

away from the purview of the Courts to enquire into the act would be one step down in the scene of human distress and motivation. It may lead to several incongruities and it is not desirable to permit them. The difficult task of crime prevention would not therefore permit the solution to be put into a straight jacket, it has to be modulated and moulded as per time and crime. Article 21 of the Constitution of India says "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Constitutional jurists one who are supporting Section 309 of IPC violating the Constitution must think in deep about Article 21, then

they can see that exceptions in fundamental rights are more worthy than enjoyment of fundamental rights. One's right is always should be treated as other's obligation. For the purpose of common good like India a democratic country will always look into the majority peoples welfare and a State cannot act upon minority people's benefit. Lastly it is most important that a State must impose regulations to prevent immoral activities like suicide, otherwise there would be no check over the unnatural termination of one's own life, the people who are attempting to commit suicide when they are in problems like poverty, deprivation, disappointment and several social mal-adjustments.

JUDICIAL RESPONSE TOWARDS RESERVATION POLICY IN INDIA - A PERSPECTIVE

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Introduction:

Since the day of the Constitution of India came into being, Judiciary is playing a crucial role in interpreting and protecting the interest of various weaker sections of the society in accordance with the constitutional mandate. During these 1 year, Judiciary has been actively discharging its Constitutional duties to achieve the goals enshrined in the preamble of the Constitution. Although, Judiciary has contributed more towards achieving social justice, and economic justice, yet in the field of reservation its achievement is not satisfactory. This can be seen from its first decision in *Champakam Dorairajan v. State of Madras*, wherein the Madras Government had reserved seats in State medical and engineering colleges for different communities in certain proportions on the basis of religion, race and caste. This was

challenged as unconstitutional and *ultra vires* to the Constitutional provision. But the Madras Government defended its Government Order on the ground that Article 46 of the Constitution permits 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 Scheduled Tribes and to secure them the social justice to them. The Supreme Court struck down the reservation made by the State and held that it was unconstitutional as it classified students on the basis of caste and religion which are prohibitory grounds under Article 15(1) of the Constitution. The Court also said that the Directive Principles of Article 46 by its own force has not established a principle of preference and observed that "Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights.

In *Jagwantkaur v. State of Bombay*, the Government of Bombay issued an order for requisitioning land for the construction of a Harijan colony. This was challenged as *ultra vires* to equality clause under Article 15(1). But the State defended that the State may undertake various measures to promote the interests of the Scheduled Castes and Scheduled Tribes as required under the Constitution. But the Supreme Court held that the order was void under Article 15(1). To modify these two decisions and to protect the interest of the weaker sections, the Parliament amended Article 15 of the Constitution (1st Amendment) Act, 1951 and inserted clause (4) to Article 15. Under this clause, the State is empowered to make any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

In *Balaji v. State of Mysore*, again the Supreme Court intervened with the reservation policy. In this case, the Government of Mysore had issued an order reserving 68% of the seats available for admission to the engineering, medical and other technical colleges within the State. Out of 68% seats, 28% were reserved for Backward Classes, 22% for more Backward Classes, 15% for Scheduled Castes and 3% for Scheduled Tribes, only 32 per cent were made available for the merit pool. This Government order was challenged on the basis that the social backwardness of the communities to whom the impugned order applied had been determined in a manner not permissible under Article 15(4). Further, it was also challenged that the 68% reservation was excessive and unreasonable in protecting the interest of the candidates coming under the merit pool. As a result, the Supreme Court struck down the Government order reserving 68% seats as unconstitutional and *ultra vires*. It observed that

“It is because the interest of the society at large would be served by promoting the advancement of the weaker elements in

the society that Article 15(4) authorizes special provision to be made. But if a provision which is in the nature of exception completely excluded the rest of the society that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4), the Constitution intended to provide that where the advancement of the Backward Classes or rights of the citizens constituting the rest of the society were to be interest and the interest of the community or society as a whole cannot be ignored in determining the question as to whether the special provisions contemplated by Article 15(4) can be special provision which excludes the rest of the society altogether.” Further the Court also observed that if admissions to professional and technical colleges is unduly liberalized, the quality of our graduates will suffer. That is not to say that reservation should not be adopted; reservation should and must be adopted to advance the prospect of the weaker sections of the society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher education centers to deserving and qualified candidates of other communities.

Protective discrimination:

Protective discrimination is one of the important methods through which constitutional goals like social and economic justice can be secured to the Scheduled Castes and Scheduled Tribes. Protective discrimination means preference given in admission to public educational institutions and in public employment to the weaker sections of the society including the Scheduled Castes and the Scheduled Tribes. As India is having diversity in terms of religion, castes and communities with different levels of social and educational advancement, which made it difficult for the State to adopt uniform policy to all sections of the society. Therefore, the

founding fathers of the Constitution of India had determined that social justice should be secured to all citizens in general and Scheduled Castes and Scheduled Tribes, in particular. To achieve this, many provision were included in the Constitution of India, like abolition of Untouchability, special protection to Scheduled Castes and Scheduled Tribes. Special representation in Legislators, public services and reservation of seats in educational institutions. This has been done for increasing the educational opportunities and representation in public services for the Scheduled Castes and Scheduled Tribes to provide equal opportunity as guaranteed by the Constitution.

In *State of Kerala v. N.M. Thomas*, the Supreme Court took a positive approach towards the members of Scheduled Castes and Scheduled Tribes. In this case, the validity of Rule 13AA of the Kerala State and Subordinate Services Rule 1958 was under challenge. The Rule 13AA says, notwithstanding anything contained in these rules, the Government may, by order, exempt for a specified period, any member or members belonging to Scheduled Castes and Scheduled Tribes and already in service, from passing the test referred to in Rule 13 or 13A of the said rules. In accordance with the above Rule 13AA, the Kerala Government framed rules for promotion of employees, working in the Registration Department, from Lower Division Clerks to the higher posts of Upper Division Clerks. Consequently, out of 51 vacancies in category of Upper Division Clerks, 34 were filled up by the Scheduled Caste members who did not possess required qualification and only 17 were given to the qualified persons. In its order, the Government exempted the members of Scheduled Castes and Scheduled Tribes from passing the tests for a period of two years only. This rule of exemption was challenged by the petitioner as violative of Article 16(1) and beyond the reservation permitted by Article 16(4). The High Court of Kerala

struck down the rule as unconstitutional and violative of Article 16(1) of the Constitution. But the Supreme Court upheld the impugned rule and said, it is constitutionally valid. The Court also observed that the classification of employees belonging to Scheduled Castes and Scheduled Tribes for allowing them an extended period of two years for passing the special test for promotion is a just and reasonable' classification having rational nexus to the object of providing equal opportunity for all citizens in matters relating to employment or appointment to public office.

But the dissenting opinion shared by Justice H.R. Khanna, is somewhat questionable. Justice said:

“The reservation of seats for the Backward Classes was not however, to be at the cost of efficiency. This fact was brought out in Article 335. In view of that it is not permissible to waive the requirement of minimum educational qualifications and other standards essential for the maintenance of efficiency of service.”

From the above dissenting opinion expressed by Justice Khanna, it is evident that in the garb of efficiency, the special provisions made under Articles 15(4) and 16(4) cannot be made nugatory and invalid. Because, the phrase ‘consistent with the maintenance of efficiency of administration has not been defined in the Constitution and there are no yardsticks to find out the efficiency for good administration. Besides, it is regrettable that, the provision of Article 335 seems to be applicable only to the members of Scheduled Castes and Scheduled Tribes and not to the others. Therefore, it is not possible to accept the dissenting view expressed by Justice Khanna in the *Thoma's* case.

Surprisingly, in *Akhil Bharatiya Soshit Karamchari Sangh (Railways) v. Union of India*, the Supreme Court of India has shown positive response towards the reservation policy. In this case, the validity of the Railway

Board circular, which provided 64.4%. This excess reservation and carry forward rule was challenged by the Sangh as unconstitutional and *ultra vires*. But the Supreme Court upheld the validity of the Railway Board circular and said that it was valid. The Court also upheld the carry forward rule. The Court observed that, 'mathematical precision could not be applied in dealing with human problems'. It pointed out that, 'some excess will not affect the reservation, but substantial excess will make the selection void'.

Justice *Chinnappa Reddy* went a step ahead and observed that, 'the rule of 50% laid down in the earlier cases was only for the guidance of Judges and they were not bound by it. This indeed is a remarkable judicial departure from its earlier rule laid down in *Balaji's* and *Devadasan's* cases. But the dissenting opinion expressed by Justice *H.R. Khanna* in *Thoma's* case (supra) has been positively accepted by Justice *R.S. Pathak* in *Akil Bharatiya Soshit Karamchari Sangh's* case (supra), wherein he observed that, 'whatever is done in considering the claims of the Scheduled Castes and Scheduled Tribes must be consistent with the supreme need, the maintenance of efficiency of administration.' This observation of Justice *Pathak* shows that the attitude of Judiciary is not in favour of the policy of reservation.

In *India Sawbney v. Union of India*, again the Supreme Court insisted on the 50% rule. In this case, the Union Government, through its Office Memoranda, reserved 27% posts for Backward Classes in Government services on the basis of the recommendations of the Mandal Commission. Soon after, the next Government also issued an office memorandum in which another 10% of posts were reserved for socially and educationally backward classes of higher castes. The total reservation, including Scheduled Castes and Scheduled Tribes went beyond 50%. This was challenged before the Supreme Court as

unconstitutional and *ultra vires*. The Supreme Court by 6:3 majority held that the reservation made under Article 16(4) shall not exceed 50%. However, the Court also pointed out that under certain exigencies this rule may be slightly relaxed, as India is known for unity in diversity. In this case also, the Judiciary has shown its reluctance to effectuate the reservation policy in favour of Scheduled Castes and Scheduled Tribes.

Suggestions:

1. As far as possible, Judiciary shall not interfere with the socio-economic programmes launched by the State for the benefit of Backward Classes including Scheduled Castes and Scheduled Tribes. The more judicial interference with the Scheduled Castes and Scheduled Tribes Economic Programmes, the more serious setback in the implementation of these programmes.
2. The fact is that even after 50 years of independence and working of the Constitution, the conditions of the Scheduled Castes and Scheduled Tribes have not been improved. This is partly because of the 'creamy layers' who make use of the reservation benefits and partly because of the lethargic attitude of the officers who are in charge of Scheduled Castes and Scheduled Tribes' Economic Programmes is not implementing them properly. To regulate this, State shall punish such officers who do not implement these economic programmes for the benefit of Scheduled Castes and Scheduled Tribes and exclude all 'creamy layers' from the ambit of reservation benefit.
3. A Constitutional amendment shall be made to extend reservation benefits in the field of private sectors as well as in the Rajya Sabha and all the States

Legislative Councils. In these fields, no reservation is being followed since 1950. As such there is no representation given to Scheduled Castes and Scheduled Tribes in the above fields. If this is not provided, then the essence of Articles 14, 15(4), 16(4) would be meaningless.

4. As far as possible, the State shall adopt one-time reservation benefit for the members of Scheduled Castes and Scheduled Tribes enables the State Governments to extend the reservation benefits for the others who really need such benefits.

RESERVATION POLICY FOR OBCS UNDER THE INDIAN CONSTITUTION – A PERSPECTIVE

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Introduction:

Equality, justice, liberty and fraternity are the chief objectives enshrined in the Preamble to the Constitution of India. Our founding fathers wished to build an edifice of democracy wherein those noble objectives might be materialized in regard to the entire Indian Society which includes communities which had hitherto remained disadvantaged and under-developed due to historical discriminations perpetrated in the name of caste, creed, race or the like. They therefore resolutely embodied certain provisions in the Constitution which conferred special favours and protection to the backward classes of citizens with a view to uplift them to levels of equality with the rest of the society. The Indian Constitution embodies manifold concessions, preferences, exemptions and above all reservations as the means of achieving social justice. The backward of all sections viz., Scheduled Castes and Scheduled Tribes are provided reservation in Central and State legislative bodies as a manifestation of political justice, whereas they are provided along with other Backward Classes reservations and other special favours in

numerous areas including in employments and admissions, as measures of social justice. Our Constitution has the unique distinction of outlining an extensive scheme for the advancement of the Backward Classes of citizens.

OBC Reservation under the Indian Constitution:

Whereas Article 14 of the Indian Constitution prohibits the State from denying “equality before the law” and “equal protection of laws” to any person. Articles 15 and 16 are concerned specially with citizens. Article 15(1) prohibits discrimination against any citizen by the State on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(4) enable the State notwithstanding Articles 15(1) and 29(2) to make any special provision for the advancement of any socially and educationally Backward Classes of citizens; or for the Scheduled Castes or Scheduled Tribes. Article 16(1) guarantees equality of opportunity for all citizens in employment or appointment and Article 16(2) prohibits discrimination in this matter against any citizen on any ground