



OVERVIEW OF SUPREME COURT ON RESERVATION

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This paper is based upon reservation policy and the constitutional protection and the role of Supreme Court. The Article 335¹ of the Constitution of India recommends for representation of Schedule Cast and Schedule Tribe in the matters of appointment to Government Services. The Article 340² of the Constitution of India requires for the establishment of a commission to investigate the conditions of socially and educationally backward classes within the territory of India and to report the difficulties under which they labour and to make recommendations as to the steps that should be taken by Union or any State to remove such difficulties and to improve their condition. The Constitution of India laid down Directive principle in holding the Governance of the Country providing that the state shall promote with special care the educational and economic interests of the weaker sections of the peoples, and in particular, of the scheduled castes and the scheduled tribes and shall protect them from social injustice and all forms of exploitation³.

The provisions of Article 46 are not justiciable in a Court of law but any Law or Rule or administrative order issued by State intended to fulfil the purpose of Article 335 or Article 46 has been protected under Article 15 (4)⁴ of the Constitution and Article 16(4)⁵, Article 16(4A)⁶ and Article 16 (4B) of the Constitution of India.

The reservation made in the matters of employment to services in favour of Scheduled Caste and Schedule Tribes are impliedly protected by the Constitution and administrative orders issued by the state in this respect are protected by Article 15(4) of the Constitution which is part of fundamental rights.

In India, the framers of the Constitution have recognized judiciary with a very high altitude of reviewing powers. Some of the important cases that acted as the milestone in the development of Reservation policy in India are as follows: -

In the case of *State Madras Vs. Champatkrum Dorairajan*⁷, the two applicants, namely, *Smt. Champatram Dorairajan* and *one Mr. Shrivasan* applied for admission in the medical college and engineering college respectively. Both the applicants had qualifying academic performance but could not get the admissions due to Government Order on communal reservations. They challenged the validity of said Government orders being violating of Articles 15(1), Article 29(2)⁸ and Article 16(1) the Constitution. The Apex Court in its larger bench consisting of seven judges held that "If a citizen who seeks admission to any such educational institution does not hold requisite educational qualification, he certainly cannot be heard to complain of an infringement of his fundamental right under this Article 29(2). But, on the other hand, if he has the academic qualifications but he is refused admission only on the ground of religion, race, caste, language or any of them, then there is a clear breach of fundamental rights. After this judgment, There was considerable protest in the southern states and, therefore, the constitution was amended by the Central Government by adding Article 15(4) in the original Article 15 of the Constitution.



In case of *M.R. Balaji vs. State of Mysore*⁹ the reservation policy prepared by the State of Mysore was challenged before the High Court of Mysore. Later on, the matter went to the Supreme Court in appeal. The Apex Court observed that the history of caste system shows that the caste system may have originally begun on functional or occupational basis but later on it was over-burdened with considerations of purity based ritual concept, and that had to its ramification which introduced inflexibility and rigidity. This artificial growth inevitably tended to create a feeling of superiority and inferiority and to foster narrow caste localities. Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said "groups of citizens". Thus, precisely speaking, in this case "the class of citizens" are to be read as a "caste of group of citizens".

In this case, the need for merit was kept at the prime importance. the Apex Court held that "the demand for technicians, scientists, doctors, economists, engineers as experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests, if consideration of merit are completely excluded by wholesale reservation of seats in all technical, medical or engineering colleges and to institution of that kind. Therefore, the consideration of national interest and the interest of the community or society as a whole cannot be ignored in determining the question as to whether the special provisions contemplated by Article 15(4) can be special privilege which excludes the rest of the society altogether".

Taking notice of "merit" the Supreme Court laid down that: -

"A special provision should not exceed 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case".

Thus, the salient features of the judgment are as follows: -

1. Reservation cannot be more than 50% of the total vacancies.
2. The classification of backward and more backward is invalid.
3. The caste may be a guiding factor to ascertain backwardness but it cannot be the only criteria because Article 15(4) talks about class "which cannot be synonymous with caste and other factors as poverty may be considered.

The same issues were again raised in *Chitralakha Vs. State of Mysore* (1964) & *Jayashree Vs. State of Kerala*¹⁰ (1976).

The Supreme Court upheld the caste-based reservation.

In the case *T. Devadasan Versus Union of India*¹¹ a competitive departmental test was held for promotion to the regular establishment of Assistant Superintendent in the Central Secretariat Service. The total vacancies were 48 and as the number of 32 vacancies were reserved on the pretext of "carry forward rule". The Supreme Court by its majority decision declared the carry forward rule to be unconstitutional. However, justice Subba Rao gave a dissenting judgment.

In the case *C.A. Rajendra Vs. Union of India*¹² the petitioner filed a writ petition alleging that the O.M. No. 2/22/55 RPS dt. 7.5.55 and O.M. No. 5/4/55 SCT (1) dt. 4.1.57 to be declared as discriminatory and sought a direction to the Railway Administration to promote the petitioner giving benefit of Article 16(4) of the Constitution. The Apex court found that there is no Constitutional duty imposed on the government to make a reservation for scheduled caste/tribes either at the initial stage of recruitment or at the stage of promotion. The Art. 16(4) is an enabling provision and confers discretionary power to the state to make a



reservation of backward class of citizens. Here the writer submits very respectfully that it appears that the impact of Article 335 of the Constitution has not been, placed for consideration, before the Hon'ble Apex Court as it is a constitutional duty of state to recognize the claims of SC/ST in the form of Reservation.

In the case *Union of India Vs. Virpal Singh*¹³ it has been held that the circular letters providing for reservation in favour SC/ST candidates in the matter of roaster and their promotion and the point of inter-se seniority and held that the circular shall prevail in the nature of special rules against the general instructions contained in Indian Railways Establishment manual including the rules contained in paras 306, 309 & 314 of the manual.

The Apex Court propounded the concept of "catch-up rule" for the first time. Under this rule, if a scheduled caste person is promoted by virtue of Roaster/reservation on priority basis, the general category person will regain his original seniority on his promotion to the higher post. The Apex Court also found that a provision of reservation in promotion is warranted by Art. 16(4) of the constitution.

In the field of reservation policy, the case of *Indra Sawhney & other Vs. Union of India & others*¹⁴ observed is of vital importance. The validity of 27% reservation in favour OBC's was challenged in this judgment. The 27% reservation was made by the "State" considering the recommendation of Mandal Commission. The Supreme Court by its larger bench decision upheld the reservation for SC/ST in basic recruitment. In the matters of promotion, it was directed that the quantifiable data to be collected before making the provision of reservation in promotion. It was clarified that the direction shall be prospective and shall not have retrospective effect. However, the promotion already taken place have to continue for a period of five years from the date of judgment. It was also held that the reservation of posts including back log in favour of SC/ST shall not exceed 50% of posts in a year. The validity of 27% reservation in favour of OBC's was also confirmed.

Thus, this judgment partly upheld the law laid down in *Union of India & others Vs. Virpal Singh Chauhan & others & M. Nagraj & others Vs. Union of India & others*.

In the case of *M. Nagraj Vs. Union of India*¹⁵ the petitioner has invoked the provisions of Art. 32 of the constitution by way of writ of certiorari seeking a prayer to quash the constitution (eighty fifth amendment) Act 2001 inserting Article 16(4A) of the Constitution making a provision for reservation in promotion with consequential seniority. The petitioner alleged that amendment is unconstitutional being violative of basic structure of constitution. The petitioners asserted that the proposed amendment shall have the effect of reversing the judgment of the Hon'ble Court passed in *Union of India Vs. Virpal Singh, Ajit Singh Vs. State of Punjab, Indira Sawhney Vs. Union of India* etc. It was claimed that the criterion of creamy layer to be extended to the persons belonging to SC/ST classes.

The Hon'ble Apex Court laid down that the impugned amendments inserting Article 16(4A) & 16(4B) are enabling provisions. The state is not bound to make the law for reservation in promotion for SC/ST classes. As regards, the extent of reservation, the state will have to show, in each case, the existence of the compelling reasons namely backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation and **also to exclude the creamy layer.**

In case the state wishes to exercise their discretion and make such provision, the state has to collect quantifiable data showing the backwardness of the classes.



Note: - This judgment is somewhat contrary to the findings in *Indira Sawhney's* case in which the court held that the social and educational backwardness of SC/ST is satisfied as they are identified and grouped as such because of prior discrimination and its continuing ill effects. The S.L.P. was filed against the final judgment and order dated 15.7.2011 in C.W.P. No. 13218/2007 passed by High court of Punjab and Haryana at Chandigarh in *Laxmi Narain Gupta & others Vs. Jarnail Singh & others*¹⁶. In this S.L.P. it was asserted that the judgment of M. Nagraj case to be reconsidered by larger bench of seven judge bench but request was turned down. The matter was referred to the constitution bench to test the validity of judgment in M. Nagraj case.

The constitution bench consisting of five judges' bench unanimously held as follows: -

The first question before the constitution bench was whether the criterion laid down in *M. Nagraj*¹⁷ reservation in promotion with consequential seniority for SC's and ST's under Art 16(4A) & 16(4B) requires a reference to a larger bench. The constitution bench held that reference to a larger bench is not warranted. However, the condition to collect quantifiable data showing backwardness and inadequacy of representation of SC & ST in public Service is invalid being contrary to law laid down in *Indra Sawhney's* case¹⁸. But it was held that the second condition of creamy layer was held to valid and applicable to Scheduled Cast and Scheduled Tribe also. The judgment of the constitution bench is reported in (2018) 10 Supreme Court cases 396 *Jairnail Singh & others Vs. Lachhmi Narain Gupta & others*.

However, on a note submitted by the Attorney General formulating common issues in bunch of cases, the court agreed to give decision on six points which are as under: -

1. What is the yardstick by which, according to *M. Nagraj*¹⁹, one would arrive at quantifiable data showing inadequacy of representation of SCs and STs in public employment?
2. What is the unit with respect to which quantifiable data showing inadequacy of representation is required to be collected?
3. Whether proportion of the population of SCs and STs to the population of India should be taken to be the test for determining adequacy of representation in promotional posts for the purposes of Article 16(4-A)?
4. What should there be a time period for reviewing inadequacy of representation?
5. Whether the judgment in M. Nagaraj can be said to operate prospectively?
6. Whether quantifiable data showing inadequacy of representation can be collected on the basis of sampling methods, as held by this Court in *B.K. Pavitra & ors. v. Union of India & Ors.*

The aforementioned six points for determination were considered by the Hon'ble Apex Court in Civil Appeal No. 629 of 2022 *Jarnail singh & others Vs. Lachhmi Narain Gupta & others* (as a leading case). In respect of point number (1) the Hon'ble Court held that no yard stick can be laid down by the Apex Court for determining the adequacy of representation of SCs and STs in promotional posts for the purpose of providing reservation.

In respect of point no. 2 as to what should be unit for collecting quantifiable date. The Court observed that the unit for collection of quantifiable data is a cadre. The court also clarified the term "cadre" and explained that the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The Third point for determination is whether the proportionate representation in comparison to population to be test of adequacy. The Apex court did not lay down any criterion for it but let to be decided by concerned



government taking into account relevant factors. The fourth point for determination is, what should be period for review of inadequacy of representation. The Hon'ble Apex Court did not express any opinion and left is for decision of the concerned government. The fifth point for determination is whether the judgment in M. Nagraj can be said to operate prospectively. The Apex Court held that the judgment in M. Nagraj case can operate only prospectively in the interest of number of civil servants affected by the judgment. The last point for determination is whether the quantifiable data can be collected by sampling method. The court held that "Cadre" should be the unit for collection of quantifiable data for promotion.

Thus, the Hon'ble Apex Court has answered the Six question common to various writ petitions, which are likely to be decided in near future as S.L.P. No. 30621/2011 which has been ordered to be listed for hearing.

Overview of the judgment *Jarnail Singh & others Vs. Lachhmi Narain Gupta*²⁰ and others and *M. Nagraj Vs. Union of India*²¹, one will find that the concept of creamy layer applicable to OBC's have been imposed upon SC./ST class also. Even if, the constitution bench in *Jarnail Singh & others Vs. Lachhmi Narain Gupta* and others has held that the concept of quantifiable data for SC/ST is invalid but it will not change the impact of the judgment of M. Nagraj because concept of creamy layer applicable to OBC's will be imposed upon SC/ST's also in a mechanical way though the social and economic backwardness of SC/ST is quite different with OBC's.

The OBC's belong to touchable class of "Sudras" and have got better social, & proprietary status and better educational back ground, whereas SC/ST belong to "have not" class of society. Here it is worth-thinking, that if the aim is to provide upliftment of very down trodden class of SC/ST persons it may be termed as a good step. However, if in the garb of creamy layer, the seats reserved for SC/ST are converted into unreserved seats on the ground that no eligible candidate is available, the whole judgment may be violative of Article 16(2) of the constitution of India.

Here, it is noteworthy that the judgment of Indra Sawhney's case was brought into force from 17.6.1995 and a period of five years was allowed to central/state governments to collect the quantifiable data to give due representation in matters of initial appointment and/or promotion for SC/ST class of persons. Unfortunately, no steps have been taken to collect such data for last above 20 years, which resulted in reversion of thousands of civil servants in UP who were promoted against reserved seats for SC/ST. The judgment in M. Nagraj has been delivered in the year 2006 but so far, no commission has been appointed to study the social, economic and educational status of SC/ST class of persons and to study the claims and grievances of such class in matters of appointment in civil services. The courts have declared the law of the land. There is a lot of problems in its implementation.

¹The Constitution of India, Article 335: The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State

² The Constitution of India: Article 340: Appointment of a Commission to investigate the conditions of backward classes: -



(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament

³ Article 46 of the Constitution of India,

⁴ Article 15(4): - Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes."

⁵ Article" 16(4): - Nothing in this article shall prevent the state from making any provisions for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state is not adequately represented in the services under the state.

⁶ Article "16 (4A): - Nothing in this article shall prevent the state from making any provision for reservation in the matter of promotion with consequential seniority to any class or classes of posts in the services under the state in favour of the scheduled tribes which in the opinion of State, are not adequately represented in the services under the state.

⁷ AIR 1951 S.C. page 226

⁸ The Constitution of India Article 29(2): No citizen shall be denied admission into any 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

⁹ AIR 1962 SC 36

¹⁰ AIR 1964 SC 1823

¹¹ AIR 1964 SC-179

¹² AIR 1968 SC-507

¹³ AIR 1996 SC 448

¹⁴ 1992 Supp (3) Sec 217

¹⁵ AIR 2007 SC71

¹⁶ S.L.P. No. 30621 of 2011

¹⁷ (2006) 8 S.C.C. 212

¹⁸ (1992) Supp (3) 217

¹⁹ Supra note 17

²⁰ (2018) 10 SCC396

²¹ (2006) 8 Sec 212