

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 4 | Issue 1

2021

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Reservation in Promotion & Jobs under the Lens of Fundamental Rights

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ABSTRACT

Reservation system has been a part of India for a long period of time. Even during the king's rule privileges were provided to certain kind of category of people. And ever since then with the pass of time this system is being followed through one or other mode. After Independence, this system was inserted in our Constitution of India where certain rights are provided for the weaker section of the society which includes Schedule Caste and Schedule Tribes. This paper focuses on the evolution of these rights and the amendments that were brought. The main issue that has been dealt in this paper is that whether reservation can be provided in regard with promotion in the jobs and also whether the right provided under the constitution is a fundamental right or not?

I. INTRODUCTION

Reservation is an act of reserving something: such as (1) the act or fact of grantor's reserving some newly created thing out of the thing granted; (2) the right or interest so reserved². To put out in simple language it means to provide special treatment to any person provided with reservation. Reservation in India is a system which is proved to be an positive action which aids the backward class and disadvantaged group of people to represent themselves in the Indian Society among the other group of people in various sector in education, employment, and politics these reservation is been enshrined under the Indian Constitution under Article 15 and 16 which gives power to the government to make special rules and regulation which ensures that the "socially and backward classes of citizens" are properly represented in the social and economical public life. This is been done by providing some relaxation and some benefit in the education, employment and political sector. The main aim of these Articles was that these backward classes are given opportunity as the social benefited people at large. But when it comes to promotion and jobs to the reserved category there is no special assistance provided under the India Constitution and they are treated same as the non-reserved people where they are promoted and hired according to their capabilities.

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² Merriam webster's Dictionary, www.merriam-webster.com/dictionary/reservation

This Reservation assistance under the Indian Constitution is provided to three category of group: Scheduled Castes, Scheduled Tribes, and Other Backward Classes. In South Asia the caste system has always considered to be a dominating aspect of the social and cultural organization for thousands of years. There are various caste system which is been brought in the past years, there are more than 2000 jatis which is generally designated to caste. During those days there were a jati who were considered as 'Untouchables' because their touch, believed by the upper castes to transmit pollution. Today these groups of people are officially referred as scheduled castes, which constituted 1/6th of India's total population. The Scheduled Tribes are also given the same status as that of Scheduled Caste under Indian Constitution, they are generally those people belonging to tribal areas of India mostle North-East of the country. As per the Census 2001, total population of the Scheduled Castes in the country (excluding the population of Mao Maram, Paomata and Purul sub-divisions of Senapati district of Manipur) is 166,635,700 which constitute 16.2% of the total population, and Total population of Scheduled Tribes is 84,326,240 as per the Census 2001 which accounts for 8.2% of the total population of country³. The Focus of the Government is to uplift these economic and socially backward societies so that they are treated equal to other group of the people in India. With the focus on 'faster, sustainable and more inclusive growth' the 13th Five Year Plan highlights that the concern of the poor, the scheduled castes, the scheduled tribes, other backward classes, minorities, differently abled must be addressed for growth to be inclusive.⁴ Under the Constitution of India Article 341 and 342 defines Schedule caste and Schedule tribes with respect to any State or Union Territory.

Article 341 mentions about which people are to be considered as scheduled castes, where the President in consultation of the Governor of a particular State or Union Territory through a public notification specify what casts, race, tribes or part of such people will be deemed to be scheduled castes in regard to such Sate or Union Territory. These communities are considered as the bottom or underneath, the caste system in South Asia. These castes have a hereditary profession which carry out cleaning of drainage, tannery or washing clothes. Earlier they were considered as a pollutant for other higher caste. Today these castes along with following their traditional occupation are also working as agricultural labourers. In the earlier times these group of people were barred from entering into temples and other religious places and in some region they were not allowed to use same road as that of other castes. To remove

³ *Ministry of Home Affarirs*, GOVERNMENT OF INDIA, (Jan. 20, 2021, 11:08 PM) https://censusindia.gov.in/Census_And_You/scheduled_castes_and_sceduled_tribes.aspx

⁴ Manohar parrikar Institute for Defence Studies and Analyses, (Jan. 20, 2021, 11:08 PM), https://idsa.in/idsacomments/13th-five-year-defence-plan-2017-22_acowshish_310717

this inequality the constitution committee have inserted several clauses where the scheduled castes people have the same right as other people of the country and any discrimination done on the basis of their caste will attract penal punishment.

Whereas, which people are considered under the category of Scheduled Tribe is mentioned under Article 342 where the President in consultation with the Governor of a particular State or Union Territory in a notification specify those tribal communities or part of those group who shall be considered be deemed to be a scheduled tribes. The basis on which these groups are identified generally are the “indication of primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and backwardness”. They were known as “adivasi” during the British rule. Mostly they belong from the north-eastern states. These people have also been discriminated and dominated by other people which included the British and also the Zamindars, to remove this discrimination they have been provided rights in the Indian Constitution where any discrimination done on the bases of their cast attracts penal punishment.

Apart from Schedule Caste and Schedule Tribe there is other category which is provided rights under the Constitution as they also form part of the economically backward class and also lack representation in the State, this category is “Other Backward Class”. Originally they were not included in the Reservation Scheme of India but during the premiership of Moratji Desai who was the head of the Mandal Commission researched all the Communities in India in order to find what cases were backward in comparison to other general population. Based on the finding and census back in 1931 they estimated that 52% of India’s total population belonged to the category of “backward” due to enormous reason which included socio economic facts such as wealth, jobs and others. So in order to provide them with an opportunity to be represented well enough in the society the power is provided with the government under Constitution of India where reservation could be made for these other backward classes.

These groups of people have been provided reservation in various categories under Article 15 and Article 16, where under Article 15 it is prohibited to discriminate on the grounds of religion, race, caste, sex, place of birth or any of them and Article 16 talks about equal opportunity is provided in matter of public employment under the government. The Clause (4) of these sections provides that state may make provision for reservation for those people who are economically backward and are not being represented in the state. But the issue arises that whether these groups of people shall be provided with reservation in Private jobs and promotion which is given to the employees. There have been various discussions where it

has been held that reservation shall not be provided in respect of jobs and promotion of employees, promotion in the office shall be made in accordance with the capabilities of the employee, and depending on the skills and knowledge of the employees.

II. HISTORY OF RESERVATION SYSTEM IN INDIA

Reservation system in India has come a long way, for a long time these groups of people were discriminated on the bases of their caste. In order to look into the timeline of reservation in India, it can be looked into two era i.e, Pre-Independence and Post-Independence

(A) Pre-Independence

Even during the British rule there existed reservation system in the form of Quota system was certain castes and other communities were favoured. For instance Shahu who was maharaja of princely State of Kolhapur, provided reservation in favour of Non-Brahmin and some backward classes, where he provided free education and also opened hostel to make it easier for them to receive it. He also made sure that those who were educated were properly employed. He also started a movement for abolition of untouchability.

On 16th of September 1921, the first Justice Party Government passes the first Communal Government order which became the first elected body in Indian legislative history to take a step towards legislative reservation. Later the British Raj introduced elements of reservation in the Government of India Act 1909. Another significant legislation which took place for providing reservation to the economically backward class or classes was the Round Table Conference of June 1932, where Communal Award was proposed by the then Prime Minister of Britain, Ramsay MacDonald which provided distinct representation for Muslims, Sikhs, Indian Christians, Anglo-Indians, and Europeans. Also the depressed classes which were roughly corresponding to the SCs, STs, were certain number of seats was to be filled by election from constituencies in which only they were permitted to vote, but they were permitted to vote for other seats as well. This proposal was controversial where Mahatma Gandhi fasted against the proposal but on the other hand the proposal was supported by B.R Ambedkar. After several negotiation and agreement was Poona Act⁵ was formed.

(B) Post- Independence

After India got its Independence major initiatives were undertaken in favour of the economically and socially backward classes and after 1980 initiatives were taken in favour of the Other Backward Classes and latest in 2019 certain initiatives have been taken for poor

⁵ Menon, V.P (1957) Transfer of Power of India (reprinted) orient Blackswan pp 49-50 ISBN 978-81-250-0884-2

general category. In the 13th five year plan (2017-2022) focus has been made to make certain promoting activities for these socially backward classes. If we look into the most common form of caste discrimination it was that of practise of untouchability which was against the Schedule Caste which became the target of the parliament to abolish it and it was successfully outlawed by the new Constitution of India⁶.

It was in 1954, when the ministry of education recommended that 20% of places should be reserved for the SCs and STs in the educational institution with relaxation of minimum requirement of qualifying marks for admission by 5% whenever required. Later in 1982 it was released by the order of the government that 15% and 7.5% of vacancies in public sector and government educational institution should have reservation for the socially backward classes which included SCs, ST. Finally in 1979 a great step was taken up by the Mandal Commission or known as the Socially an Educationally Backward classes commission to look after situation that those socially backward people were facing in the country due to discrimination which was done to them by the other general population. In 2019 the government made an additional reservation for the people who were socially backward and were not being represented in the society now the maximum of 10% reservation in the educational institutions and government jobs will be provided, this was done through The Constitution (103 Amendment) Act, 2019⁷.

III. WHAT DOES CONSTITUTION SAY ABOUT RESERVATION?

Article 14- It is considered as backbone of law as it mandates equality before law. It says that state is under an obligation of not denying any person equality before law or equal protection of laws in the territory of India. This right is not only provided to the citizen of India but to any person who is in the territory of India shall be provided with equality before law irrespective of religion, race, caste, sex or place of birth. This section protects people from discrimination that people face on the basis of their caste religion or other various reasons and ensures that when they come before law they will be treated equally.

Article 15(4) - This Article prohibits any discrimination on the ground of religion, race, caste, sex or place of birth. But right under this article is provided only to the citizens of India and not every person who is in the territory of India. Clause (4) of this article provides that the state has a liberty to make special provision for advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

⁶ *Passin, Herbert (October 1955). "Untouchability in the Far East". Monumenta Nipponica. 11 (3): 247-267. doi:10.2307/2382914. JSTOR2382914*

⁷ The Constitution (103 Amendment) Act, 2019, www.egazette.nic.in/WriteReadData/2019/195175.pdf

Article 16(4) – The Article talks about equality of opportunity in matter of public employment. This right is also provided to the citizens of India in all those matter which are in relation to appointment to any officer under the State. This article prohibits any discrimination on the basis of religion, race, sex, caste, descent, place of birth, residence or any of them, or declares them as ineligible on these bases for any employment or office under the state. Clause (4) of this article allows the state for making any special provision for the reservation of appointment or posts in favour of any backward class of citizen which the state is in the opinion that they are not being adequately represented in the services of the state.

Article 16 (4A) – This Clause was inserted in the Constitution of India by the 77th Amendment where an additional provision was made for the Schedule Caste and Schedule Tribes in regard with promotion in the services under the state, where the state if in opinion that such provision shall be made for such category.⁸

Article 16 (4B) – This clause was inserted by the 81st Amendment act, 2000, where the state is allowed reserving for the Scheduled caste and Scheduled tribes in promotion to carry forward the unfulfilled vacancies from previous years this was called as carry forward rule.⁹

Article 29(2) – This article focuses on protection of interest of the minorities, under Clause (2) of this Article it was laid that no citizen shall be denied admission into any educational institution which is being maintained by the state or those institutions which is receiving aid out of the state funds on the ground of religion, race, sex, caste, language or any of them.

Article 46 – This article is focusing on promoting of educational and economic interest of the backward class which includes the Scheduled Castes and Schedule tribe and certain other weaker section of the society which are not being represented in the society. This article mandates the state to promote with special care educational institution for these weaker sections of the people, the state is also under an obligation to protect these weaker sections from social injustice and all form of exploitation.

Article 335 – In this article claim of Schedule Castes and Schedule Tribes to service and post shall be taken into consideration with maintenance of efficiency of administration, in making of appointment services and posts in connection with affairs of the State and Union Territory.

IV. IS RESERVATION A FUNDAMENTAL RIGHT?

This question has been in a debate for a long time as to whether having a reservation in jobs

⁸ The Constitution (Seventy-Seventh Amendment) Act, 1995, <http://legislative.gov.in/constitution-seventy-seventh-amendment-act-1995>

⁹ The Constitution (eighty first Amendment) Act, 2000, www.legislative.gov.in/constitution-eighty-first-amendment-act

and promotion considered to be a fundamental right or is it the state who decides that reservation should be provided to the weaker section of the society. It has been bitterly contested issue between the Supreme Court and the Parliament. In the past years there have been several cases which questioned the Article 16(4) where the issue was that whether the Schedule Caste and Schedule tribe people who are weaker section of the society have a fundamental right to have reservation in the jobs and promotion. Several Amendments were also brought in the Constitution with this regard but the issue was never resolved. We will look into the cases that brought up the Supreme Court in dilemma as to whether the weaker section have a fundamental right to have reservation in the jobs and promotion which is being provided in the public employment.

Indra Sawhney v. Union of India¹⁰

It was landmark judgment as a clarity as to whether promotion is included in Article 16(4). The Court held that Article 16(4) does not grant reservation in promotion because it pertains only to reservation in appointment for the Schedule caste and Schedule Tribes. But this judgment allowed reservation in promotion to continue for five years post 16th November, 1992. This judgment also upheld that reservation also included reservation for other Backward classes which are also considered as weaker section and unrepresented part of the society.

Article 16 (4A) -77th Amendments

In 1995, the Government to nullify the effect of the Indra Sawhney¹¹ case by introducing a new Clause to Article 16 where the State was allowed to provide reservation to Sc/St, in matters of promotion, as long as the State is in the opinion that these section of the society is not adequately represented in the government services. But again this clause did not mandate the State to provide reservation in promotion but it was done on the basis of representation of such section in the government services, which shows that a fundamental right of reservation under promotion was not given to Schedule Caste and Schedule Tribe people.

Catch Up Rule – Ajit Singh v. State of Punjab¹²

After reservation of promotion was constitutionally recognized by the 77th Amendment in the year 1995 , it lead to a situation where the reserved category candidates, who were promoted over the general class counterparts, became their senior due to earlier promotion. This was

¹⁰ Indra Sawhney v union of India (1992) Supp. (3) SCC 215

¹¹ Indra Sawhney v union of India (1992) Supp. (3) SCC 215

¹² Ajit singh v state of Punjab (1966) ILR 1Punjab and Haryana 828

addressed by two judgment ie. Virpal Singh¹³ and Ajit Singh (1996) which introduced the rule of catch up Rule, the Supreme Court held that the senior general candidates who were promoted after the SC/ST candidates would regain their seniority over reserved candidates, that were promoted earlier. So that the injustice which was done to them earlier would be compensated by giving back them the seniority which they had lost because of not being a reserved.

S Vinod Kumar v Union of India¹⁴

In this case it was held that relaxation in qualifying marks in matter of reservation in respect of promotion was not permissible under Article 16(4) in a view of the command contained in Article 335 of the Indian Constitution where it has been stated that reservation are subject to the principle of administrative efficiency.

The carry forward rule- 81st Amendment

In the year 2000, a major amendment was made to the constitution in regard to filling up the vacancies in a job, thus a new clause was added to the Article 16 i.e 16(4B) was inserted through the 81st amendment where the government also introduced the carry forward rule. Through the Article 16(4b) the state was allowed to reserve promotion to breach the 50% ceiling set on regular reservation. The amendment allowed the state to carry forward the unfilled vacancies from the previous year which was known as the carry forward rule.

Proviso added to the Article 335- 82nd Amendment¹⁵

In the year 2000, the state amended the Constitution which was the second time that state had done. In this amendment, the state added a proviso to the Article 335; this amendment eviscerated the efficiency requirement. It introduced a proviso where it was held that nothing in this article would prevent the state from relaxing the Qualifying marks or lowering the standard of evaluation for reservation in matter of promotion to members of SCs and STs.

After the insertion of this Amendment judgment given in the S Vinod Kumar case¹⁶ was undone.

85th Amendment of Indian Constitution¹⁷

Through this amendment again a change was brought in respect to the consequential

¹³ Union of India v virpal singh (1996) SC448

¹⁴ S vinod kumar v. Union of India (1996) VIIAD(SC)768

¹⁵ 82nd amendment of Indian Constitution www.legislative.gov.in/constitution-eighty-second-amendment-act

¹⁶ S vinod kumar v. Union of India (1996) VIIAD(SC)768

¹⁷ 85th amendment of Indian Constitution, 2001, www.legislative.gov.in/constitution-eighty-fifth-amendment-act-2001

seniority for SCs/STs. The parliament had negated the catch-up rule that was introduced in Virpal Singh and Ajit Singh case. An amendment was made in Article 16(4A) and introduced the principle of Consequential seniority to promote the SC/ST candidates.

Subsequently, the text of Article 16(4A) was amended such that “in matter of promotion to any class” became “in matters of promotion, with consequential seniority to any class”.

M. Nagaraj v Union of India 2006¹⁸

In this case the Supreme Court has validated the parliament’s decision to extend reservation provision for the SCs and STs to include promotion with three riders. In which it required the state to provide for the backwardness of the class benefited from the reservation, for its inadequate representation in the position/service for which reservation in promotion is being granted to them and to show that how such reservation in promotion would further administrative efficiency which is a requirement as mentioned under Article 335 of the Indian Constitution.

But this judgment soon gave rise to several misleading that it failed to recognize that the weaker section of the Society i.e, SCs and STs continued to suffer from centuries of discrimination by requiring the state to reassess their backwardness in the case of reservation in promotions. The critics claimed that the court in Nagaraj case has just overruled the judgment which was given in Indra Sawheny which clearly held that SCs and STs are homogenous and could not be sub-categorised.

Creamy layer is essential - Jarnail Singh vs. Lachhmi Narain Gupta¹⁹

The term creamy layer was first coined in 1975 in the *State of Kerala vs N. M. Thomas*²⁰ case when a judge said that the "benefits of the reservation shall be snatched away by the top creamy layer of the backward class, thus leaving the weakest among the weak and leaving the fortunate layers to consume the whole cake". The 1992 *Indra Sawhney vs Union of India*²¹ judgement laid down the limits of the state's powers, it upheld the ceiling of 50 percent quotas, emphasised the concept of "social backwardness", and prescribed 11 indicators to ascertain backwardness. The judgement also established the concept of qualitative exclusion, such as "creamy layer". The creamy layer applies only to OBCs. In October 2015, the National Commission for Backward Classes (NCBC) proposed that a person belonging to OBC with an annual family income of up to Rs. 15 lakh should be considered as minimum

¹⁸ M. Nagaraj v Union of India (2006) 8 SCC 212

¹⁹ Jarnail Singh vs. Lachhmi Narain Gupta (2018) 10 SCC 396

²⁰ State of Kerala vs N. M. Thomas AIR1976SC490

²¹ Indra Sawhney v union of India (1992) Supp.(3) SCC 215

ceiling for OBC. The NCBC also recommended sub-division of OBCs into "backward", "more backward" and "extremely backward" groups and to divide the 27 per cent quota amongst them in proportion to their population, to ensure that stronger OBCs do not corner the quota benefits.

A five-judge Constitution Bench of the Supreme Court has upheld **the application of "creamy layer" principle** relating to reservations for Scheduled Castes (SCs) and Scheduled Tribes (STs) in promotions. The creamy layer is a concept that puts an income ceiling on people availing of caste-wise reservations in government jobs and education. Till now, this was only applicable for reservations under the Other Backward Classes quota. SCs and STs were excluded since it was argued that their backwardness was based purely on untouchability for which economic improvement was not a remedy.

Further Supreme Court ruled that the judgment in the case of *M. Nagaraja v. Union of India*²², relating to reservations for SCs and STs in promotions, need not to be referred to a larger bench for consideration. Centre had claimed that there was a need to review the M Nagaraj verdict of 2006 stating that the judgement had virtually stopped promotions by putting criteria like backwardness, inadequate representation and overall administrative efficiency. Various States had challenged the Nagaraj verdict stating that the criteria for reservation in promotion for SC/ST employees laid down in it was proving to be a hurdle to filling up lakhs of vacancies in different government departments spread across various States. So, the correctness of interpretation given by Nagaraj decision was referred to Constitution Bench for reconsideration during November 2017.

Background

The Central and the State Government since the 1950s have been following a policy of reserving seats in promotions in favours of SC and ST communities on the ground that they are not adequately represented at the decision making level of public services.

This policy was held to be unconstitutional and void by the Supreme Court in **Indra Sawhney v. Union Of India**²³ on the ground that under Article 16(4) the State is provided with the power to make reservations in favour of backward classes of citizens only at the entry level that is at the time of recruitment into public services but not subsequently. The Parliament responded by enacting 77th Constitutional Amendment Act which introduced Article 16(4A). It confers power on the state to reserve seats in favour of SC and ST in

²² *M. Nagaraj v Union of India* (2006) 8 SCC 212

²³ *Indra Sawhney v union of India* (1992) Supp. (3) SCC 215

promotions in Public Services if the communities are not adequately represented in public employment. This law was given retrospective effect from 1992. The Supreme Court in *M. Nagaraj v. Union of India* 2006 case while upholding the constitutional validity of Art 16(4A) held that any such reservation policy in order to be constitutionally valid shall satisfy the following three constitutional requirements:

- The SC and ST community should be socially and educationally backward.
- The SC and ST communities are not adequately represented in Public employment.
- Such a reservation policy shall not affect the overall efficiency in the administration.

The judgment that was given by the supreme court case was that **Application of the “Creamy layer” principle the "creamy layer exclusion" principle, till date applied only to OBCs, can be extended to SCs and STs to deny reservation to the elite among the two communities.** It upheld the constitutional amendments leading to Article 16(4A). Therefore, the Constitution Bench held that there was no necessity to revisit Nagaraj judgment in so far as it applied the creamy layer test. Giving a stamp of approval to application of creamy layer principle to SC/STs, the court asserted that the objective of reservation would not be fulfilled if only the creamy layer within that class bag all the coveted jobs in the public sector, leaving the rest of the class as backward as they always were.

Proof of Backwardness of SC/STs

The Supreme Court held the conclusion in Nagaraj case that the State has to collect quantifiable data showing backwardness of the SCs and the STs as invalid. It opined that this was contrary to the finding arrived at by the nine-judge bench in *Indra Sawhney v. Union of India*²⁴. It noted that the nine-Judge Bench in *Indra Sawhney* case had categorically ruled that test or requirement of social and educational backwardness cannot be applied to SCs and STs, who undoubtedly fall within the expression “backward class of citizens”.

Reservation in Promotion Need Not Be In Proportion To Population

It noted that while the test of proportionality to the population is mandated by the Constitution in Article 330 (Reservation of seats for SCs & STs in the House of People), it does not do so in the provision of reservations in promotions (Article 16(4A)).

While on the one hand the Court struck down the further backwardness criterion, it on the other hand introduced the principle of creamy layer exclusion. It held that creamy layer

²⁴*Indra Sawhney v union of India* (1992) Supp.(3) SCC 215

exclusion extends to SC/STs and, hence the State cannot grant reservations in promotion to SC/ST individuals who belong to the creamy layer of their community.

Nevertheless, the judgment modified *Nagaraj* with regards to 'further backwardness'. In *Nagaraj*, the Supreme Court had held that if the State chose to grant reservations in promotion, the State must collect quantifiable data to demonstrate the current backwardness of the SC/ST been granting reservations in promotion. On further backwardness, the judgment held that the further backwardness condition is contrary to the nine-judge Bench decision in *Indra Sawhney*. Justice Nariman held that *Indra Sawhney* does not allow for the collection of quantifiable data as a pre-requisite for granting reservations in promotions. However, while the judgment modified the further backwardness criterion, it also added that the principle of creamy layer exclusion applies to SC/STs. Previously creamy layer exclusion only applied to Other Backward Classes (OBCs) in matters of reservation.

The Court held that creamy layer exclusion is a principle of equality. It held that failing to apply the exclusion of creamy layer principle would violate right to equality in two ways. Firstly, it held that doing so treats equals differently, namely the general classes and the forward among Backward Classes (SC/ST). Second, it held that doing so treat unequals the same, namely backward classes and the forward among backward classes. Thus, the Court held that the exclusion of creamy layer principle is essential to safeguard the right to equality.

Court also observed "the whole object of reservation is to see that backward classes of citizens move forward so that they march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were."

Justice Nariman clarified that in applying the creamy layer principle to Scheduled Castes and Scheduled Tribes, the Court does not in any manner tinker with the Presidential list under Article 341 and 342 of the Constitution. Justice Nariman wrote, the Castes and groups mentioned under Presidential Order is not altered, but those persons of the group who have come out of untouchability or backwardness by virtue of belonging to creamy layer are excluded from the benefit of reservation in promotion.

The Court read creamy layer exclusion as an ingrained principle of Equality in determining contours of reservation policy. Justice Nariman specifically overruled the observation by

Former Chief Justice K.G. Balakrishnan in *Ashok Thakur*²⁵, where he held that the creamy layer principle is merely a principle of identification and not a principle of equality.

The Bench clarified that the second condition of states giving quantifiable data with respect to inadequate representation still stands and that inadequacy of representation has to be in relation to specific cadre and not in proportion to SC/ST population in the State.

BK Pavitra v Union of India

BK Pavitra I²⁶

In 2017, a two-judge bench of the Supreme Court in *B.K. Pavitra vs Union of India-I* had declared a 2002 legislation passed by Karnataka assembly invalid on the ground that Karnataka had not collected quantifiable data on the three parameters – inadequacy of representation, backwardness and the impact on overall efficiency – before making reservations in promotions.

The 2002 Act passed by the Karnataka assembly provided for consequential seniority to roster-point promotees based on the length of service in a cadre.

After the decision of the Supreme Court in *B.K. Pavitra I* on March 22, 2017, the Karnataka government set up the Ratna Prabha Committee, headed by the then additional chief secretary to submit a report on the backwardness and inadequacy of representation of SCs and STs in the state civil services and the impact of reservation on overall administrative efficiency in the state.

This committee submitted its report on May 5, 2017. On the basis of the Ratna Prabha Committee report, the state assembly passed the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation Bill, 2017. The Bill received president's assent under Article 200 of the constitution, after the state governor referred it for his consideration following a controversy that the state legislature could not undo a Supreme Court's judgment, declaring a similar law passed in 2002 invalid.

The 2018 Act was challenged in the Supreme Court in *B.K. Pavitra II*.

B.K. Pavitra II²⁷

In *B.K. Pavitra II*, the Supreme Court bench of Justices U.U. Lalit and D.Y. Chandrachud held on May 10 that the state legislature, by enacting the 2018 Act, took care to remedy

²⁵ *Ashok kumar v union of India* (2008) 6 SCC 1

²⁶ *BK Pavitra v Union of India* (2017) SC 820

²⁷ *B K pavitra v Union of India* (2019) SC 2723

the underlying cause which led to a declaration of invalidity of the 2002 Act. Curative legislation is constitutionally permissible, and is not an encroachment on judicial power, the bench held. Such a law is valid because it removes the basis of the Supreme Court's decision. While curing the defect, it is essential to understand the reasons underlying the declaration of invalidity of the earlier Act. The reasons constitute the basis of the declaration. The legislature cannot simply override the declaration of invalidity without remedying the basis on which the law was held to be ultra vires, the bench clarified.

The bench held that both the governor's reserving a Bill for the consideration of the president under Article 200 and the president's assent or his withholding of it to a Bill under Article 201 are not justifiable. The bench's ruling has implications for federalism, as governor's action in referring a Bill for consideration of the president, when there are no clear grounds for doing so, can leave a state legislature without any remedy. The bench had to resolve this issue, as the petitioners had challenged the Karnataka law on the ground that the state governor's reference of the Bill for president's consideration was illegal. They had also challenged the president's assent to the Bill.

Relying on *Indra Sawhney*, the bench held that the opinion of the government on the adequacy of representation of the SCs and STs in the public services of the state is a matter which forms a part of the subjective satisfaction of the state. When an authority is vested with the power to form an opinion, it is not open for the court to substitute its own opinion for that of the authority, nor can the opinion of the authority be challenged on grounds of propriety or sufficiency, the bench held categorically.

In *Jarnail*, it was held that Article 16(4A) has been couched in language which would leave it to the states to determine adequate representation depending upon the promotional post that is in question.

The bench held that the Ratna Prabha Committee cannot be held to have acted arbitrarily in adopting recourse to sampling methodologies or to have based its conclusions on any extraneous or irrelevant material. If sampling is a valid methodology for collection of data, the exercise cannot be invalidated only on the ground that data pertaining to a particular department or of some entities was not analysed. The data which was collected pertained to 31 departments which are representative in character. The state has analysed the data which is both relevant and representative, before drawing its conclusions. There are limitations on the power of judicial review in entering upon a factual arena involving the gathering, collation and analysis of data, the bench held.

Once an opinion has been formed by the state government on the basis of the report submitted by an expert committee which collected, collated and analysed relevant data, it is impossible for the court to hold that the compelling reasons which *Nagaraj* requires the state to demonstrate have not been established. Even if there were to be some errors in data collection, that will not justify the invalidation of a law which the competent legislature was within its power to enact, the bench further clarified. The adequacy of representation has to be assessed with reference to a benchmark on adequacy. Conventionally, the state and Central governments have linked the percentage of reservation for the SCs and STs to their percentage of population, as a measure of adequacy. It is open to the state to make reservation in promotion for SCs and STs proportionate to their representation in the general population, the bench explained.

CURRENT SITUATION OF RESERVATION IN PROMOTION- MUKESH KUMAR V STATE OF UTTRAKHAND²⁸

In this case of reservation, the Supreme Court refused to issue direction to the Uttarakhand State Government to provide reservation to SC/ST candidates in fulfilling vacancies holding that quota in jobs is not a fundamental right. The Supreme Court ruled, "No mandamus can be issued by the court directing the state government to provide reservations."

The Supreme Court ruled, "It is settled law that the state government cannot be directed to provide reservations for appointment in public posts. Similarly, the state is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matters of promotions."

Why it matters?

The Supreme Court has made the reservation optional in a sense. "If they (states) wish to exercise their discretion and make such provision, the state has to collect quantifiable data showing inadequacy of representation of that class in public services," the Supreme Court said. This may be interpreted as departure from the understanding with regard to reservation in jobs. The earlier ruling of the Supreme Court fixing the limit of reservation at 50 per cent of the total vacancies has been interpreted as a mandatory rule for the government to provide reservation for SC/ST and OBC candidates in all fresh appointments. But in the latest judgment, the Supreme Court has interpreted Article 16 to say, "It is for the state government to decide whether reservations are required in the matter of appointment and promotions to public posts." The Supreme Court held that the Constitution empowers the state to provide for reservation of seats in favour of the SC/ST candidates in matters of appointment and

²⁸ Mukesh Kumar v State of Uttarakhand (2020) SC 113

promotion "if in the opinion of state they are not adequately represented in the services of the state". The court also held inadequacy of representation a matter of subjective satisfaction of the state. The only important thing for the law is that the state must form its opinion about inadequacy of representation on the basis of "some material" facts. This applies in the cases of promotion as well, the Supreme Court held in its latest ruling.

Politics in reservation case

The matter related to a September-2012 decision of the Uttarakhand government (then under the Congress party) to fill up all posts in public services in the state without providing reservations to Scheduled Castes and Scheduled Tribes. The decision was challenged in the Uttarakhand High Court, which struck it down in April last year (the BJP had come to power by now in the state). The Uttarakhand reservation case went to the Supreme Court, which has now upheld the state government decision of 2012.

On the political side, the Congress has lashed out at the BJP and the Modi government over the issue of dilution of reservation for SC/ST communities. The party raised the issue both inside and outside Parliament. Congress leader Rahul Gandhi said it is in the DNA (genetic material) of the BJP and the RSS to try and end reservation for SC/ST communities. He said, "They (the RSS and BJP) wake up every morning and this (reservation) irritates them, except it is in our Constitution, and these rights are guaranteed by our Constitution."

The RSS has been calling for a review of the reservation policy for quite some time. Being the parent organisation of the BJP, its view is taken as the future policy of the current ruling party at the Centre. In 2015, RSS chief Mohan Bhagwat had called for a relook at the reservation policy in the run-up to the Bihar Assembly election. This one statement, many believed, ruined the BJP's chances of winning the state election that the JDU-RJD-Congress combine won with nearly three-fourth seats in 243-member assembly. The apex court has now re-iterated that Articles 16(4) and 16(4A) do not confer any fundamental rights to claim reservations in promotion. It is for the state government to decide whether reservations are required for appointment and promotions to public posts, it said.

"It is settled law that the State Government cannot be directed to provide reservations for appointment in public posts. Similarly, the State is not bound to make reservations for Scheduled Castes and Scheduled Tribes in matters of promotions," it observed.

However, if the state government does want to exercise this discretion and provide reservations, it would have to first collect quantifiable data showing inadequacy of representation of that class in public services. The court then opined that the high court

should not have struck down the state government's 2012 decision to not provide reservation in promotions. It further ruled that since Article 16(4) and 16 (4A) do not provide fundamental rights, courts cannot issue a direction to the state government to provide reservations. It clarified that since the state government had decided not to provide reservations it did not have to collect quantifiable data at all.

V. CONCLUSION AND SUGGESTIONS

It is well settled issue that although certain privileging provision are made in favour of the weaker section of the society which include Schedule Caste and Schedule Tribe and Other Backward Classes it is not their fundamental right to have reservation in promotion. It is upon the state to decide whether these section of the society is being represented in the society or not, if the state is of an opinion that these people are inadequately represented state may make provision of promotion of these schedule caste and schedule tribe people for employment in public offices. Thus, even though these rights have been provided within the ambit of Part III of the Constitution does not make these right a fundamental right.

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