

RIGHT TO EQUALITY - DISCRIMINATION AND RESERVATIONS*By***—NARASIPURAM ASHWANI KUMAR,**
Studying 2nd BSL in ILS Law College, Pune*Introduction:*

The right to equality has been enshrined in our Constitution; the said right has been given many forms and dimensions by the legislative organ of the State. The rights are said to be of varied types. Reservations awarded to various backward classes have become a subject of debate off late. This very question of reservations leads us to two important queries, number one “whether the reservations which were meant as a tool for unified progression of society has in fact divided the society” and the second “have these reservations outlived their purpose?”

Constitutional Provisions:

This Article delves into the concept of Reservations but it would be essential to orient ourselves with the Constitutional provisions governing the same. Article 14 guarantees the right to equality before the law and equal protection of the laws; Articles 15 and 16 deal with non-discrimination. The enabling provisions aimed at affirmative action to help the weaker sections are contained in Article 15(3), which permits making special provisions for women and children. Article 15(4) enables the State to make any special provision for the advancement of any social and educationally backward classes, the Scheduled Castes and Scheduled Tribes, facilitating reservation of seats in educational institutions. Article 16(4) permits 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 of the State. To avail the benefit of reservation the backward classes need minimum equipment such as the basic qualification. Consequently, the forward

sections among the backward classes appropriately reap the benefits.

The object of Articles 41, 45 and 46 is to remove illiteracy. Article 41 mandates the State to secure right to education. Article 45 is meant to impart free and compulsory education for all children until they attain the age of 14 years. Article 46 directs the State to 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 exploitations. Unless and until the above is taken care of, the weakest amongst the weaker sections cannot rise to the level of other citizens. An affirmative action at this juncture by implementing the directive in Article 46 is the need of the hour. The record of all the Governments in the country in the matter of promotion of educational and economic interests of the weaker sections is dismal. Statesman made the Constitution, it has fallen prey to the politicians who care more for votes rather than the Constitution itself. They consider the people not as a collective entity but as one represented by castes, communities, regions and languages. This very fact is a set back for the Constitution.

Caste as an indicator of backwardness:

The reservation contemplated by Article 16(4) is in favour of any backward “class” of citizens and not in favour of any particular ‘caste’ or ‘community’. How does one get classified as belonging to a backward class? This question has engaged the attention of the Supreme Court from time to time. In *MR. Balaji v. State of Mysore*, AIR 1963 SC

649 = (1963) Supp. 1 SCR 439, the Court held that it might not be irrelevant to consider the caste of the group for deciding the question whether it is a backward class. "If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves." In *R.Chitralkesha v.State of Mysore*, (1964) 6 SCR 368, 387, 389, another Constitution Bench held that a valid classification of backward classes could be made without reference to caste. In *K.C. Vasant Kumar v. State of Karnataka*, (1985) Suppl. 1 SCR 352, 391, the opinion was divided: *D.A. Desai*, J., was against making caste as the basis for recognizing backwardness. He commented the economic criterion for compensatory discrimination or affirmative action for achieving two constitutional goals: "One, to strike at the perpetuation of caste stratification of Indian Society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty."

In *Indira Sawhney v. Union of India*, (1992) Supp. 3 SCC 217, p.470 para 330; p.472, 476, p.591, 592, the relevance of caste in the matter of classification of backward classes was seriously challenged. A Bench of nine Judges was constituted because of the divergent views expressed in earlier decisions on the role of caste in the matter of identification of backward classes. In his dissenting judgment Kuldeep Singh J., noted the rival contentions. "Mr.Ram Jethmalani appearing for the State of Bihar has advanced an extreme argument that the term 'class' under Article 16(4) means 'caste'. Mr.P.P.Rao on the other hand vehemently argued that the Constitution of India, with secularism and equality of opportunity as its basic features, does not brook an argument of the type advanced by Mr. Jethmalani. According

to him, caste is a closed door. It is not a path, even if it is - it is a prohibited path under the Constitution." The Judge held: "*secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society.... Caste poses a serious threat to the secularism and as a consequence to the integrity of the country.... Castes cannot be adopted as collectivities for the purpose of identifying 'backward class' under Article 16(4)*". *R.M.Sabai* J., who was on the same wavelength held that under a secular Constitution, caste, like religion and race, cannot furnish the basis for reservation of posts in service. According to him, uplifting the backward class of citizens, promoting them socially and educationally, taking care of weaker sections of society by special programmes and policies is the primary concern of the State. However, the majority of Judges without answering the question directly, whether in a secular polity envisaged by the Constitution. Identification of backward classes on the basis of or with reference to caste was permissible at all as that would only perpetuate the caste system and generate antagonism and antipathy between castes, declared: "identification of backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people". The nine-Judge Bench of the Supreme Court has lost the opportunity of laying down the foundation for a casteless society contemplated by the Constitution.

Nani A. Palkhivala's comments on the majority judgment are profound: "*The basic structure of the Constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism the judgment fractures the nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into forward and backward - and open up new vistas for internecine conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgments will revive casteism, which the*

Constitution emphatically intended to end; and the pre-independence tragedy would be re-enacted with the roles reversed - the erstwhile underprivileged would now become the privileged'. [Nani. A. Palhivala, *We The Nation* (1994) p.179] He quoted from **Prime Minister Nehru's** letter to the Chief Minister's: "The only real way to help a backward group is to give opportunities for a good education. But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate... It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way is not only folly, but disastrous. Let us help the backward groups by all means, but never at the cost of efficiency." [Id.atl.82]

In *S.R.Bommai v. Union of India*, (1994) 3 SCC 49, a Bench of nine Judges held: "How is this equal treatment possible, if the State were to prefer or promote a particular religion, races and castes. How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements?"

In Gujarat, Justice C.V.Rane Commission had no difficulty in identifying backward classes without reference to the caste. Caste in its origin was referable to occupation. In course of time it became heritable by birth. It is a known fact that many members of backward castes have left their traditional occupations. Only a few are carrying on their traditional occupation in the traditional manner. Prof. Andre Beteille, a renowned Sociologist, was quoted by Kuldeep Singh, J., in *Indira Sawhney* (supra): "A class derives the character it has by virtue of the characteristics of its individual members. In the case of caste, on the other hand, it is the group that stamps the individual with its own characteristics. There are some affiliations, which an individual may change, including that of his class; he cannot change his caste. At least in principle a caste remains the same caste even when a majority of its

individual members change their occupation, or their income, or even their relation to the means of production; it would be absurd from the sociological point of view to think of a class in this way. A caste is a grouping sui generis, very different from a class, particularly when we define class in terms of income or occupation."

Secularism is a basic feature of the Constitution. Caste, community and race cannot be relevant factors in a secular State either in the matter of admission to educational institutions or for employment opportunities

The Society's notions—

Can and Should Caste be an appropriate yardstick for judging the backwardness of individuals in society?

Can the classification of "backward classes" as provided in Articles 15(4) and 16(4) be effectively executed by relying on "caste" as an indicator?

The stalwarts of the Judicial and the Sociological world have did answer to these questions:

■ *Lai Narain Sinha*, former Attorney General, viewed this question from the standpoint of the community. He said: "There are three interests which enter into consideration in the interpretation of the clause. The backward class of citizens is to be the beneficiary of the provisions of the clause. Those who are outside the category of backwards are to be denied the opportunity of appointment *pro tanto*. But there is yet a much larger section interested in the interpretation of the clause. That section is the community at large which has to pay for and to avail of benefits of the service. It is that section whose interest is paramount and is sought to be safeguarded by the provisions of

Article 335¹. Services are created for advancing the interests of the community. They are not an end in themselves.... The provisions contemplated by that Article must advance the interest of the backward community, and not result in retarding their progress by creating excessive sense of security in backwardness.... It will also be a matter for consideration whether the privileges granted to the members of the backward classes are not retarding the process of national integration and creating growing conflict between the different sections of the people. Elimination of competition takes away the incentive to do the best”².

- Prof. Andre Beteille:³ “The prospects of material advancement through job reservation have lead to a kind of competition for backwardness among castes at the middle levels of hierarchy. This kind of competition creates a vested interest in backwardness and it combines the worst features of a hierarchical and a free-market society. It stifles individual initiative without creating equality between individuals, and it obstructs the natural processes through which the barriers between castes and communities can be effaced.” In *K.C. Vasanth Kumar v. State of Karnataka*⁴, O.Chinnappa Reddy, J., observed: “the paradox of the system of

reservation is that it has engendered a spirit of self denigration among the people. Nowhere else in the world do castes, classes or communities queue up for the sake of gaining the backward status, Nowhere else in the world is there competition to assert backwardness and to claim ‘we are more backward than you.’”

- Dr. R.L. Chaudhari observed: “Regarding the caste and reservation policy, it can be said that the privileges attached to castes have encouraged casteism since the caste is proving very beneficial to the persons belonging to the backward castes. Not only this, there is a general desire for the enrolment in the list of Scheduled Castes and Backward Classes even among those who are advanced and who have rejected the caste system for other purposes. Thus, the reservation policy instead of removing, has maintained the caste distinction, and has encouraged social tensions, which retard the process of social integration. It has also created obstacles in achieving the object of casteless society in India.”⁵
- Justice S. Ranganathan observed⁶, “An automatic reservation of a substantial number of seats in educational institutions, public employment and promotional avenues could tend to sap all initiative for betterment. It generates, in the field of education and in public services, an atmosphere of discontent and frustration.”

Is India moving forward or backward:

With the passage of time, the number of castes listed as backward classes by various State Governments has been increasing. For example, the Jats of Punjab and Haryana have succeeded in getting into the list of backward classes. The inclusion of such a powerful caste will certainly deprive some of

1. Art.335 reads: “claims of Scheduled Castes and Scheduled Tribes to services and posts. -The claims of the members of the Scheduled Castes and 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.

2. Lai Narain Sinha, Indian Constitution- A Fresh Look 110-111 (1993)

3. Andre Beteille, The Backward Class in Contemporary India 42 (1992)

4. Supra 392

5. R.L. Chaudhari, The Concept of Secularism in Indian Constitution 194 (1987)

6. S. Ranganathan, Constitution of India - Five Decades 312 (1999)

the more deserving sections among the backward classes of benefits of reservations. One wonders whether India is moving forward or backward? Politicians are unable to think of upliftment of weaker sections as a whole by equipping them to compete with others on equal terms with dignity and self-respect and they have forgotten that a word called development exists in dictionary. The weaker sections too clamour for more and more reservations but do not demand raising their socio-economic status to the level of non-backward sections. It is obvious that reservations act like opium, they are addictive and they have also become counter productive.

Reservations were meaningful in the beginning as a temporary measure, at a time when the State was required and expected to promote with special care, the educational and economic interests of the weaker sections of the people, and in particular the Scheduled Castes and Scheduled Tribes. The Constitution did not envisage non-implementation of the Directive Principles of State Policy set out in Articles 41, 45 and 46 for so long and continuing with reservations indefinitely. The time limit of ten years mentioned in Articles 45 and 334 is a clear indication. In *Akshil Bharatiya Soshit Karamchari Sangh (Raj) v. Union of India*, (1981) 1 SCC 246, 264, V.R. Krishna Iyer, J., has observed: "To lend immortality to the reservation policy is to defeat its *raison d'être*, to politicize this provision for communal support and party ends is to subvert the solemn undertaking of Article 16(1), to classify reservation even beyond the dismal groups of backward most people, euphemistically described as Scheduled Castes and Scheduled Tribes, is to run a grave Constitutional risk."

Fifty-four years is quite a long period. Continued neglect of promotion of educational and economic interests of the backward classes is against the tenor of the Constitution. In the matter of reservation of seats in Parliament and the State Legislatures,

the story is no different; Article 334 initially provided for reservation of seats for the Scheduled Castes and Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States for a period of ten years. However, by successive amendments to the Constitution, this reservation has been extended from time to time up to 2010 A.D. The Judiciary is not powerless to correct this serious lapse on the part of the State. Although *Indira Sawhney* accepted caste as a relevant factor or as a path for identification of backward classes, the lists of backward classes are all lists of castes. The threaded path has now become the destination. Perpetuation of caste and community differences is now inevitable.

Creamy Layer:

Reservations made in favour of backward classes were being lapped up by the forward sections among them defeating the very object of reservation.

In *State of Kerala v. N.M. Thomas*, (1976) 1 SCR 906, 972, 984, V.R. Krishna Iyer, J., noted this fact. He said: "*its benefits by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake*". "The heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers. The Constitutional dharma, however, is not an unending deification of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exorcising of the social evils and gradual withdrawal of artificial crutches. Here the Court has to be objective resisting mawkish politics." Prof. B. Sivaramayya⁷ elucidated this aspect with facts

7. 'Inequalities and The Law' p.55-56 (1984)

and figures collected from Tamil Nadu. Out of 370 castes and sub-castes, nine backward castes managed to create a virtual monopoly for themselves. These nine castes constituting 11.3% of the backward class secured 37% of the non-gazetted and 48% of the gazetted posts in the sixties. Similarly, they got 44.3% of the engineering and 47.3% of the medical seats. On the other hand, seven castes, which constituted 12.1% of the backward castes, held 1.9% of the non-gazetted and 0.9% of the gazetted posts.

The majority judgment in *Indira Sawhney* directed the Government of India to specify the basis of exclusion of creamy layer from the backward classes. On such specification, persons falling within the net of exclusionary rule shall cease to be members of other backward class for the purpose of Article 16(4). There are controversies with respect to the criteria adopted by different Governments for separating the creamy layer of backward classes.

The Supreme Court disapproved the norms adopted by the State of Kerala in *Indira Sawhney v. Union of India*, (2000) 1 SCC 168, 208 para.86 and p.209 para.90, and noted that the attitude and action of the State Government resulted in allowing creamy layer to continue to grab the posts in the services in the Government with the result that really many of the backward classes have been deliberately deprived by the State of their legitimate rights to those posts. The Court observed that “the resistance of the creamy layer to get out of the lists is as bad as the clamour for entry into the quota system of various castes whose social status does not conform to the Law decided by this Court”. The State of Tamil Nadu has provided for reservation to the extent of 69%, which by far is in excess of the limit of 50% permitted by the Supreme Court in *Balaji's* case and subsequently in *Indira Sawhney's* case. The State of Tamil Nadu not only

obtained the assent of the President to the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and all appointments or posts in the Services under the State) Act, 1993; also got it inserted as Item 257 A in the Ninth Schedule. Its validity is under challenge.

Extent of Reservation:

In *Balaji's* case, the Court held that reservations couldn't exceed 50%, Article 16(4) being an exception to clause (1) of Article 16. Even so it declared that the extent of reservation cannot ordinarily exceed 50% but in rural and remote areas some relaxation could be made if the situation so warranted. The Court also indicated that with respect to Article 335 it may not be advisable to provide for reservation in certain services and positions where either on account of nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit alone counts and by way of illustration, the Court mentioned that in technical posts in research and development organizations/departments/institutions, in specialties and super specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defense services and in the establishments connected therewith. Similarly in the case of posts at the higher echelons, e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable. Recently a Bench of three learned Judges of Supreme Court has referred to a Constitution Bench: The question, whether there could be reservation in favour of backward classes in the posts of faculty members of All Institute of Medical Sciences is being discussed. AIIMS is an institution of national repute established for imparting professional competence among medical practitioners and promotion of medical research.

Sub-Classification:

The judgment in *Indira Sawhney* has permitted sub-division of Backward Classes as backward and more backward. [supra p.729-730 para.802] The State of A.P. has not only divided the Backward Classes into four groups namely, A, B, C, D, but also categorized the Scheduled Castes into four groups with a separate percentage of reservation for each group. The sub-classification has been upheld by a Full Bench of Five Judges of A.P High Court in the case of *E.V.Chinniah v. State of A.P.*, and an appeal against the judgment is pending before the Supreme Court. The question of Law involved is when the Constitution confers the power to specify Scheduled Castes in a State as one class, is it open to a State Government to divide this class into four groups with varying percentage of reservation. We have to wait for the pronouncement of the highest Court on this question.

Excessive reliance on caste distinctions for the purpose of reservations, instead of promoting unity, has resulted in unending hostility among the castes. It is but common that most of the political leaders of the day are leaders of castes and communities. Appointments in several States are manipulated by those in power in favour of members of the ruling caste causing dissatisfaction and rivalry between others. The State Public Service Commissions and other Service Selection Boards have become suspect in the eyes of the people in many States. Neutrality of civil servants has become a thing of the past. Corruption is widespread and is almost institutionalized. Administration is tottering in several States, Law and Order situation has worsened. The basic necessities of life like drinking water, food and health have not been secured to the common man even after 56 years of independence. The electoral system is dominated by muscle power and money power. In this scenario, the welfare of the weaker sections takes a back seat. Frustration

looms large on the face of unemployed youth. Vast sections of the citizens stand excluded from enjoying the fruits of freedom and democracy. This is one of the reasons for increasing terrorist activity in different parts of the country.

The Constitution aims at a casteless and classless society with emphasis on fraternity and unity of India. In the Constituent Assembly, Dr.B.R.Ambedkar said that the principles of liberty, equality and fraternity form a union of trinity and one could not be divorced from the other, as they would defeat the very purpose of democracy. He observed: "Fraternity means a sense of common brotherhood of all Indians.... It is the principle, which gives unity and solidarity to social life. It is a difficult thing to achieve." [Constituent Assembly Debates Vol.11979, 980] The political class has vested interest in keeping the country divided on the basis of community and caste for electoral gains. The backward classes too have developed a vested interest in remaining backward. The weakest among the weaker sections are the hardest hit. The want of requisite educational qualifications cannot entitle them the benefits of reservation of seats in professional courses and reservation of posts in public employment. Their position in this regard is *status quo*. Reservations alone cannot improve their condition; the need of the hour is genuine affirmative action as suggested by *E.S. Venkataramaih, J.*, in *K.C.Vasanth Kumar v. State of Karnataka*. He observed: "There are in all castes and communities poor people who if they are given adequate opportunity and training, may be able to compete successfully with persons belonging to richer classes. The Government may provide for them liberal grants of scholarships, free of cost, stationery, books and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for the qualifying examination he may be able to attain a high degree of proficiency in his studies." Dr.B.R.Ambedkar is a shining example of how a member of a backward class, given opportunities and

economic support could realize his potential. He became an outstanding leader with generations of followers. He piloted the draft Constitution with commendable ability.

Article 51(j) declares that it is the duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the Nation constantly rises to higher levels of endeavour and achievement. The manner in which reservations are made and are being operated, obstructs the discharge of fundamental duty by the citizens.

Reservation cannot be the solution to the problem of massive backwardness of our people. According to Prof.B.Sivaramayya, "*the remedy for people confined in unremunerative occupations*

lies in removing steep disparities in wages between different kinds of occupations and in making unclean occupations clean by mechanization and other devices". Raising the level of weaker sections requires a multi dimensional approach.

The Central and the State Governments have neglected the mandate of Part IV so far and have been focusing mostly on reservations under Articles 15(4) and 16(4). It is time we declare that reservations under Articles 15(4) and 16(4) will be permissible only as supplements to schemes for universal education and eradication of poverty but not in lieu thereof. The Constitutional goal of promoting fraternity assuring the dignity of the individual and unity of the Nation is of paramount importance and it cannot be circumvented.

GENDER JUSTICE: STATUS OF WOMEN IN ANDHRA PRADESH^{*}

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