
Gerrymandering of Reservations in India

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ABSTRACT

The goal of protective discrimination was to integrate the Scheduled Caste and Scheduled Tribes with the rest of the population than the system of quotas in jobs, scholarships, and reserved constituencies have only strengthened their separate identity and caused heart burning to the members of general category people who are similarly deprived and for whom there is no reservation. In adopting, retaining and even extending the range of the policy of protective discrimination, the claims of the individuals as against those of the group, of the reward given to merit as against those of need have to be balanced. Again it would be erroneous to assume that by making concessions to communities and castes, the needs of every individual is satisfied. Classification of castes and communities embodied in itself the concept of discrimination. So in destroying old inequalities we should not create new ones. Discrimination is dangerous instrument, no matter how pure the intentions are of those who use it and how careful we have to be in using it even for a desirable end. There is a gerrymandering in Indian Law regarding reservations and this article will try to examine every aspect of it.

I. INTRODUCTION

The Constituent Assembly worked for about three years in framing the largest constitution of the world. The ideals, about which the Freedom Movement had spoken, were to be translated into Constitutional provisions. One of them was the protection of the socially backward communities. The rhetoric of establishing an egalitarian society found its vociferous expression in the words of Nehru.² According to Anirudh Prasad, “At that time the issue of reservation was pleaded, explained, accommodated and accepted with the national spirit to assimilate sections of society including the intended beneficiaries of the reservation policy into the main stream of national life.” In the present context of affairs in regard to these unfortunate countrymen of ours who have not had these opportunities in the past, special attempts should be made, of course, in the educational and economic field and even in the political field to see

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² The sixth item in the objective Resolution moved by Nehru in the Constituent Assembly read: “Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes...”

that they have a proper place till they find their own legs to stand upon without the external aid.³

The provisions related to reservation for SC, ST and OBC are as follows:

1. The word ‘social justice’ in the Preamble implies recognition of greater good to larger number of people without deprivation of legal rights of anybody.⁴

2. **Article 14 of the Constitution** reads:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Right to equality, granted in Indian Constitution, is covered by Article 14 to 18 basically. Article 14 is directly related to the preamble of the Constitution which declares as one of the object of the Constitution the securing of all citizens equality of status and of opportunity. This article is first of the series mentioned which embodies the ideal of equality expressed in the preamble; the succeeding Article 15 to 18 and 29(2) enact particulars applications of the general rules contained in Article 14.⁵ The doctrine of equality, as embodied in article 14, is not of independent origin. The first expression, “equality before the law” represents the English rule of law and the second, “equal protection of the laws” has its origin in the Fourteenth Amendment of the United States Constitution which provides, inter alia, that no State shall deny to any person within its jurisdiction the equal protection of the laws.⁶ The transplantation of these expressions from two constitutional systems, viz., English and American, into the Indian Constitution is a matter of great significance. The former expression covers a large field of executive action in England and the latter a still larger field of both legislative and executive action in the United States. They seem to have been embodied in the Constitution from this point of view, so as to cover every conceivable field of action. Thus, article 14 “is founded on a sound public policy recognized and valued in all civilized States.”⁷ Though both expressions appear to be somewhat identical and aim at establishing “equality of status,” as envisaged in the preamble, and have one common idea, viz., equal justice, it is said that while the former expression is somewhat a negative concept implying the absence of any special privilege in favour of an individual, the latter is a more positive concept implying equality of treatment in

³ Anirudh Prasad, “Reservation Policy and Practice in India-Means to An End”, South Asia Books, (New Delhi 1991) p.17.

⁴ Preamble of Constitution of India, 1950

⁵ AIR 1955 Mad. 100, 164 (S.B.).

⁶ J.K.Mittal “Right to Equality in India: An Introduction”, Published by Satyam Law International, 2012.

⁷ Ibid. Page No. 84.

equal circumstances.⁸ Probably the use of both expressions “discloses the anxiety of the makers of the Constitution that no aspect of inequality, whether positive or negative, or in any form or shape, should escape the prohibition, and that in no sphere of law should one be either favoured or placed under any disadvantage by the State in circumstances which do not admit of a reasonable justification for a different treatment.”⁹ It may be inferred that the second expression is a corollary of the first¹⁰ and overlaps it in its meaning. This might be the reason that the Supreme Court, while interpreting article 14, took into consideration the second expression only. But Mr. D.D. Basu observes that on the face it may be that the former part of article 14 is redundant but no word of a constitution is to be taken as superfluous and, therefore, he holds the view; “When the principle of equality before the law is incorporated in a written Constitution, there is no reason why the principle should not operate as a limitation against the Legislature itself, viz., that the Legislature should not arbitrarily place persons or bodies above its general laws, and that if it does, the Courts would pronounce such laws to be unconstitutional—as they are bound to do, under art. 13(1)-(2).”¹¹

The interpretation of article 14 is based on the theory of classification. There is no absolute equality among human beings. Inequality is a fundamental fact in actual life. To reconcile the constitutional equality with the facts of life, some distinction, classification, gradation, or differentiation is inevitable.¹²

3. Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—(1) “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth of any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) Access to shops, public restaurants, hotels and places of public entertainment; or

(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

⁸ State of Uttar Pradesh v. Deoman Upadhyaya, AIR 1960 SC 1125, p.1134; Sheo Shankar v. Madhya Pradesh State Government, AIR 1951 Nag. 58 p. 86 (FB); Suryapal Singh v. Uttar Pradesh Government, AIR 1951 All 674 (FB). See the opinion of the Court at p.690.

⁹ S.S. Nigam, “Equality and the Representation of the Scheduled Classes in Parliament,” 2 Journal of the Indian Law Institute (1959-60) 297, p.298.

¹⁰ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, p.79.

¹¹ Commentary on the Constitution of India, Vol.I (4th ed. 1961) footnote (16), p.260. See also V.G. Row v. State of Madras, AIR 1951 Mad. 147, p.176 (FB).

¹² Champakam Dorairajan v. State of Madras, AIR 1951 Mad. 120, p.131 (FB). See also T.L. Venkatarama Aiyar, T. Devadasan v. Union of India, AIR 1964 SC 179, p.185.

- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.¹³
- (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes 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.”¹⁴

The insertion of Clause (4) to Article 15 was not so much based on legal necessity as on political expediency.¹⁵ It reads, “Nothing in this Article or in a Clause (2) of Article 29 shall prevent the State from making special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.” This provisions would have served the purpose had it been inserted in Clause (3) of Article 15 adding “or for the educational, economic and social advancement of any backward class of citizens:¹⁶ But Nehru explained that the Select Committee chose the final words because of the use of similar expressions in Article 340 and they wanted to make Article 15(4) at par with that Article.¹⁷ From debates in Parliament certain trends become visible. First, it was not very much clear whether the scope of newly inserted clause would be limited¹⁸ to classes specified by President in Article 340 or it would be wide.¹⁹ An amendment to limit its scope to groups specified in Article 340 was not accepted by the government. Second, Backward classes, irrespective of their designation were expected to be a list of castes and

¹³ Added by the Constitution (First Amendment) Act, 1951, sec. 2 (w.e.f. 18.6.1951).

¹⁴ Ins. by the Constitution (Ninety-third Amendment) Act, 2005, sec. 2 (w.e.f. 20.1.2006).

¹⁵ During the debate on amendment, Nehru remarked: “The House knows very well and there is no need for trying to hush it up, that this particular matter in this particular shape arose because of certain happenings in Madras.” Parliamentary Debates, Vol. XII-XIII (Part II), Col. 9615. Shri Shankaraiya pointed thrust amendment to the whole of South. He said “it is not only the Madras Government that is concerned with this but the whole of the South India—The State of Mysore, Travancore-Cochin and even Bombay” (id. At Col. 9000, May 17, 1951).

¹⁶ It was intended in the original draft of Article 15(4) which was a changed before the Select Committee.

¹⁷ Parliamentary Debates, Vol. XII-XIII (Part II), Col. 9830.

¹⁸ Pandit Thakurdas Bhargav and Sri M.A. Ayyangar were of the view that its scope would be limited to Article 340 (ibid., Col. 9719 and Col. 9817).

¹⁹ Sardar Hukum Singh and Dr. S.P. Mookerjee were of the view that it was not so confined. (ibid., Col. 9719 and Col.9817).

communities. Law Minister, Dr. Ambedkar expressing the need of amendment made it clear that, “What are called backward classes are.....nothing else but a collection of certain castes. Third, there was considerable concern that it should permit communal quota to be enjoyed by more advanced groups.²⁰ Fourth, more poverty was not thought to be enough for the claim of the benefit of backwardness.²¹ Fifth in Nehru’s view, backwardness was the cumulative effect of divergent factors—economically, socially and educationally.²² Sixth Nehruvian vision was to avoid caste consciousness. In his view, caste could be taken into consideration in unavoidable circumstances to locate really backward classes in historical perspectives. This view is clear from his conclusion in his famous *Discovery of India*: “An examination of the question in the background of Indian social conditions shows that the expression ‘backward classes’ used in the Constitution referred only to those who were born in particular castes or who belonged to particular races or Tribes or religious minorities which were backward. Despite the Nehruvian extraordinary evidence about the use of the word ‘caste’, the impact of newly inserted Clause (4) of Article 15 was not in conformity with the spirit of casteless society. It had ill-impact of accentuating caste-consciousness and politicalisation of protective discrimination policy. In the words of Dr. P.K. Tripathi: “It seemed to be the impression for many years that this new clause gave a carte blanche to the dominant groups in the legislature to select any caste as classes and to give them any amount of preferential treatment. Legislators representing the various castes groups, it was thought had just to strike political bargains for sharing the spoils amongst themselves in terms of reservations in government employment and in educational institutions, particularly those imparting technical education with high potential for employment opportunities. Certain talented communities with small populations, and consequently insignificant representation in the legislatures, were made the special victims of these political alliance. In other words, Clause (4) was understood by the state legislatures to authorize them to do exactly what Clause (1) of Article 15 had forbidden.”²³

4. Article 16- Safeguards for public employment

Article 16 of the constitution provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16 reads as under:-

²⁰ Marc Glanter, *Competing Equalities*, Oxford University Press, p. 166.

²¹ The move of Professor K.J. Shah to qualify ‘backward class’ with ‘economically’ (Parliamentary Debates, Vol. XII-XIII, Part II, Col. 9815) was not accepted by Nehru in whose view ‘socially’ ‘economically’ backward class. Ibid. Col. 9830.

²² Nehru observed: we have to deal with the situation were for a variety of causes for which the present generation is not to blame, the past has responsibility, there are groups, classes, individuals, communities, if you like, who are backward. They are backward in many ways—economically, socially, educationally-sometimes they are not backward in one of these respects and yet backward in another, Ibid., Col. 9616.

²³ Tripathi, P.K. “Some Insights into Fundamental Rights”, Univ. of Bombay, 1972, p.198.

“There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory]²⁴ prior to such employment or appointment. Nothing in this article shall prevent the State from making any 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 service under the State.” Nothing in this article shall prevent the State from making any provision for reservation²⁵ [in matters of promotion, with consequential seniority, to any class]²⁶ or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State. Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.]²⁷ Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. Reasonable classification ensures the attainment of the equality of opportunity assured by Article 16(1). For assuring equality of opportunity in public employment by Article 16(1), Article 16(4) is an instance of such classification implicit in and permitted by 16(1). The Supreme Court held in case of *Indra Sawhney*²⁸.

5. Article 335: Limitations of the Safeguard under Article 16

²⁴ Subs. by the Constitution (Seventh Amendment) Act, 1956, sec. 29 and Sch., for certain words (w.e.f. 1.11.1956).

²⁵ Ins. by the Constitution (Seventy-seventh Amendment) Act, 1995, Sec. 2 (w.e.f. 17.6.1995).

²⁶ Subs. by the Constitution (Eighty-fifth Amendment) Act, 2001 sec.2 for “in matters of promotion to any class” (w.r.e.f. 17.6.1995).

²⁷ Ins. by the Constitution (Eighty-first Amendment) Act, 2000, sec. 2 (w.e.f. 9.6.2000).

²⁸ *Indra Sawhney v. Union of India*, AIR 1993 SC.

Article 335 of the Constitution originally read as under:

“The claim 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 appointment to services and posts in connection with the affairs of the Union or of the State”

The Hon’ble Supreme Court has held in a number of cases, that Article 335 operates as a limitation to the provision contained in Article 16(4) though Article 16(4) does not specifically refer to Article 335 or raise any question of maintenance of efficiency of the administration. Thus, reservation for the backward class will be struck down as violative of Article 14 and 16(1), if it is unreasonably excessive.²⁹ While forming an opinion for making reservation the State shall also take cognizance of the limitation set out in Article 335 i.e. whether making reservation is consistent with the maintenance of efficiency of administration.³⁰ 82nd Amendment³¹ amended the Article 335. The background for the amendment was that the Hon’ble Supreme Court in the case³² had held that the various instructions of Government providing for lower qualifying marks/lesser standard of evaluation in matter of promotion for candidates belonging to SC/ST are not permissible in view of the provisions contained in Article 335. In view of this decision the various orders regarding lower qualifying marks/standard of evaluation for SC/ST in the matter of promotion were withdrawn by the Government w.e.f. 22.7.1997. However, the Parliament decided to once again restore the relaxations and concessions in promotion and the following proviso to Article 335 were added:- “Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.” In pursuance of this enabling proviso of Article 335, all relaxation/concessions which were withdrawn earlier w.e.f. 22.7.97 have now been restored w.e.f. 3.10.2000.³³

6. Article 330 : Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People (Lok Sabha)—

(1) Seats shall be reserved in the House of the People for—

²⁹ persmin.gov.in/otraining/UNDPProject/undo – module / Reservation in Service.pdf.(Assessed on 27-05-2015)

³⁰ Pooran Kohli, “Reservation Rules in India: Eligibility and Promotion Rules”, Kanoon Prakashak, Jodhpur, 2010.p.56-57.

³¹ The Constitution (Eighty Second Amendment) Act, 2000.

³² S. Vinod Kumar v. Union of India. AIR 1989 SC 139

³³ DOPT’s O.M. No. 36012/23/96 Estt. (Res.)-Vol. II, dated 3.10.2000 (Government of India).

- a. the Scheduled Castes;
- b. the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam³⁴ and
- c. the Scheduled Tribes in the autonomous districts of Assam³⁵.

(2) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.³⁶

7. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies (Vidhan Sabha) of the States³⁷ —

Article 332 provides reservation of seats for SCs and STs in the Legislative Assemblies of the States. Seats shall be reserved for the Scheduled Caste and the Scheduled Tribes, except the Scheduled Tribes in the autonomous districts of Assam, in the Legislative Assembly of every State. The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved bears to the total population of the State³⁸.

8. Reservation of Seats in Local Self Government Institutions (LSGIs)—

The LSGIs regime envisaged in the Constitution (Seventy-Third and Seventy-Fourth Amendment) Act 1992 has given rise to legislation regarding Panchayat Raj at the village level and Nagar Palika at the urban level. This is significant in the sense that one, the object of participatory democracy demands that people at the village level should understand the intricacies of democratic mechanism. Here too the Scheduled Castes and Scheduled Tribes are

³⁴ Subs. by the Constitution (Fifty-first Amendment) Act, 1984, sec. 2(1), for sub-clause (b) (w.e.f. 16.6.1986). Earlier clause (b) was amended by the Constitution (Twenty third Amendment) Act, 1969, Sec. 2 (w.e.f. 23.1.1970) and by the Constitution (Thirty-first Amendment) Act, 1973, sec. 3(1)(a) (w.e.f. 17.10.1973).

³⁵ Bare Act of The Constitution of India, Universal law Publishing Co. Pvt. Ltd Delhi.

³⁶ Pooran Kohli, "Reservation Rules in India: Eligibility and Promotion Rules", Kanoon Prakashak, Jodhpur, 2010.p.57.

³⁷ Article 332 of Constitution of India

³⁸ Id.

given the benefit of reservation. For instance Constitution Act ³⁹ 1992 adds to the Constitution a new Part⁴⁰ titled “Panchayats”. In this Part, Article 243D provides that there shall be reservation of seats for the Scheduled Castes and Scheduled Tribes in every Panchayat and number of seats so reserved shall bear as nearly as may be, the same population of Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat. The same Article in clause 2, 3 and 4 provides for the reservation of seats for Scheduled Castes and Scheduled Tribes women as well as for other women. Again the State legislature is empowered to make provisions for women Chairpersons in Panchayat. But these reservations are interlinked with Article 334 that specifies the time limit for the reservation of seats in the legislative bodies.⁴¹

9. Article 341 and 342 of the Constitution—

Article 341 and 342 of the Constitution provides for drawing up the lists of Scheduled Caste and scheduled Tribes— The president may with respect to any state or union territory, and where it is a state after consultation with the governor thereof, by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purpose of this constitution be deemed to be schedule castes in relation to that state or union territory, as the case may be. ⁴² The President may be law include in or exclude from the list of schedule castes specified in a notification issued under clause (1) any castes, race of tribe or parts of or groups within castes, races or tribes but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. ⁴³

10. Directive Principles of the State Policy

Part-IV of the Constitution of India provides Directive Principles of the State Policy which are the Guidelines provided to State.

Article 38 and 46 reads: State to secure a social order for the promotion of welfare of the people—(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities

³⁹ The Constitution (Seventy-third Amendment) Act 1992.

⁴⁰ Part IX of the Constitution of India

⁴¹ Article 243 D Clause (5)

⁴² Article 341(1) of the Constitution of India

⁴³ Article 341(2) of the Constitution of India

and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. ⁴⁴ Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.—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.⁴⁵

II. JUDICIAL GERRYMANDERING

1. A detailed account of judicial retreat from secular, scientific and rational criteria evolved in Balaji's⁴⁶ case and Chitrallekha's⁴⁷ case demonstrated, through Rajendran's⁴⁸ case, Periakaruppan's⁴⁹ case and Balaram's⁵⁰ case have been given in the earlier chapter. The discussion of those cases have shown how those decisions made the task of rationalisation of the grounds of the identification of backward classes difficult. Can't it be said that retreat cases inspired the different States Committees and Commissions appointed to identify backward classes to suggest backwardness in terms of caste? It is clear from the outlook of Mandal Commission which treat the judgment in Balaji case and more so in that of Chitrallekha "as representing the most conservative view on the relevance of caste for determining social backwardness and synonymity between 'classes' and 'castes'. The Commission expressed the view that 'the Supreme Court decision in P. Rajendran case marked a water shed in that connection.'" Mandal Commission was guided more by the supreme decisions in Rajendran Sagar, Balaram and more so Periakaruppan to insist that 'a caste has always been recognized as a class'. But, the Commission itself realized that the courts have not taken serious view of those decisions and that the powerful influence of Balaji continued to exercise on judicial thinking.⁵¹

2. The other trend quite different from Balaji is marked by the 5 : 2 majority of a seven Judge bench in State of Kerala v. N.M. Thomas⁵² allowing the promotion of the employees belonging to the Scheduled Castes and Scheduled Tribes from lower divisional clerks, to upper

⁴⁴ Article 38 of the Constitution of India.

⁴⁵ Article 46 of the Constitution of India.

⁴⁶ Balaji v. State of Mysore, AIR 1963 SC

⁴⁷ R. Chitrallekha & Anr vs State Of Mysore & Ors, 1964, SCR (6) 368

⁴⁸ Rajendran vs State Of Madras & Ors, 1968 AIR 1012

⁴⁹ Periakaruppan Chettiar vs State Of Tamil Nadu & Ors, 1971 SCR (2) 430

⁵⁰ Balram Prasad vs Kunal Saha & Ors, on 24 October, 2013

⁵¹ Anirudh Prasad, "Reservation Policy and Practice in India: A Means to An End" Deep & Deep Publications, New Delhi" 1991. p.170

⁵² State of Kerla v. N. M. Thomas, A.I.R. 1976 SC 490 at pp. 535-36 (Iyer, J.) pp. 534-35 (Fazl Ali, J.), p.519 (Mathew, J.), pp. 498-99 (Ray, C.J.).

divisional clerks and giving them two additional chances to clear the required test. The decision is welcome. But, instead of upholding such special treatments under the permissible limit of Article 16(1), the four Judge's reconceptualisation of Article 16 and treating clause (4) of Article 16 not as an exception to Article 16(1) but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for the free competition, the forward sections are ordinarily entitled to has opened the flood gate of the demands for substantial equality. Ray. C.J. upheld the preferential treatment as `just as reasonable classification having rational nexus to the object of promoting equal opportunity.....relating to public employment.⁵³ He allowed just and rational classification on analogy of Article 14 by pointing out that Article 16 would permit treatment of unequals unequally. Mathew, J. interpreted constitutional guarantee of equal opportunity to mean not for equality with fair competition but equality of result and pointed out that it implice" differential treatment of persons who are unequal. ⁵⁴ So did Krishna Iyer, J. and thought that Constitution erects a general doctrine of backward classification "to pursue, real and not formal equality". ⁵⁵ So did Krishna Iyer, J. and thought that Constitution erects a general doctrine of backward classification "to pursue, real and not formal equality", *Id.*, p. 529 (Iyer, J.) In his view state may confer "lessor orders of advantage on the principle of classification under Article 16 in addition to preferential treatment through reservation under Article 16(4). In view of Fazl Ali, J. Articles, 14, 15 and 16 form part of the same constitutional code of guarantees and supplement each other and Article 16 is only an incident of the application of the concept of equality enshrined in Article 14 and gives effect to the doctrine of equality in the matter of appointment and promotion. ⁵⁶ And therefore, he concluded that "there can be a reasonable classification of the employees for the purpose of appointment and promotion."⁵⁷

3. The jinn that came out of bottle with the announcement of reservation for OBC was kept in abeyance for some time on 29 March 2007 when the Supreme Court stayed the law providing for 27 per cent reservation for Other Backward Classes (OBCs) in higher education institutions such as the IITs and IIMs for 2007- 2008. This landmark order of the Supreme Court of India founded on timeless elemental principles of equity, natural law, natural justice (which does not exclude social justice) will be welcomed by all the enlightened people of India committed to the noble cause of eradication of untouchability and other forms of cruel

⁵³ *Ibid.*, p. 502

⁵⁴ *Ibid.*, p.516 (Mathew, J.)

⁵⁵ *Ibid.*, p. 529 (Iyer, J.)

⁵⁶ *Ibid.*, pp. 550-51 (Fazl Ali, J.)

⁵⁷ *Id.*

discrimination practised against the Scheduled Castes / Scheduled Tribes for centuries by all the other communities, definitely not excluding the so called 'Backward Classes' who are being converted into scapegoats in the dirty and murky world of caste-based vote bank politics patented and perfected by various politicians. By implication, the Supreme Court has made it abundantly clear to the Central government that they are not willing to buy the 'caste-based, caste-hatred' founded theory of the Mandal Commission that the vote-bank generated 'Backward Classes' can on no account be treated on par with the Scheduled Castes / Scheduled Tribes. The Supreme Court passed the interim order on petitions challenging the constitutional validity of the Central Educational Institutions (reservation in admission) Act 2006. The Supreme Court rejected the government argument that reservation was not anti-merit. The Court also summarily rejected the absurd, aboriginal and abominable argument of the government of India that in the absence of Caste Data after 1931, there was no alternative to projecting the population proportion of socially and educationally backward classes and OBCs from the next best source the latest available census of 1931. According to the Supreme Court, the policy of reservation cannot and should not be intended to be permanent or perpetuate backwardness. To quote the historic words of the Supreme Court in this context : 'Nowhere in the world do castes come up, classes or communities queue up for the sake of gaining backward status. Nowhere else in the world is there competition to assert backwardness and then to claim we are more backward than you.' The Union Minister for Human Resource Minister Arjun Singh has as was to be expected reacted to the Supreme Court judgment by saying that the government would exercise all legal and constitutional options to implement the 93rd Constitutional Amendment that extends reservation for Other Backward Classes (OBCs). He has also brazenly refused to term the verdict of the Supreme Court as a setback.⁵⁸

4. Thomas majority zeal was demonstrated in Jagdish Rai v. State of Haryana,⁵⁹ 50 per cent reservation was done in favour of Ex-emergency Commissioned officers for the post of demonstrators in the Dental College and 28 per cent reservations to the post of sub-Inspectors in Food and Supplies Department for 'released Army Personnel'. The High Court pointed out that Thomas has given a new dynamism and dimension into the concept of equality of opportunity. It had got rid of the old sterility. It was not necessary in view of the Court to be apologetic that special preference was justified under permissible exception. It could be boldly claimed that such laws were necessary incidents of equality. The losing petitioner in the case

⁵⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406222 (Assessed on 10-06-2015)

⁵⁹ AIR 1977 P and H 56 (F.B.)

was herself a Scheduled Caste. *N.B. Rao v. Principal, Osmania Medical College*⁶⁰ demonstrates the incident of obtaining false social status certificates and grabbing reserved seats in educational field.⁶¹

5. As the issue of 'carry forward' resulting into filling of vacancies upto 66% per cent, Krishna Iyer J. pointed out that Balaji and Devadasa both considered reservation in actuality and disapproved reservations exceeding 50 per cent. He pointed out that "in Devadasan case Court went into the actual, not into the hypotheticals"⁶² Since it found that out of 45 vacancies 29 i.e. 65 per cent had gone in favour of S.Cs. and S.Ts. due to carry forward rule it applied 50 per cent test of Balaji and declared the rule bad.

6. The next important issue is reservation at promotional stage. The former insist on reservation at very stage and the latter argue that preferential treatment be limited to initial appointment. The judiciary has supported the former's stand point. The story starts with the majority approval of governmental move to provide reservation to S.Cs. and S.Ts. at the level of promotion too. Thus in *General Manager, Southern Railway v. Rangachari*,⁶³ the Supreme Court had to decide the claim of the respondent who had been successful before Madras High Court in assailing the circular of Railway Board providing for reservation of Selection posts in Class III of the railway service in favour of the members of the Scheduled Castes and the Scheduled Tribes and in particular the reservation of selection posts among the court Inspectors in Class III one of which held by the respondent. The impugned circular reads:- "There are different grades of Class III posts. Some of those posts are 'non-Selection' posts, promotion to which is made on "seniority-cum-suitability" basis while in the case of others which are 'Selection' posts promotion is made by a positive act to selection. There will be no quota for Scheduled Castes and Scheduled Tribes candidates in respect of promotion to 'non-Selection' posts."

7. In ***S. Vinod Kumar and Another v. Union of India and others***,⁶⁴ the Court reiterated that no concession can be allowed to the reserved categories in matters of promotion. The Court said, "We are, therefore, of the opinion that so far as provision for lower qualifying marks or lesser level of evaluation in the matter of promotion is concerned, it is not permissible under Article 16(4) in view of the command contained in Article 335 of the Constitution.

⁶⁰ AIR 1986 A.P. 246

⁶¹ Anirudh Prasad, "Reservation Policy and Practice in India: A Means to An End" Deep & Deep Publications, New Delhi" 1991.p.172.

⁶² Id.

⁶³ (1962) 2 S.C.R. 586

⁶⁴ AIR 1989 SC 139

8. In the Indra Sawhney case, Hon'ble Supreme Court also held that reservation in promotion is unconstitutional but permitted the reservation, for Scheduled Castes and Scheduled Tribes to continue for a period of five years (From 16.11.92). Consequent to this, the Constitution was amended by the Seventy-seventh Amendment⁶⁵, and Article 16(4-A) was incorporated. This Article enables the State to provide for reservation, in matters of promotion, in favour of the Scheduled Castes and Scheduled Tribes. The fact that the words "Backward class" used in Article 16(4) have been instituted in Article 16(4-A) by the words "SCs & STs", itself precludes consideration of making reservation in promotion in favour of any other category of citizens⁶⁶.

9. In *S.R. Murthy v. State of Karnataka*⁶⁷, the question is promotion in single promotional post. In the Government Polytechnic in Karnataka though the appellant was the senior most person eligible for promotion, he was not promoted because in accordance with the roster point a Scheduled Caste candidate was to be appointed and thus a junior person got promoted. Citing previous decisions the Supreme Court held that the application for the purpose of promotion was not permissible.

10. In **P. Rajendran v. State of Madras**⁶⁸ the Supreme Court upheld the ratio in Hariharan Pillai's case. The question was whether caste could be considered the sole criterion for determining socially and educationally backward classes. The Court observed that if the caste as a whole was socially and educationally backward reservation could be made in favour of such caste within the meaning of Article 15(4) The Court also struck down district-wise distribution of seats in the Medical Colleges on the basis of population in each district to the total population of the State. This could not be permitted under Article 14. But at the same time in **Nishi Maghu v. State of J&K**⁶⁹ the classification of social castes made with reference to the nature of occupations and the classification based on areas adjoining actual line of control and bad pockets in Jammu and Kashmir being really backward areas' and residents of these areas being socially and educationally backward were valid⁷⁰.

11. In **M.R. Balaji and others v. State of Mysore and others**⁷¹ the Court was trying to keep a just balance between the conflicting interests of those who would like to have as much reservation as possible and those might lose their chance even if they are the deserving ones.

⁶⁵ Constitution (Seventy-seventh Amendment) Act, 1995

⁶⁶ persmin.gov.in/otraining/UNDPPProject/undp – modules/ Reservation in Service.pdf (Assessed on 27-05-2015)

⁶⁷ AIR 1997 SC 2138

⁶⁸ (1974)1 SCC 87, AIR 1974 SC 532.

⁶⁹ (1996) 7 SCC 512, 1996 AIR SCW 2248.

⁷⁰ P. P. Vijayan, "Reservation Policy and Judicial Activism", Kalpaz Publication, New Delhi, 1st Edition, 2006

⁷¹ AIR 1997 SC 2101

The issue in this case is about the admission to the Medical course. “According to the petitioners, but for the reservations made by the impugned order, they would have been entitled to the admission in the respective colleges for which they had applied.” The impugned order was issued on 31.7.1962 and it reserved seats for candidates belonging to the backward classes whose average of student population was the same or just below State average. This resulted in 69 per cent of seats available for admissions to the Engineering and Medical Colleges and to the other technical institutions is reserved for backward classes, more backward classes, Scheduled Castes and Scheduled Tribes. The classification of the socially backward classes of citizens made by the State, proceeds on the consideration only of their caste without regard to other factors, which are undoubtedly relevant. It was argued that this might lead to a virtual reservation for nearly 90 per cent of the population, which might come under different categories of backwardness. This would be at the expense of those classes of people whose members may perform well but may not get an opportunity.

12. In **Chitrlekha v. State of Mysore**⁷² the Supreme Court gave some leeway to caste by saying that caste could be considered as one of the relevant factors in determining social and educational backwardness. But at the same time it was made clear that the terms ‘caste’ and ‘class’, are not synonymous. The Court observed: “We do not intend to lay down any inflexible rule for the Government to follow. The laying down of criteria for ascertainment of social and educational backwardness of a class is complex problem depending upon many circumstances, which may vary from State to State and even from place to place in a State. But what we intend to emphasize is that under no circumstance a ‘class’ can be equated to a ‘caste’ though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in particular class. We would also like to make it clear that if in a given situation caste is excluded I ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests.”

13. The question in **Aarti Gupta v. State of Punjab**,⁷³ whether the Government could make relaxation in mark of the Scheduled Cast and Scheduled Tribe candidates. According to the first notification of the Punjab Government SC/ST candidates had to secure only 35 per cent of marks in the competitive exam to qualify for medical admission. Yet for 100 reserved seats only 32 qualified. The general candidates claimed those reserved seats. However, the Government issued a notification reducing the minimum percentage of 25. This was challenged

⁷² 1996(9) JT (SC) 320

⁷³ Backwardness in law perhaps is different from backwardness in economic development and educational attainments. Thus a political solution was found when a new State was carved out of U.P. namely Uttaranchal.

by the general candidates before the High Court which dismissed the petition. Hence they approached the Supreme Court. The Supreme Court rejected the argument that the Medical Council of India prescribed 40% as the minimum and Universities could not reduce it further. But the Court did not accept the argument. Citing earlier decisions, the Court observed that how the selection has to be made out of the eligible candidates is a matter, which depends upon circumstances prevailing in a particular state. In an earlier case **M.P. v. Nivedita Jain**,⁷⁴ the State Government fully deleted the prescription of the percentage of marks in the selection examination. Though the case was worse than the present one the Court upheld the Government decision. Here too therefore the Court upheld the Order of the Government, which was in favour of reservation that could not be encroached upon by general candidate.

14. The Courts have consistently denied the claim of the substantive right of equality. In the judicial force of the observation of Gupta, J. in his dissenting decision in Thomas, the later courts have found susceptibility. Said Gupta, J: “This Article (Article 16) does not create any right in the members of the Scheduled Castes and the Scheduled Tribes which they might claim in the matter of appointments to services and posts; one has to look elsewhere, Article 16(4) for instance, to find out the claims conceded to them. Article 335 says that such claims shall be considered consistently with administrative efficiency, this is a provision which does not enlarge but qualify such claims as they may have as member of the Scheduled Castes and Scheduled tribes.”⁷⁵

15. The judiciary has been alert to the constitutional commitment to establish classless and casteless society and gradual elimination of caste consciousness. D.A. Desai, J. expressed the view in **K.C. Basanth Kumar** consciousness. D.A. Desai, J. expressed the view in **K.C. Basanth Kumar** that noble constitutional goal is to take steps to weaken and progressively eliminate caste consciousness but he lamented “unfortunately, the movement is in the reverse gear” and noted that preferences to disadvantaged people identified by the caste label gives fresh lease of life to caste system. Even Krishna Iyer, J. was conscious in Thomas of the impact of expanding protective discrimination under Article 16(1) and (2). He strictly limited it to S.Cs and S.Ts and no other class. “Not all caste backwardness is recognized in this formula”, as “to do so is subversive of both Art. 16(1) and 2”.⁷⁶ The learned judge warned “Any other caste, securing exemption from Art. 16(1) and (2) by extending political pressure or other influence will run the high risk of unconstitutional discrimination. If the real basis of classification is

⁷⁴ AIR 1972 SC 2381

⁷⁵ AIR 1976 S.C. 490 at pp. 540-41.

⁷⁶ AIR 1976 SC 490 at p. 537

caste marked as backward class the court must strike at such communal manipulation". He put it in emphatic words: "So we may readily hold that casteism cannot come back by the backdoor and except in exceptionally rare cases no class other than Harijans can jump the gauntlet of equal opportunity. Their only hope is in Art. 16(4)".⁷⁷ With a view to eliminate caste consciousness the ultimate criterion of the determination of backwardness should be economic backwardness. In words of Desai, J. (in Basanth Kumar) Balaji uttered the "harsh but unquestionable truth" that the economic backwardness would provide much more reliable yardstick. He conceded "to this may be added some relevant criteria such as the secular character of the group, its opportunity for earning livelihood etc. But by and large economic backwardness must be the load star."⁷⁸

16. There may be some observation hither and thither like that of Hegde, J. in Vishwanath which may give impression that merit may be compromised in view long-range national policy of ameliorating the conditions of depressed classes. But analysis of decisions reveals otherwise. Even in admission relaxation cases allowing relaxation of 5 per cent or 10 per cent relaxation in prescribed minimum qualifications for S.Cs. and S.Ts. or even allowing no minimum marks requirement, the Courts have expressed the view that relaxation will not affect merit because of no relaxation in examinations and result. The Courts have allowed easy entry but no exist without required standard.⁷⁹ So in the case of reservation and preferential treatment in services. Even the most progressive judge of the Supreme Court, the pronouncer of the judicial slogan "Jurisprudence to be living law must respond to Bhangi Colony,"⁸⁰ has never been agreeable to make any compromise with administrative efficiency. The judicial version of Iyer, J. is worth nothing here: "You can't throw to the winds considerations of administrative capability and grind the wheels of Government to halt in the name of 'Harijan Welfare'. The Administration runs for good government, not to give jobs to Harijans."⁸¹ In *Soshit Karamchari Sangh* case referring to Articles 16(4) and 46 and the lucid intent of the Constitution makers that the exploited lot of the harijan-girijan groups in past shall be expiated with special case of State; the learned judge said: "of course, reservation under Article 16(4) and promotional strategies envisaged by Article 46 may be important but shall not run berserk and imperil administrative efficiency in the name of concessions to backward classes."⁸² And, after considering Articles 46, 335 and 16(4) he ruled that "measures taken by the State, pursuant to the mandate of

⁷⁷ Ibid

⁷⁸ AIR 1985 SC 1495 at p. 1506 (Desai, J.)

⁷⁹ *Gupta v. Union of India*, AIR 1974 All. 288

⁸⁰ AIR 1976 SC 490 at p. 538 (Krishna Iyer, J.)

⁸¹ Ibid., p.526,

⁸² (1981) 1 SCC 246 at p. 270.

Articles 16(4), 46 and 335, shall be consistent with and not subversive of the maintenance of efficiency of administration.⁸³

17. In **Soosai v. Union of India**,⁸⁴ the issue was whether a person, who belonged to Scheduled Caste and converted himself to Christianity, was eligible to get the benefits of protective discrimination. The Court answered this question in the negative. The petitioner Soosai belonged to Adi-Dravida community, which was included in the list of Scheduled Castes. Later the petitioner embraced Christianity. He was cobbler by profession. Khadi and village Industries Board allotted bunks free of cost to the Adi-Dravida cobblers under Special Central Assistance Scheme of the Government Order in this regard clearly pointed out that a person belonging to Scheduled Caste loses his position as a member of Scheduled Caste when he is converted to another religion. The petition was for the above reason dismissed.

18. A **Periya Karuppan v. State of Tamil Nadu**⁸⁵ was indeed a landmark case in respect of the issue of reservation. The candidates challenged the unit wise selection of Medical Colleges including the reservation for backward classes. Another significant question was the determination of backwardness on the sole basis of caste. Hegde J. observed that a caste has always been recognized as a class. The learned Judge perhaps was not aware of the consequences of such observations. The pertinent question, here is, will it help abolish caste. The question whether 41 per cent reservation for Scheduled Castes, scheduled Tribes and other Backward classes could be void. The Court also observed that 41 per cent reservation was not excessive. Commenting on this aspect of the judgment Anirudh Prasad (1991) writes: "Rajendran, Balaram and Periyakaruppan appear to present a retreat from judicial efforts to search secular and rational criterion."⁸⁶

19. In **Gopalakrishna v. State of Maharashtra**,⁸⁷ two questions cropped up. One, whether a carry forward formula could be adopted in reservation under Article 16(4) and what could be its extent. Two, whether neo-Buddhist or converted Buddhists from Scheduled castes could claim the benefit of reservation under article 16(4) even after renunciation of Hinduism? The Court observed that the carry forward formula was part of the reservations under Article 16(4) and the limit could not be more than 50 per cent. The ratio of the court was that the neo-Buddhists were still in the category of backward classes, as the conversion had not changed

⁸³ Ibid. p. 271.

⁸⁴ 1986 AIR 733, K. Srinivasan & Sanjay Kumar, Economic and Caste Criteria in Definition of Backwardness, EPW October 16-23, 1999.

⁸⁵ (1991), Rajesh Agarwal v. M.D. University and Anil v. Dean, Government Medical College, AIR 1985 P&H 206.

⁸⁶ AIR 1985 Kant. 196.

⁸⁷ 1968 AIR 240, 1968 SCR (1) 355, Sheod Singh v. State of Bihar, AIR 1986 Pat 124

their social position. They were still subjected to social ostracism and continue to be under the social stigma of untouchability.

20. In, **Indra Sawhney v. Union of India**,⁸⁸ is a significant case. Based on the recommendations of the Mandal Commission Report (the Second Backward Class Commission) the government decided to provide reservation for backward classes and subsequently an OM was issued that 27 per cent of the vacancies in civil posts and services under Government of India shall be reserved for Socially and Educationally Backward Classes. The central issue in the case was the Government's Order dated August 13, 1990 reserving 28 per cent of the seats in the government services based on the recommendations of the Mandal Commission. This order was to come to effect on August 7, 1990.

III. CONCLUSION & SUGGESTION

The reservation policy has its critic's right from the beginning. The impact study clearly shows that the policy has failed to achieve the desired objective underlying it. In India reservations emphasize more on caste or tribe rather than a person's income. Reservations should exist but in a different form: people who cannot afford education should be given a reservation so that they can afford to study and build a career on their own. Any other form of reservation would only become a bane to society. However, this should not mean that the people from backward classes should not be condemned to mediocrity of illiteracy. 11 A solution to this problem is to improve the quality of education. The standards of public and private education in India are at two separate levels. The public schools should impart quality education that can be considered as equal to its private counterpart.

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AIR 1994 SC 153