

Chapter 6

JUDICIAL AND LEGAL RESPONSE

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6

JUDICIAL AND LEGAL RESPONSE

The role of a judiciary and legal response in context of promotion of educational and economic interests of scheduled castes and scheduled tribes and other weaker sections should be analyzed critically to see the attitude of judiciary in case of promotion of educational and economic interest and scheduled casts and scheduled tribes and other weaker sections.

6.1 Indian Supreme Court on Reservation with Reference to Constitutional Provisions

The principle of equality is aptly guaranteed under the Constitution of India. All the citizens are entitled to be treated by the state equally, irrespective of their caste, race, religion, sex, descent, place of birth and residence. No citizen may be discriminated against by the State only on any of these grounds. The exceptions to this principle are made in favour of women and children, the backward classes, the Scheduled Castes and the Scheduled Tribes, and the weaker sections.

Under Article 15(3) of the Constitution, any special provision may be made for women and children belonging to all social groups transcending caste, religion etc. for their advancement and welfare in all fields.

Under Article 15(4), special provisions may be made for the advancement of any socially and educationally backward class and for the Scheduled Castes and the Scheduled Tribes.

The term "advancement" meant here is again in any field. This sub-clause (4) of Article 15 was inserted by an amendment in 1951. Article 16 (4) permits the State to make any provision for the reservation of appointments or posts in favour of any backward class, which, in the opinion of the State, is not adequately represented in the services under it.

The expression "backward class" in this sub-clause is interpreted by the Supreme Court to mean "socially and educationally backward" as is specifically mentioned in the sub-clause (4) added later to Article 15.

Further, Article 46 directs the State to promote with special care the educational and economic interests of the "weaker sections of the people", particularly of the Scheduled Castes and the Scheduled Tribes and also directs the State "to protect them from social injustice and all forms of exploitation".

Along with these, Article 335 lays down that the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of appointments to the services and posts in connection with the affairs of the Union and of a State.

Although *prima facie*, these appear to be the exceptions to the citizens' right to equality before the law or to the equal protection of the laws guaranteed by Article 14, a deeper consideration will show that in fact they enable the state to make the right to equality a reality for the vast majority of the backward classes which, together with the Scheduled Castes and the Scheduled Tribes, constitute about 85% of the population.

The right to equality without the capacity and the means to avail of the benefits equally is a cruel joke on the deprived sections of the society. It widens the social and economic inequalities progressively with the haves making use of the guaranteed right to amass the fruits of progress, and the have-nots remaining where they are. The exceptions enable the State to make the deprived capable of availing of the benefits which otherwise they would not be able to. It is to give effect to the principle of equality that the exceptions become mandatory in any unequal society such as ours which intends to become egalitarian.

The principle of equality is not an esoteric concept. It may be used as a constructive tool of social engineering, for building a society based on social justice. To treat two unequal as equals causes as much injustice as to treat two equals unequally. The jurisprudence of equality, therefore, requires that those below are levelled up to those above.

The exceptions made in the Constitution are in favour of four classes for certain stated purposes, with or without conditions —

1. Women and children in general, i.e. belonging to all social groups and all the strata of the society regardless of class, caste, race, religion etc. [Article 15 (3)], obviously for their all-round welfare and development
2. The socially and educationally backward classes and [for their advancement, Article 15(4)]
3. The Scheduled Castes and the Scheduled Tribes, and lastly

4. The "weaker sections", which, in particular, include the Scheduled Castes and the Scheduled Tribes for promoting with special care their educational and economic interests and to protect them from social injustice and all forms of exploitation [Article 46].

Which is this fourth category of the "weaker sections" mentioned in Article 46? It is obvious that they are similar in conditions to and include sections other than the Scheduled Castes and the Scheduled Tribes, for they are "particularly" referred to in it.

It is also clear that to qualify it to be included in it, the section of the people has to consist of those (a) whose educational and economic interests need to be promoted with special care, and (b) who need to be protected from social injustice and all forms of exploitation.

Would not the purpose have been served if the expression "backward classes" had been used instead of "weaker sections" as done in Article 16 (4), which would mean all the weaker sections, including the Scheduled Castes and the Scheduled Tribes? It may be remembered here that sub-clause (4) of Article 15 was not there originally — it was inserted by an amendment and the expression "backward classes" was used with a qualification "socially and educationally (backward classes)" and not only socially or educationally backward but backward on both counts. Second, the Scheduled Castes and the Scheduled Tribes were separated from the expression "backward classes" to make a distinction between them and the other backward classes (OBCs). The effort, it seems, has been to maintain the same distinction in Article 46.

Incidentally, it is also necessary to point out that the Supreme Court in all its decisions on reservation has interpreted the expression "backward classes" in Article 16 (4) to mean the "socially and educationally" backward. It also emphatically rejected "economic backwardness" as the only or the primary criterion for reservation under article 16 (4) and observed that economic backwardness has to be on account of social and educational backwardness.

When Article 46 refers to "weaker sections", it qualifies that expression with different and more parenthetical clauses as pointed out earlier.

Although Article 46 speaks of weaker sections, whose "economic" interests have also to be promoted along with their "educational" interests with special care, it also speaks of "protecting" them from all forms of "social injustice and exploitation".

Therefore, it is obvious that the "weaker sections" referred to in Article 46 are those other than the Scheduled Castes and the Scheduled Tribes who are backward both socially and educationally and need to be protected from social injustice and all forms of exploitation. Those sections, which are merely economically weak or backward, would not qualify for promotion of their interests under the cover of this Article.

The present system of reservation is in favour of "classes", and not individuals. And in order that the individuals may qualify for them, they must belong to those classes. There is no one or particular "class" which is economically backward. All classes and social groups have economically backward individuals. But on that account alone, a group does not qualify to be called a backward class.

What is, however, argued is that it is not the "upper" castes or the social groups, but the poor individuals in the groups who should be entitled to reservation? As has been pointed out earlier, reservation has been provided in the Constitution for "classes", not individuals. If the individuals have to be provided with reservation on the economic criterion, then those satisfying the said criterion and belonging to any caste and social group, irrespective of any distinction will be entitled to it, including the individuals belonging to the backward classes and the Scheduled Castes and the Scheduled Tribes, for, such reservation will fall in the general category and all will be entitled to it whether there is reservation on other grounds or not.

A backward class person may choose to apply for reservation on economic criterion, instead of the reservation made for his class, or if he does not get a seat on the basis of class reservation, he may claim a seat on economic grounds and if he is qualified for it, he cannot be denied the same.

On the other hand, he may qualify for it better if the poorer are entitled to it. Since economic criteria, whatever these may be, will run common through all the social groups, it will be contrary to the right to equality and therefore unconstitutional to keep them confined to any particular social group or groups.

Some other features of the present reservation system may be borne in mind, which is often forgotten by many, in their superior approach to the problems of reservation. The existing reservation in state employment under Article 16 (4) is in favour of such backward classes, which, in the opinion of the state, are "not adequately represented" in the services.

It is clear from this provision that it is to give the "classes" adequate representation in state administration that reservation has been made.

At this juncture it becomes important to study the timeline on reservation in India so find how the concept of reservation has developed into a great bastion of liberty for the little Indians who not properly represented because of the caste factor:

6.2 Reservation in India: Time-Line¹²²

1918-1919: Reservations in government jobs were introduced in 1918 in Mysore in favour of a number of castes and communities that had little share in the administration. In another instance, upon petition from the Muslim community, the British government at the time made provisions in the Government of India acts of 1909 and 1919 granting muslims share in the administration and other facilities.

1931: Ambedkar pressed for a separate electorate for the depressed classes at Round Table Conference in London held from November 1930 to January 1931 while representing the depressed classes there.

1932: Ambedkar and Gandhiji signed the Poona Pact. According to the pact the separate electorate demand was replaced with special concessions like reserved seats in the Regional Legislative Assemblies and Central Council of States.

¹²² <http://blog.smr.co.in/misc/reservation-in-india-timeline/> (Last Visited 30 Nov 2009)

1935: In the communal award of 1935, legislative seats were reserved for members of the Muslim, Sikh, Maratha, Parsi, Christian, European, and Anglo-Indian communities. In addition seats were reserved for depressed classes within the Hindu community.

1942: The scheduled castes were given 8.5 reservations in central services and other facilities in 1942.

1947: In independent India, provision for reservation in legislature was made in the Constitution until 1960, recently extended until 2010. Provision for public services was made at the same time with no time limit.

1950: In Constitution of India, 15% of educational and civil service seats were reserved for "scheduled castes" and 7.5% for "scheduled tribes."

1963: The Supreme Court of India ruled that total reservations could not exceed 50%.

1980: Mandal Commission recommended changes to quotas, increasing them by 27% to 49.5%. (Limited by 1963 act). The Commission estimated that 52% of the total population (excluding SCs and STs), belonging to 3,743 different castes and communities was "backward".

1990: The implementation of the Mandal commissions' recommendations in the case of government jobs by VP Singh. Despite widespread agitation (mostly among students), reservation for the backward classes were upheld to the extent of 27% (this

was in addition to the 22.5% already reserved for scheduled castes and tribes, bringing the total of 'open' seats to only 50.5%). Rajiv Goswami, student of Delhi University, self-immolated himself in protest of the government's actions.

1992: Panchayati Raj Act, 1992 (73rd and 74th Constitutional Amendment) came into effect granting not less than 33% reservation to women in the Panchayati Raj Institutions or local bodies.

1993: Upheld 27% reservation for OBCs subject to the exclusion of socially-advanced persons/sections (creamy layer) from amongst the OBCs. Children of persons with annual income greater than Rs 1 lakh were also to be excluded. The limit was later revised to Rs 2.5 lakh in 2004.

1996: Prime Minister H.D. Dev Gowda made the actual promise for reservation of seats for women in Parliament and State Assemblies.

2005 (Aug): The Supreme Court abolished all caste-based reservations in unaided private colleges.

2005 (Dec 21): After Arjun Singh's move the Lok Sabha passed the 104th Constitution Amendment Act 2005, rolling back the SC judgment by introducing a new clause into Article 15 to allow for reservations for schedule castes and scheduled tribes as well as other backward classes in private unaided educational institutions other than minority institutions.

2006 (Apr-May): Human Resource Development Minister Arjun Singh declared government's intention to fix a quota for the Other

Backward Castes (OBCs) in the premier government educational institutions like the Indian Institute of Technologies (IITs) and Indian Institute of Managements (IIMs) and other institutions of higher learning.

2007: Supreme Court give stayed on OBC reservation in Central Government Educational Institutions.

2008: The Supreme Court of India on April 10 2008 upheld the Government's move for initiating 27% OBC quotas in Government funded institutions. The Court has categorically reiterated its prior stand that "Creamy Layer" should be excluded from the ambit of reservation policy. The Supreme Court avoided answering the question whether reservations can be made in private institutions, stating that the question will be decided only as and when a law is made making reservations in private institutions. The verdict produced mixed reactions from supporting and opposing quarters.

Thus, the Constitutional protection is amply provided which has enabled the Indian Supreme Court to broaden the boundaries for the protection and upliftment of the weaker sections. We now discuss the host of the Supreme Court judgments on following lines:

6.2.1 Madhya Pradesh Rajya Sahakari Bank Maryadit v. State of Madhya Pradesh¹²³

The issue was pertaining to Article 12 and 16 of the Indian Constitution with specific reference to reservation granted in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes as general condition of service.

123 (2009) 12 SCC 529

The court said that the power of Registrar to direct said reservations, its scope and objective are wide enough to give power to the Registrar of Co-operative Societies to lay down reservation in favour Scheduled Castes, Scheduled Tribes and other Backward Classes as general condition of service. In Co-operative Societies in which State has more than 51% paid up share capital it is left open to Registrar to make fresh rules, thus the appeal was dismissed.

6.2.2 State of Maharashtra v. Sanjay K.Nimje¹²⁴

In the instance case the court went on to say that the cancellation of the caste certificate (Koshti Caste) without proper justification on the basis of the back date government resolution amounts to violation for the Articles 341 and 342 of the Indian Constitution.

The case stands as a benchmark for the protections of the SCs to whom the benefit of the caste certificate is withdrawn by the government officials under the impugned Government notification. The impugned judgment of the scrutiny committee was set aside and the appeal was allowed.

6.2.3 Ashok Kumar Thakur v. Union of India¹²⁵

The case revolved around the Constitution (Ninety-third Amendment) Act, 2005, and Article 14, 15(4), and 15(5) pertaining to reservation in educational institutions imparting higher education for socially and educationally backward classes. The court discussed the scope and ambit of the hinted provisions of Constitution in consideration of the importance of the issues involved and its likely impact on social life of the country as a whole and various complexities. In the instance case the constitutional validity of the

124 (2007) 14 SCC 481

125 (2007) 4 SCC 361

Section 2(g), 3(iii), 5 and 6 of the Central Educational Institutions (Reservation in Admission) Act 2006 was challenged. It dealt with the concept of creamy layer and reservation policy.

The case harped on the basic issues pertaining to:

- (a) Validity of the Constitution (Ninety-third Amendment) Act, 2005 and hence Article 15(5)
- (b) True ambit and scope of Article 15(4) and 15(5) if Article 15(5) found to be valid
- (c) Scope of judicial review
- (d) Listing of socially and educationally backward classes in terms of units of caste/communities
- (e) Whether 27% reservation for Socially and Educationally Backward Classes/Other Backward Classes is justified
- (f) Socially advanced persons or sections or creamy layer of SEBC/OBC
- (g) Constitutionality of the Central Educational Institutions (Reservation in Admission) Act, 2006

Constitution's 93rd Amendment 2005 by which Article 15(5) has been inserted in Part III of the Constitution lays down that the creamy layer rule is a necessary bargain between the competing ends of caste based reservations and the principle of secularism. It is a part of constitutional scheme and thus the issues raised by the then decision of the Court in *Indra Sawhney v. Union of India* would continue to be operative with respect of Scheduled Caste and Scheduled Tribe candidates.

Under the Constitution of India - Article 14, 15, 16, 19(1) (g) – Central Educational Institutions (Reservation in Admission) Act, 2006 whether the Act is constitutionally invalid in view of definition of "Backward Class" and whether the identification of such "Backward Class" based on "caste" is constitutionally valid, it was held that, socially and economically backward class when not properly identified the power to identify such class is given exclusively to Central Government.

The court held that the policy of reservation is having an affirmative action on the policy of 27% reservation for OBCs. Along with this the court went on to say that Articles 14, 15(4), 15(5) and 16 of Indian Constitution would be equally applicable and the content of the section 2, 3, 5 and 6 of the Central Educational Institutions (Reservation in Admission) Act, 2006 has to be read in tune with the constitutional guarantees.

It was also held that Article 14, 15(4), and 15(5) pertaining to reservation in educational institutions imparting higher education for socially and educationally backward classes stand as a bastion of liberty for the downtrodden and little Indians and laid down that such provisions must be cherished for protecting the equality right in wider sense.

The court held that the Act 5 of 2007 is not invalid for the reason that there is no time limit prescribed for its operation, but a review can be made after a period of 10 years for 27% of seats for other backward classes. The court further said that, it is not illegal and the Parliament must be deemed to have taken into consideration all relevant circumstances when fixing the 27% reservation. Thus Ninety-Third Amendment to the Constitution does not violate the

"basic structure" of the Constitution so far as it relates to aided educational institutions.

6.2.4 Rajesh Kumar Daria v. Rajasthan Public Service Commission¹²⁶

The most celebrated case, talked about the Service Law of Rajasthan Judicial Services Rules (RJSR), 1955 Rule 9(3) which dealt with the selection to posts of Munsif Magistrate in Rajasthan Judicial Service with reference to total number of posts declared. It was held that, selections made by RPSC amount to treating 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

Thus, selection of other eleven women candidates from reserved category was clearly impermissible, however, the court said that appellants to be accommodated without disturbing selection already made. Thus the appeals were allowed.

6.2.5 Mahesh Gupta v. Yashwant Kumar Ahirwar¹²⁷

The impugned case discussed on Constitution of India Article 14, 16, and 39 with special reference to Person with Disabilities (Equal Opportunities, Protection of Rights and Full Particulars) Act, 1995. In this case the recruitment of handicapped persons, interpretation of advertisement, SC, ST and backward class reservation and advertisement announcing vacancies in reserved categories to be filled from handicapped person were discussed. The appellant's appointment was from general category, but got appointed because he was handicapped.

¹²⁶ (2008) 8 SCC 785

¹²⁷ (2007) 8 SCC 621

The respondent no. 1 was both handicapped and belonged to reserved category. Respondent no 1 challenged in Tribunal and it was held that respondent no. 1 had no right of appointment.

The High Court ordered State Government for fresh selection and termination of service of appellants. In this case the court came down heavily on the State Government and laid down that, it is expected to have constitutional vision.

The court said that the State Government completely lost sight of its commitment both under its own policy decision as also statutory provision. Thus the judgment of the tribunal was set aside and the court directed that persons whose services have been terminated should be continued in service along with their back wages.

6.2.6 Shiv Prasad v. Government of India and Others¹²⁸

The court held that, in our considered opinion, in the light of the above facts and circumstances, namely, the cadre of Associate Professor and Asst. Professor is a combined cadre, the policy of reservation of UP Government provides for 20% reservation for women, the said policy has been accepted by the University; that even the advertisement also provided for selection and appointment on the Combined Cadre of Associate/Asstistant Professor, that respondent no. 4 was a woman candidate for the post of Assistant Professor and was duly considered, selected and recommended for the post of Asst. Professor, selection and recommendation of the writ petitioner as Associate Professor, in our considered opinion, was irrelevant.

128 (2008) 10 SCC 382

In view of combined cadre of Associate/Assistant Professor, the Selection Committee was enjoined to consider the matter on the policy of the Government keeping in view reservation for women.

Hence, even though the writ petitioner was found fit, selected and recommended by the committee for the post of Associate Professor in the light of the reservation Policy, availability of respondent no. 4 and her selection to the post of Asst. Professor, the action of the university in appointing her to that post and not appointing the writ petitioner as Associate Professor cannot be held illegal, unlawful or contrary to law and could not have been set aside by the High Court.

6.2.7 Pushpa Rani v. Union of India¹²⁹

The issue for discussion was whether policy of reservation of posts for Scheduled Castes/Scheduled Tribes would be applied at stage of giving effect to cadre restructuring exercise undertaken pursuant to letter issued by Railway Board. It was held that, policy of reservation could be applied at stage of giving effect to cadre restructuring exercise.

The court said that Railway Board and General Manager are empowered to frame rules for regulation of recruitment and conditions of service. The filling of post becoming available consequent upon restructuring by promotion cannot be equated to up gradation simplifier. The employer can frame its own mode and method, Court has no role in determining methodology of recruitment or laying down criteria of selection and thus the power

129 (2008) 9 SCC 243

of judicial review can be exercised only if action of employer shown to be patently arbitrary or vitiated due to malafide reasons.

6.2.8 Vinod Kumar R. V. v. University of Bhavnagar¹³⁰

The area for discussion was on Constitution of India - Articles 14, 15 and 46 with special reference to Indian Medical Council Act, 1956 - Ss. 19-A and 33, Postgraduate Medical Education Regulations, 2000 (Rule 9).

The case dealt with admission to post-graduate to Medical Education, Reservation of seats, Admission Ordinance and Rules of the University which provide for reservation in favour of Schedule Caste, Schedule Tribe and Socially and Educationally Backward Class candidates.

The rules of the University further provide that on non-availability of a candidate belonging to reserved category of the very same University, a seat would be de-reserved, i.e. any outsider belonging to the reserve class would not be allowed to compete for the seat which is for reserved category. It was held that, on non-availability of reserved class candidate, who could be given preference, would not make the seat unreserved.

The seat will have to be offered to a person who belongs to the same category if no person is available against him to have preference. Further, if reserved seats cannot be filled by in-institutional candidate, it cannot be de-reserved. The court said that the rule of the University which de-reserves the seats on account of non-availability of the in-institutional candidate belonging to the

¹³⁰ (2009) 1 SCC 696

reserved category violates Articles 14 and 15 of the Constitution of India.

6.2.9 Kerala Public Service Commission v. Cochin University¹³¹

It is not in all cases that the Indian Supreme Court has taken the stand for the backward classes. Cases like this shows that the court is very neutral in granting the rights. Cases like this when the person changes his caste by getting married in Scheduled Tribes or changes the caste by way of adoption, the court has come forth for the benefits of general community by laying down that a person cannot change his caste to SC/ST to avail the benefits of reservations.

6.2.10 Indra Sawhney v. Union of India¹³² and Aftermath - Conflicts of Judiciary and Politics

Slowly the politician and statesman of the stature of Pandit Nehru, Sardar Patel eloped from the political scene of India and the politicians with little worth and standing occupied the scene. The politicians were not commanding the patronage of masses because of their ideal or policies and thus they started to widen the gulf on the basis of caste.

They started the policy of caste appeasement and thus tried to vow their supporters not by development but by appeasing them and giving them the carrot of reservation.

131 (1996) 3 SCC 545

132 AIR 1993 SC 477

This degradation started very early but its signs were seen after the Mandal Commission recommendations were implemented by the government of Mr. V. P. Singh. Mandal Commission was given the duty to identify backward classes and to examine the desirability or otherwise of making provision for reservations of appointments or tests in public services.

In this case the petitioners challenged the original official memorandum and also the additional memorandum.

A bench of 9 judge of this Supreme Court heard this petition and the decision was by majority of 6 against 3. The majority judgement was delivered by Justice Jeevan Reddy on behalf of Chief Justice Kania Vankantashalliah J., Ahmed J. and himself. Pandean and Sawant JJ. Wrote concurring judgement. Three Judges, Thommen, Kuldeep Singh and Sahai JJ. All these judgements constitute a learned discourse on the conditional law of reservations.

The salient point of the Supreme Court Judgement may be mentioned as follows:

1. Reservation of jobs can be made for the backward classes under Article 16 (4). The office memorandum of August 1990 is constitutionally valid.
2. 27% reservation in Government Jobs and SEBC is valid.
3. SEBC candidates recruited on the basis of merit shall not be adjusted against the reservation quote of 27%.

4. Creamy layer among the backward classes SEBC should be excluded from the benefit of reservations.
5. Class, but not only caste, may be taken into consideration while determining backwardness.
6. Reservation should not exceed 50% at any time.
7. There should be no reservations in promotion. They should be confirmed to initial recruitment.
8. Reservation could not be made for poor among the forward communities. Reservation is a social justice measure, not an anti-poverty measures.
9. Article 15 (4) and 16 (4) are enabling provisions, and do not enact mandatory provisions to prescribe reservations.
10. Reservation can be made by executive instructions also.
11. Programme of alternative action under Articles 15 (4) and 16(4) are subject to judicial review. The scope of judicial review is similar to the judicial review of any administrative action.
12. Reservation may not be advisable in certain service and in respect of certain posts that require technical expertise.

Justice Kuldeep Singh observed in *Indra Sawhney* case, "The most vital part of Term of Reference is wholly ignored by the commission."

He further stated, "the commission surveyed only 0.06% of the villages in the country." He further lamented, "The entire exercise was clerical and drawing room exercises." And on such basis the reservation for OBC was fixed at 27% because as per the Commission the OBC population is 52%.

In total 3743 castes were identified as OBC. And with this case the conflict between Judiciary and Politics started. The politicians because of vote bank politics and political pressure started adding more and more castes, within the framework of reservation forgetting the constitutional mandate that it is the backward classes that is to be protected not the castes. The courts started declaring these acts unconstitutional and then the politicians started amending the Constitution.

And the game of cat and rat started which is taking place till date but in this lies not the folly but disaster as stated by Panditji in his letters to Chief Ministers in early sixties.

From *M. R. Balaji* to *Indira Sawhney*, the Supreme Court held that clause 16(4) was an exception to the fundamental guarantee provided to all citizens that they shall have equality of opportunity in competing for governmental employment. The court held, as Dr. Ambedkar had stated in this very context during debates of the Constituent Assembly that an exception cannot be allowed to swallow the rule.

Hence the Court held, speaking generally, reservations should not exceed 50% of the jobs being filled. Tamilnadu crossed this margin and gave 69% reservations which were declared unconstitutional by Madras High Court. Government went to Supreme Court but to no

avail. Then Tamilnadu Assembly unanimously passed a resolution requesting Central Government to intervene.

Then on 13th July, 1994 all party meeting in Delhi was held and it was decided that Tamilnadu will pass a bill for enabling such reservation and that bill will be placed in Ninth Schedule of the Constitution.

Another controversy was over the reservations in promotion. In *Indra Sawhney*, the Supreme Court held that reservations can be given only one time and there will be no reservations in promotion. But this again was undone by Parliament by amending Constitution 77th time and enacting a new clause Article 16(4A) for giving reservation in promotions.

Then the problem arose that the vacancies of reserved categories when carried over exceed the ceiling of 50%. So Constitution was amended 81st time and a clause (4B) was inserted in Article 16, which stated that the vacancies carried forward and vacancies afresh shall not be considered together?

6.2.11 S. Vinod Kumar v. Union of India¹³³

Relaxation in qualifying marks and standards of evaluation:

The scheduled castes and scheduled tribes had enjoying the facility of relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion.

133 (1996) 6 SCC 580

The Supreme Court in its Judgment dated 1 October 1996 in this case held that such relaxations in matters of reservation in promotion were not permissible under Article 16(4) of the Constitution in view of the command contained in Article 335 of the Constitution.

The Apex Court also held that the same view is laid down by the nine judges Constitution Bench of the Supreme Court in *Indra Sahney* judgment, which held such relaxation in promotion as being not permissible under Article 335 of the Constitution.

Government implemented the verdict of these judgments vide its OM dated 22 July 1997. To obviate the effect of these judgments, the Parliament passed 82nd Constitutional Amendment in the year 2000 adding the following to Article 335.

AMENDMENT TO ARTICLE 335: "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 relaxations 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".

Supreme Court held that under the light of Article 335 efficiency of administration has to be maintained and standards could not be relaxed or waived to afford the protection of reservation. This made the Constitution to be amended 82nd time and a new proviso was inserted under Article 335 that standards can be relaxed to accommodate reservation. Now the question came before court for consequential seniority.

The rule was followed that a reserved candidate may be promoted on the basis of roster system prior to a general candidate, but as the general candidate is promoted he supersedes the reserved candidate who was his junior initially but was promoted earlier than him because of reservation policy, and the *status quo* that existed prior to promotion of reserved candidate will be maintained in terms of seniority.

This made the Constitution to be amended 85th time and in clause (4A) of Article 16 terms *with consequential seniority* were added. This shows that the politicians have kept the merit on back burner and started giving priorities to reservation on the basis of caste which is dividing the entire country and is against the very principle for what the constitutional framers had kept this principle of reservation.

6.2.12 Ramesh M. Parmar v. State of Gujarat and Others¹³⁴

This judgment related to reservation policy implemented in the judiciary as per Gujarat Judicial Service Recruitment Rules, 1961 Rule – 4 the reservation in favour of SCs and STs in appointment of Judicial officers, Reservation policy not introduced by High Court on the administrative side on the ground that such “policy might become harmful to judiciary”. Such approval held, is adding insult to injury.

The emphasis laid on an action programme to secure composition of judiciary in such a manner as would reflect diversity of the population taking care of the interest of SCs and STs. Direction

134 GLR 2005 (Vol I) 52

issue to the High court on the administrative side to consider "the entire issue of reservation of posts in judicial service" and take appropriate decision keeping in view the concept of social justice.

Absence of provision for reservation in the Recruitment Rules challenged as being unconstitutional. Article 16(4) and 16(4-A) do not confer any fundamental right nor do they impose any constitutional duties. Article 46 being a directive principle can not be enforced. Challenge to the validity of the Rules on the ground that it is violative Article 16(4) turned down.

Article 46 of the Constitution contains a directive principle which cannot be enforced in view of provisions of Article 37. Thus the challenge against the validity of the provisions of the Recruitment Rules on the ground that they violate Article 16(4) as they do not provide reservation of SC/ST and OBC in judicial service fails.

Social Justice

There are 3 possible rationals for usage of affirmative action underlying the reservation policy for the Scheduled Castes and Scheduled Tribes:

1. It ensures that the institutions do not discriminate against the disadvantaged groups either deliberately or unwillingly.
2. The adoption of such reservation policy for the disadvantaged sections of the community that has suffered vicious discrimination denying them access to equal opportunities, would compensate those who have been directly or indirectly harmed by such past discrimination.

3. Last but the least, the institution function with greater administrative efficiency, if it is represented by diverse interest of the community.

Equality as a theory is meaningless unless, it is realized in reality and as a result, the petition is rejected and issue direction to High Court.

The Supreme Court in its landmark decision considered the question of reservations of seats in the right of Article 15 (4) in *M.R. Balaji and Others v.State of Mysore*¹³⁵ and *Chitralekha v.State of Mysore*.¹³⁶

In this case, the Supreme Court struck down the Mysore Government order classifying the Socially and Educationally backward classes under Article 15(4) on the ground that Government had taken caste as the predominant test in determine social backwardness.

However, on the relevant issues involved in the case, the court elaborated the following principles:

1. The bracketing of socially and educationally backward classes in the Scheduled castes and the Scheduled tribes should that in the matter of their backward they were comparable to the SCs and STs.
2. The concept of backward class was not relative in the sense that any class which was backward in relation to the most advanced class in the community must be included in it.

135 (1963) SUPP 1 SCR 439

136 (2009) 5 SCC 380

3. The backwardness must be most social and educational and neither social nor educational.
4. Article 15(4) referred to backward classes and not to backward castes. The test of caste would be known as regards backwards community which had no caste.
5. Caste was a relevant factor in determining social backwardness.

Again, reservations in post-graduation specialties or super specialties are detrimental to the high degree of efficiency and violative of Article 14 is obviously incorrect, erroneous, illegal and unconstitutional.

Thus, it is held that the reservation in post-graduation specialty or super specialty is valid under Article 14, 15(4) of the Constitution. Chief Justice Lahoti in recent Supreme Court case; *P.A.Inamdar and others v. State of Maharashtra and others*¹³⁷ decided on 12 February 2009 on unaided professional educational institutions whether minority or non-minority observes:

1. Imposition of state seats in unaided professional institutions is acts constituting serious encroachments on the rights and autonomy of private professional educational institutions.
2. Merely because the resources of the State in providing professional education are limited, private education institutes which intend to provide better education cannot be forced by

137 AIR 2005 SC 3226

the State to make admissions available on the basis of reservation policy less meritorious candidates.

3. A limited reservation not exceeding 15% may be allowed to NRIs depending on management's discretion
4. Unaided Institutions can have their own admission system if fair, transparent, non-exploitative and based on merit is adopted in the admission process.
5. Every Institution is free to devise its own fee structure and generate reasonable surplus to meet cost of expansion and augmentation of facilities subject to the limitation that there can be charged directly or indirectly or in any other form.

6.2.13 Union of India v. Virpal Singh Chauhan¹³⁸ and Ajit Singh Jauja v. State of Punjab¹³⁹

The government servants belonging to scheduled castes and scheduled tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. This judgment led to the issue of the OM dated 30 January 1997, have adversely affected the interests of government servants belonging to the scheduled castes and scheduled tribes category in the matter of seniority on promotion to the next higher grade.

This has led to considerable anxiety and representations were also received from various quarters including Members of Parliament to protect the interests of the Government servants belonging to the scheduled castes and scheduled tribes.

138 (1995) 6 SCC 684

139 AIR 1996 SC 1189

"Are those who produce certificates from an official or a legislature or some authority that their family incomes are less than a certain figure to be so qualified? The rural elite, the upper classes of the rural areas who don't pay any income tax because agricultural income is not taxed?" Again, he asked: "Who will find it difficult or impossible to obtain such certificates?" And answer: "of course is the truly lower classes who need it the most."

There are instances of false income certificates and attempt to bypass income limit by deceptive means itself. Thus, an applicant to a medical college declined to supply income certificate of his father and instead, he filed his own income certificate on plea that he was separated. As a result, his income was shown below Rs. 3000 i.e. maximum required income. The Patna High Court rejected his plea and allowed the rejection of his application on the ground of lack of submission of father's income certificate as required.

6.2.14 Dr. Pradeep Jain etc. v. Union of India and Others¹⁴¹

This case is on the Article 16 (2) for the admission to medical college and residence for admission to college in a State. Article 16(2) is not violated. That article prohibits discrimination on ground of place of birth and not on the ground of residence. Residence and place of birth are two distinct conceptions.

According to Article 14 of the Constitution of India, the reservation should also be maintained for the purpose of bringing about real equality of opportunity between those is unequal. The reservation should in no event exceed the outer limit of 70% of total number of

141 AIR 1984 SC 1420

open seats after taking accounts other kinds of reservations validly made.

An admission to post M.B.B.S. course such as M.D. and M.S. and M.D.S. should not exceed 50% of open general seats. In above kind of post medical course admission is not provided on the basis of residence for the reserved category within the State or an institutional preference.

However, admissions in post-graduate course so far as super specialties such as surgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on all India basis.

Article 15 (1) states that The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

So far admissions to an educational institution such as a medical college are concerned; Article 16 (2) has no application.

If therefore, there is any residence requirement for admission to a medical college in a State it can not be condemned as "unconstitutional" on ground of Article 16(2). Nor can Article 16(2) be invoked for invalidating such residence requirement because that Article prohibits discriminations on ground of place of birth and not on ground of residence.

**6.2.15 Akhil Bharatiya Soshit Karmachari Sangh
(Railway) v. Union of India¹⁴²**

Akhil Bharatiya Soshit Karmachari Sangh (Railway v. Union of India) cited Article 16 which guarantees equal opportunities for all citizens in matter of State Service inherently implies equalization as a process towards equality, but also hastens to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on a equal footing and devotes Article 16(4) for this specific purpose.

6.2.16 Bihar v. Mukund Sah¹⁴³

The maintenance of efficiency of judicial administration was entirely within the control and jurisdiction of the High Court as laid down by Article 235 and that the High Court would have an expertise to suggest that, for maintenance of efficiency of administration in judicial services controlled by it, reservation may not be required at all.

6.2.17 Ajitsingh v. State of Punjab¹⁴⁴

In this case Supreme Court was cited for the proposition that Article 16(4) and 16(4A) do not guarantee any fundamental right to reservation. The language of these Articles was in the nature of an enabling provision and they did not confer any fundamental rights nor do they impose any constitutional duties but were only in the nature of an enabling provision vesting discretion in the State to

142 AIR 1981 SC 298

143 AIR 2000 SC 1296

144 AIR 1999 SC 3471

consider providing reservation if the circumstances mentioned in those Articles so warranted.

6.2.18 N.T.R. University of Health Sciences v. Babu Rajendra Prasad¹⁴⁵

In this case it was cited for the proposition that, how and in what manner the reservation should be made was a matter of policy decision of the State, which would normally not be open to challenge subject to its passing the test of reasonableness, as also the requirements of the Presidential Order made in terms of Article 371 D of the Constitution of India.

6.2.19 General Manager, Southern Railway v. Rangachari¹⁴⁶

In this case it was cited for the proposition that the condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services.

6.2.20 State Bank of India SC/ST Employees Welfare Association v. State Bank of India¹⁴⁷

Article 16(4) did not confer any right and there is no constitutional duty imposed on the Government to make such a reservation. Article 16(4) is enabling provision and confers a discretionary power on the state of make reservation.

145 AIR 2003 SC 1947

146 AIR 1962 SC 36

147 AIR 1996 SC 1838

6.2.21 C.A. Rajendra v. Union of India¹⁴⁸

In this case it was cited for the same proposition that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make reservation for SCs and STs, either at the initial stage of recruitment or at the stage of promotion and that Article 16(4) is an enabling provision and confers a discretionary power on the State to favour of backward class of citizens which in its opinion, is not adequately represented.

6.2.22 Janardan Subbarye v. State of Mysore¹⁴⁹

It was classified that the reservation for the SCs and STs as such was not invalidated by the judgement in *Balaji's* case.

The decisions of the Supreme Court establish that a rule reserving a maximum number of seats for backward classes would be void, whenever, students of backward classes became eligible on merit for a large number than reserved for them but the Court will not strike down such reservation but will prevent its operating to the disadvantage of the students of the backward classes.

Protective discrimination also involves reservation in public employment. The Constitution specifically protects such reservation by providing in Article 16(4).

148 AIR 1968 SC 507

149 1963 SCR 475

In pursuance of the policy enunciated in Article 16 (4) the Governments have made reservation for the backward classes in the various services under the State.

However the Courts have found it necessary to regular this policy so that it may not operate to the detriment of the community as a whole. The Government reserved a certain percentage of the vacancies for SCs and STs, adopting "Principle of carry forward" to the second and third year.

6.2.23 Rajendra v. State of Madras¹⁵⁰

The importance of caste as a relevant factor has been reinforced in the above case. The occupations followed by certain classes may contribute to social backwardness, and so may the habitation of people, as the problem of social backwardness is the problem of rural areas.

The impugned order made a classification only on caste, without regard to other factor and such a classification was not permissible under Article 15(4). The question of the extent of the reservation was also considered Article 15 (4) was a special provisions, in derogation of the fundamental rights of citizens under Article 15 (1) Article 29 (2) to both of which right Article 15 (4) is a provision.

Thus, the general right of equality and national interest in providing superior students with facilities for higher education cannot be ignored.

¹⁵⁰ AIR 1968 Mad. 1812

The Supreme Court therefore held that speaking generally the reservation must be less than 50%, without laying down any specific rules as to how much less.

6.2.24 Shrimati Champakam v. State of Madras¹⁵¹

The Madras High Court held that "the public G. O". which reserved seats in engineering and medical colleges violated Article 15 (1) and Article 29 (2) and was void.

6.2.25 Madhuri Patil v. Additional Commissioner¹⁵²

The Committee is to investigate and verify the caste status certificate of those persons who had obtained them based on corrected entries of school records as per the procedure set out by the Supreme Court in their decision.

6.2.26 Kalasika Prashanta Kumar v. State of Andhra Pradesh¹⁵³

For attracting the offence under section 3 of the SC/ST (POA) Act 1989 it is enough that an offence is committed against a member of SC or ST Bare perusal of the provisions shows that the offence should be committed against the person belonging to SC or ST on the ground that such a person was a member of SC or ST.

151 AIR 1951 Mad. 120

152 1994 (3) Supp. SCR 50, 1994 (6) SCC 241

153 2004 CR.L.J. 1051

6.2.27 Hanmant Ramhari Ghodake v. State of Maharashtra¹⁵⁴



Giving or fabricating false evidence in Capital Offence

If any person not being a member of a SC or ST, gives or fabricates false evidence intending thereby to cause or knowing it to be likely that he will thereby cause any member of SC or ST to be convicted of an offence which is capital by the law the time being in force, he shall be punished with imprisonment for life and with fine and if innocent member of a SC or ST be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence shall be punished with death.

6.2.28 Nair Service Society v. Dr. T. Beermasthan and Others¹⁵⁵

Reservation provisions are enabling provisions. The State is not bound to make a reservation but it is empowered to do so in its own discretion. Different State Governments in the country may have different methods for providing reservations, and these will be valid as long as the method adopted by a particular State Government does not violate any constitutional provision or statute. It is not for the Court to decide on the wisdom or otherwise of the method of reservation. Courts should exercise judicial restraint and not interfere with the same unless there is some clear illegality.

¹⁵⁴ 2003 CR.L.J. 4368

¹⁵⁵ (2009) 5 SCC 545

As per Kerala State and Subordinate Services Rules, 1958 Rule 14(a),(b),(c) and (d) the vacancies were allocated between general candidates, OBCs and SCs/STs. The methodology adopted for reservation as per unit appointment and not as per percentage of reservation. The entire merit list were broken up into batches of twenty and then the roster prescribed in Rule -14(c) is applied to each batch of twenty and not percentage wise to the entire list. Rule 14(a) does not mention percentage of vacancies to be earmarked for respective categories. Implication of Rule-14(b) is that meritorious SC/ST or OBC candidate selected in open merit would not take away reserved seat.

6.2.29 Wilson Reade v. C. S. Booth¹⁵⁶

Status of the Children belonging to the couple one of whom belongs to SCs and STs

Legal view on the status of the children belonging to the parents one of whom is a member of Scheduled Caste: The general position of law as to that effect of marriage between parties who are Hindu and one of whom belongs to the Scheduled Caste is under the ancient Hindu Law, generally, inter-caste marriage was looked down upon by the profunder and commentators.

Some of the authorities, however, reluctantly permitted marriage between a male Hindu with a Shudra female and included it in the list of *Anuloma* marriages although it was stated that in wedding with a Shudra wife, the ceremony should be performed without mantras. The children born out of a marriage by a male Hindu with a woman of an inferior caste had neither caste of the father nor the

156 AIR 1958 Assam 128

status of his *Savarn Aurasas* meaning the son born of a caste Hindu wife. They were turned as *anulomaja* and belonged to an intermediate caste higher than that of their mother and lower than that of their father.

Yajnavalkya omits the son of Brahmin by a Shudra wife from the list of sons mentioned by Manu. *Pratiloma* marriages i.e. marriages between woman of a superior caste with a man of an inferior caste, were altogether forbidden and no rites were prescribed for them in *Grihya Sutra* and persons entering into such marriages were degraded from the caste.

After the passing of the various statutory enactments related to the Hindu Law such as, the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956 and the Hindu Minority and Guardianship Act, 1956, customary ban on inter-caste marriages in either way has been lifted by the statutory enactments, under the Hindu Marriage Act, any two Hindus of different sex, irrespective their caste may enter into a valid marriage unless such marriage is prohibited by the Statute itself. According to the above three Statutes, all children either legitimate or illegitimate, one of whose parent is a Hindu, Jain or a Sikh by religious and who are brought up as members of the tribe, community, group of family to which their parents belong or belonged, are to be treated as Hindus.

In view of the above, the off-springs of marriage between the caste Hindu and a member of the Scheduled Caste community, are Hindus and like the off-springs of marriages in the same caste are entitled to succeed to the proportions of their parents. But the question arises as to whether such a child will acquire the status of his or her parent belong to the higher caste or to that of the parent belong to the Scheduled Caste. On this point, we have not come

across any direct case law. But we feel that the ratio of the decision in *Wilson Reade v. C.S. Booth*¹⁵⁷, would apply to such cases.

The Supreme Court in *V.V. Giri v. D.S. Dora*¹⁵⁸ held the caste-status of a person in the context would necessarily have to be determined in the light of the recognition received by him from the members of the caste into which he seeks an entry. There is no evidence on this point at all. Besides the evidence produced by the appellant merely shows, some acts by respondent 1 which not doubt were intended to asset a higher status, but unilateral acts of this character cannot be easily taken to prove that the claim for the higher status which the said acts purport to make is established. That is the view which the High Court has taken and in our opinion the High Court is absolutely right.

In view of the above observation by Superior Courts, it can safely be concluded that the crucial test to determine is whether a child born out of such a wedlock has been accepted by the Scheduled Caste community as a member of their community and has been brought up in that surrounding and in that community or not.

The nexus between the child and the community or class or caste is a real test irrespective of the fact whether the accommodating class or caste or community is Scheduled Caste community or a caste Hindu community.

Even if the mother of the child is a member of the Scheduled Caste community, it is possible that the child is accepted by the community of his father and brought up in the surroundings of his father's relations. In that case, such a child cannot be treated as a

157 AIR 1958 Assam 128

158 AIR 1959 SC 1318

member of the Scheduled Caste community and cannot get any benefit as such. Similarly, when the mother belongs to a higher caste and the father is a Scheduled Caste, the father may remain away from the Scheduled Caste community and the child may be brought up in a different surrounding under the influence of his mother's relations and her community members.

In such cases also, the child cannot be said to be a member of the Scheduled Caste community. In the alternative; where the child irrespective of the fact whether the father or the mother is a member is a member of Scheduled Caste community, is brought up in the Scheduled Caste community as a member of such community, then he has to be treated as a member of the Scheduled Caste community and would be entitled to receive benefits as such.

The above are the general observations, however, each case has to be examined in the light of the circumstances prevalent in that case and final decision has to be taken thereon.

Legal views on the status of the off-springs born out of wedlock between a couple one of whom is a member of Scheduled Tribe community

The question has arisen whether the off-spring born out of wedlock between a couple one of whom is a member of Scheduled Tribe and other is not, should be treated as a Scheduled Tribe or not.

It may be stated at the outset that unlike member of Scheduled Castes the member of Scheduled Tribes continue as such even after their conversion to other religion. This because while Constitution

(Scheduled Castes) Order, 1950 provides in Clause 3 that only a member of Hindu, or Sikh religion shall be deemed to be a member of Scheduled Castes, the Constitution (Scheduled Tribes) Order, 1950 does not provide any such condition.

It may be stated that unlike member of Scheduled Caste members for Scheduled Tribes remain in Homogenous groups and quite distinct from any other group of Scheduled Tribes. Each tribe live in a compact group under the care and supervision of the elders of the society whose word is obeyed in all social matters. A member committing breach of any prescribed conduct is liable to be excommunicated. The social custom has a greater binding force in their day-to-day life.

In the case of marriage between a tribal with a non-tribal the main factor for consideration is whether the couple were accepted by tribal society to which the tribal spouse belongs. If he or she as the case may be, is accepted by the society then their children shall be deemed to be Scheduled Tribes. Out this situation can normally happen when the husband is a member of the Scheduled Tribes. However a circumstance may be there when a Scheduled Tribes woman may have children from marriage with a non-Scheduled Tribes man. In that event the children treated as Scheduled Tribes only if the member of Scheduled Tribes community accepts them as members of their own community. This view has been held by the Assam High Court in *Wislon Reade v. C.S. Booth*¹⁵⁹ where it has been held:

It is the recognition and acceptance by the society of the children born out of a marriage between a member of Scheduled Tribe with an outsider, which is the main determining factor irrespective of

159 AIR 1958 Assam 128

whether the tribe is matriarchal or patriarchal. The final result will always depend on whether the child was accepted as member of the Scheduled Tribe or not.

The general position of law has been stated above. However, each individual case will have to be examined in the light of existing facts and circumstances in such cases.

The test which will determine the membership of the individual will not be the purity of blood, but his own conduct in following the customs and the way of life of the tribe, the way in which he was treated by the community and the practice among the tribal people in the matter of dealing with person whose mother was a Khasi and father was European.

6.2.30 Muthusamy Mudaliar v. Masilman Muddaliar¹⁶⁰

It is not uncommon process for a class or tribe outside the pale of caste to another pale and if other communities recognized their claim, they are treated as of that class or caste, The process of adoption into the Hindu hierarchy through caste is common both in the North and in the South India.

As we have already pointed in the past there have been cases where people who judge from the purity of blood could be Khasis, were taken into their fold or orthodoxy did not stand in the way of their assimilation into the Khasis Community.

160 ILR 33 Madras 342

6.2.31 M. A. Kuttappan v. E. Krishnan Nayar and Others¹⁶¹

The appellant herein, the complainant, claiming to be a member of the Kerala legislative assembly and belonging a Scheduled Caste known as "Pathiyan" and practicing as a doctor by profession.

In his complain he alleged the respondent no. 1 belongs to Nair community, which is not Scheduled Caste. He at the relevant time held the office of the Chief Minister of the state of Kerala and was contesting by election of Kerala legislative from the Thalassery assembly constituency. Thalassery in which Respondent no. 1 made a speech wherein he made certain disparaging observations wilfully and deliberately emphasizing the fact that the complainant belongs to lower and inferior category of M. L. A. being a member of Scheduled Caste. Respondent no. 1 emphasized the fact that the appellant was a Harijan and made derogatory remarks about the complainant.

This was done in full view of the public assembled in the auditorium and stated as follows:

'There was an MLA Kuttapan, the Harijan MLA, he climbed over the table and was dancing. Is this opposite to democratic manner?

The learned special judge on a consideration of the statement of complainant on oath and the statement of two other witnesses executive before it, and came to conclusion

¹⁶¹ AIR 2004 SC 2825

that in fact and circumstances of the case, the commission of an offence under section 3 (1) (x) of the 1989 and under section 7 (1) (d) of the protection of Civil rights act was made out and issue process summary respondent no. 1 to stand trial.

This order was challenged by the respondent no. 1 before the High Court which by its impugned order quashed the order of the special judge taking cognizance finding that no offence was made out under either of the two Acts.

Aggrieved by this judgement and the order of High Court the appellant has preferred this appeal by special leave.

It was submitted that unless an order of committed was made by a competent magistrate committing the accused to start trial before court of session judge had no jurisdiction to try an offence under the aforesaid Act.

He had no jurisdiction even to entertain a complaint before it under the aforesaid act. Reliance was placed on two decision of the courts in *Gandula Ashok and Others v. State of Andhra Pradesh*¹⁶² In *Gangula Ashok* and another case a complaint had file before the police and after investigation the police filed a charge sheet before the special judge and the special judge from a charge against the appellants which was challenge before the High Court on the ground of procedure adopted by investigating officer in filing the charge before the special court was not in accordance with the law and special judge had no jurisdiction to take cognizance. The procedure should be followed the judicial magistrate first claims for the purpose of committal.

162 (2002) 2 SCC 504

The next question was whether special judge was justified in taking cognizance under section 7 (1) (d) of the protection of Civil Rights Act 1955. The High Court held that the utterance imputed to respondent no. 1 did not attract the provision of section 7 (1) (d) of the protection of Civil Right Act 1955.

To attract the said provision it had to be shown that the words so uttered had the effect of insulting the appellant on the ground of "untouchability" which is not in the case. There was no justification for the submission that the words allegedly uttered respondent no. 1 encouraged his audience to practice untouchability or that respondent no. 1 practice untouchability. The appellant was neither insulted nor attempted to be insulted on the ground of untouchability. Therefore, the provisions of section 7 (1) (d) of the Protection of Civil Rights Acts were not attractive.

In the result this appeal is dismissed.

6.2.32 Ghanshyam Kishan Borikar v. L. D. Engineering College and Others¹⁶³

In this case the applicants prayed to issue an appropriate writ, direction or order directing the respondents to include the name of the petitioner in the merit list of scheduled caste candidate and to give him admission in the degree course in Engineering etc.

Constitution of India Article 341: Phrase "For the purpose of this Constitution" can not be sub-servant to the phrase "in relation to State of Union Territory".

¹⁶³ GLH 1986 802

Having regard to the wide disparity, regional as well as in Socio-economic background of different caste and communities in the country.

It may be that a particular caste residing in a specified state may not be socially and economically backward in that part of the State, while that very caste residing in another part may be socially and economically backward and may be suffering from various types of socio-economic injustice and be also suffering from various forms of exploitations.

Therefore, in relation to such State or part of the Territory of the State, the caste/tribe is required to be specified as SC/ST and that is the reason why article 341 and also article 342 provided that SC/ST may be specified "in relation to that State or Union Territory".

Guidelines issued by the Central Government in its letter dated 2-4-1975, Para 2(ii) thereof interpretation said guidelines can not be read so as to deny the benefit of the reserved seat to student or candidate whenever such a student or candidate claims the benefits of reservation in the State where he has migrated and in relation to which his caste/tribe is not recognized as SC/ST, but the same is recognized in relation to the State of his origin.

6.3 Reservation Extended to Self-Finance Educational Institutions (93rd Constitutional Amendment)

Reservation hitherto was available in educational institutions either run by or aided out of the government funds. With enormous

increase in number of self finance educational institutions, reservation in such educational institutions knocked the Supreme Court door recently in the matter of *P.A. Inamdar and Pai Foundation*.¹⁶⁴

The Supreme Court contemplated that as the unaided colleges do not take government funding, they are under no obligation to follow central government quotas for socially deprived classes.

The Apex Court in its judgment in *P.A Inamdar and Pai Foundation* gave a right to decide its own admission policies to self finance educational institutions.

The judgment had long consecutive repercussions. With new economic reforms and more and more liberalizing policy, non-availability of reservation in unaided private educational institutions for SC/ST/OBC was reviewed by the government and accordingly 93rd constitutional amendment was passed in the Parliament which nullified the above judgment by making an addition in Article 15 as stated overleaf.

Article 15(5): Reservation in Self-Finance Educational Institutions

Nothing in this Article or sub clause (G) of Clause (1) of Article 19 shall prevent the State from making any provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes in so far as such special provisions relate to the their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

¹⁶⁴ (2008) 8 SCC 234

6.4 Base of Reservation: Caste or Economic?

Issue of reservation is often confronted with regard to its base i.e. what should be the base for considering reservation? Whether it should be caste/class or economic condition or a combination of the two?

Accepting that reservation is essential for creation of harmonious egalitarian society next comes the base to be taken for considering entitlement for reservation. With passage of time and experience of the existing reservation policy, changing social considerations under influence of educational advancement, it is advocated that extent of poverty i.e. economic condition should be the base for continuing any type of reservation. A judgment in *Janki Prasad Parimoo v. State of J and K*¹⁶⁵ rightly focuses its stand on the basis of reservation. It states:

However in this case, the Court put balance the other way. Mere poverty cannot be the test, it said, because in India except for a small proposition, the majority people are all poor. To qualify for the assistance that is envisaged by the Constitution, the group must be both socially and educationally backward.

In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji's case* that if poverty be the exclusive test, a very large proportion of population in India would have to be regarded as socially and educationally backward, and if the reservations are made only on the ground of economic considerations, an untenable situation may arise.

¹⁶⁵ (1973) 1 SCC 420

Even in advanced countries, there are large pockets of poverty. The task of an investigator is not just to identify the poor, but also to go further and ascertain who among the poor, are also socially and educationally backward.

6.5 Carry Forward

Carry forward of unfilled reserved vacancies is one more controversial area. Lot of misunderstanding prevails for want of clarity in this regard. Sometimes, it is presented in such a bias way that a rosy picture is created that all the government positions will be fully occupied by reserved category people only. Quite a few government positions are quoted where 90% of super scale positions will be occupied by reserved category promotes in next three years and so on.

The very purpose of carry forward is ensuring adequacy of representation in the government services. If unfilled vacancies are declared exhausted for backward classes, the governmental commitment to provide adequate representation of backward classes in services will be frustrated. There are two famous Supreme Court Cases.

The first is *T Devadasan v. UOI*¹⁶⁶ the norms as enumerated above came into force thereafter and another one is *State of Kerala v. N M Thomas*.¹⁶⁷ In this case as a result of carry forward rule, 34 vacancies out of 51 in one particular year were to be filled by the scheduled caste candidates.

166 (1952) 3 SCC 234

167 (1981) 23 SCC 342

The Court was confronted with another way of getting around 50% limits. This was the "carry forward rule" to which we have just seen references. Assume that this year, 50% seats had been reserved, but the 30% could be filled as the remaining candidates, even after the relaxation of minimum standards just could not be found.

The position was taken that these unfilled 20% shall be "carried forward" to the next year. The result would be that next year, not 50% but 70% seats could be reserved. If again, only 60% of these seats could be filled in that year, in the third year, 80% seats would get reserved and so on.

6.6 Ground Reality and the Real Way Ahead

Economic reform has intensified the mismatch between the availability of jobs and the number of people unemployed. This problem cannot be solved in a market economy that depends increasingly on external forces beyond the control of the national government. Affirmative action is needed to create equal opportunities and remove discrimination.

A reservation system based on caste and tribes cannot provide money to the poor students of the backward castes to travel to schools or colleges or to buy books or to have a space to study. Severe poverty exists even among the higher castes and among those who are not qualified to receive the benefits. There are Brahmins among porters and rickshawallas.

There is no reason why their children will not receive any benefits. But relatives of Jagjivan Ram, Lalu Prasad, Ram Bilas Paswan, Purno Sangma, Shibu Soren or Mayawati are entitled to reserved

vacancies in higher education and jobs. The system that exists in India is unethical in the extreme. However, all parties want to perpetuate and enhance this system of injustice.

For thirty years, each concession, each relaxation of standards, the inclusion of each new caste in the reservations list has been decreed with just one thing in mind - the vote banks to which "the right signal" needs to be sent. The progressive judge can't be bothered; indeed he sees merit in his pandering to the newly risen.

Sometimes it is obliquely suggested, we are instructed in *Vasant Kumar*, that excessive reservation is indulged in a mere vote catching device. One can only say, "out of evil come no good" and quicker the redemption of the oppressed classes, so much the better for nation. But if the system of Reservation has failed that what is the alternative action.

6.7 Alternatives to Affirmative Action

The questions arise: are there better options than reservations or quotas in jobs and higher education? Don't these measures encourage the beneficiaries of affirmative action to designate themselves as members belonging to preferred groups? Don't these measures make those sections of society that historically have been discriminated against feel that they have been elevated due to preferential treatment or positive discrimination on the basis of group allegiance rather than individual merit? Won't the poor upper caste people suffer due to reverse discrimination in favour of affluent well-to-do lower castes in India? Won't they make the beneficiaries of the affirmative action lethargic or complacent?

If the students coming from a backward class were to know in advance that they would be accepted by higher education institutions or jobs under the reserved category or preferential treatment, would they still strive hard to perform their best? Won't it aggravate further animosity if, despite reservation and preferential treatment, such students find students from the general category outperforming them?

Affirmative action in the name of race, caste or minority can have deeper psychological scars on the groups, according to who receives preferential treatment and who does not.

Moreover, affirmative action in the name of diversity has an ameliorating effect on both groups, preferred as well as non-preferred. Like mercy, it is "doubly blessed". It leads to less passion and resentment. It gives due weight to students' potential capabilities along with their realized capabilities reflected in high grades and scores on the basis of final examinations or common entrance tests.

Under the new measures, once admitted, the costs of poor performance are borne to a greater extent by the beneficiaries of affirmative action themselves and to a lesser extent by others. By promoting diversity on the campus, affirmative action can help in diluting the ill effects of race or caste on society in the long run.

Enhancing access, equity and diversity in higher education does not mean that all must be treated as equal or exactly the same. Nor does it imply equal or proportional representation in all areas of jobs, higher education and institutional operations. It simply implies being systematically fair. Consideration for all on an equal footing requires that inequities, when they occur, should be justified by

overall benefit and gains to all concerned and that they should be in the public interest.

Some alternatives to affirmative action should also be devised to strike a balance between equity and equality, on the one hand, and individual gain and public accountability, on the other. Greater accuracy, creativity and autonomy in the appraisal of the qualifications of prospective students are required to serve the individual, institutional, national and international interests. It is imperative that universities and policy makers focus on the criteria to be used for affirmative action.

They should ponder the issues, such as: Should affirmative action be used for the purposes of equity and justice or diversity and redistribution? Should it be used uniformly or differently for different groups and sub-groups? Should tests be used to stop misuse, overuse or in egalitarian use of affirmative action? Should it be limited to access to higher education through positive discrimination, or should it also be supplemented with necessary financial support in the case of the needy? What should be the extent of affirmative action in each course or institution? What should be the duration of affirmative action? How should we find out the potential for higher education from amongst the lower strata of society? How can we avoid subjectivity and a biased attitude on the part of the recruiting authorities and faculty? How can we secure the support of the non-beneficiaries for affirmative action policies and practices? How do we quantify or record the benefits accruing from such policies? All such questions await honest answers and evidence based on research. The government provides scholarship to SC students to attend school, but that is not enough:

"Even when the government provides primary schooling free of charge, the costs of books and supplies may not be affordable by very poor people. For secondary education, rural students especially may not always find a school nearby, so that those whose parents cannot afford the costs of commuting or relocating - and paying for housing and boarding - have little realistic prospect of attending, regardless of preferential admissions policies."

Some Scheduled Castes do better than others with the system, raising the demand in some quarters for "quotas within the quota". A particular case in point is the Chamars, historically a leather-working (and therefore untouchable) caste. In the State of Maharashtra, the Chamars are among the most prosperous of the scheduled castes. A study found that they were 17% of the States population and 35% of its medical students. In the State of Haryana, the Chamars received 65% of the scholarships for the scheduled castes at the graduate level and 80% at the undergraduate level.

Meanwhile 18 of the 37 untouchable groups in Haryana failed to get any of the preferential scholarships. In the State of Madhya Pradesh, Chamars were 53% of all the scheduled caste students in the schools of that State. In Bihar, just two of the 12 scheduled castes in that State - one being the Chamars - supplied 61% of the scheduled class students in school and 74% of those in college.

Therefore looking at such diversities some of the alternatives to affirmative action that have been suggested are using family income, education and social capital as criteria, ranking of the school last attended, ascertaining opportunity costs based on neighbourhood, convincing the non-beneficiaries to believe in the fairness of the system, guaranteeing 10% of seats to students from

local schools (for instance, the mandated 20% in Florida, 10% in Texas, and 4% in California), allowing for low performance due to circumstances but not due to the lack of individual capabilities, motivation or determination, using modern psychological methods for ascertaining future potential even in the case of low credential applicants, allotting bonus points for various factors that have resulted in the loss of opportunity or poor performance, awarding bonus points for excellence in sports, co-curricular activities and community leadership or in compensation for physical or mental challenges, etc.

Also the creamy layers should be identified regularly and those castes which have got the advantages of reservations should be slowly and gradually removed from the list of reserved category.

6.8 Last Submission

Right from childhood, we are told what is right and what is wrong, and not to question what is told. Over time, that becomes a habit. Even those who question the truth of everything tend to fall into that trap. For example, the Americans have propagated a practice called political correctness.

The irony of the situation is that the high priests of political correctness correct what they consider as wrong in others, but do not accept that others can question their own, let alone amend them! Woes betide those that disagree with them.

In our country, the reservation policy exhibits similar traits. Some are for it, others are against it, but neither would tolerate the other's point of view. Objectively speaking, the reservation policy

favours those who are disadvantaged and discriminated against, and provides them with certain inheritance rights.

Like all broad classifications, not everyone identified may be really either disadvantaged or discriminated against. The reservation policy treats such exceptions as unimportant.

The reservation policy operates on the quota system, which works the way the legendary Greek innkeeper *Procreates* used to fit all guests into the bed he had. If they were too short, he stretched their limbs; if they were too long; their limbs were cut to size. Politicians have found that strategy so profitable that they have steadily extended it to more and more castes.

In the bargain, reservation has increased social tensions, and reduced social harmony. Those in favour of reservation treat that loss of harmony as collateral damage, a damage that is unavoidable and worth suffering because only the privileged upper castes are affected.

Unfortunately, the damage has started to boomerang, and started hurting the backward castes also. The reason, the benefits of reservation apply only in public sector employment. That restriction did not matter till now because over 85% of post-matriculate employment was in the public sector.

However, the public sector is shrinking; the private one is expanding fast. Hence, the benefits of reservation have started shrinking. The logical solution is to extend reservation quotas to the private sector also.

Unfortunately, such an extension is unacceptable to the private sector. We have two ways out of this impasse: One, ignore the views of the private sector even if that vitiates social harmony even more.

Then, reservation ceases to be a tool and becomes the objective instead. Two, view reservation as a technique and not as the objective, and that like all techniques, it can succeed at times, and fail in others. Therefore, look for alternative solutions that may produce better results, better in the sense they benefit backward castes, and yet will be acceptable to others.

To conclude let me quote R. Vidyathan, "Caste is a vital social capital". He points out that the tradition of mutual assistance as being one of the secrets behind, for instance, the phenomenal success of Gounders in Tirupur in the garments industry, of Nadars in Virudhnagar are in the match-making and printing industries.

He points to the way members of these communities as also the Marwaris, Sindhis, Kutchis, and Patels help each other – their willingness to extend credit, the strong networks of the communities, their contract enforcement mechanism, the way their members encourage and assist each other to take risks and how they stand by each other in case of failure.