle): social and economic inequalities are to be arranged so that they are both : (a) to the greatest benefit to the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

These principles become the basis of the argument in this paper that the present classification of caste as mere OBC and SC/ST may require further sub-categorisation. The rationale behind this is the right to equality of all the people and the benefits must reach to the least advantaged castes/class within these broadly defined categories of castes.

This paper would first, discuss the rationale behind introducing the concept of creamy layer in the OBC. For this purpose, the journey from *M.R. Balaji vs State of Mysore*² to *Indra Sawhney vs Union of India*³ would be discussed. This would allow us to do comparative analysis for the need for further reforms in the current reservation policy and mechanism.

Secondly, the paper would argue that the present broad categorisation of scheduled caste and OBC is not sufficient to meet the objectives of our reservation policy. This paper would throw light on shreds of evidence which corroborate with the fact that a wide spectrum of social and educational differences exists within these categories itself.

Lastly, some ideas related to rationalisation of reservation would be discussed for better identification of targeted beneficiaries. Under this section, apart from sub-categorisation of caste few more ideas would be discussed.

II. RATIONALE BEHIND INTRODUCING THE CONCEPT OF CREAMY LAYER

Until the period of mid 1970s the dominant position of the judiciary in India was that the reservation under article 15(4) and article 16(4) for reservation in higher education and public employment respectively were an exception to the equality and non-discrimination clauses.

However, the shift happened in *N.M. Thomas vs State of Kerala*⁴ in 1975 wherein it was ruled that the reservation was a part of the equality principle and not an exception to it. This position was made stronger in *Indra Sawhney* judgment in 1992. It has been part of the judicial interpretation since then.

Regarding the identification of backward classes, the courts in India had a strong tendency towards homogeneity to the backward class. The only exception to this has been the permissibility to create the category of 'most backward classes' within the backward classes.

² AIR 1963 SC 649

³ AIR 1993 SC 477

⁴ AIR 1976 SC 490

In the case of *M.R. Balaji vs State of Mysore*⁵, acknowledging the sociology and history of caste in India the court held that while caste cannot be the sole or dominant criteria it may be relevant to consider caste as one of the factors. The court stated that if caste were to be made the sole basis then it would render the identification of backward classes impossible for other groups in India like for Muslims, Christians, Jains etc. that do not recognise caste as such.

Later, the Supreme Court in *Chitrlekha vs State of Mysore*⁶ reiterated the ratio of Balaji case. However, the interpretation changed in the case presided by five judges in *Rajendran vs State of Madras*⁷, where it was held that if the caste as a whole is socially and educationally backward then it could be regarded as a criteria for backward class and that would not be violative of Article 15.

When there was no finality on the clear criteria for identification of OBC, the state of Karnataka finally requested to the Supreme Court to decide the guidelines. A five-judge bench heard the matter in *K.C. Vasanth Kumar vs State of Karnataka*⁸. Each of the judges wrote a separate opinion and it was evident that the Supreme Court was far from reaching a clear position on the issue. While Chief Justice Y.V. Chandrachud pressed upon economic and comparability to the social position of SC/ST as the criteria, justice Desai emphasised relying on the economic criteria alone. Justice A.N. Sen again relied on economic criteria as the sole basis and considered caste could play a role only when the groups in question were comparable to SC/ST. In contrary to this justice Chinnappan Reddy advanced that the 'group poverty' approach would be constitutional, if the group, whether based on caste or occupation or sub-region is identifiable on the basis of poverty.

From the discussion, in this case, it was clear that the Supreme Court had determined poverty as well as comparability to SC/ST as the criteria to define OBC. This itself corroborate with the appeal that there exists a wide spectrum of backwardness in the OBC itself. There are some people who are backward because of limited economic opportunities available to them and then there are some groups who are more backward because they are closer to the level of social backwardness that of SC/ST along with economic backwardness.

The issue of clear guidelines for identification based on caste was further taken up in Indra Sawhney case. Justice Jeevan Reddy gave a prominent interpretation in the judgment that: 'Class' was used in order to facilitate identification of backward classes beyond Hindus as

⁵ AIR 1963 SC 649

⁶ AIR 1964 SC 1823

⁷ AIR 1968 SC 1012

⁸ AIR 1985 SC 1495

well. Any given caste was a social homogenous class and that it was ‘also an occupational grouping with difference that its membership was hereditary’.⁹

He then ruled that the state could begin its attempt to identify the backward classes on the basis of caste. Beginning with caste, he clarified, meant that the state had to evolve various criteria of backwardness which would then have to be applied in each caste. The conclusion thus was that the two important factors could be criteria of backwardness and adequacy of representation.

With regard to sub categorisation of OBC as most backward class(MBC) justice Jeevan Reddy argued that with the same reasoning that SC/ST has been given separate quota from OBC, MBC can be carved out of OBC as well. Under Article 16(4) there is no explicit mention of SC/ST but there has never been any contest to the separate classification for SC/ST. If they were clubbed together with OBC then OBC would corner a disproportionate share of vacancies¹⁰. It was moved as a tool for ‘equitable apportionment’ between the two categories.

By upholding, the classification per se, the court recognised the fact that some groups are at a more disadvantageous position and thus require a greater share of benefits for development.

The creamy layer criteria applied on this basis is solely based on economic position in society. However, as argued in the case of *Vasanth Kumar*, there may be certain caste who are closer to in social position to SC/ST. They may not be in a position to compete with the dominant caste in OBC. Dalit Muslims and Dalit Christians who are converted from Hindu Dalit society are put under OBC list. But due to their social and economic position remaining equivalent to SC’s they are not in a fair position to compete with other dominant OBC castes.

III. CASE FOR SUB-CLASSIFICATION OF BACKWARD CLASSES

The concern with Supreme Court approach to understanding the nature of OBC as a group is reflected in the context of Dalit Muslims and Christians. The supreme court has not acknowledged the difference in social and educational standing of the groups with the OBC. It has been deemed to be concluded that once a group has been included in ‘backward class’ the nature of backwardness is same for all the members. A limited effort was made in *Indra Sawhney* case when the court permitted the criteria of MBC category. However, this limited interpretation doesn’t do justice to the varied status of backwardness that exists among the OBCs.

⁹ AIR 1993 SC 477.Para 82.

¹⁰ Ibid Para 92-92A.

The inclusion of Dalit Muslims and Dalit Christians in the OBC list throw light on the importance of this concern. These groups changed their religion to escape from caste based discrimination they faced in the Hindu religion. But their hopes crashed when they didn't received equal treatment in the society even after conversion. It is evident and can be corroborated by referring to relevant studies.¹¹

The constitution (scheduled caste) order, 1950 denies SC status to Dalits who have converted to Islam or Christianity. Paragraph 3 of the original 1950 provided that "no person who professes a religion different from the Hindu religion shall be deemed to be a member of a scheduled caste". However, after amendments in 1956 and 1966 Dalits amongst Sikhs and Buddhists were also recognised as scheduled caste. This differentiation between the converts to different religions is itself difficult to justify constitutional principles. The exclusion of Dalit Christians was challenged in *Soosai vs. Union of India*¹² before a three-judge bench of the Supreme Court. The petitioner belonged to the Adi-Dravida caste (a scheduled caste in Tamil Nadu) but had converted to Christianity and challenged the order of the Tamil Nadu government, which denied them benefits of scheduled caste, violating the equality provision in Article 14 and the anti-discrimination provision in Article 15. The court was of the view that for availing the benefits provided under scheduled caste category it was important to show that the converted people continue to face discrimination under new religion as they used to face while being a Hindu. The court held that no authoritative evidence had been placed before it about the conditions of Christian society in India and had to, therefore, reject the constitutional challenge to the 1950 presidential order.

Similarly, in *Aqeela Khanam vs. City of Nagpur Municipal Corporation*¹³, the Bombay High Court in 2004, set aside an order of the Maharashtra government that sought to provide reservations to the Dalits Muslims under the scheduled caste quota while appointing schooled teachers. The Bombay High Court reaffirmed the position that there could be no Scheduled caste among Muslims.

The important question here is not whether Dalit Muslims or Dalit Christians should be given scheduled caste status or not. But the more relevant issue is that there exists a wide spectrum of group within the OBC who are placed at different backwardness level. The law treats these converted Dalits as OBC's but their social position is far different from a large number of

¹¹ Prakash Louis, "Dalit Christians: Betrayed by State and Church" XLII(16) *Economic and Political Weekly* 1404 (2007); Yoginder Sikand, "A New Indian Muslim Agenda: The Dalit Muslims and the All-India Backward Muslim Morcha" 21(2) *Journal of Muslim Minority Affairs* 287 (2001).

¹² AIR 1986 SC 733

¹³ 2005 (2) BomCR 169

castes included in the OBC list. The categorisation of 'backward class' and 'most backward class' is not adequate to capture the complete nature and intensity of backwardness that exists within the rather large category of OBC's. Untouchability, caste, class, religion and gender are relevant in different ways to factor the backwardness of groups in the OBC category.

Even the constitution itself recognises the pluralities of backwardness within its text. The member of the Mandal commission report, Mr L.R. Naik, while noting his dissenting opinion in the report recognised this fact. He disagreed regarding the homogeneity of backwardness that was being ascribed to the groups included in the list of backward classes.

The L.R.Naik's dissent in the Mandal Commission Report points to the inadequate response the Supreme Court has made towards identifying backwardness and concerns of distribution of benefits within the OBC's. While the court made significant progress through its decision in the *Indra Sawhney* judgment, it did not engage sufficiently with the dynamics of backwardness that exists within the OBC group. The constitutional logic that groups cannot benefit from opportunities if they are not similarly situated needs to be applied within the OBC's so that the most disadvantaged among them have a fair chance. Recently, the Ranganath Mishra committee has recommended for extending the scheduled caste benefits to the Dalit Muslims and Dalit Christians.

Even within the scheduled caste category, the homogeneity ascribed is much greater. Due to this, there are groups which are deprived of much needed benefits because few dominant of the groups take away the larger chunk of benefits allotted to the scheduled caste as a whole.

There are many research works which establish that scheduled caste groups have replicated the very hierarchy of Hindu caste system among themselves. Louis Dumont's '*Homo Hierarchicus*'¹⁴ is an important work in this area. He had argued that untouchables have replicated the very hierarchy which subjugated them among themselves. His central argument is that untouchables have followed the same idea of purity and impurity as it is prevalent in the overall hierarchy of the caste system.

Sir Herbert Ridley was the commissioner of the 1901 census, which was the first task of classifying and ranking castes. The basis of his classification of untouchables revolved around their treatment by the hands of Brahmins. Thus, it was not a comprehensive work on classification and did not classify together groups which on the ground had many differences in terms of social treatment.

Similarly, the 1935 list concerning scheduled caste classification was prepared by the

¹⁴ Louis Dumont, *Homo Hierarchicus: The Caste System and its Implications* (Paladin 1972).

Britishers. Lloyd Rudolph and Susanne Rudolph had illustrated in their research work that how the two unequally placed caste, the Mahars and the Bhangi, were placed in the same category. While Mahar's literacy rate was almost equal the national average the Bhangi's literacy rate was abysmal.¹⁵ At the same time, seven generations of Mahars were not involved in 'polluting' occupations while the Bhangis are still doing it. It is disappointing to find that these differences till continue to exist in present day India. Both the groups are still placed under the same scheduled caste category fighting for the limited reservation benefit placed in unequal positions.

In this manner, the intended benefits will hardly trickle down. As a result, the disadvantageous sections will still struggle to come out of exclusion.

IV. JUDICIAL APPROACH TOWARDS THE ISSUE

The Andhra Pradesh has been the only state in India that has attempted sub-classification of scheduled caste by enacting a legislation to that effect. Based on the empirical evidence provided by Justice Ramchandra Raju Commission, Andhra Pradesh Scheduled Caste (Rationalisation of Reservation) Act 2000 was passed. It divided the Scheduled Caste into four groups.

The High Court of Andhra Pradesh decided the issue of such sub-classification in *Mallela Venkata Rao vs state of Andhra Pradesh*¹⁶. It held the legislation constitutionally valid, relying on the justification that merely grouping the scheduled caste into four groups does not lead to inequality or any sort of caste-based discrimination. The court said that this would ensure equitable distribution of benefits. It was challenged before the Supreme Court in *Chinnaiah vs State of Andhra Pradesh*¹⁷. The Supreme Court held the legislation unconstitutional arguing that the scheduled caste is a homogeneous group thus further classification would be arbitrary in exercise. This understanding of considering scheduled caste as a homogeneous group is itself not correctly paced as discussed before in this paper.

In *N.M. Thomas v State of Kerala*¹⁸ the Supreme Court has held that there is no basis in sociological or empirical evidence to show different social standing of castes within the scheduled caste. In fact the court described the scheduled caste as a homogeneous class and not as caste. Validating the N.M. Thomas judgment, the Supreme Court in *Indra Sawhney*

¹⁵ Rudolph L and Rudolph S, *The Modernity of Tradition: Political Development in India* (University of Chicago Press 1967).

¹⁶ 2000 (6) ALD 555

¹⁷ AIR 2005 SC 162

¹⁸ AIR 1976 SC 490

reiterated scheduled caste as a homogeneous class. The judgment stated that any sub-classification would violate article 14, equality of treatment.

The above findings of the courts do not find corroboration with the findings of the B.N. Lokur Committee which submitted its report over the subject in the year 1965. The report explicitly referred to the problem of certain castes in the list of scheduled caste cornering a disproportionate scheme of benefits.

Similarly, the Justice Usha Mehra Committee constituted to study the issue of sub-classification of Scheduled Caste for the purpose of reservation concluded in favour of such sub-classification. In its report submitted in the year 2008, the committee accepted the findings that some castes consider themselves superior to the other. For example 'Mala' consider themselves superior to the 'Madigas'.

In conclusion, we can say that there is ample evidence which speaks about social and educational differences lying within the scheduled caste. The uniformity imposed by the law has maintained and perpetuated these differences. It is one of the reasons that have prevented the benefits from trickling down.

V. WAY FORWARD

Sub-categorisation, as discussed so far in this paper could prove to be a useful exercise to better target the intended beneficiaries. By intended beneficiaries we refer to those backward classes who require state support to uplift themselves in the society. This would rationalise the limited quota of benefits available. This would avoid only a few sections of people, cornering a large proportion of benefits.

While sub-categorisation could be one of the tools for better targeting of intended beneficiaries, there could be few more ideas upon which the policy makers might think. The purpose of using these tools should be to adopt a simple and effective strategy to perform the task of rationalisation. These ideas are developed over discussions among social thinkers, concerned with rationalisation of reservations. The possible tools of refinement are:

1) Prioritisation of Beneficiaries:

A simple device of rationalisation could be to set priority for least advantaged in a group. In other words, the last beneficiary in the current system could be placed first in priority to access the benefits. Here, it is not that persons with better conditions within the backward class would be deprived altogether. They would get a chance to avail the benefit only after the least advantaged sections get a chance. This way the issue of non-fulfilment of seats by

desired candidates would also be resolved. More importantly, this would help in the equitable apportionment of benefits.

2) Provisions for limiting multi-generational advantages:

It is observed through various studies that children of government servants get hold of most of the reserved seats. This is due to an already advantageous position in terms of a good education, access to expensive higher education, coaching, counselling etc. This in turn limits the chances of under privileged among the backward classes. In order to check this, a limit on multi-generational advantages could be made. For example, if the parents of the candidate have availed the benefit of the reservation to get a class II job then she would be eligible for reservation benefit only for the class I job i.e., for the superior post but not otherwise. This tool will ensure that while the children of government servants coming from backward classes aspire for higher posts and fill the social gap there. At the same time, the least advantaged children have more number of seats available for their adequate representation.

3) Evidence based review to determine exclusion:

Lack of substantive evidence about the effect of reservation on the backward classes is a drawback for the aim to rationalize reservation. Due to the void of such concrete evidence, policy makers are not in a position to argue before the people that measures are necessary to be taken for betterment. Politicians succumb to political pressure and don't wish to lose their vote banks. An effort was made through collection of data through socio-economic and caste census, 2011 however the caste based data has not been made public.

An evidence based review would help to determine the limits of benefits. This would help in making tools discussed earlier like sub-categorisation, prioritisation and limiting multi-generational evidences more effective.

VI. CONCLUSION

In the recent judgment by the Supreme Court, *Jarnail Singh & Others v. Lachhmi Narayan Gupta and Others*¹⁹ the Hon'ble Court has emphasized on equitable distribution of reservation benefits. The court remarked the whole object of reservation is that the backward class of the society move forward, this would not happen if the creamy layer bags major chunk of benefits.

These remarks by the Court corroborate with the views and arguments highlighted in this paper. A thorough evidence based review inculcating new tools of rationalisation like sub-

¹⁹ (2018) 10 SCC 396

categorisation would help to serve the true objectives of reservation that is, equitable apportionment. Moreover, this would gain the trust of people from all the sections of society towards the reservation policy of the country.

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