

PROTECTIVE DISCRIMINATION: MAINTAINING THE BALANCE UNDER THE CONSTITUTION*

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1. Introduction

The founding fathers of our Constitution felt that the inequitable forces in the socio-economic system and political organisations had created imbalance in the society and placed certain people particularly the SCs / STs in the disadvantageous position. The members of particular group of people experience multiple socio-economic disadvantages that limit their access to the basic needs of life.¹ Issues of sustainable livelihood, social and political participation of the vulnerable groups exists as the major problem in developing India. In spite of legislative measures and enforcement mechanism, there exist a wide gap between administration of justice and equity. This gap shows that they are susceptible for all kinds of exploitation. In such case justice is capable of reaching only those who can afford and deprives those who cannot afford economically.

Equality as an ideal has been a strong force in the evolution of human civilization. Essentially the idea seems to have arisen from consideration on how to deal with differences in people within the same group or outside it. The early response was one of subjugation, exclusion, elimination, and segregation, which led to wars, slavery and institutional discrimination of one class by the other class. With rationality and small utilitarianism, the approach towards equality changed for better. The emphasis was on rationalization of inequalities in a manner that promoted division of labour, mutual co-existence and socio-cultural legitimisations, which suited the dominant class.

It is out of this historical process that one sees today several conceptions of equality competing for dominance in the legal systems of the world. The most popular model is the “equality of status and of opportunity and of non-discrimination on the basis of religion, sex, race, caste and so on. The essence of this model of equality, which the Indian constitution has adopted, has been to demolish age-old

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¹ Health, education, shelter, food, employment, justice and equity etc.,

barriers, which denied equality of status and of opportunity to group of citizens on the basis of caste and sex. Empowerment² of the vulnerable section of the society is a method of benevolent social transformation.

Since the concept of equal citizenship and equal liberties of all is foundational value of the constitution, distribution of benefit and burden on the basis of community, caste and gender becomes odd and needs to be justified by a balanced application of “formal equality” and “Proportional equality”.

2. Advancement of socially and educationally backward classes

While Article 15(1) Prohibits discrimination by the State; clause (2) prohibits both the state and private individuals from making any discrimination. The object of Article 15(2) is to eradicate the abuse of the Hindu social system and to herald a united nation. Article 15(4) was added by Constitution (First Amendment) Act 1951 to nullify the decision in *State of Madras v. Champakam Dorairajan*³ Article 15(4) is an exception to clause (1) and (2) of Article 15. This empowers the state to make special provision for the advancement of any socially and educationally backward classes of citizens or for SCs and STs.⁴

The principle behind Article 15(4) is that a preferential treatment can be given validly where socially and educationally backward classes need it and is not an exception but only makes a special application of the principle of reasonable classification.⁵

In *Mandal commission case*⁶ the Supreme Court had held that there can be no reservation to other backward classes in higher educational institutions. e.g., IITs, IIMs and post graduate level in the Universities. Followed by the *T.M.A Pai v. State of Karnataka*,⁷ *Islamic Academy v. State of Karnataka*⁸ and

² Empowerment infuses ability for self-organisation, overcomes subordination, fills confidence for all-round growth by using special facility given by the state and enables better participation in control and use of resources

³ AIR 1951 SC 226.

⁴ Article 46 under the directive principles of state policy provides that “the state shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of scheduled castes and scheduled tribes and shall protect them from social injustice and all forms of exploitation.

⁵ *Gulson Prakash v. State of Haryana*, AIR 2010 SC 288.

⁶ *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

⁷ AIR 2003 SC 355.

⁸ AIR 2003 SC 3724.

*P.A Inamdar v. State of Maharastra*⁹ cases wherein it was held that the State cannot make reservation of seats in admission in privately run educational institutions. This ruling has been given burial, by Constitution (93rd Amendment) Act, 2005¹⁰ and the scope of special provision is extended to admission to private educational Institutions whether aided or unaided by the State.

The Amendment, however, keeps the minority educational institutions out of its purview. This is a retrogressive step seems to appease minority. It would damage the social fabric of Indian Society which is more cohesive and unified.

In *Ashok Kumar Thakur v. UOI*¹¹ Supreme Court held that the Constitution (93rd Amendment) Act 2006 providing 27 percent reservation in admission to OBC candidates in higher educational institutions like IITs and IIMs is Constitutional.

3. Protective discrimination for minimization of inequality

The Constitution of India provides to all the citizens, social, economic and political justice and equality of status and of opportunity. The code of equality under the Constitution of India is to be found in Articles 14, 15, 16, 17, 18 and 29 (2).¹² Special measures of reservation for scheduled castes, scheduled tribes, socially and educationally backward classes and other backward classes are major public policy developed by the Indian society. One of the efforts of the State to bring transformation in the lives of the suppressed, downtrodden and vulnerable class of the Indian society is Protective discrimination¹³.

In the historic *Mandal Commission case*,¹⁴ the Supreme Court held that the sub-classification of backward classes into more backward and backward classes for the purpose of Article 16(4) can be done. But, as a result of sub –classification,

⁹ AIR 2005 SC 3226.

¹⁰ Art 15(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 clause (1) Article 30.

¹¹ *Ashok Kumar Thakur v. UOI* AIR 2008 SCW 2899

¹² The idea of equality expressed in the preamble is stipulated here. This provision has enabled the state to reserve seats for SCs and STs in educational institutions including engineering and Medical colleges.

¹³ Protective discrimination is a contentious issue that is in vogue from 1951, with *Champakam Dorairajan* case and successive amendments to Articles 15 and 16.

¹⁴ AIR 1993 SC 477

the reservation cannot exceed more than 50 per cent. The distinction should be on the basis of degree of social backwardness. In fact such a classification would be necessary to help more backward classes otherwise those of the backward classes who are little more advanced than the more backward classes might take away all the seats. This interpretation is equally applicable to Article 15(4), as the words 'Backward Classes of citizens' in Article 16(4) are wider and includes the SCs and STs and other socially and educationally backward classes also. On this point the decision in *Balaji v. State of Mysore*,¹⁵ has been disapproved and *State of Andhra Pradesh v. Balram*¹⁶ and *K.C. Vasanth Kumar v. State of Karnataka*¹⁷ have been followed by the court.

As regards the limit of reservation the court held that the total reservation shall not exceed 50 percent. This general rule can be relaxed in extraordinary situations for population living in far flung areas of the country as it may be desirable to treat them differently. On this point, the court affirmed the ruling *Balaji*¹⁸ and *Devadasan*¹⁹ cases and overruled the *State of Kerala v. N.M Thomas*²⁰ and *K.C Vasanth Kumar v. State of Karnataka* case.²¹

Article 16(1) guarantees equality of opportunity for all citizens in matters of 'employment' or 'appointment' to any post under the State. Clause (2) says that 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. Clause (3) and onwards provides four exceptions to these general rules of equality of opportunity.

Article 16(4) provides for the State's power to make reservation in the matter of public employment in favour of any backward classes of citizens, which in the opinion of the State, is not adequately represented in the services under the State.

¹⁵ AIR 1963 SC 649.

¹⁶ AIR 1972 SC 1875.

¹⁷ AIR 1985 SC 1495.

¹⁸ *Supra* Note 9.

¹⁹ *Devadasan v. UOI* AIR 1964 SC 179.

²⁰ AIR 1976 SC 490.

²¹ *Supra* Note 11.

4. Implementation of Mandal Commission Report

In *Mandal Commission case*,²² the Supreme Court held that the existing policy of reservation in promotion is not sustainable under Article 16(4)²³ of the constitution. Though the court had accepted caste as determinant of backwardness yet it has struck a balance with the principle of Secularism which is the basic feature of the Constitution by bringing the principle of creamy layer. However, it allowed the existing policy to continue for a period of five years. The Government of India, however, considered it necessary to continue with reservation in promotion, in the case of SCs / STs as their representation in services had not reached the required level. Accordingly, Article 16 was amended *vide* Constitution (77th Amendment) Act, 1995, empowering the government to provide for reservation in promotion for SCs / STs by inserting clause 4A²⁴ in Art 16.

Thus, the policy of substantive equality through affirmative action and protective discrimination has been contemplated to deal with the problem of social backwardness arising from caste discrimination. Reservation can be provided only in favour of backward class and whether a class is a backward or not is to be determined objectively according to the acceptable criteria.

While Article 16(4) empowers state to make reservations, the constitution makers laced a limiting provision within the constitution²⁵ under Article 335 which reads as under;

Article 335: Claims of scheduled caste and scheduled tribes to services and posts: The claims 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.

²² *Supra* Note 6- AIR 1993 SC 477.

²³ Art 16(4) speaks of class protection and not individual protection.

²⁴ Art 16(4A): Nothing in this Article shall prevent the state from making any provision for reservation in matter of promotion to any class or classes of posts in the services under the state in favour of the scheduled castes and scheduled tribes which in the opinion of the state are not adequately represented in the services under the state.

²⁵ Chidananda Reddy S. Patil, "Affirmative action: check and balances", Paper presented at a National seminar, Marga. 23rd and 24th 2007. p.3.

Article 335 assumes that the scheduled castes and scheduled tribes have some claims to reservation and these claims have to be taken into consideration in the making of appointments to services and posts.

Reservation of posts exceeding 50 percent limit in order to fill up the backlog vacancies of Scheduled Castes and Scheduled Tribes is also permitted.²⁶ The Constitution (81st Amendment) Act, 2000, inserted new clause 4B in Article 16 which seeks to end the 50% ceiling on reservation for SCs/STs in the backlog vacancies which could not be filled up in the previous years due to the non-availability of eligible candidates. Under the newly added clause 4-B of Article 16, the vacancies which could not be filled up in the previous year or years shall be treated as a separate class of vacancies of the years, even if they go beyond the 50% limit.

5. Proviso²⁷ to Article 335 of the Constitution of India

“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.”

The Constitution (85th Amendment) Act, 2001 has inserted, in clause 4A: “in matters of promotion to any class” the words “*in matters of promotion, with consequential seniority, to any class.*” This Amendment aims at extending the *benefit of reservation in favour of the SCs/STs in matters of promotion with consequential seniority.* This is from April 1995 when the constitution (77th Amendment) Act 1995 was enacted.

All the above mentioned Constitutional Amendments came to be challenged in the case of *M. Nagraj v. Union of India*²⁸. The constitutional validity of all these amendments was upheld by the Supreme Court subject to some conditions. Imposing of these conditions in the judgment is a caution to the legislature and the executive that, in appropriate cases, the court will not hesitate to interfere and strike

²⁶ Art 16(4-B), Constitution of India.

²⁷ The Constitution (82nd Amendment) Act, 2000.

²⁸ AIR 2007 SC 71.

down the provisions providing for excessive reservations and undue concessions. The following observations of the court make this manifest.

“The object in enacting the enabling provisions like Article 16(4) (4A) and (4B) is that the state is empowered to identify and recognise the compelling interests. If the state has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind the maintenance of efficiency which is held to be a constitutional limitation on the discretion of the state in making reservation as indicated in Article 335...”

As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Article 16(4A) and 16(4B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this court has to examine individual cases and decide the matter in accordance with law. This is the theory of ‘guided power.’

Answering the question of relaxation of qualifying marks or standards for reservation in matters of promotion the court observed: “In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated...” Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs / STs. These compelling interests however, have to be identified by weighty and comparable data.

Introduction of new paradigm of “compelling reasons” in *M. Nagaraj v. Union of India*²⁹ has persuaded for more objective scrutiny of the presence of backwardness, inadequacy of representation and overall administrative efficiency so as to comply with all the constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.³⁰

The State is not bound to make reservation for SC / ST in matter of promotions. However, if they wish to exercise their discretion and make such provision, the

²⁹ AIR 2007 SC 71.

³⁰ An Illustration given about “compelling reasons” in *M.Nagaraj* can be looked into, in order to know its method of practical application.

State has to collect quantifiable data showing backwardness of the class and inadequacy of representation in that class in public employment in addition to compliance with Article 335.

Thus, Objective determination of the factual position was insisted. Looking to the relation between creamy layer rule and secularism, the court in *Nair Service Society case*³¹ observed that the creamy layer rule is a necessary bargain between the compelling ends of caste-based reservations and the principle of secularism, and is “a part of the constitutional scheme. Court’s prescription of means test to exclude the creamy layer has made laudable contribution to ensure that the benefits of protective discrimination would go to really deserving section.”³²

The ‘difference principle’ of justice enunciated by Rawls contemplates equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality.³³

In *B K Pavitra and Others v. State of Karnataka*,³⁴ the apex court held that the exercise for determining ‘inadequacy of representation’; Backwardness’ and ‘overall efficiency’ must be carried out before granting promotion to Scheduled Castes and Scheduled Tribes employees under the Constitution.

The mere fact that there is no proportionate representation in promotional posts for the population of SCs’ and STs is not by itself enough to grant consequential seniority to promotes, who are otherwise juniors and thereby denying seniority to those who are given promotion later on account of reservation policy. In this case, the assistant engineers of SC/ST category recruited in 1987 were promoted to the cadre of assistant executive engineers while assistant engineers, recruited in 1976 under general merit were considered for promotion to the said cadre. The government granted benefits to the 1987 cadre engineers under the Karnataka Determination of seniority of the Government Servants Promoted on the basis of Reservation

³¹ *Nair Service Society v. State of Kerala* (2007) 4 SCC 1.

³² Ishwar Bhat, P. Law and Social transformation, Eastern Book Co. p.494

³³ Quoted by Ishwar Bhat P. Law and Social transformation, Eastern Book Co. p.492

³⁴ Civil Appeal No. 2368 of 2011 decided on 9th February 2017.

(To the posts in the Civil Services of the State) Act 2002.³⁵ The petitioners challenged a high court ruling that they must prove that overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation granted under Article 16(4A) of the Constitution relying upon *M Nagaraj and others case*,³⁶ the Supreme Court held that ‘it is for the state to place material on record that, there was compelling necessity for exercise of such power and that the decision of the state was based on material including the study that overall efficiency is not compromised.’³⁷

The Constitution (93rd Amendment) Act, 2006, added clause (5) into Article 15. By this Amendment, the scope of special provision is extended to admission to private educational institutions whether aided or unaided by the state.³⁸ Its addition became imminent because in *P.A Inamdhar v. State of Maharashtra*³⁹ the Supreme Court held that “neither the policy of reservation can be enforced by the state nor can any quota or percentage of admission can be carved out to be appropriated by the state in an unaided educational institution. Reiterating its stand in *T.M.A. Pai Foundation v. State of Karnataka*⁴⁰, the right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g),” it went further and held that “imposition of quota of state seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions..., which cannot be held to be reasonable restriction within the meaning of Article 19(6).” The Constitution (93rd Amendment) Act, 2006 neutralises the decision on these points and restores the prior position subject to the condition that the special provision can now be made only by law while before the amendment it could be made even by the executive action.⁴¹

³⁵ Entire legislation has been quashed.

³⁶ ‘Catch up rule’- If a senior general candidate was promoted after SC / ST candidates, he would regain his seniority on promotion in relation to the juniors who had been promoted against reserved vacancies.

³⁷ Deccan Herald Feb 10, 2017.

³⁸ Article 15(5), Constitution of India.

³⁹ (2005) 6.SCC 537.

⁴⁰ (2002) 8 SCC 481.

⁴¹ Mahendra P singh (ed.), V.N. Shukla Constitution of India. p. 100.

In pursuance of this provision parliament enacted the central educational institution (Reservation in Admission) Act, 2006 providing for reservation in central institutions of Higher education and research for members of scheduled caste (15%), scheduled tribe (7.5%) and educationally backward class (27%). However, Linguistic or religious Minority run educational institutions are excluded from the purview of Article 15(5).

In *Ashok Kumar Thakur v. UOI*,⁴² the Constitutional Bench of the Supreme Court continued the policy of upholding caste criterion as one of the criteria for identification of OBC and SEBC subject to the application of creamy layer test in the context of Article 15(4) and 16(4) given in *Indra Sawhney case* as equally relevant and applicable in cases of Article 15(5) also.

6. Reservation Laws in IX Schedule

The IX schedule was incorporated into the constitution with the purpose of providing protection to agrarian and economic reform legislations. The object of the IX schedule was to save land reforms laws enacted by various states from being challenged in the court. Originally, it had 13 legislations for which Jawaharlal Nehru remarked as long list.⁴³

There was strange addition to the IX schedule i.e., Tamilnadu Reservation Statute of 1994, which clearly purport to surpass the well- thought judgment rendered by the apex court in *Mandal Commission's* case. Karnataka state government also attempted to include its reservation law with 73% reservation in the IX schedule. The Tamilnadu law in IX schedule was added because of the Supreme Court's ruling in the *Mandal* case that overall reservation cannot exceed 50%. In *I. R. Coelho (Dead) by L.Rs v. State of Tamilnadu and others*⁴⁴ the petitioner had challenged the validity of the various Central and State laws put in the IX schedule including Tamilnadu reservation law. A nine judge constitution Bench headed by chief justice Y.K.Sabharwal held that any law placed in the IX schedule after April 24, 1973 will be open to challenge. The court said that even though an Act is put in the IX schedule by a Constitutional Amendment its

⁴² (2008) 6 SCC 1.

⁴³ As of now there are 284 legislations in the IX schedule.

⁴⁴ 2007(1) SC 137.

provisions would be open to challenge on the ground that they destroy or damage the basic features, if the fundamental rights are taken away or abrogated pertaining to the basic features or the basic structure.

7. Article 342(1) the Constitution of India: discourse

Regarding the identification of SCs and STs, the president is vested with power of public notification of lists specifying castes, races, tribes or parts of groups to be deemed to be SCs and STs under Article 341 and 342. Article 341(1) provides that the President may, with respect to any state or union territory after consultation with the Governor thereof, by public notification, specify the castes or races or tribes which shall for the purposes of this constitution be deemed to be scheduled castes in relation to that state or union territory. According to Article 341(2) the Parliament may by law include or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. For alteration of the list of SCs and STs, the Parliament's law-making power alone is regarded as competent.

8. Reservation within reservation by micro classification

The fact that there has not been uniform level of development amidst various castes grouped under the category of Scheduled castes has given rise to the problem of uneven competition because of which more advanced sections among them are able to get the benefits and the weaker of the weakest are lagging in the race.⁴⁵ Since, there is no application of creamy layer test to exclude the forward section from the competition within the category of Scheduled castes because of confinement of *Mandal Commission's* case judgment only to OBC and SEBC, this unfair situation has arisen.

Since, states have both power and responsibility to protect the interests of weaker sections of society under Article 15(4), 16(4) and 46, it is justifiable act on their part to sub group the castes on the basis of their respective population in order to allocate their respective entitlement. The list of SCs as specified by president

⁴⁵ *Supra* Note 32. p. 496.

in consultation with the State Governors under Article 341(1)⁴⁶ is kept intact, and only the allocation is monitored on the basis of pragmatic appreciation of facts. A distinction needs to be made between disturbance of the list and allocation of the quantum of share.⁴⁷

There is also an opinion that once a reservation benefit has been already claimed and got by a candidate even belonging to SC / ST; such candidate shall be disqualified from claiming reservation benefit in his carrier.⁴⁸ As the nomenclature scheduled castes suggests, it is a list of castes and not the single caste. Because of different types of employments undertaken by them or socio-economic position enjoyed by them or because of different cultural background even going to the extent of denying co-dining or marital relations amidst the castes listed as scheduled castes, it is travesty of truth to treat them as a homogenous class.⁴⁹

As per Article 38(2), “The State shall, in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas engaged in different vocations.” This obligates the states to subgroup the castes having different characteristics for the purpose of avoiding hostile competition amidst them.⁵⁰

Other Backward Classes are in fact, conglomerations of castes or religious groups having the characteristics of inadequate representation in services. In

⁴⁶ Regarding the identification of SCs and STs, the president is vested with power of public notification of lists specifying castes, races, tribes or parts of groups to be deemed to be SCs and STs under Article 341 and 342. Article 341(1) provides that the President may, with respect to any state or union territory after consultation with the Governor thereof, by public notification, specify the castes or races or tribes which shall for the purposes of this constitution be deemed to be scheduled castes in relation to that state or union territory. According to Article 341(2) Parliament may by law include or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. For alteration of the list of SCs and STs, Parliament’s law-making power alone is regarded as competent.

⁴⁷ *Supra* Note 32 at 499.

⁴⁸ It was a terrible mistake in the past in believing that merit was an attribute not of Individual but of groups, that being born a Brahmin was itself a mark of merit. This generation of reservationists will make the same kind of mistake if they act on the belief that need too is always, and not just in special cases, an attribute of groups rather than of individuals. There is a tough competition on the sub soil of India for being continued to be always backward to claim benefits of state affirmative action.

⁴⁹ *Supra* Note 32 at 499.

⁵⁰ *Ibid*

Indra Sawhney case⁵¹ the Supreme Court allowed sub grouping of OBCs into less backward and more backward, allowed categorization with different quotas based on population and applied creamy layer test to filter out the advanced individual members.

Since, the social dimensions of castes in general remain common in India at various sectors, it is difficult to say that there remains homogeneity⁵² amidst SCs/ STs and heterogeneity amidst OBCs. Since the entire group cannot be elevated simultaneously, differences do arise between the beneficiaries of reservation and others in the group, or to put it more particularly, between the forward and backward within the community.⁵³ In Karnataka, the Government has appointed Justice A.J Sadashiva Commission to look into discrimination arising within the Scheduled Castes because of cornering the advantages by the advanced sections among them and the committee has submitted its report after due consultation with the stake holders among SCs in Karnataka.

9. The problem of non-birth entry into caste or reservation category

Birth is a non-controversial basis for membership in a caste because, the social atmosphere that caste builds and the one in which the child is brought up from the childhood days is likely to influence the growth and competence of the child.⁵⁴ An outsider's entry into that social group at a subsequent stage by marriage, conversion or adoption might not be envisaging similar disadvantage and on the other hand, might have been motivated by an idea just to grab the affirmative action benefit. However, apex court declined to extend such benefit in many cases⁵⁵ pertaining to marriage and election and conversion and election. Regarding adoption by scheduled caste parents as a basis for entitlement to reservation, in *Khazan Singh*⁵⁶ the Delhi High court has approached from legalistic perspective of adoption. The

⁵¹ *Supra* Note 6; AIR 1993 SC 477.

⁵² The Issue of homogeneity needs to be looked from sociological viewpoint. After Sixty five years of protective discrimination policy at various levels and sectors of public life continuously and seriously practiced, a vague point focus on its social impact and dynamics of change demands attention.

⁵³ *Supra* Note 31 at 500.

⁵⁴ *Supra* Note 31 at 503.

⁵⁵ *N.E Horo v. Jahanara* (1972)1 SCC 771; AIR 1972 SC 1840; *Urmila v. UOI* AIR 1975 del 115; *Valsamma v. Cochin University*, AIR 1996 SC 1011

⁵⁶ AIR 1980 Del 60.

court reasoned that once adoption is valid, even though the motive is for taking advantage of loophole in the law and is a measure of “career planning”, in view of future consequences of adoption upon subsequent generation, it is appropriate to consider the person as within the fold of the SC community. Prof B.N. Sampath criticized this verdict as it allows the transformation of loophole into floodgate for unscrupulous people eyeing on State patronage.⁵⁷

10. Women and children as vulnerable class

Article 15(3)⁵⁸ empowers the State to make special provision for ‘Women and Children.’ Women and Children require special treatment on account of their very nature. The women’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical well being becomes an object of public interest and care in order to preserve the strength and vigour of the race.⁵⁹

11. Free and compulsory education to all children

The Constitution (86th Amendment) Act 2002, has added a new Article 21A and has made education for all children of the age of 6 to 14 years a fundamental right. It provides that “The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.”⁶⁰

12. Cultural and educational rights

Any section of the citizens residing in the territory of India or any part thereof having distinct language, script, or culture of its own shall have the Right to conserve the same.⁶¹ Article 29(1) has special significance for all the scheduled tribes. However, this provision need not be understood to educate the tribal only in their language and thereby making them isolated. They should be educated in

⁵⁷ B. N. Sampath. “Pseudo-scheduled castes: A Gift of Adoption law”; (1981)23 *JILI* p. 599

⁵⁸ 15(3): Nothing in Article 15 shall prevent the State from making any special provision for women and Children.

⁵⁹ *Muller v. Oregon*, 52 L.Ed 551

⁶⁰ Article 45: provision for early childhood care and education to children below the age of six years - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

⁶¹ Article 29(1), Constitution of India.

the language of the state as well as national language to expose them to outside knowledge.

No citizen shall be denied admission into an educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.⁶² Clause (2) of Article 29 relates to admission into educational institutions which are maintained or aided by state funds. It may be recalled that Article 15 also prohibits discrimination against citizens on grounds of religion, caste etc. But the scope of two Articles is different. Article 15(1) protects citizens only against the state while Article 29(2) protects citizens against the State or anybody who denies the right conferred by it. Secondly, Article 15 protects citizens against discrimination generally but 29(2) protects only against a particular species of wrong, namely, denial of admission into educational institutions maintained or aided by state. Article 29(2) is a special Article and is a controlling provision when the question relates to admission to colleges. The right to admission into an educational institution is a right which an individual citizen has and not as a member of any community or class of citizens. Hence a school run by a minority, if it is aided by state funds, cannot refuse admission to children belonging to other communities.

It shall be the endeavour of every local authority within the state to provide adequate facilities for instrussions in the mother tongue at the primary stage of education to children who belongs to linguistic minority groups and the president may issue directions to any state as he considers necessary or proper for securing the provision of such facilities.⁶³ Most of the tribal communities have their own language or dialects, which usually belongs to a different family of language than the one to which the state's official language belongs. However, facilities should be provided to teach in the national language and in English, besides in the mother tongue and local dialect.

13. Political safeguards

Article 164(1) provides⁶⁴, that there shall be a minister in charge of tribal

⁶² Article 29(2), Constitution of India.

⁶³ Article 350(A), Constitution of India.

⁶⁴ In the State of Bihar, Madhya Pradesh and Orissa.

welfare who may in addition be in charge of the welfare of the scheduled castes and backward classes or any other work.

Article 330 provides, for reservation of seats⁶⁵ of SCs / STs in the Lok Sabha. In pursuance of this 106 seats out of 545 total seats are reserved for members of SC / ST communities. In the post 11th Lok Sabha, SC / ST number of MPs outnumbered the fixed quota which indicates that besides the reserved constituencies SC / ST candidates are elected against unreserved Lok Sabha seats also. It is a healthy sign of social transformation.

14. Constitutional 73rd and 74th Amendment Acts: Empowerment of SCs, STs and OBCs and Women

In accordance with the Constitution (73rd Amendment) Act 1992, seats in Panchayat from Gram panchayat to Zilla panchayat will be reserved for SC / STs in proportion to their population at respective level, in direct election.⁶⁶ Out of the seats reserved for SCs and STs one third will be reserved for women of these communities. These reserved seats for SCs and STs shall be allotted by rotation to different constituencies in a panchayat at each level.

In accordance with the Constitution (74th Amendment) Act, 1992 out of total seats to be filled by direct election, seats shall be reserved for SCs / STs in proportion to their population in the municipal bodies at each level.⁶⁷ Out of these seats for SCs / STs at least one-third shall be reserved for SC / ST women.

Reservation for SCs and STs in the Panchayats and Municipalities is an important step towards their political empowerment. As a result of these provision more than seven lakhs elected representatives including women from these groups are playing important roles in decentralised governance, planning and development.

With the enactment of the Panchayat (extension to the Scheduled Areas) Act, 1996, the provision of part IX of the constitution relating to Panchayats have been

⁶⁵ Article 332 provides for reservation of seats for SC/ST state Vidhana Sabhas (Legislative assemblies).

Article 334 lays down the provision relating to the reservation of seats for SCs and STs in the Lok Sabha and state Vidhana Sabha (reservation of the Anglo-Indian community in the Lok Sabha and the state Vidhana Sabhas by nomination). This provision has been extended by amending the constitution every ten years.

⁶⁶ Article 243-D, Constitution of India.

⁶⁷ Article 243-T, Constitution of India.

extended to the scheduled areas subject to exceptions and modifications that a legislature of a state shall not make any law inconsistent with any of the following features- customary law, Social and religious practices and traditional management practices of community services.

Every village shall have Gram sabha which shall be competent to safeguard and preserve the traditions and customs of the people and shall be vested with the powers to approve the programmes and projects for social and economic development, also identification of beneficiaries under such programmes the Panchayats at their levels shall be endowed with ownership of minor forest produce. The Gram sabha or the Panchayats at the appropriate level shall be consulted for granting prospective licensees or mining lease or minor minerals and their prior recommendation obtained for acquisition of land in the scheduled areas for development projects or for settlement of project affected members of the scheduled tribe. Thus, the extension of the 73rd Amendment Act to the scheduled areas would enable the tribal people to prepare and execute economic development and social justice plans in their respective areas.

15. National Commission for SCs and STs

Under Article 338 and 338-A⁶⁸ National Commissions for SCs and STs are constituted to investigate about all matters relating to safeguards, inquire into

⁶⁸ Article 338 and 338-A prescribes the following duties of the respective commissions;

- i. To investigate and monitor all matters relating to the safeguards provided for the scheduled castes (scheduled Tribes) under this constitution or under any other law for the time being in force or under any order of the government and to evaluate the working of such safeguards;
- ii. To inquire into specific complaints with respect to the deprivation of rights and safeguards of the scheduled castes (scheduled Tribes);
- iii. To participate and advise on the planning process of the socio-economic development of the scheduled castes (scheduled Tribes) and to evaluate the progress of their development under the union and any state;
- iv. To report to the president, annually and at such other times as the commission may deem fit, reports on working of those safeguards;
- v. To make in such reports recommendations as to the measures that should be taken by the union or any state for the effective implementation of those safeguards and other measures for the protection, welfare, and socio-economic development of the scheduled castes (scheduled Tribes);
- vi. To discharge such other functions in relation to the protection, welfare and development and advancement of the scheduled castes (scheduled Tribes) as the president may, subject to the provisions of any law made by parliament, by the rule satisfy.

complaints about deprivation of rights, to recommend for their better protection. In order to enable more effective and focused work for their amelioration, bifurcation of National Commission into two separate commissions was affected by the Constitution (89th Amendment) Act, 2003. This hints how instrumentalities for social change are also reshaped with changing times.

16. Reservation in private sector

With the growth of Information technology (IT) and Biotechnology (BT) sectors and flourish of Multinationals and Indian listed companies, reservationists are aiming their sight at high-end jobs in these spheres. State's power of making infrastructural facilities available is sometimes relied upon for seeking governmental intervention to pressurise the private sector to follow reservation policy. Protagonists of reservation in private sector claim that for reducing economic discrimination, for promoting equitable growth, for securing the tenure of dalit workers and for minimizing the potential conflict, reservation is essential. With the growth of Privitisation, the arena of public sector is reduced and the scope for special provision for the backward classes is also narrowed down.

According to a study commissioned by the National Human Rights Commission in 2002, 'autonomy of operation is the key in the private sector since the responsibility for profit and loss is borne by the enterprise. Therefore, those who invest their capital would not countenance restrictions on their autonomy. There is no accountability of private sector enterprise to government or to public. They are accountable to their own share holders. In the era of Privitisation, Liberalisation and Globalisation (LPG) high level of performance cannot be maintained in the private sector without a flexible system of job contracts.

The study report expressed doubts over the "Constitutional Sustainability" of the proposal for job reservation in private sector for those belonging to scheduled castes and scheduled tribes for a number of reasons. That is why even in the peak period of commitment to reservation as a strategy of empowerment of SCs/STs, the government did not consider introducing reservation of jobs in the private sector. According to the report, with the intervention of the Supreme Court in restricting the scope and ambit of reservation from time to time, it "seems highly

improbable” that the idea of reservation of jobs in the private sector would muster legal sanction.⁶⁹

The report goes on to suggest that the government could engage the private sector in meaningful discussion on how to facilitate the entry of marginalized communities such as SCs / STs in private sector employment, trade and commerce. This may not assure jobs in the manner of reservation but would bring the vast private sector employment in the ambit of social obligation.⁷⁰ It says adding appropriate mechanisms can be created to monitor the progress and such success of these efforts.

The report is dismissive of the scale of possible absorption of SCs/STs in private sector jobs through reservation, saying even if 15% reservation were to be enforced; this would take care of only around 13 lakhs persons from the SCs and another 6.5 lakhs from among the STs. While the benefits from reservation are shrinking SCs / STs are not equipped to tap employment opportunities in the open market. This is likely to increase their frustration.

17. Conclusion

Affirmative action as a means of empowerment and an instrument of social justice has taken multiple forms and has been employed by various levels of Government with region- specific political policy decisions. With the growth of society, the features and characteristics of the beneficiaries and of the categories of reservation also undergo change. However, objectivity has suffered when prejudice, favoritism and mere political consideration are mixed with policy. The confrontational approach between the Legislature and judiciary has made both law men and lay men not in a position to perceive the reservation policy. Exclusion of persons or families who got reservation benefit or of persons who merged with forward sections by becoming creamy layer from the advantages of affirmative action’s, would help in channelising the benefits to weaker of the weakest. Extension of Mandal Commission’s case principle on this matter to scheduled

⁶⁹ Retired bureaucrat K.B.Saxena wrote the Report in 2002.

⁷⁰ Govt. of Karnataka has announced the policy of awarding Govt. contracts worth up to Rs 50, 00,000 for SC/ST.

castes and scheduled tribes is required. The need for actual empowerment of the weaker section by infusing the strength for competition should be realized and the direction of development should be towards minimizing the dependence on caste factor for identifying the beneficiaries of state affirmative action.

The ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely; backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of status and of opportunity would collapse.