

ROLE PLAYED BY INDIAN JUDICIARY IN PROTECTION AND PROMOTION OF MINORITY RIGHTS: AN ANALYSIS

Dr. Shilpa Jain*

“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”

-Andrew Jackson

Introduction

The prevention of discrimination seeks to secure that everyone, as individuals, are treated on an equal basis. In the human rights system the state is the nexus or the focal point, where the rights are organized and balanced. The duty of the state imposes an obligation on the state not to discriminate, protect individuals against social discrimination and to take affirmative action in order to compensate for past discriminations.¹

Almost all States have one or more minority groups within their national territories, characterized by their own ethnic, linguistic or religious identity which differs from that of the majority population. Harmonious relations among minorities and between minorities and majorities and respect for each group's identity are a great asset to the multi-ethnic and multi-cultural diversity of our global society. Meeting the aspirations of national, ethnic, religious and linguistic groups and ensuring the rights of persons belonging to minorities acknowledges the dignity and equality of all individuals, furthers participatory development, and thus contributes to the lessening of tensions among groups and individuals.

* Assistant Professor, Rajiv Gandhi National University of Law, Punjab.

¹ Srivastav V.P., Human Rights Issues and Implementations (Indian Publishers Distributors, Delhi) 2004, Vol.1.

Minority rights have gained greater visibility and relevance all over the world. India is no exception to it being a multi-ethnic, multi-religious, multi-linguistic and multi-cultural society. Diversity of all types is the very soul of India. It is in this context that minority rights have assumed added significance in post-independence India. When India attained independence after its division on religious lines, religious minorities became very apprehensive of their identity. In order to compensate the members of discriminated groups who were placed at a disadvantage Article 15(1)² of the Constitution of India specifically bars the State from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth or any of them. Further, Article 29(2) also guarantees protection to citizens against State action which discriminates admission to educational institutions on ground of religion, race, caste or any of them. This being the position, soon after the coming into the force of the constitution, challenges were made to governmental programmers aimed at making special provision for weaker sections of society in the field of education and housing.

Defining Minority

The term “minority” shall include only those non dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.³

Louis Wirth defined a minority group as "a group of people who, because of their physical or cultural characteristics are singled out from the others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination."⁴

² Art. 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

³ *Supra* note 1.

⁴ “The Problem of Minority Groups”, p. 347 in Ralph Linton (ed.), *The Science of Man in the World Crisis*. New York: Columbia University Press, 1945.

According to Francesco Capotorri UN Special Rapporteur in his report⁵ has laid down what constitutes a minority: A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Protection and Promotion of Minority Rights: Role Played by Indian Judiciary

“A democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine.”

--Thomas Jefferson

The Indian Judiciary is playing the role of safeguarding the rights of the forty nine who are in minority in India and have been on disadvantaged position .When the Constitution of India under Article 15(1) and further under Article 29(2) gave protection to the minorities challenges were made to governmental programmers aimed at making special provision for weaker sections of society in the field of education and housing. Two judicial decisions, one of the Supreme Court and the other of the Bombay High court led to the first Amendment of the constitution in 1951.

The first Supreme Court decision in *State of Madras v. Champakam Dorairajan*⁶: This case was with regard to admission of students to the Engineering and Medical Colleges of the State, the Province of Madras had issued an order (known as the Communal G.O.) that seats should be filled in by the selection committee strictly on the following basis, i.e., out of every 14 seats, 6 were to be allotted to Non-Brahmin (Hindus), 2 to Backward Hindus, 2 to Brahmins, 2 to Harijans. 1 to Anglo-Indians and Indian Christians and 1 to Muslims:

⁵ Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Document E/CN.4/Sub.2/384/Add.1-7 (1977).

⁶ AIR 1951 SC 226.

Held by the Full Court that the Communal G.O. constituted a violation of the fundamental right guaranteed to the citizens of India by Art. 29 (2) of the Constitution, namely, that: "No citizen shall be denied admission to any educational institution maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them and was therefore void under Art.13. The directive principles of State policy laid down in Part IV the Constitution cannot in any way override or abridge the fundamental rights guaranteed by Part III. On the other hand they have to conform to and run as subsidiary to the fundamental rights laid down in Part III.

In *Jagwant Kaur v. State of Bombay*⁷: In this case an order of the collector of Poona under Sec 5 of the Bombay Land Requisition Act for requisitioning Some land in Poona for establishment of a Harijan camp was challenged as violation of Article 15(1). The basis of challenge was that a colony intended for the benefit only of Harijans was discriminative under the above Constitutional provision. Further it was held that Article 46 could not over ride a fundamental right. Consequently the order was declared void.

At the time of decision in the case (18-2-1952) presumably, the first amendment had not come into effect Chief Justice Chagla had observed, "We may that after the amendment it would be possible for the State to set up a Harijan colony in order to advance the interest of the backwards class. But till that amendment was enacted as Article 15 stood, it was not competent for the State to discriminate in favour of any caste or community. Thus it may be pointed out that it was these two decisions, which led to the amendment of Article 15. The first amendment incorporated clause 4 to Article 15 empowering the State, to make special provisions for the advancement of any socially educationally backward classes of citizens or for the Schedule Castes and Schedule Tribes, despite Article 15(1) or clause(2) of Article 29. The object of first constitutional amendment was to bring Articles 15 and 29 in line with Article 16(4)

⁷ AIR 1952 Bom. 461.

which empowers the State to make Special Provisions for the backward classes in matters of public employment.

The addition of clause 4 to Article 15 opened doors for several petitions before the court and the courts have wavered on the interpretation of this clause in several cases. The reason behind this is that the constitution does not state who are to be covered under "backward classes" and there can be how much reservation. But the constitution is not silent it allows the president to set up a commission to investigate into the condition of people in states and then classify them as backward under art 340⁸, as required. Additionally Art. 335⁹ says that special provisions for SC/STs should be taken into consideration, consistently with the efficiency of the services.

Contribution of Judiciary in Changing the Direction of Reservation in India

There has been a series of cases after the addition of clause 4 to Article 15 and these cases gave rise or directions to Reservation system in India. In *Balaji v.*

⁸ 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.

⁹ Article 335: Claims of Scheduled Castes and Scheduled Tribes to services and posts 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.

*State of Mysore*¹⁰ it was held that reservation cannot be more than 50%, the classification of backward and more backward is invalid and caste cannot be the only criteria for reservation because Art. 15(4) talks about class and class is not synonymous with caste. So other factors such as poverty should also be considered.

Further Supreme Court held the "carry forward rule" as unconstitutional in the case of *Devedason v. Union of India*¹¹. As per carry forward rule posts that could not be filled due to lack of candidates in backward classes would be filled by regular candidates but the same number of additional posts would be reserved in the next year. This caused the amount of reservation to go above 50%. S.C. held that power of Art. 16(4)¹² could not be used to deny equality of opportunity for non-backward people.

In *Janki Prasad v. State of J & K*¹³ the Supreme Court did not consider poverty as exclusive test for judging socially and educationally backward classes because that would convert a large portion of population of India to backward classes of citizens.

The court in *State of U.P. v. Pradeep Tandon*¹⁴ did not approve reservation for the rural areas as justifiable reservations because 80% people live in rural areas and it cannot be a homogenous class by itself. The rural element does not make it a class, so on the basis of poverty alone backwardness cannot be judged since poverty is found in all parts of India.

In the case *State of Kerala v. N.M. Thomas* SC held that the relaxation of 2 years given to SC/STs in State of Kerala for passing certain test for promotion is valid. It held that the relaxation does not cause reduction in the efficiency because such people will have to pass the test

¹⁰ AIR 1963 SC 649.

¹¹ AIR 1964 SC 179.

¹² Article 16(4) in the Constitution of India 1949 read as:

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

¹³ AIR 1973 SC 930.

¹⁴ AIR 1975 SC 563.

anyway. It further held that special provisions for SC/STs could be made even under 16(1) and not only under 16(4). This is because the classification has a reasonable nexus with the objective, of upliftment of backward classes.

Building upon the case of N.M. Thomas, in *Akhil Bhartiya Soshit Karamchhari Sangh (Rly) v. Union of India*¹⁵ SC upheld that reservation could be done even without 16(4) because Art. 16(1) has to be read in light of Art. 14, which permits classification based on intelligible differentia and a justifiable nexus with the objective. It further held that "carry forward rule" is valid if the reservation does not become excessive. It held that exact mathematical calculation of 50% is not required in solving human problems but reservation should not be excessive. In this particular situation, 64.4% was not considered excessive. 50% limit was not a strict limit but only a guideline. In *State of MP v. Nivedita Jain*¹⁶ SC held that complete relaxation of qualifying marks for SC/STs for admission in medical colleges is valid. Further in *Indra Sawhney v. Union of India*¹⁷ popularly known as *Mandal Commission* case it was mandated that reservation ordinarily should not exceed 50% upholding carry forward rule subject to overall ceiling of 50%. It is submitted that this view is correct as reservation is an exception to the general principle of equality and as such an exception cannot exceed the main principle. Moreover even the founding fathers of Indian Constitution envisaged reservation much below than 50%¹⁸. Another important contribution of the Judiciary has been to limit reservation to initial appointment and not to apply it to further promotions.

Another connected issue with promotion is the determination of seniority. This issue cropped up in *Union of India v. Virpal Singh Chauhan*¹⁹. The court held

¹⁵ AIR 1981 SC 298.

¹⁶ AIR 1981 SC 2045.

¹⁷ AIR 1993 SC 477.

¹⁸ Manoj Kumar Sharma, "Reservation to Scheduled Castes and Backward Classes in Government Employments: An Analytical Study", in Dr. S.C. Sharma (ed), *Indian Constitution and Weaker Sections*, p. 260(2005).

¹⁹ AIR 1996 SC 448.

that when a person is promoted on the basis of reservation, he shall not be entitled to seniority in the feeder category and as soon as a general candidate having seniority in feeder category is promoted, he regains his seniority. In *D.G. Vishwanath v. State Of Mysor*²⁰ the reservation made for backward bases on the basis of occupation, income, residence and caste was challenged and the court held that such an order was unjustified. In *Chitralkha v. State of Mysore*²¹ the Supreme Court held that though the caste of a group of citizen might be a relevant circumstance for ascertaining their social backwardness, it could not be the sole or dominant test in this behalf. The court respected the criteria adopted by the Mysore government for ascertaining the backwardness that should be social and educational backwardness, similar to backwardness from which the scheduled castes and scheduled tribes have suffered.

The SC departed from the Chirtalekha approach with the passage of time in *P. Rajendra v. State of Madras*²² the rules adopted by the govt. of madras for regulating admission to medical colleges provided for reservation of seats for socially and educationally backward classes specified in the appendix to that order the order was challenged as violative of Articles 14 & 15 on the ground that list in that order was nothing but actually a list of certain castes only. the supreme court held that was nothing but actually a list of certain castes only the supreme court held that a must not be forgotten that a caste is also a class of citizen and if the caste as a whole is socially and educationally backward reservation be made is favor of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Art. 15(4) the court further held that in the present case the list of socially and educationally backward classes has been specified by caste it does not necessarily mean that caste is the sole consideration. If the entire caste is found socially and educationally backward on the basis of relevant facts, the caste as a whole may be regarded as backward class.

²⁰ AIR 1963 S.C. 702 MYS 132.

²¹ AIR 1964 S.C. 1823.

²² AIR 1968 S.C. 1012.

The Supreme Court, after considering the various aspects of reservation in series of cases analyzed, examined, scrutinized and reviewed the constitutionality of the reservation system under Article 15(4), 16(4) and 340 in modern perspective in well reasoned and elaborate case of *K.C. Vasanth Kumar v. State of Karnataka*²³ in which a bench of the Supreme Court consisting to Y.V. Chandrachud, J.J. D.A. Dasai, O. Chinappa Reddy, A.P. Sen and E.S. Kenkaratamiah, J.J. held that the reservations in favour of scheduled castes, scheduled Tribes and Backward classes must continue as it is in the present form and for a further period not exceeding fifteen years. But the policy of reservation in employment, education and legislative Institutions should be reviewed after five year or so.

The criterion to judge the backwardness should be the economic backwardness and reservation should not cross a reasonable limit of preference and discrimination. Recently the Supreme Court in *Dr. Fazal Gaffar's* case held that there should not be any reservation in the field of specialties. If however, preference has to be given, it should not exceed 35% of total quota.

Analysis of Judicial Decisions

An analysis of the series of cases stated above it can be stated that the comparison of socially and educationally backward classes with the scheduled castes and scheduled tribes in Article 15(4) the reference to scheduled castes and scheduled tribes were to be construed as including such backward classes as the President may by order specify on receipt of the report of the Commission appointed under Article 340(1) shows that in the matter of backwardness they are compared to Scheduled Castes and Scheduled Tribes. The concept of backward classes is not relative in the sense that any class which is backward in relation to the most advanced class in the community must be included in it. Hence the division of backward classes into backward is unconstitutional. The backwardness should be social and educational and not either social or educational.

²³ AIR 1985 SC 1495.

Article 15(4) refers to backward classes and not backward castes. The test of caste would break down in respect of communities which have no caste. In the present India Society case, of course caste is a relevant factor in determining social backwardness but it is not the sole or dominant test. In the light of the latest decision of the Supreme Court (*State of U.P. v. Pradeep Tandon*) caste is not a synonym for class. This case reiterated the Balaji approach. The Socially and educationally backward classes of citizens are groups other than groups based on caste. Classes of citizens mean a homogenous group of people with some common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. A classification based only on caste without regard to other relevant factors is not violative of Article 15(4). The onus is on the state to prove that the criteria it has adopted in classifying backward classes are constitutionally permissible. Both caste and poverty are important in determining the backwardness.

The occupation followed by certain classes of people which are looked down upon as inferior or unclean and place of habitation may contribute to social backwardness. Rural population as a whole cannot form socially and educationally backward class. The proportion of population of backward classes to the total population of the state for the purpose of reservation for admission to Professional institutions has been held valid. The inclusion of a class in the list of backward classes should not be perpetual, otherwise the whole purpose of reservation would be defeated. Hence the list should be under constant periodical review by the state. The quantum of reservation to be made is primarily a matter for the state to decide. However, it should be limited.

It can thus be concluded that from *Champakam Dorairajan* to *Arun Kumar* the facets of reservation scheme has undergone several changes and Judiciary has played a very important and crucial role in shaping this policy and bringing about social justice.