

Constitution 103rd Amendment Act, 2019 and its Position in Indian Constitutionalism: An Observational Study

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ABSTRACT - With the advent of the year 2019 India celebrated its 73rd Independence Day while embracing glory of success pertaining to *Mission Shakti*, *Train 18 (Vande Bharat Express)*, *launching of Chandrayan II by ISRO*, *getting placed in UNSC* and many more.

But, gazing on the other face of the coin, it is so ironical that even after years of independence we are in need of a system which reserves seat for some particular sections of the society belonging to a specific caste.

Indian Caste system and Reservation Policies pertaining to that has gone through a long evolution and improvised itself to the present structure. It is a policy which is more based of the conception of Equity rather than Equality for “*Like must be treated alike and unequals must be treated unequally*” is an intrinsic connotation of the provision pertaining to reservation as mentioned in the Indian Constitution.

Alongside, India being a democratic country with a written Constitution, Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India.

Pertaining to all these it could be observed that the recent move by the Government to come up with Constitution 103rd Amendment Act, 2019 is something not coherent to the notions aforementioned and its position is quite vague as per the Constitutional Provisions and Precedents existing in the Country at current time.

Law is mobile and it changes with the change in society. Admitting to the same, in this paper the researcher has tried to make a mere observational study without making any judgmental statement.

Keywords - Constitution Amendment Act, Reservation Policies.

I. INTRODUCTION

“Ours is a battle; Not for wealth, nor for power. Ours is battle; for freedom; for reclamation of human personality.”

- Dr. B. R. Ambedkar

With the advent of the year 2019 India celebrated its 73rd Independence day while embracing glory of success pertaining to *Mission Shakti*, *Train 18 (Vande Bharat Express)*, *launching of Chandrayan 2 by ISRO*, *getting placed in UNSC* and many more.

But, gazing on the other face of the coin, it is so ironical that even after years of independence we are in need of a system which reserves seat for some particular sections of the society belonging to a specific caste. It adequately narrates the tale of something that is wrong with this

country and its structure of imparting education and employment.¹

In simple language, reservation refers to an act of withholding, reserving or keeping back some of the seats for the upliftment of status and standard of living socially and educationally backward sections, classes or groups.²

In a legal understanding, “reservation in Indian law is a form of affirmative action whereby a percentage of seats are reserved in the public sector units, union and state civil services, union and state government departments and in all public and private educational institutions, except in the religious or linguistic minority educational institutions for

¹ An Analysis of Reservation in India, available at <http://lawtimesjournal.in/an-analysis-of-reservation-in-india/> (Last visited on 19th Sept, 2019).

² *Reservation: Under Article 15 & 16 of the Constitution (2017)*, available at: https://www.legalbites.in/law-notes-constitution-reservation/#_ftn2

the socially and educationally backward communities and the Scheduled Castes and Tribes who are inadequately represented in these services and institutions.”³

Indian reservation system which is basically a Caste based Reservation System is one of most established surviving type of isolation getting portrayed on the planet. The conception basically derived from the Sanskrit word “Chaturvarna” which truly implies four-shading framework. The hues allude to the skin shade of the Aryans (white) and Dravidians (dim cleaned). Since there was intermixing between these races previously, there were more shades. The system that originally oriented certain occupational division took an ugly turn over the ages.

True in saying that, at current time reservation is a huge debate. Pertaining to that in this paper the researcher while adopting Doctrinal Legal Research Methodology has tried to deal with existing laws and precedents has tried to observe the true position of the recently brought 124th Constitution Amendment Bill, 2019 by the BJP Government and its nexus with the Constitutionalism in India.

II. HISTORICAL SCENARIO

A. Pre-Independence Era:

The Chaturvarna (a Sanskrit word) talks about such a framework which is guaranteed to be a drop out of the Aryan intrusion of India, partitioning individuals into 4 + 1 classifications i.e., Brahmins (Priests), Kshatriyas (Warriors), Vaishyas (Traders/Landowners), Shudras (Peasants) in one side and Outcasts (Tribes) on the other. The best 3 - Brahmins, Kshatriyas, and Vaishya were considered to be the 'purer' casts while the rest two i.e., Shudras and Outcasts, as they were subjected to deal with all the odd professions in the society, were considered to be the impure or dirty casts and thus were untouchables.

Talking about the history of the reservation system in India, it existed even before autonomy in a few zones of British India. Requests for different types of positive discrimination had been made, for instance in 1882 and 1891 and in a chronological it could be summarized in the following manner:

- (i) In the year 1882 Hunter commission was appointed. Mahatma Jyotirao Phule, a prominent leader of that time made a demand for free and compulsory education for all along with proportionate reservation in government jobs.
- (ii) In 1902 CHATRAPATI SHAHUJI MAHARAJ, Maharaja of Kolapur presented reservation for non-Brahmin and backward classes, quite a bit of which came into power in 1902, adopting 50 percent reservation for backwards. He gave free

training to everybody and opened a few hostels to make it simpler for them to get it. He likewise endeavored to guarantee that individuals' reasonable thoughts were appropriately utilized in the administration process and also strived for the abrogation of untouchability.

- (iii) In 1908 reservation were introduced by the British in favour of a number of castes and communities that had little share in the administration.
- (iv) Subsequently in 1909 the British Raj came up with certain components for reservation in the Government of India Act of 1909 commonly known as Morley Minto reforms and there were numerous other estimates to set up the preceding autonomy.
- (v) In 1919 provisions regarding the same were made in government of India Act 1919.
- (vi) In 1921 Madras presidency introduces Communal GO in which reservation of 44% for Brahmins 16% for non Brahmins and Muslims 16% for Anglo Indians/Christians and 8% for schedule castes.
- (vii) A critical situation rose up out of the Round Table Conference of June 1932, when the Prime Minister of Britain, Ramsay Macdonald, proposed the Communal Award, as indicated by which, separate electoral constituencies was to be accommodated to Untouchables, Muslims, Sikhs, Indian Christians, Anglo-Indians and Europeans to satisfy the minority interest. There was collision of opinion in between Gandhi who was opposing the proposition and Dr. Ambedkar who was in support of it that ultimately got settled in 1935 whereby Indian national congress passes resolution called Poona Pact to allocate separate electoral constituencies for the depressed and oppressed classes.⁴

B. Post Independence Era:

Major segments of the development of reservation system in the country as a part of Administrative as well as Judicial action by the newly born Government of Independent India were,

- (i) **State of Madras v. Champakam Dorairajan**⁵ is a milestone choice of the Supreme Court of India. This judgment prompted the First Amendment of the Constitution of India. It was the first significant judgment with respect to reservations in Republic of India. In its managing the Supreme Court maintained the Madras High Court judgment, which thusly had struck down the Communal Government

⁴ Menon V. P, “Transfer of Power in India” (Reprinted edn.). (Orient Blackswan Publishers, 1957).

⁵ AIR 1951 SC 226

³ Supra Note 1

Order (G.O) go in 1927 in the Madras Presidency. The Communal G.O had given caste based reservation in government occupations and school seats. The Supreme Court's decision held that giving such reservations was infringing upon Article 16 (2) of the Indian Constitution.

(ii) The establishment of *Kalekar Commission* in 1953 to assess the circumstance of socially and instructively backward class. The Commission was directed to determine the criteria to be adopted in considering whether any section of people should be treated as socially and educationally backward.⁶ Complying with Article 340 of the Constitution of India, the First Backward Classes Commission was set up by a presidential request on 29 January 1953 under the chairmanship of Kaka Kalekar. It is otherwise called the First Backward Class Commission, 1955 or the Kalekar Commission.

Following were the major criterion to be considered by the Government of India to rectify and reestablish the reservation system as per the recommendations made by Kalekar Commission:

- Low social position in the caste hierarchy.
- Lack of educational progress.
- Inadequate representation in government service.
- Inadequate representation in the fields of trade, commerce and industry.⁷

(iii) In 1963 court has put 50% cap on reservation in the case *M R Balaji V. State Of Mysore*⁸.

(iv) The Mandal Commission, or the Socially Backward Classes Commission (SEBC), was established in India on 1st January 1979 by the Janta Party government under Prime Minister Morarji Desai with an order to "recognize the socially or instructively backward classes" of India. In 1990 Mandal Commission suggestion was actualized in government occupations by Vishwanath Pratap Singh.

Following were the major recommendations made by the commission:

- "The reservation of 27 per cent jobs for those who do not qualify on the basis of merit.
- The reservation of 27 per cent for promotions at all levels.
- The reserved quota, if unfilled, should be carried forward for a period of three years and de-reserve thereafter.

- Age relaxation for the backward classes should be the same as it is in the case of the scheduled castes and the scheduled tribes.
- A roster system should be prepared for the backward classes on the pattern of that for the scheduled castes and scheduled tribes.
- The principle of reservation should be made applicable to all the public sector undertakings, banks, and private undertakings receiving grants from the central and state governments, universities and colleges.
- The government should make the necessary legal provisions for implementing these recommendations."⁹

(v) In 1990 Government headed by V. P. Singh issued executive order giving 27% reservation to OBC community. Government's order created chaos among the forward class people. With rising unemployment and slow growth of economy it added more fuel in the fire. One recurrent controversy that has arisen on multiple occasions before the Apex Court is the criteria for determining backwardness in order to qualify for reservation. There have been several cases that directly deal with this question. Of these, the most significant is the 1992 decision of by the Supreme Court in *Indra Sawhney v. Union of India*.¹⁰

The 9 judges Constitution Bench of the Supreme Court by 6-3 majority gave the following judgments:-

- Backward class of citizen in Article 16(4) can be identified on the basis of the caste system & not only on economic basis.
- Article 16(4) is not an exception of Article 16(1). It is an instance of the classification. Reservation can be made under article 16(1).
- Backward classes in Article 16(4) were not similar to as socially & educationally backward in article 15(4).
- Creamy layer must be excluded from the backward classes.
- Article 16(4) permits classification of backward classes into backward & more backward classes.
- A backward class of citizens cannot be identified only & exclusively with reference to economic criteria.
- Reservation shall not exceed 50%.

⁶ Kaka Kalelkar Commission (Useful Notes), available at: <http://www.yourarticlelibrary.com/essay/kaka-kalelkar-commission-useful-notes/35172> (last visited on 19th Sept, 2019).

⁷ Ibid

⁸ AIR 1963 SC 649.

⁹ Short notes on the recommendations of the Mandal Commission, available at: <http://www.preservearticles.com/notes/short-notes-on-the-recommendations-of-the-mandal-commission/24657> (last visited on 19th Sept, 2019).

¹⁰ (1992) Supp. (3) SCC 217 [2]

- Reservation can be made by the ‘EXECUTIVE ORDER’.
- No reservation in promotion.
- Permanent Statutory body to examine complains of over – inclusion / under – inclusion.
- Majority held that there is no need to express any opinion on the correctness or adequacy of the exercise done by the MONDAL COMMISSION.
- Disputes regarding new criteria can be raised only in the Supreme Court.

It could hereby be concluded that, in all the landmarked events concerning the Reservation policy in India, the concerned authorities have always spoken about on the basis of social and educational backwardness and not that of economic. And economic backwardness can only be construed as a criterion for the same whereby such backwardness has arouse out of such Social and educational backwardness.

III. CONSTITUTIONAL PROVISIONS

A. Article 14.

Art 14 states that “The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

1. The two phrases—
 - (a) equality before the law and
 - (b) equal protection of the law do not
2. mean exactly the same thing. The former is negative in content implying absence of special
3. Privilege in favour of any section of the people or any individual. Equal protection of the law is positive in content. It implies equality of treatment in equal circumstances again “equality before the law” implies that all are equal in the eyes of law and from the highest to the humblest, all will be tried by the same law and will be given the same punishment for same crime.

The phrase “equal protection of the laws” is borrowed from the 14th amendment of the U. S. constitution. It means that like should be treated alike, that none should be favoured and none should be discriminated, against. This allows the Parliament to classify persons for the various purposes. The classification should be reasonable.

B. Article 15

Art 15 states that “the state shall not discriminate against any citizen on grounds only of religion, race, caste sex, place of birth or any of them.” This article ordains that no citizen shall be denied

- a. access to shops, public restaurants, hotels or places of public entertainment or

- b. the use of wells, tanks, bathing ghats, roads and places of public resorts maintained wholly or partly out of state funds.

This article however does not forbid the state from making special provisions for women and children. The state is equally free to make special provisions for socially and educationally backward classes and for the scheduled castes and tribes.

Supreme Court in *Nain Sukh Das v. State of UP*¹¹ invalidated an Act of State Legislature which provided for elections on the basis of separate electorates for members of different religious communities. In *D.P. Joshi v. State of M.P*¹², the Supreme Court held that a law which discriminates on the ground of residence did not infringe Article 15. Place of birth in Article 15(1) is different from residence. In a significant judgment¹³, a five judge bench of the

Supreme Court has held that a person belonging to Scheduled Caste or Scheduled Tribe, bearing the same nomenclature in two States is entitled to the rights, privileges and benefit only in the State of his origin but not entitled to those rights and benefits in other States where he immigrates. Clause 5 was added by Constitution (93rd Amendment) Act, 2006. It has been enacted to nullify the effect of the three decisions of the Supreme Court, i.e., *T.M. Pai Foundation v. State of Karnataka*¹⁴ and *Islamic Academy v. State of Karnataka*¹⁵. It provided provision for reservation of backward and SC & ST classes.

C. Article 16[1]

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

Article 16 is therefore a facet of Article 14. Articles 14 and 16(1) have a very close nexus with each other. Article 16 as a matter of fact takes its roots from Article 14 and in a Constitutional sense, identifies “equality of opportunity” in matters of employment under the State. Article 16 in the true sense expands the principle of “equality” enshrined in Article 14 and therefore applies the same to situations which involve employment under the State.

The Supreme Court clarified that Article 16(4) was not an exception to Article 16(1) but only an instance of classification implicit and permitted under Article 16(1). Even without Article 16(4), the State could have classified “backward class of citizens” in a separate category for special treatment in the nature of reservation in government services. Article 16(4) merely put the matter beyond any shadow of doubt in specific terms. It was also noted by the

¹¹AIR 1953 SC 384

¹²AIR 1955 SC 334

¹³The Hindustan Times, July 22, 1994

¹⁴AIR 2003 SC 355

¹⁵AIR 2003 SC 3724

court that Article 16(4) was rather a means of achieving the right to equality enshrined in those Articles. Therefore the Supreme Court overruled this opinion of its judgment in **N.M.Thomas**.

D. Article 16[4]

Clause[4] of Article 16 expressly permits that state to make “provision for 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”.

The expression “backward class of citizens” in Article 16[4] includes the schedule caste and schedule tribes.¹⁶

This clause cannot be extended to persons acquiring SC/ST status by voluntary mobility. Further children of inter caste married couple of which one is SC/ST, have been entitled to claim reservation benefit. However, such children can claim relaxation of marks¹⁷

E. Article 335

Article 335 of the **Constitution** deals with the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Hon’ble Supreme Court examined the provision of Article 335 of the Constitution in the case of **M. Nagaraj & Ors. V. Union of India & Ors.**¹⁸ wherein it was held that, “Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion”¹⁹.

The fundamental focal point of Article 335 of the Constitution is the necessity of the state to recognize the cases of the SCs/STs while 'making arrangements to posts and administrations'. Be that as it may, Article 335 likewise states that the affirmation of such cases will be consistent with the worries of effectiveness. In any case, decisions of the Supreme Court have utilized this arrangement to strongly suggest, with no genuine supporting contentions, that reservation and productivity essentially pull in various ways. Despite the fact that the arrangement allowing the state to give reservation in work discovers notice in the Fundamental Rights part of the Constitution and Article 335 is in the section on Special Provisions Relating to Certain Classes, the Supreme Court has utilized Article 335 to check the intensity of Parliament to give reservation in advancements even while it is practicing its capacity to correct the Constitution.

¹⁶E.V Chinnaiiah v State of AP 2005 [1] SCC 394.

¹⁷Sindhvusscommr.Of Entrance Examination, AIR 1996 SC 1011.

¹⁸ AIR 2006 SC

¹⁹ Ibid

Minimum necessary requirement under Art 335

Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of backward classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and Tribes who are said by this Court to be backward classes can maintain minimum necessary requirement of administrative efficiency not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Articles 15(4) and 16 (4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15 [1] and 16 [1] the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society. It follows therefore that in order to provide equality of opportunity to all citizens of our country, every class of citizens must have a sense of equal participation in building up an egalitarian society, where there is peace and plenty, where there is complete economic freedom and there is no pestilence or poverty, no discrimination and oppression, where there is equal opportunity to education, to work, to earn their livelihood so that the goal of social justice is achieved.

F. CONSTITUTION 124TH AMEDMENT BILL

“Be it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. (1) This Act may be called the Constitution (One Hundred and Twenty-fourth Amendment) Act, 2019.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In article 15 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority

educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage'.

3. In article 16 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

Statement of object and reason

1. At present, the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article 15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.
2. The directive principles of State policy contained in article 46 of the Constitution enjoins that 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.
3. Vide the Constitution (Ninety-third Amendment) Act, 2005 clause (5) was inserted in article 15 of the Constitution which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, clause (4) of article 16 of the Constitution enables the State to make special 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.
4. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a

fair chance of receiving higher education and participation in employment in the services of the State, it has been decided to amend the Constitution of India.

5. Accordingly, the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 provides for reservation for the economically weaker sections of society in higher educational institutions, including private institutions whether aided or unaided by the State other than the minority educational institutions referred to in article 30 of the constitution and also provides for reservation for them in posts in initial appointment in services under the State.
6. The Bill seeks to achieve the above objects.”²⁰

IV. JUDICIAL INTERPRETATIONS

In **IndraSawhney v Union of India**²¹, the Supreme Court directed the government of India to specify the basis of exclusion whether on the basis of income, extent of holding or otherwise of “**Creamy Layer**”. In accordance with this direction, the government of India appointed a committee known as the “**Justice Ram Nandan Committee**” the creamy layer among the socially and backward classes. The committee submitted its report on March 16, 1993, which was accepted by the government. The aim of the civilized society should be to secure the dignity of the every individual of the society. There can be no dignity without the equality of status and opportunities. The absence of such treatment or opportunities in this walk of social life is the denial of equal status and equal participation in all the affairs of the society be it job education and so on. Founding fathers wanted to minimize the inequalities which are being preserved in the society to provide facilities among the person as well as among the gathering of individuals with the goal that they may verify the sufficient methods for work and their instruction and a wide range of social needs are secured. This aimed at their protection from social injustice and exploitation²².

Constitutional Law provides preferential treatments to the Backward Classes of citizens in the matter of appointment of posts in Public Services and it was a controversial issue since the enactment of the Constitution²³. The provisions for job reservation to the SCs and STs are incorporated in the Constitution as a part of the means to abolish the caste based, close hierarchical society and to establish an egalitarian society, having equal status and opportunity.

Therefore, to serve the basic objective of constitutional reservation, proper identification of the persons deserving to get the benefit of reservation, is considered to be

²⁰THE CONSTITUTION (ONE HUNDRED AND TWENTY-FOURTH AMENDMENT) BILL, 2019, Bill No. 3 of 2019. As introduced in Lok Sabha by Dr. Thaaawarchand Gehlot, Minister of Social Justice and Empowerment on the 7th January, 2019.

²¹ AIR 1993 SC 477

²²IndraSawhney v/s Union of India, AIR 1992, SC p. 477

²³Sunny, K.C., Creamy Layer Principle: Its social Relevance and legal Consequences, ALR1999, vol.23:l&2, p.135

essential. The apex court of the country had the opportunity to consider the legality of different criteria formulated by various State Governments to find out backward classes for the purpose of reservation under Article 16 (4) of the Indian Constitution. In 1992 while examining the validity of the job reservation policy to the backward class and the criteria followed by the **MANDAL COMMISSION** to identify backward classes of citizens in India, the Supreme Court itself had formulated a concept in this regard i.e. **the creamy layer principle**.²⁴

The Supreme Court explained the concept of the **Horizontal Reservation** in **Indra Sawhney v Union of India** and thus explained:

All reservations are not of the same nature. There are two types of reservation, which may, for the sake of convenience be referred to as the 'vertical reservation' and 'horizontal reservation'. The only difference between such reservation are that the reservation which are being made for the SC ST OBC's are known as vertical reservation and reservation made for the benefit of the handicapped are known as the horizontal reservation. To be more precise, suppose 3% of the vacancies are reserved in favour of the physically handicapped persons this would be a reservation relatable to clause [1] of Article 16. The person selected against the quota will be placed against that quota by making necessary adjustments. Even after providing for this horizontal reservation the percentage of reservation in favour of the backward class of citizens remains and should remain the same.

In Case of **State of Kerala V. N. M. Thomas**²⁵ it was also cited where Krishna Iyer, J. pointed out one of the dangers of reservation to be, "Its benefits, by and large, are snatched away by the top creamy layer of the 'Backward Caste' or class keeping away weak and leaving the fortunate layers to consume to the whole cake."

Caste as a Sole Basis

In **M.R. Balaji v. State of Mysore**²⁶ the Supreme Court held that backwardness under Clause [4] of Article 15 must be both socially and educationally. The caste of a group of persons could not be the sole criteria to determine whether that class should be taken into the backward purpose in reference to the Article 15[4]. The court held that as regards social backwardness, the main determining factor would be the result of poverty. One's occupation and place of habitation could be the other relevant factors in determining social backwardness of a class of person. The court thus invalidated the test social backwardness which was based predominantly, if not solely, on the basis of the caste.

In **State of A.P. v. U.S.V Balaram**²⁷ In this case supreme court reiterated the same view and observed 'If after the collection of data, it is found that a caste as a whole socially

and educationally backward, the reservation made for such persons will have to upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average.

In **K.S Jayasree v. State of Kerela**²⁸ the State of Kerela notified that candidates belonging to the families whose annual income was Rs. 10,000 or above would not be eligible for seats reserved for backward classes in the Medical Colleges in the state. The five-Judges expressed five separate opinions on the vexed question. The conclusion which may be drawn from these would be relevant factors to determine the backwardness of citizens.

In **IndraSawhney v. Union of India**²⁹ commonly known as the Mandal Commission case, the matter seems to have been settled by the majority of the supreme court, holding that caste can be a sole or a important factor in determining the social backwardness and that poverty alone cannot be such a criterion.

"The percentage of OBC population estimated at 'not less than 52%' (in Indra Sawhney judgment popularly known as Mandal verdict) certainly must have gone up considerably as, over the last two decades, there has been only inclusions in the central as well as state OBC lists but hardly any exclusion. This is certainly not what has been envisaged in our constitutional scheme," the bench said.

The court said the legislature must exercise high level of carefulness to discover rising types of backwardness and alluded to its ongoing decision perceiving the 'third sexual orientation' network as socially and instructively backward class qualified for reservation.

Neither can any more drawn out backwardness involve assurance based on scientific formulae developed by considering social, monetary and instructive markers. Assurance of backwardness must likewise stop to be relative, conceivable wrong incorporations can't be the reason for further considerations however the doors would be opened just to allow section of the most distressed. Some other incorporation would be a genuine resignation of the constitutional obligation of the state.

It has been as of late led in reference to these Transgender are qualified for advantages as socially and instructively backward class residents they are likewise entitled for reservation in open work.

V. CONSTITUTIONALISM IN INDIA

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one. On the one hand, we have

²⁴AIR 1993 SC 477

²⁵AIR 1976 SC 490.

²⁶AIR 1963 SC 649.

²⁷AIR 1972 SC 1375.

²⁸AIR 1976 SC 563.

²⁹AIR 1993 SC 447.

excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which were backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.³⁰

“In I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors. view taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.”³¹

In Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr. “The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.” Constitutionalism is about limits and aspirations.

As observed by Chandrachud, CJ, in **Minerva Mills Ltd.** – “The Constitution is a precious heritage and, therefore, you cannot destroy its identity”

On one hand, our judiciary elicit such intellectual responses that “Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism” said in **Indra Sawhney and Ors. vs. Union of India (UOI) and Ors.**

VI. CONCLUSION

As per Constitution of India, “one of the main purposes of reservation is to provide adequate representation of all classes (castes) in government services. Economic Reservation introduced by Article 16(6) is actually against this concept – as it does not take into consideration the caste-based representation.

Moreover, the reservation is not a poverty alleviation scheme.

Supreme Court had also ruled that economic status cannot be the sole criterion for reservation.

Many states had tried to implement Economic Reservation; however, they were subsequently quashed by Courts.

Introducing EWS bill in 2019, Union Social Justice and Empowerment Minister Thaawarchand Gehlot said the similar state laws for EWS quota were quashed by Courts because there was no provision for economic reservation in the Constitution before. Now, the Law will not be struck down by the Supreme Court if challenged as it has been brought by making required provisions in the Constitution.”³²

Last but not the least, the Constitutionalism in India too doesn't permit the same. Constitutionalism, the soul, the working force of the constitution, is the antithesis of arbitrariness or any kind of despotism. However, this particular move of the government is not coherent with the said conception of Constitutionalism.

The aforementioned discussion clearly portrays that the move taken by the Government is an arbitrary action against the unreserved categories thereby by violating Article 14 of the Constitution. Moreover, financial status can never be the sole criterion to provide reservation in India as decided the apex court of the country. For the said issue, a check must also be on the enjoyment of the policy of reservation by the so called **Creamy Layers** instead of the needy ones. Alongside, it is also to be kept into mind that reservation in India is to be provided to minority population, however with the advent of 10% Reservation for EWS, it is evident that 59.5% of the seats are reserved thereby making a way to provide reservation to the majority of the population. The Conception of **Equity** is to be highlighted more rather than **Equality** while dealing with the issue of Policy of Reservation for “**Like must be treated alike and unequals must be treated unequally.**”

Pertaining to all these issues it could be deduced that, the advent of Constitution 103rd Amendment Act, 2019 is an unconstitutional move by the present Government which is not in coherence with the notion of Constitutionalism in India. A case is already pending before the Hon'ble Supreme Court of India named as **Youth for Equality v. Union of India**. The Court though is yet to come up with a decision for the same.

³⁰ Constitutionalism. Available at: <http://www.legalservicesindia.com/article/1699/Constitutionalism.html> (Visited on 19th Sept, 2019).
³¹ Ibid.

³² Reservation in India – Explained in Layman's Terms. Available at: <https://www.clearias.com/reservation-in-india/> (last visited on 19th Sept, 2019).