**Reservation within Constitutional bounds**

**The story so far:**

A political slugfest has emerged over the reservation issues with the BJP making outlandish remarks about the Congress’ demand for caste census by linking it to religion. The Opposition, meanwhile, had raised concern over the BJP’s position on reservation, despite the latter’s explicit denial of any change in policy.

Constitution and affirmative action

The Constitution aims to secure social justice while guaranteeing equality as a fundamental right. Articles 15 and 16 guarantee equality to all citizens in any action by the state (including admissions to educational institutions) and public employment respectively. To achieve social justice, they also enable the state to make special provisions for the advancement of OBC, SC and ST. OBC is a collective term to classify socially and educationally backward castes. Many States also classify certain castes as the Most Backward Classes (MBC). The reservation percentages vary from State to State.

In the Indra Sawhney case (1992), the Supreme Court upheld the 27% reservation for OBC. It opined that caste is a determinant of class in the Indian context and backwardness cannot be determined solely on economic criteria. However, to uphold the basic structure of equality, it fixed a cap of 50% for reservations unless there were exceptional circumstances. The reservation of OBC (27%), SC (15%) and ST (7.5%) resulted in a total reservation of 49.5%. The court also provided for excluding the creamy layer from OBC with an income limit currently at ₹8 lakhs per annum. Children of parents, either of whom entered the government service (Centre or State) as Group A/Class I officers and children of parents, both of whom entered as Group B/Class II officers are also excluded. In the Janhit Abhiyan case (2022), the court by a majority of 3:2 upheld the constitutional validity of the EWS reservation. It held that economic criteria could be a basis for reservation.

**Affirmative action elsewhere**

In the U.S., there is ‘affirmative action’ that consists of government-approved and voluntary private programs granting special consideration to racial minorities like African-American and Latin-American. In Fair admissions vs Harvard case (2023), the U.S. Supreme Court, however, ruled that race-based affirmative action programs in college admissions violate the equal protection clause of the U.S. Constitution. In the U.K., the law enables voluntary ‘positive action’ which allows employers to combat under-representation of disadvantaged groups. France does not have any affirmative action based on race or ethnicity. It provides educational measures designed to increase opportunities for low-income students.

**Current debate**

The Constituent assembly that framed our Constitution was against reservation solely based on religion. The Constitution guarantees the prohibition of discrimination only based on religion under Articles 15 and 16. The inclusion of all Muslim communities within the OBC quota in Karnataka forms the basis for the BJP’s campaign at present. However, it is pertinent to note that sub-categorisation for Muslims within the OBC quota has been present in Karnataka since 1995. The four per cent sub-categorisation for Muslims introduced in 1995 by the H. D. Deve Gowda-led government was removed by the previous government led by Basavaraj Bommai. This was redistributed amongst the OBC in the Hindu community. However, after observation by the court in the case challenging this order, the status quo continues. Muslim and Christian communities who are socially and educationally backward are provided reservations under the OBC/MBC category. There is also sub-categorisation within the OBC/MBC quota for Muslim communities in States like Kerala, Tamil Nadu and Andhra Pradesh. This is because the term used in the Constitution is ‘socially and educationally backward classes’ and could encompass backward communities from all religions. It is only for being a member of a SC, ‘The Constitution (Scheduled Castes) order, 1950’ specifies that the person should profess only Hinduism, Sikhism or Buddhism. There is no such requirement for being a member of a ST.

The Congress, meanwhile, in its manifesto has promised that they would work towards removing the 50% cap placed on reservations.

**The way forward**

Reservation is affirmative action meant to balance the historical discrimination faced by OBC, SC and ST communities. Rohini Commission was set up to provide recommendations on sub-categorisation amongst OBC castes. Though the findings of the report are yet to be made public, it has been estimated that 97% of reserved jobs and seats in educational institutions have been garnered by just around 25% of the OBC castes/sub-castes at the central level. Close to 1,000 of around 2,600 communities under the OBC category had zero representation in jobs and educational institutes. While sub-categorisation has been implemented in 11 different States, it has not been carried out at the central level. A similar issue of concentration of reservation benefits persists in the SC and ST categories. There is no exclusion based on the ‘creamy layer’ for these communities. The Dalit Christians and Muslims also suffer from considerable discrimination and lack of opportunities. The government has constituted a commission headed by former CJI K. G. Balakrishnan to study the question of extending SC reservation to Dalits who have converted to religions other than Sikhism and Buddhism.

Increasing the reservation limit beyond 50%, sub-categorisation among reserved categories, introducing appropriate creamy layers for SC and ST, and extending SC reservations to Dalit Christians and Muslims are matters that are sensitive with their set of pros and cons. There must be effort nevertheless to deliberate on these matters and frame suitable policies such that the benefits of reservation progressively reach the extremely marginalised sections. The aim should be towards the continuous pursuit of social justice while maintaining a harmonious balance with equality guaranteed in the Constitution.