

**A CONSTITUTIONAL ANALYSIS OF THE IDEA  
OF AFFIRMATIVE ACTION: EXPLORING NEW  
STANDARDS IN LIGHT OF THE GUJJAR  
RESERVATION IN RAJASTHAN**

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**ABSTRACT**

*The Rajasthan government recently enacted two legislations guaranteeing reservations to Economically Backward Classes and Special Backward Classes, primarily Gujjars. The said reservation includes quotas in various spheres including education, public employment etc. Article 15 and 16(1) of the Indian Constitution guarantees equality of opportunity to all citizens in matters relating to employment. However, such equality is not absolute as the Article itself allows for reservation of certain portion of seats for the backward classes. The Apex Court on this point has held that the straitjacket rule for reservation is 50%, a cap which can only be exceeded in extra ordinary situations. The basic idea behind reservation was to do justice to the downtrodden. However, the allegations that government activities of reservation are targeted at creating a vote bank have emerged too and Rajasthan government's present act of granting*

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*reservation is attacked with the same. The justification given by the parliamentary affairs minister Rajendra Rathore, was the existence of similar reservation in Karnataka, Andhra Pradesh and Odisha. Similar actions have led to the emergence of the question of the motive behind such reservation and the aptness of the same. This paper aims to decipher the above questions while also throwing light on the validity of reservations in the aforementioned states. It discusses the Rajasthan model of reservation in depth, comparing it with that of Tamil Nadu and Andhra Pradesh while determining its validity. It also aims to fathom whether the idea behind the concept of reservation is being achieved or not.*

## I. INTRODUCTION

Affirmative action has been described as a tool that is used to eliminate both past and present discrimination, to remedy the effects of the same and to keep a check on any future discrimination.<sup>1</sup> In other words, it includes every positive mechanism undertaken to increase the representation of the underprivileged or backward classes in areas of employment, education, and culture etc. from which they have been historically excluded.<sup>2</sup> Hence, the basic idea behind affirmative action is providing a platform to the unequal so that they can come up and compete with the equals.

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<sup>1</sup>BRYAN A GARNER, BLACK'S LAW DICTIONARY, 64, (8<sup>th</sup>e.d., 2004) [Hereinafter BRYAN].

<sup>2</sup> Robert Fullinwider, *Affirmative Action*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2014 Edition), <http://plato.stanford.edu/entries/affirmative-action/>

India as a country has experienced the wrath of inequality since time immemorial, so much so that the earlier caste system acts as a testament to that fact. The bifurcation had the Shudras, which constituted the depressed class, encompassing a tremendous number of people. It is for their upliftment that affirmative action was introduced in India and is still prevalent. India has considerable experience with implementing affirmative action programs.<sup>3</sup> Recently, the Rajasthan Assembly passed two legislations to provide reservation to the backward class of Gujjars. Since this reservation comes after a long standing agitation against the same, its grant raises a lot of questions. Contentions have been made that these Acts are aimed at capturing vote banks by the leaders rather than upliftment of the Gujjars. Another related controversy, is the fact that the said grant exceeds the cap of 50%, which is against the Supreme Court guidelines. The government has cited the examples of Tamil Nadu, Telangana and Karnataka to justify their model. Hence, the purpose of this paper is to analyse the said model of reservation and decide whether such a reservation is constitutionally permissible.

Part I of the paper would explore the advent of affirmative action and its existence in India. Part II would discuss the present Acts of the Rajasthan Government granting the said reservation and the circumstances which gave rise to them. Part III would constitutionally analyse the Acts and compare them with the model of reservations prevalent in Tamil Nadu and Karnataka. Part IV will highlight the flaws in the existing model of reservation granted by the said Acts. Part V will provide suggestions for its improvement.

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<sup>3</sup>Siely Joshi, *The Constitutional Flaws of India's attempt to promote equality and a look at the United States constitution as a solution*, 32 Wis. Int'l L.J. 195 (2014).

## II. INDIA AND AFFIRMATIVE ACTION

‘Affirmative Action’, also called reservation in India, has a deep rooted existence. Its history goes back to the caste system, wherein the ancient Indian society was divided into four castes, i.e. Brahmin, Kshatriya, Vaishya and Shudra (the lowest of all).<sup>4</sup> It was the Shudras constituting the lowest category in the society, subjected to ill-treatment leading to their backwardness. It is the majority of members of this caste today that are entitled to reservation. The first formal instance of the same was in 1882, when during the Hunter Commission, Jyotirao Phule demanded free and compulsory education for the Smritis and also demanded representation for them in the government.<sup>5</sup> Further, in the year 1901 reservations were introduced in Maharashtra in the Princely State of Kolhapur by Shahuji Maharaja.<sup>6</sup> This policy became so important that provisions for the same were also incorporated made in the Government of India Act, 1919.

Reservation became such a pivotal part of the society that when the Constitution of India was drafted, the makers for the implementation of the backward classes, enshrined this concept into the text of the Constitution, in form of Article 16(4). This Article, gave the State the power to make specific provisions for reserving certain posts for the backward classes in the government sector.

Sixty five years since its introduction, the current scenario is that the central government has a reservation policy of 49.5% wherein 15% for the Scheduled Caste (hereinafter referred to as “**SC**”), 7.5% for the Scheduled Tribe (hereinafter referred to as “**ST**”) and 27% for the

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<sup>4</sup>SMITH, BRIAN, VARNA AND JATI’, ENCYCLOPAEDIA OF RELIGION, 79 (2<sup>nd</sup> ed., 2005).

<sup>5</sup>Mehbubul Hassan Laskar, *Rethinking reservation in higher education in India*, ILI Law Review, at 25,

[https://web.archive.org/web/20120425081633/http://www.ili.ac.in/pdf/article\\_2.pdf](https://web.archive.org/web/20120425081633/http://www.ili.ac.in/pdf/article_2.pdf)

<sup>6</sup> *Chatrapati Sahu Ji* (Dec. 02, 2015, 3:35:23 PM), <http://dalitvision.blogspot.in/2012/04/chhatrapati-shahu-ji-maharaj-1874-1922.html>

Other Backward Classes (hereinafter referred to as “**OBC**”).<sup>7</sup> The Hon’ble Supreme Court in the landmark case of *Indira Sawhney v. Union of India*,<sup>8</sup> stated that a cap of 50% should not be crossed while reserving seats in any case unless an extraordinary situation prevails. However, there are states that have exceeded it, namely, Tamil Nadu which has 69% reservation (OBC 50%, SC 18% and ST 1%)<sup>9</sup> and Karnataka having 66.5% reservation (22.5 SC& ST, 27.5 OBC and 15% and 5% in favour of rural candidates and students from Kannada medium and 1% for J&K). A similar model has been adopted by the Rajasthan government that has been discussed in Part II of the paper.

### III. THE RAJASTHAN GOVERNMENT AND THE ACTS

The Rajasthan Government recently passed two bills in its Legislative Assembly which grants reservation to the Gujjars of the state terming them as ‘backward’. The Acts, namely the Rajasthan Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015, (hereinafter referred to as “**Act One**”) and the Rajasthan Special Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015 (hereinafter referred to as “**Act Two**”).<sup>10</sup>

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<sup>7</sup>*Critical Analysis on Reservation Policy in India*, LEGAL SERVICES INDIA(Nov. 22, 2015, 4:30:29 PM), <http://www.legalservicesindia.com/article/article/critical-analysis-on-reservation-policy-in-india-1331-1.html>

<sup>8</sup>*Indira Sawhney v. Union of India*, AIR 1993 SC 477.

<sup>9</sup>*Id.*

<sup>10</sup>*Why Rajasthan reservation may run foul of constitution*, INDIAN EXPRESS(Nov. 13, 2015, 1:20:23 PM ), <http://indianexpress.com/article/explained/why-rajasthan-reservation-may-run-afoul-of-constitution/#sthash.KFcepm9p.dpuf>

Act One provides 5% quotas in jobs and education to the Gujjars under a new category of “*special backward classes*”<sup>11</sup> and Act Two provides 14% quota for the economically weaker sections of upper castes families with annual incomes up to Rs 2.50 lakh.<sup>12</sup> Put together, the two sections i.e. the economically backward classes and the special backward classes will avail total reservation of upto 68 per cent.

This reservation comes in light of the Gujjar agitation. On 23<sup>rd</sup> May, 2008 a protest group of Gujjars demanding reservation for them, was fired upon by the police leaving few certain dead and many injured. This was the starting point of a wide spread movement by the Gujjars demanding reservation for them in the state.<sup>13</sup> Initially, the government appeared adamant against giving in to the demands but finally succumbed to the pressure and passed the two bills in the state legislature granting reservation to the group.

Since this reservation comes in light of the Gujjar agitation a pertinent question arises as to whether such a reservation is targeted at the need of the Gujjars or the need of the leaders? The next part of the paper, delves into the same and analyses the two Acts attempting to deduce whether the Gujjars satisfy the constitutional requirements of availing the reservation or not.

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<sup>11</sup>Rajasthan Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015, § 5.

<sup>12</sup>Rajasthan Special Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015, §4.

<sup>13</sup>*Gujjars revive agitation for uota in Rajasthan government*, BIHARPRABHA (Dec. 2, 2015, 7:40:23 PM), <http://news.biharprabha.com/2015/05/gujjars-revive-agitation-for-quota-in-rajasthan-govt-institutions-hit-rail-services/>

#### IV. CONSTITUTIONAL ANALYSIS OF THE ACTS

Article 15(4) of the Indian Constitution deals with the issue of backward classes. The Constitution of India being silent on who falls within the category of backward classes, leaves the matter to the states to specify backward classes.<sup>14</sup> The courts in the past have taken various stances while defining backward classes. In *M.R Balaji v. State of Mysore*<sup>15</sup> the Honourable Supreme Court stated that for a class to be identified as ‘backward’, it should be both ‘educationally’ and ‘socially’ backward. Further, it enumerated various other criteria in determining backwardness. For instance, ‘poverty’ as the sole criteria for backwardness was not allowed, however clubbed with occupations, place of habitation was made a permissible form of criteria.

Additionally, in *Chitralekha v. State of Mysore*, the Honourable Supreme Court further laid down certain occupations which would be treated as backward including agriculture, petty business, inferior services, crafts etc.<sup>16</sup>

Gujjars constitute around 7-8 % of the population of Rajasthan<sup>17</sup> and have a literacy rate of 18% as compared to the 74% of the entire country.<sup>18</sup> Further, they are a class backward both economically and socially and have been cowherds graziers<sup>19</sup> and a nomadic community residing in forests and hills, hence being a community cut off from

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<sup>14</sup>M.P JAIN, INDIAN CONSTITUTIONAL LAW 943 (7<sup>th</sup>ed. 2014, LexisNexis).

<sup>15</sup>M.R. Balaji v. State of Mysore, AIR 1963 SC 649.

<sup>16</sup>Chitralekha v. State of Mysore, AIR 1964 SC 1823.

<sup>17</sup>*Gurjar agitation on the reservation*, INDIA TODAY (Dec.1, 2015, 2:20:12PM), <http://indiatoday.intoday.in/story/gurjar-agitation-on-the-reservation-issue-in-rajasthan-2007/1/155654.html>.

<sup>18</sup>T.K Rajalakshmi, *Gurjars agitation*, I (8) INDIAN RESEARCH JOURNALS, at 2.

<sup>19</sup> See, KELKAR COMMITTEE REPORT ON HIGH LEVEL COMMITTEE ON SOCIOECONOMIC, HEALTH AND EDUCATIONAL STATUS OF TRIBAL COMMUNITIES, 2014,

<http://www.indiaenvironmentportal.org.in/files/file/Tribal%20Committee%20Report,%20May-June%202014.pdf>

the main society.<sup>20</sup> Even their poverty ratio is very high and 94% of their income comes from animal husbandry.

In every determinant of backwardness the Gujjars of the State as per the data presented above satisfy all of the criteria of backwardness as contemplated by the Honourable Supreme Court. It also shows that the plight of the Gujjars is worse than the communities that have been granted reservation in the state (namely Jats).<sup>21</sup>

*A. Rajasthan model vis-à-vis Tamil Nadu and Karnataka.*

To analyse as to whether the situation of Rajasthan is similar to those of Karnataka and Tamil Nadu, a study of both the models is required. Since the latest instance of grant of reservation has been with respect to Muslims in the above two states, Gujjars are being compared to them.

A comparative analysis of the models of the three states presents the following picture. First in Karnataka and Tamil Nadu, Muslims constitute 8.5 %<sup>22</sup> and 5.561% respectively as compared to 11% Gujjars in Rajasthan.<sup>23</sup> Second, in Tamil Nadu the poverty ratio is less than 10% for the Muslims, which is very much similar to the plight of Gujjars in Rajasthan.<sup>24</sup> Third, literacy rate of Gujjars in Rajasthan is 18%<sup>25</sup> as compared to 70.1% and 82.9% respectively of the Muslims

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<sup>20</sup> See, LOKUR COMMITTEE REPORT ON REVISION OF BACKWARD CLASSES, <http://hlc.tribal.nic.in/WriteReadData/userfiles/file/Lokur%20Committee%20Report.pdf>

<sup>21</sup> See, Rohit Parihar, *Jat representation vis-à-vis the Gujjars*, INDIA TODAY (June 11<sup>th</sup> 2017, 3: 35 PM), <http://indiatoday.intoday.in/story/gurjar-agitation-on-the-reservation-issue-in-rajasthan-2007/1/155654.html>.

<sup>22</sup> *Population by Religious Communities* (Nov. 15, 2015, 10:30:16 PM), [http://demotemp257.nic.in/httpdoc/Census\\_Data\\_2001/Census\\_data\\_finder/C\\_Series/Population\\_by\\_religious\\_communities.htm](http://demotemp257.nic.in/httpdoc/Census_Data_2001/Census_data_finder/C_Series/Population_by_religious_communities.htm).

<sup>23</sup> *Id.*

<sup>24</sup> See, SACHCHAR COMMITTEE REPORT BY MINISTRY OF MINORITY AFFAIRS, Issued on Nov. 7th, 2015, [http://www.minorityaffairs.gov.in/sites/upload\\_files/moma/files/pdfs/sachar\\_comm.pdf](http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf) [Hereinafter S.C. Report].

<sup>25</sup> T.K. Rajalakshmi, *supra* note 18.

in Karnataka and Tamil Nadu.<sup>26</sup> Fourth, if we focus on the representation in government jobs the situation is even worse, as Rajasthan has merely 4% representation of Gujjars as compared to 8.5% in Karnataka and 3.2 %in Tamil Nadu of the Muslims. Therefore, the situation of Rajasthan is not similar but even worse as compared to Tamil Nadu and Karnataka. Thereby, the government is correct on adopting the model of Tamil Nadu and Karnataka for justifying its grant of reservation.

It is established by now that the action of the Rajasthan government is justified as Gujjars are indeed backward, thereby deserving the said reservation. However, the granting Acts still consists certain flaws with respect to the way they grant the reservation. The next part of the paper deals with the flaws in the Acts.

## V. FLAWS WITH THE ACTS

### A. *No obligation to accept the proposal.*

The Honourable Supreme Court of India, in *Kumar Singhania v. Union of India* held that Article 16(4) neither imposes any constitutional duty nor confers any Fundamental Right on any individual or state to claim reservation.<sup>27</sup> Hence, the state of Rajasthan was under no obligation to grant reservation to the Gujjars and could have instead chosen to resort to other means aiming towards their upliftment, an option it did not exercise. It needs to be noted that affirmative action is not the only recommended step to uplift the unequals as India is a country with a major chunk of its population backward and if reservation is seen as the only step to uplift them, then the percentage of reservation might go even beyond the 68%, as it stands today. Hence, causing serious prejudice to the

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<sup>26</sup>S.C. Report, *supra* note 24.

<sup>27</sup>*Kumar Singhania v. Union of India*, 1991 S.C.R. Supl. (1) 46.

general meritorious classes. Regardless, the state legislature still went ahead with its proposed reservation.

An alternative could have been the introduction of various schemes or setting up of infrastructure for the upliftment of Gujjars. It is trite knowledge that providing reservation is a less cumbersome option for the legislature rather than providing a pedestal wherein the unequals get the said infrastructure to improve themselves, where the benefits are not spoon-fed but given to the ones who deserve. The primary flaw with every state granting reservation is that the states forget that the idea of 50% being the cap for reservation was introduced keeping in mind the welfare of the general classes too. The Court along with providing for situations where the cap could be exceeded, deemed such situations ‘*exceptional*’, *so as to avoid its regular usage*. Hence, if a mere uproar causes a state to succumb to the demands of the people, it can be used against it to raise demands that are not genuine in nature.

*B. The acts do not provide for any minimum criteria.*

The basic principle behind introduction of reservation was upliftment of the un-equals and of those who are not represented sufficiently in the public services under the state. However, the Court in its pronouncements has time and again stated that even though the socially backward people may not be able to compete with the open category people, it does not mean that they would not be able to pass the basic minimum criteria laid down thereof.<sup>28</sup> A minimum criterion here denotes the smallest acceptable benchmark that a candidate needs to attain.<sup>29</sup>

For instance, if two candidates A and B appear for an exam, the latter being an OBC has a reserved seat. Candidate A scores a 120/150 and still doesn't qualify as someone scores more than him, whereas

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<sup>28</sup>Andhra Pradesh Public Services Commission v. Baloji Badhavath, (2009) 5 S.C.C. 1.

<sup>29</sup>BRYAN, *supra* note 1, at 1016.

candidate B scores 32 and still qualifies as he scores the most from his category. Such instances are made permissible as per the present Acts. Hence, the author proposes for a basic minimum criteria for such examinations or position which should be laid down and candidates attaining that minimum limit should only be allowed to avail the reservation.

*C. No check and balance procedure i.e. misuse by the creamy layer.*

The term creamy layer was first coined by Justice Krishna Iyer in *State of Kerelav.NM Thomas*,<sup>30</sup> wherein he envisaged a situation where the top layer of the backward society will take away the benefits of reservation thus leaving the others unfortunate. Further, the Court in *Indira Sawhney*,<sup>31</sup> made it mandatory for the state to identify creamy layer and exclude it from reaping the benefits of the reservation.

Despite this being the law, the creamy layer does enjoy the benefits of reservation. The present Acts provide for exclusion of creamy layer but does not provide for a mechanism in case a person from the creamy layer fabricates his income.

These Acts suffer from certain flaws, as stated above. The author in the next part of the paper has provided for suggestions that can be included in the Acts to improve it.

## VI. SUGGESTIONS.

Discrimination against minority groups is present in the history of almost every nation. However, what sets nations apart are the

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<sup>30</sup>State of Kerela v. NM Thomas, 1976 SCR (1) 906 (India).

<sup>31</sup>Indira Sawhney v. Union of India, AIR 1993 SC 477.

mechanisms they implement to overcome this historical oppression.<sup>32</sup> The Rajasthan Government can include the following suggestions in its Acts to improve them aiming for better implementation and result:

*A. Time cap for reservation.*

The Government can include the reservation for Gujjars for a specific time period. It can include a clause wherein only one generation can avail the benefit of reservation. The rationale behind such a clause can be the fact that one generation can be an ample time for bringing a family to a stable existence and at par with other classes. For instance, when a student from a backward class, graduates from a premier institution and starts earning for himself, he is in a position to provide for his family too, and hence is no more economically backward.

Such a move if adopted, will result in the purpose of offering a reservation being fulfilled, i.e. upliftment of the backward classes. Furthermore, this suggestion is a practicable one and can be deduced from the example of Tamil Nadu where, after several years of reservation there came a time when the cut-off marks for both the General category and OBC were same, and the state withdrew the reservation policy.<sup>33</sup>

*B. One step reservation.*

The Government can also provide for a stipulation wherein a member of a backward class engaging in higher studies or government employment, will only be entitled to reservation at one level. For instance, if a student gets reservation in his graduation, he will not be entitled for it in his post graduation.

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<sup>32</sup>Siely Joshi, *The Constitutional Flaws of India's Attempt to Promote Equality and a look at the United States Constitution as a solution*, 32 WIS. INT'L L.J. 195 (2014).

<sup>33</sup>Shobha Warriar, *Evaluating Tamil Nadu's 69% quota*, (Nov. 19, 2015, 7:30:15 PM), <http://www.rediff.com/news/2006/may/30spec.htm>.

Such a step will ensure that the reservation is not misused, as the person who receives reservation, and benefits out of it at once stage, can now compete with the other in the next one. This view was also suggested by the Supreme Court in the case of *Preeti Srivastava v State of Madhya Pradesh*<sup>34</sup> wherein it held that reservations in promotions should not be allowed keeping in mind the advancement of knowledge. Even though this aspect was just limited to medicine but the idea behind was an efficient and fruitful use of affirmative action.

### *C. Defining who is backward.*

The Supreme Court, left it to the Centre and State government to define who is backward and hence entitled for reservation. However, in the past the policies intended to assist the disadvantaged, have been corrupted by political elites who manipulate the system to their own advantage and block any attempts at reform.<sup>35</sup> Therefore, to eradicate this problem the Supreme Court should take upon itself to define who is backward and hence entitled for reservation. This would solve the problem of granting reservation with a view to capture vote banks, as has been alleged against Rajasthan.

### *D. Checks and balances.*

It is an established fact that despite the exclusion of creamy layer from reservation in OBC, the elite class still reap the benefits. The state can come up with a penal provision which provides for a rigid penalty/imprisonment in case of non-compliance. This would deter people from illegally using the benefits of reservation.

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<sup>34</sup>*Preeti Srivastava v. State of Madhya Pradesh*, (1999) 7 SCC 120.

<sup>35</sup>Graham K. Brown & Arnim Langer, *Does Affirmative Action Work? Lessons From Around the World*, 94 *Foreign Aff.* 49 (2015).

## VII. CONCLUSION

The present paper discussed the recent Acts passed by the legislature of Rajasthan which granted reservation to the Gujjars. After this grant, the percentage of reservation in Rajasthan goes over 50%. The settled law is that reservation in a state should not exceed 50% as a general rule, unless exceptional circumstances exist. The Rajasthan government relied on the model of Karnataka and Tamil Nadu to establish an exceptional situation. However, since reservation today has become a tool for capturing vote banks, the author compared the model of Rajasthan to Karnataka and Tamil Nadu to investigate whether the grant of reservation was genuine or not.

The analysis provides a picture in support of the reservation as the situation of Gujjars seems even worse than the two states. Hence, the proposed reservation is valid. However, they do suffer from flaws such as the absence of checks and balances, administrative inefficiency etc. The author also provided for suggestions which can lead to better implementation of the policy. Such suggestions include time cap for reservation, one time reservation, defining who is backward etc.

Affirmative action was never meant to be permanent, even the 'Father of Indian Constitution' suggested a time cap for it. However, its permanency today has brought into question its true purpose i.e. upliftment. Therefore, it is high time that states before granting reservation realise the kind of impact it has on the people availing it, as on one hand they get a head start, but on the other its never ending nature makes it an act of benign discrimination. Therefore, the state of Rajasthan and every other state proposing it should consider implementation of the above changes so as to achieve the main purpose of affirmative action and the concept of using it as a tool to target vote banks can be ruled out of the minds of people.