

AFFIRMATIVE ACTION IN INDIA:A CONCEPT OF FAIRNESS OR FRAUD ON THE CONSTITUTION

¹VISHNUVARDHAN.N, ²Dr.A.SREELATHA

¹Student, Final Year, BA,BL,(HONS), Saveetha School Of Law, Saveetha University, Saveetha institute of medical and technical sciences, Chennai, Tamilnadu, India

²Professor, Saveetha School Of Law, Saveetha University, Saveetha institute of medical and technical sciences, Chennai, Tamilnadu, India

²annamanenisreelatha.ssl@saveetha.com,

ABSTRACT:

The caste system has denied fundamental rights to some groups while at the same time granting an overabundance of rights to other groups in the same society and concluding that India is in violation of internationally recognized human rights standards.

Use of the term *compensatory discrimination* does not ignore the fact that some people are left out by these policies and that the policies are more than a harmless process of inclusion. The purpose, however, is not to exclude and deny. Rather, it is to include and compensate for centuries of historic repression and to counter present disabilities suffered by India's underprivileged. The term also carries with it an implication that the discrimination will end when the current unequal conditions are cured. Other terms that have been used are special treatment, protective discrimination, and progressive discrimination.

India's founding fathers were aware of the disabilities suffered by many sections of Indian society and therefore included compensatory discrimination provisions in the Constitution to advance underprivileged classes. The Mandal Commission Report, first announced in 1980, recommended that twenty-seven percent of central government jobs be reserved for the Other Backward Classes of India. This was in addition to an already guaranteed twenty-two and a half percent for India's Scheduled Castes' and Scheduled Tribes by the Indian Constitution.

KEYWORDS: INDEGENIOUS CAST, MANDAL COMISSION, CAST, BACKWARDNESS, DISCRIMINATION, CONSTITUTION.

1. Introduction

The V.P. Singh Government on August 13, 1990 accepted the Mandal Commission recommendation, an extensive affirmative action program through a memorandum. University students across India protested the move of the Government by self immolating themselves. Thousands of Indian students boycotted classes, blocked traffic, smashed car windshields, and threw stones at police in vehement defiance of the proposal.

India's affirmative action program, referred to as compensatory discrimination by most scholars, is a daring attempt to remedy past injustices suffered by those who are at the lower levels of India's four-tier caste hierarchy. The caste system is the predominant characteristic of Hindu social organization. The essence of the Hindu caste system is the arrangement of hereditary groups into a hierarchical social order.

The hierarchy of the caste system is divided into four classes, or *varnas*. At the highest level are the Brahmins who are primarily known as priests and scholars. Beneath the Brahmins come Kshatriyas, the classes of rulers and warriors. Then comes the Vashyas, which are generally merchant and farmer classes. The lowest caste is the Sudras, the menial and servant classes. The Untouchables are generally considered to be outside the four-tier caste system and are often referred to as "outcastes." The Untouchables were considered to be polluted and were assigned menial tasks such as sweeping and toilet cleaning. In Hindu religious thought the four *varnas* emanate from the body of Purusa, the lord of beings, who is portrayed as a primeval god-man sacrificed at the inception of time.

The Mandal Commission Report classified 3,743 castes as backward and deserving of special treatment in the form of central employment and educational reservations. These particular castes were ineligible to benefit from the central jobs and educational seats already exclusively reserved for Scheduled Castes and Scheduled Tribes. In all, the program recommends setting aside forty-nine and a half percent of central government jobs and

educational seats for scheduled castes, scheduled tribes and other socially and educationally backward classes in India.

In 1991, the Narasimha Rao Government modified the V P Singh Government's memorandum in two respects. Firstly, the poorer sections among the backward classes would get preference over the other sections. Secondly, 10% vacancies would be reserved for other "economically backward sections" of the people who were not covered by any existing reservation scheme. This brought the total amount of reserved jobs to fifty-nine and a half percent.

The Supreme Court of India ruled that the implementation of Mandal Commission report by the V P Singh Government was indeed constitutional. Government positions are highly coveted in India because they offer security, pensions, and free housing when one is promoted to upper-level positions. Most students protesting against implementation of the Mandal Commission recommendations are from lower-middle economic classes but come from caste backgrounds that disqualify them from the reservation scheme. Quotas for the backward classes threaten the position of upper caste students who traditionally have an advantage in merit based competitions because of their superior education.

Although many Indians accept the fact that some reverse discrimination is necessary for India's Scheduled Castes and Scheduled Tribes, they oppose having almost half of federal jobs decided on factors other than merit.[8] Critics charge that reservations reinforce and harden the legitimacy of caste distinction, deny qualified candidates opportunities and promote inefficiency in an already immense Indian bureaucracy.

Aim of the Study

1. To study the recommendations by Mandal Commission
2. To study the advancement made to upliftment by supreme court
3. To analyze role of supremecourt and legislation in treatment of compensatory discrimination.

HYPOTHESEIS:

H₀: The present provisions in Compensatory discrimination is not sufficient to eliminate discrimination and the status will be the same.

H_a: The increased concentration on education will result in progress and also may more new provisions will eliminate discriminations.

RESEARCH METHORDOLOGY:

1. The nature of the project is non-empirical in nature. It is purely based on data collected from books, acts, journals and web sources.
2. The methodology also includes data collected both from the primary and secondary sources, but mainly from secondary sources.

1. HISTORICAL BACKGROUND***1.1. Compensatory Discrimination during British Rule***

When the British arrived in India, they discovered that the caste system was an integral part of Indian society and that the system, through sources such as the *Vedas* and the *Manava Dharmasastra*, assigned different rules and regulations to various caste members. (Ashalatha. P et al. 2011)¹ The British rule also witnessed public employment and university reservations.² The British had a policy of reservations in public service posts for Muslims, Christians, Anglo-Indians, and other communal groups.³

British reservation policies were aimed at adjusting the political balance among different caste and religious groups and improving the plight of the disadvantaged. Reservations also served to ameliorate and appease minorities.⁴ The granting of special preferences to India's minorities and underprivileged were viewed by many as part of Britain's divide-and-rule strategy, a plan designed to pit different segments of the Indian populace against each other so that Britain could remain dominant.⁵ (Chambers 2013)

¹ Laura Dudley Jenkins, *Contemporary Caste Discrimination and Affirmative Action*, in *HINDUISM AND LAW: AN INTRODUCTION* (Timothy Lubin, Jayanth Krishnan, & Donald R. Davis, Jr. eds., Cambridge University Press, 2010)

² Samuel M. Witten, *Compensatory Discrimination in India: Affirmative Action as a Means of Combating Class Inequality*, 21 *COLUM. J. TRANSNAT'L L.* 353 (1983)

³ Parmanand Singh, *Equality, Reservation And Discrimination In India* 82 (1985).

⁴ *Id*

⁵ *Id*

1.2. Compensatory Discrimination just after British Rule: Constitutional Provisions

India gained her independence from Great Britain in 1947. The new Indian state was modeled essentially on British lines—a parliamentary democracy was established with the President as the titular head of state, while the legal system was constituted according to common-law traditions.

Nehru and Ambedkar were both committed to the idea of an egalitarian India. These men were cognizant that a Dharmasastra-based system would be contrary to egalitarian principles and would evoke discontent among the lower castes.⁶ In 1946, a Constituent Assembly was established under Ambedkar's leadership with the purpose of creating India's Constitution.⁷

In December of 1946, the Assembly set up a special committee to deal with the issue of fundamental rights. Members of the Constituent Assembly faced a difficult choice in deciding which rights should be designated as fundamental. The Constitution drew its inspiration from the United States Bill of Rights, the Declaration of the Rights of Man from France, the Irish Constitution of 1935, and the Universal Human Rights Charter (Stern, n.d.).⁸ It declared the Republic of India to be committed to the ideals of securing justice, liberty, equality, and fraternity for all its citizens.⁹

The key Articles of the Constitution that would aid India in its objectives included Article 14 of the Constitution, which guaranteed equal protection of the law for all of India's citizens. To improve the condition of the poor and assail the hierarchical structure of Hindu society, the Constituent Assembly provided for a general right to equality for all persons before the law in Article 14 (Arstein-Kerslake and Flynn 2015). The inclusion of equal protection before the law in Article 14 was influenced by the equal protection clause in the Fourteenth Amendment of the United States Constitution.

⁶ Clark D. Cunningham, *Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey*, 16 A.B.A.J. 777 (1991)

⁷ V.D. Mahajan, *Constitutional Law of India* 11 (7th Ed. 1991)

⁸ *Id* at 41

⁹ Clark D. Cunningham, *Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey*, 16 A.B.A.J. 777 (1991)

Article 15, which prohibited discrimination on numerous grounds including caste. During the drafting of Article 15 it was noted that in a country like India, constitutional provisions protecting fundamental rights would be meaningless unless there were specific safeguards to protect individuals from discrimination on the basis of race, religion, or social status. Article 15(4), however, allows the state to make special provisions in the form of reservations⁶⁷ for the advancement of both socially and educationally backward classes and those who are designated as Scheduled Castes or Scheduled Tribes.¹⁰

Article 16, which promoted equality in public employment. The Constituent Assembly believed that compensatory discrimination in this field was both a method to strengthen India's underprivileged and a means of preventing upper classes from obstructing the admission of backward classes into government employment.¹¹ Article 16(1) guarantees the opportunity to be considered for government employment, but does not confer a right to actually obtain such employment.¹²

Article 16(4) amplifies Article 16(1) by stating two requirements for an individual to benefit from a reservation scheme¹³: First, the person must be both socially and educationally backward, and second, his social group must be inadequately represented in government employment. The decision of whether a class is deemed backward is determined by an objective analysis decided by the government. Taken together, Article 14 protects the general right to equality, while Articles 15 and 16 guarantee the same right in favor of disadvantaged groups.¹⁴

¹⁰ Damodaran v. Secretary to Govt, AIR 1991 AP 194

¹¹ Samuel M. Witten, *Compensatory Discrimination in India: Affirmative Action as a Means of Combating Class Inequality*, 21 COLUM. J. TRANSNAT'L L. 353 (1983)

¹² G.P. Verma, *Caste Reservation In India: Law And The Constitution*, 10 (1980)

¹³ Indra Sawhney v. Union of India, AIR 1993 SC 477

¹⁴ G.P. Verma, *Caste Reservation In India: Law And The Constitution*, 17 (1980)

The Constituent Assembly also dealt with the ancient social stigma of untouchability. Article 17, abolished the practice of untouchability.¹⁵ The abolition of untouchability gave millions of Indians equal status before the law. (Marx and Useem 1971)

The Indian Constitution explicitly incorporates compensatory discrimination policies in Article 46. Article 46 dictates that the government shall promote educational and economic interests of Scheduled Castes and Scheduled Tribes and will protect them from all forms of injustice and exploitation. The government may revise the list of backward classes needing special treatment as their economic and educational conditions improve.¹⁶ When a section of the population is deemed backward it is not assumed that they will permanently be treated as such because economic, educational, and social conditions for them may improve (Kang and Park 2016).

The Constitution also specifically set aside seats in state legislatures and the Parliament for SC/ST individuals.¹⁷ The Constituent Assembly included these provisions in the Constitution to incorporate the goals of compensatory discrimination under early British programs. Reservations for the Scheduled Castes and Scheduled Tribes in the legislature conferred political power to groups of Indians whose representation in the federal and state elected branches of the Indian government was previously inadequate (Ji Eun Lee and Lee 2010).¹⁸

2. BENEFICIARIES AND RECOMMENDATIONS FOR THEIR ADVANCEMENT

2.1. The first backward class commission

To determine the criteria for identifying socially and educationally backward classes, the Indian Central Government appointed the first Backward Classes Commission under Article 340 of the Constitution on January 29, 1953. The President may appoint a commission to investigate the conditions of the backward classes and that this commission should report back with their

¹⁵ *Id*

¹⁶ V.D. Mahajan, *Construtritional Law of India* 373 (7th Ed. 1991)

¹⁷ Art 330, Constitution of India, 1950

¹⁸ B. Sivaramayya, *Protective Discrimination and Ethnic Mobilization*, 22 J. INDIAN L. INST. 480 (1980)

findings and recommendations.¹⁹ The popular name of the first Backward Classes Commission was the Kaka Kalelkar Commission, named after its chairman.(UN 2016)²⁰ Two years later the Commission presented a list of 2,399 groups it considered backward and recommended numerous measures to improve their status.²¹ The criteria used to identify backwardness were trade and occupation, security of employment, level of education, general representation in government positions and, most importantly, position in the Hindu caste hierarchy.²²

On March 30, 1955 the first Backward Classes Commission submitted its report to the President.²³ The Commission proposed reservations in government jobs ranging from twenty-five percent to forty percent according to the level of the position. They further recommended a reservation of seventy percent in technical and professional institutions for qualified students of backward classes.²⁴

At the same time the Commission submitted its recommendations, the chairman of the Commission, Kaka Kalelkar, repudiated the report by claiming that the Commission should have used criteria other than caste to designate a group as backward. The Commission's report was also accused of having methodological flaws and internal contradictions.²⁵ Accordingly, the report of the first Backward Classes Commission was rejected by the Parliament and its recommendations were never implemented.²⁶

The first Backward Classes Commission report was used only for reference and academic purposes and that most people, other than politicians, forgot about the Commission. the criteria used were not reliable in terms of how the designated classes were perceived to be backward

¹⁹ Art 340, Constitution of India, 1950

²⁰ Indra Sawhney v. Union of India, AIR 1993 SC 477

²¹ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 169 (1984)

²² *Id* at 170

²³ Mandal Commission Report: *Myth And Reality* 7 (K.L. Chanchreek & Saroj Prasad eds., 1991)

²⁴ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 172 (1984)

²⁵ Mandal Commission Report: *Myth And Reality* 225 (K.L. Chanchreek & Saroj Prasad eds., 1991)

²⁶ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 173 (1984)

because the Commission had adopted a list prepared by a separate government agency used for an entirely different purpose.(Sen, Gang, and Yun 2008)

2.2.The Second Backward Class Commission

On December 20, 1978, then Prime Minister Morarjibhai Desai announced that he would appoint a second Backward Classes Commission under the chairmanship of B.P. Mandal, Member of Parliament(India. Backward Classes Commission and Mandal 1991). The Mandal Commission was formed with the purpose of determining the criteria for identifying the socially and educationally backward classes and to report on the desirability of reservations and other measures to advance these backward classes not adequately represented in educational institutions and public employment.²⁷(Barman 2009) On December 31, 1980, two years later, the Mandal Commission submitted its report to the then President of India, Neelam Sanjiva Reddy.

2.2.1. Criteria for Identification of Backward Class

The Mandal Commission Report noted that Articles 15(4) and 340(1) made special reference to social and educational backwardness but did not state a requirement of economic backwardness.²⁸ By giving priority to economic tests the government had previously paid little attention to Constitutional requirements which were silent as to a group's economic status as a criterion for backwardness. Economic backwardness may not be used as the sole test of social and educational backwardness to merit special protection under Article 16(4)²⁹(Rands Barros and Barros 2016)

The Mandal Commission further noted that the strength of the caste system was not in upholding the supremacy of the Brahmin. Instead, its strength was in conditioning the consciences of lower castes into accepting their status as inferior persons. Social and educational backwardness was a direct consequence of the hierarchal caste system.(Teltumbde 2010)³⁰ The Mandal Commission noted that the caste system was enduring: it had survived challenges from Buddhism, Islam, British culture and colonial administration, and even the crusades of Gandhi.

²⁷ Paul Lansing & Sarosh Kuruvilla, *Job Reservation in India*, 37 LAB. L.J. 653 (1986)

²⁸ Report of the Mandal Commission, 1980

²⁹ Shivaji v. Chairman, M P S Commission, AIR 1984 Bom 434

³⁰ Report of the Mandal Commission, 1980

Finally, the Commission stated that there could be no equality among those who have been historically denied equal opportunity.³¹

The treatment of un-equals as equals only perpetuated inequality in India. The Mandal Commission noted that by allowing the weak and strong to compete on equal footing, the central and state governments were in essence creating a "mock competition" where weaker sections of society were destined to fail from the start. The Mandal Commission was determined to remedy this inequality.³²(Novak 2018)

In Chapter XI of the report, the Mandal Commission set forth its criteria for identifying the Other Backward Classes.³³ The Mandal Commission considered the criticisms of the first Backward Class Commission and also several judgments of the Indian Supreme Court.³⁴ The Commission based its conclusions on a survey of 405 districts by the Bureau of Economics and Statistics.³⁵ The survey used was designed with the assistance of top Indian social scientists and specialists. From this analysis the Commission developed several key indicators of social and educational backwardness.³⁶ These indicators of backwardness were grouped under the three main headings of social, educational, and economic status.³⁷

Indicators of social backwardness included whether most members of society considered their caste or class to be backward and whether they came from a region generally considered to be backward.(Suryawanshi and Dhande 2013)³⁸ Marriage can raise or lower the social status of women. a woman born into a higher caste who marries a man born into a backward caste changes her social status and may take advantage of university admission reservations for his

³¹ Report of the Mandal Commission, 1980

³² Report of the Mandal Commission, 1980

³³ Mandal Commission Report: Myth And Reality 296 (K.L. Chanchreek & Saroj Prasad eds., 1991)

³⁴ Indra Sawhney v. Union of India, AIR 1993 SC 477

³⁵ Mandal Commission Report: Myth And Reality 296 (K.L. Chanchreek & Saroj Prasad eds., 1991)

³⁶ Indra Sawhney v. Union of India, AIR 1993 SC 477

³⁷ Mandal Commission Report: Myth And Reality 296 (K.L. Chanchreek & Saroj Prasad eds., 1991)

³⁸ Report of the Mandal Commission, 1980

caste so long as the marriage was not a "mock marriage" designed for the sole purpose of benefitting from a reservation.³⁹ The court reasoned that this would be an incentive to encourage inter-caste marriages which, in the past, were considered taboo. Additionally, the court stated that after marriage the woman passes to the domain of her husband and is no longer a part of her own family but instead is a member of her husband's family.

Another consideration was whether the caste or class depended on manual labor for its livelihood. An additional indicator was whether twenty-five percent of the females and ten percent of the males above the state's normal average were married at age seventeen or below. In urban areas this indicator of backwardness was whether ten percent of the females and five percent of the males above the state's average were married at age seventeen or below.⁴⁰

Educational criteria for backwardness included the number of children who had never attended school. Furthermore, castes or classes where the student drop-out rate was twenty-five percent above average were also relevant when determining whether a class was backward. Economic indicators of backwardness included castes or classes whose total family assets were twenty-five percent below the state average and the number of households who had taken out loans to pay for basic living expenses. In addition, the Mandal Commission considered castes or classes whose source of drinking water was more than half a kilometer from their homes.(Suryawanshi and Dhande 2013; Sedwal and Kamat 2008)⁴¹

2.2.2. Recommendations of the Mandal Commission Report

In its report, the Mandal Commission observed that Scheduled Castes and Scheduled Tribes make up approximately twenty-two and a half percent of India's population.⁴² Accordingly, twenty-two and a half percent of government jobs had already been reserved on their behalf.⁴³ Because the Other Backward Classes make up fifty-two percent of India's population, fifty-two

³⁹ Uma Devi v. Kurnool Medical College, AIR 1993 AP 38

⁴⁰ Mandal Commission Report: Myth And Reality 296 (K.L. Chanchreek & Saroj Prasad eds., 1991)

⁴¹ Report of the Mandal Commission, 1980

⁴² Mandal Commission Report: Myth And Reality 225 (K.L. Chanchreek & Saroj Prasad eds., 1991); Report of the Mandal Commission, 1980

⁴³ *Id.*

percent of government posts should therefore be set aside for their benefit.(Kohli 2001)⁴⁴ This, however, conflicted with past Indian Supreme Court and state court judgements that held that the total amount of reservations permissible under Articles 15(4) and 16(4) of the Constitution must be less than fifty percent.⁴⁵

Thus, the percentage of reservations needed to be set at a figure which, when combined with the twenty two and a half percent reservations for the Scheduled Castes and Scheduled Tribes, remained below the constitutional ceiling of fifty percent. Hence, the Mandal Commission recommended twenty-five percent reservations for the Other Backward Classes despite the fact that their population is almost twice that figure. The twenty-seven percent figure applied to all government services as well as placement in technical and professional educational institutions.⁴⁶ Added together, the two sets of reservations came to forty-nine and a half percent, just below the fifty percent ceiling.

With these and other factors in mind, the Mandal Commission made several additional recommendations.⁴⁷ The Commission contended that the percentage of backward classes that obtain public employment through open competition should not be adjusted against the reservation quota of twenty-seven percent.(Sen, Gang, and Yun 2008)⁴⁸ It means if a person from the Other Backward Classes obtains government employment based on merit, that position should not be subtracted from the total amount reserved for that category. This proposal is sound because the purpose of reservations is to assure a minimum of reservations for the Other Backward Classes and not to limit the maximum number of positions or seats at educational institutions that could be acquired by persons in reserved categories(“Backward Classes: Reservations, Recognition and the Republic,” n.d.).

⁴⁴ *Id.*

⁴⁵ M. R. Balaji v. State of Mysore, AIR 1963 SC 649

⁴⁶ Nandan Nelivigi, *Constitutional Validity of Mandal: Chitrlekha Revisited*, 3 NAT'L L. SCH. J. 127 (1991)

⁴⁷ Report of the Mandal Commission, 1980

⁴⁸ S.P. Sathe, *Constitutional Law*, 26 ANN. SURV. INDIAN L. 7 (1990)

Reservations for the Other Backward Classes would apply to promotions as well as for initial placement.⁴⁹ Unfilled quota would be carried forward for three years.⁵⁰ The reservation policy would apply to all private sector organizations that are recipients of government financial assistance⁵¹, including all universities and colleges. The Mandal Commission noted that the Indian educational system was elitist in nature and not suited for an over-populated and developing country. India's educational system had not changed since British rule. According to the Mandal Commission, reservation of seats at educational institutions was the most important method to advance the backward classes because education would improve their self-image and bolster their social status. It declared education as the best catalyst of change

Additionally the commission recommended the establishment of a separate Ministry for the Backward Classes.⁵² The Ministry would be created to safeguard the backward classes' interests at both federal and state levels. Finally, the Mandal Commission recommended that the entire scheme be evaluated after twenty years⁵³ because the raising of social consciousness would take at least one generation.(Müller 2017)

3. INDIAN SUPREME COURT TREATMENT OF COMPENSATORY DISCRIMINATION

3.1.Caste as a Condition for Backwardness: From Balaji to Rajendran

The Indian Supreme Court first dealt with the criteria for classifying particular communities of Indian society as backward in the seminal case of *Balaji v. State of Mysore*.⁵⁴ In *Balaji*, the Supreme Court dealt with the question of whether caste could be used as the sole test to determine backwardness.⁵⁵

⁴⁹ Report of the Mandal Commission, 1980

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Nandan Nelivigi, *Constitutional Validity of Mandal: Chitralekha Revisited*, 3 NAT'L L. SCH. J. 127 (1991).

⁵³ Report of the Mandal Commission, 1980

⁵⁴ AIR 1963 SC 649

⁵⁵ *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649

In 1962, the State of Mysore issued an order that reserved for the Backwards Classes, Scheduled Castes, and Scheduled Tribes sixty-eight percent of the admissions to the engineering and medical colleges and other technical institutions specified in the 1961 order.(Barman 2009)⁵⁶ This left only thirty-two percent of seats to be awarded on the basis of merit.⁵⁷ The order was challenged by twenty-three petitioners claiming that the classification was irrational, that a sixty-eight percent reservation violated Article 15(4),⁵⁸ and that it was a fraud on the Constitution(National Research Council et al. 2009).⁵⁹ The petitioners contended that the reservation was a colorable exercise of state power and amounted to a fraud on the Constitution. The term fraud on the constitution is synonymous with the term colorable legislation Declaring When a government act is declared to be a fraud on the Constitution, it raises questions of the competency of a state government or the Indian Parliament to enact such a law. It does not, however, question the legitimacy of the representatives.

The Indian Supreme Court stated that while reservations should be adopted to advance underprivileged sections of society, such compensation should not exclude qualified applicants of other communities from admission to educational institutions.⁶⁰ The interests of the backward classes had to be arranged in relation to the community as a whole.⁶¹ Consequently, the Supreme Court ruled that reservations for the Other Backward Classes and the Scheduled Castes and Scheduled Tribes, when added together, should generally be less than fifty percent in total.⁶² The object of Article 15(4) was to advance society as a whole while still promoting the weaker communities.⁶³ In Karnataka, 33 of 35 professor positions reserved for Scheduled Castes,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ H M Seervai, *Constitutional Law of India* 133 (1995)

⁶⁰ Balaji, 50 A.I.R. (S.C.) at 659.

⁶¹ *Id.*

⁶² M. R. Balaji v. State of Mysore, AIR 1963 SC 649

⁶³ *Id.*

Scheduled Tribes, and the Other Backward Classes at a state university was well above the Balaji 50% reservation ceiling and was therefore violative of Article 16(4) of the Indian Constitution.⁶⁴

In Balaji, the Supreme Court did not object to the use of caste as a criterion for backwardness.⁶⁵ The court held, however, that caste could not be the sole criterion for the identification of backwardness.⁶⁶ Communities with levels of illiteracy below that of the State could only properly be regarded as educationally backward. Other factors such as occupation and place of living should also be considered in addition to caste (Nesbitt 2016).⁶⁷ Essentially, Balaji allows caste to be considered, but does not allow it to be the sole criterion of backwardness (Guha, n.d.).⁶⁸

The failure to make a distinction between castes as a potential backward unit, as opposed to the hierarchical rank of a caste, encouraged the belief that caste membership was not to be included when determining backwardness. The Constitution specifically states backward classes, not backward castes, and that the determination of backwardness must be both social and educational. A caste test alone would fail with Christian and Muslim Indians who are socially and educationally backward and deserving of special treatment. Balaji gave hope that reservations for Central Government employment and educational institutions would be based on class rather than caste.⁶⁹ Members of Scheduled Castes who convert to Christianity and back to Hinduism should be allowed to benefit from reservations because the objective of compensatory discrimination is to compensate for past injuries.⁷⁰

⁶⁴ Rajkumar v. Gulbarga University, AIR 1990 Kant 320

⁶⁵ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 191 (1984)

⁶⁶ M. R. Balaji v. State of Mysore, AIR 1963 SC 649

⁶⁷ *Id.*

⁶⁸ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 192 (1984)

⁶⁹ B. Sivaramayya, *Protective Discrimination and Ethnic Mobilization*, 22 J. INDIAN L. INST. 480 (1980)

⁷⁰ Guntur Medical College v. Mohan Rao, AIR 1976 SC 1904

In 1963 the Court was confronted with a similar case arising under Article 16(4) in *T Devadasan v. Union of India*.⁷¹ Devadasan confronted the issue of whether the amount of unfilled reserved positions in government employment could be carried forward and added to reserved positions for the following two years if that amount exceeded fifty percent.⁷² Here, after carrying forward unfilled reservations from the previous year, the total amount of reserved positions came to sixty-four percent.⁷³ This was well above the fifty percent limit announced in *Balaji*. The Supreme Court declined to make such an exception and affirmed the fifty percent principle set forth in *Balaji*.⁷⁴

In *Chitrallekha v. State of Mysore*,⁷⁵ the Court dealt with the issue of whether it is mandatory to consider caste, along with other factors, when determining backwardness.⁷⁶ Here, the Court first found that *Balaji* had laid down two main principles: 1) caste status may be a relevant condition to ascertain social backwardness; but 2) it could not be the sole criterion for this determination. Expanding on its earlier decision, the Court contributed to *Balaji* the notion that though the use of caste is permissible, it is not a mandatory measure of a group's social and educational backwardness. (Mathur and Jain 2013)⁷⁷

The Supreme Court altered its approach in *Rajendran v. State of Madras*.⁷⁸ Here, the Court held that a particular caste is in fact a class of citizens, and may be used as a unit to be measured for backwardness.⁷⁹ So long as it could be proven that an entire caste was socially and educationally

⁷¹ AIR 1964 SC 179

⁷² *T Devadasan v. Union of India*, AIR 1964 SC 179

⁷³ *Id.*

⁷⁴ *T Devadasan v. Union of India*, AIR 1964 SC 179

⁷⁵ AIR 1964 SC 1823

⁷⁶ *Id.*

⁷⁷ *Chitrallekha v. State of Mysore*, AIR 1964 SC 1823

⁷⁸ AIR 1968 SC 1012

⁷⁹ *Id.*

backward, reservations for it fell within the meaning of Article 15(4).⁸⁰ In *Rajendran*, the Court endorsed the view that caste as a unit, rather than caste rank, should be the gauge of backwardness.⁸¹ Additionally, the Court placed upon the party challenging the reservation the burden of proving that the method used to identify backward classes was unsatisfactory.⁸² Though disapproving of caste as the sole basis of backwardness, *Balaji* and *Chitrallekha* were silent as to which party carried the burden of proving that the challenged reservation was unconstitutional.

3.2.An Innovative Opinion: Thomas and Vasanth Kumar

The Indian Supreme Court's decision in *State of Kerala v. N M Thomas*⁸³ signified the beginning of new thinking on Article 16. But the origin of the court's decision in *Thomas* was the dissenting opinion of Subba Rao, J., in *Devadasan*.⁸⁴ In *Thomas*, the State Government of Kerala had issued a notification granting a two-year temporary exemption to employees belonging to either Scheduled Castes or Scheduled Tribes from passing a test for promotions.⁸⁵ According to the order, all Scheduled Castes and Scheduled Tribes who were unable to pass the test could still be promoted to higher positions.⁸⁶ They were, however, required to pass the test at some point within the two-year exemption period.⁸⁷

The Supreme Court stated that there can be reasonable classifications in matters of promotions under Article 16(1).⁸⁸ The Court in *Thomas* read preferential treatment of Scheduled Castes and Scheduled Tribes into the equal opportunity clause of Article 16(1) even though Article 16(4)

⁸⁰ *Id*

⁸¹ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 198 (1984)

⁸² *Rajendran v. State of Madras*, AIR 1968 SC 1012

⁸³ AIR 1976 SC 490

⁸⁴ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

⁸⁵ *State of Kerala v. N M Thomas*, AIR 1976 SC 490

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Mohammad Ghose, *Constitutional Law*, 12 ANN. SURV. INDIAN L. 240 (1976)

specifically provides for special treatment. Article 16(4) was not an exception to Article 16(1).⁸⁹ Rather, Article 16(4) clarifies and explains that classifications based on backwardness are permissible under Article 16(1).⁹⁰ Thomas gave new content to equal opportunity by viewing compensatory discrimination as complementary to Article 16(1). The Court opined that the principle of equal opportunity embraces the concept of preferential treatment for India's underprivileged.

Granting a two-year exemption to employees who are members of Scheduled Castes or Scheduled Tribes was a just and reasonable classification which had a rational nexus to the goal of providing equal opportunity to all citizens in respect to public employment.⁹¹ The classification was fair because it gave members of Scheduled Castes and Scheduled Tribes two additional years to pass the exam.⁹² In sum, the Supreme Court in Thomas gave the government greater liberty in implementing compensatory discrimination policies.⁹³

*Vasanth Kumar v. State of Karnataka*⁹⁴ was the last decided case before the 1992 Indra Sawhney decision. In *Vasanth Kumar*, the Indian Supreme Court was asked to give an advisory opinion on the criteria that should be used to identify classes that are socially and educationally backward. In four of the five separate opinions, the court accepted the use of caste as a unit to identify backward classes. One judge recommended that while caste may be used as one criterion, in certain cases an income ceiling might be set so that members of a caste who have the economic means to advance themselves without government assistance will not take advantage of a preference system meant for the socially and economically disadvantaged.⁹⁵ One judge,

⁸⁹ *State of Kerala v. N M Thomas*, AIR 1976 SC 490

⁹⁰ *Id*

⁹¹ *State of Kerala v. N M Thomas*, AIR 1976 SC 490

⁹² *Id.*

⁹³ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 390 (1984)

⁹⁴ AIR 1985 SC 1495

⁹⁵ *Id*

however, asserted that there should only be an economic test to make determinations of backwardness and that caste rank should not be considered at all.⁹⁶

3.3.Present Day Situation: *Indra Sawhney v. Union of India*

The validity of the order of former Prime Minister V.P. Singh to implement the Mandal Commission recommendations was examined in *Indra Sawhney v. Union of India*.⁹⁷ The case involved all the issues previously decided in cases from Balaji to Vasanth Kumar.

In *Indra Sawhney*, the Court first partially overruled *Balaji* and *Devadasan* by holding that Article 16(4) was not an exception to 16(1).⁹⁸ Article 16 recognizes equal employment opportunities for all citizens and reservations are merely an exception limited in point of time; accordingly, short-term goals of protective discrimination cannot be allowed to adversely affect the permanent features of the Constitution. Instead, the Court declared that classifications and provisions for backward classes were implicit in Article 16(1).⁹⁹ Thus, classifications and reservations under 16(4) merely make explicit what was already implied in 16(1).¹⁰⁰ Furthermore, the Court stated that reservations were not the only means available under Article 16(4) to advance the backward classes.¹⁰¹ The state could make additional less extreme provisions,¹⁰² such as concessions, exemptions, and other relaxations, to advance those classes deemed backward.¹⁰³ These supplemental provisions fall within the broad scope of reservations.¹⁰⁴ The constitutional scheme and general context of Article 16(4) led the justices to believe that the

⁹⁶ *Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495

⁹⁷ AIR 1993 SC 477

⁹⁸ *Id*

⁹⁹ *Id*

¹⁰⁰ *Id*

¹⁰¹ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹⁰² *Id*

¹⁰³ *Id*.

¹⁰⁴ *Id*

broader concept of reservations includes any potential ancillary or supplemental provisions the state may find reasonable.

The Court next addressed the meaning of the term Backward Classes, an issue already examined in *Balaji*. Though *Balaji* and *Devadasan* arose under Article 15(4) and not Article 16(4), their interpretations of Article 15(4) were adopted for cases arising under Article 16(4) as well. Under this interpretation, backwardness had to be both social and educational and must not be determined solely on the basis of caste status. Article 16(4) did not contain these qualifying words, social and educational backwardness were read into it by the Court.¹⁰⁵

The Court said that in pre independence India, where the words *caste and class* were used interchangeably, *caste* was an enclosed class of citizen.¹⁰⁶ The Constitution did not use the word *caste* in Article 16(4) because the Indian Constitution was meant for the entire country.¹⁰⁷ Except Hindus other religions or sects present in India such as Islam, Christianity, and Sikh do not recognize the caste system, even though castes have existed among these religions or sects to some degree. *Caste*, according to the Court, is nothing more than a term for a socially and occupationally homogeneous class.¹⁰⁸ The Constitution envisioned the possibility that in the future many different classes may qualify as backward and need the protection that 16(4) affords. The Indian Constitution was intended to be a permanent document expected to last centuries and envisioned a time when a person's caste would no longer bear on his or her social status. Accordingly, the Court held that even though the word *caste* is not specifically written in Article 16(4), it may still be used as a criterion for determining backwardness.¹⁰⁹

The Court emphatically stated that it was neither encouraging nor advocating the legitimacy of caste distinction.¹¹⁰ Rather, it merely pointed out that any program aimed at improving these sections of society must adjust its policy to recognize the evident reality of India's hierarchical

¹⁰⁵ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹⁰⁶ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹⁰⁷ *Id*

¹⁰⁸ *Id*

¹⁰⁹ S.P. Sathe, *Constitutional Law*, 26 ANN. SURV. INDIAN L. 7 (1990)

¹¹⁰ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

caste/social division. If caste is the basis for discrimination, it must also be the foundation for any remedial measures taken under the Constitution.¹¹¹ The Supreme Court of India noted that though a complete restructuring of the socio-economic system was the final objective, it could not be realized without first advancing India's backward classes both socially and educationally. For non-Hindus, the government could use other criteria as it considers appropriate to identify groups as backward. There is no one standard method to identify the Other Backward Classes.¹¹²

Next, the Court addressed the question of whether backwardness must be both social and educational. According to a plain reading of Article 16(4) the qualifying words social and educational were not included in the language of this provision.¹¹³ Consequently, the Court asserted that there is no requirement for a group to be both socially and educationally backward for the purposes of Article 16(4).¹¹⁴ The Court believed that the type of backwardness referred to by Article 16(4) was mainly social backwardness.¹¹⁵

To eliminate the possibility of advanced backward class members from profiting from the reservation schemes, the Court ordered the government to adopt an economic means test.¹¹⁶ This means test allows for the exclusion of the "creamy layer," those members of the backward classes who do not need government assistance because they have adequate economic means to promote themselves. The line drawn must be realistic and take into account the differences in the cost of living expenses between cities and rural parts of India. The Court asserted that exclusion of the socially advanced members from the backward classes would ensure that the groups designated as needing assistance are truly backward. The Court believed this would better serve the objectives of Article 16(4).¹¹⁷ The Court reasoned that exclusion of the "creamy layer" would

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*; *V Narayana Rao v. AP*, AIR 1987 AP 53

¹¹⁷ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

make such classes truly backward. The exclusion of the "creamy layer" from the Other Backward Classes category has no relevance to those designated as Scheduled Castes and Scheduled Tribes.

The Sawhney, the Supreme Court continued to follow the Balaji fifty percent rule. Only in exceptional circumstances would reservations be permitted to exceed fifty percent. Consequently, the twenty-seven percent reservation for backward classes by Prime Minister V.P. Singh added to the existing twenty-two and a half percent reservation for Scheduled Castes and Scheduled Tribes, was safely within the fifty percent limit. The Court overruled Devadasan by stating that the most it could have done in that instance was to void the reserved appointments exceeding fifty percent.¹¹⁸

The Court noted that Devadasan had unnecessarily made all carry-forward provisions unconstitutional. This was especially unnecessary if the percentage carried forward to the following year, when added to the percentage of reservations for that year, did not exceed 50%.

The Court declined to extend reservations to promotions once a member of a backward class is employed. The Court observed that once hired, members of backward classes could compete and earn promotions on merit as do other public employees. Finally, the Court declined to approve of an additional ten percent reservation for poorer members of those upper classes not designated as backward.¹¹⁹

3.4.Ashok Kumar Thakur v. Union of India

In May 2006, upper-caste students and professionals protested vehemently against the central government's decision to implement another part of the Mandal Commission's Report recommending a 27% reservation for OBCs in government-managed educational institutes. The government implemented this part of the Mandal Report by passing the Central Educational Institutions Act of 2006 after parliament approved the Ninety-Third Amendment to the Constitution. The amendment provided for the government of India to create law to advance socially and educationally backward classes of citizens.¹²⁰

¹¹⁸ *Id*

¹¹⁹ *Id*

¹²⁰ Art 15(5), Constitution of India, 1950

The Supreme Court, in its April 2008 judgment, re-affirmed the legality of India's reservations system and its expansion to educational institutions managed by the central government.¹²¹ The court upheld the constitutional validity of the ninety third amendment as it did not violate the basic structure of the Constitution. Articles 15(4) and 15(5) of the Constitution were not mutually contradictory and thus Article 15(5) was not *ultra vires*. Moreover, the exclusion of minority educational institutions from Article 15(5) was not violative of Article 14. Apart from this the court also ordered the creation of creamy layer of those belonging to these socially and educationally backward classes, so that they could be excluded from the benefits of quotas.

4. RECOMMENDATIONS

The Indian Supreme Court has made great strides to provide a workable solution to protect against future inequities, yet guard against outbreaks of divisive and hateful violence as resulted in the fall of 1990(Wisniewski 2013). Unfortunately, these efforts have not always been successful. Periodic violence and protests over reservations for the Scheduled Castes, Scheduled Tribes, and the Other Backward Classes still plague India. The thoughtful decisions by the Indian Supreme Court have been unable to quell the violence and controversy. Accordingly, as the Court suggested in *Indra Sawhney*, the Indian Government should pursue other less extreme forms of compensatory discrimination.

One possible option is for the Government to lower the amount reserved for the Other Backward Classes from twenty-seven percent to, perhaps, fifteen percent. The Mandal Commission would have recommended reserving fifty-two percent of government jobs and university seats for backward classes in addition to twenty-two and a half percent for the Scheduled Castes and Scheduled Tribes but for the fifty percent Balaji rule.(Teltumbde 2010)¹²² This proportional reasoning is unsound and not substantiated by the Constitution. Articles 15(4) and 16(4) state that reservations may be provided for classes whose representation is inadequate, it does not discuss disproportional representation. Lowering the percentage of reservations for the Other Backward Classes to fifteen percent would set the total percentage of reservations at thirty-seven and a half percent. Though largely a symbolic gesture, it would likely serve to quiet dissent and

¹²¹ Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1

¹²² Report of the Mandal Commission

protect against future deadly riots by students and other protesters who find it difficult to accept a reservation scheme that grants almost half of public jobs and university seats on criteria other than merit.

Government agencies and universities should also follow the program of compensatory discrimination used by the Indian Institute of Technology (IIT) in New Delhi.¹²³ IIT operates a compensatory discrimination scheme where members of backward classes who fail the entrance examination by slim margins are nevertheless accepted and given special training and appropriate course work to bolster their technical skills (Valentine and Mosley 1998).¹²⁴ This program avoids the problem of having unprepared persons thrust into a highly technical environment.¹²⁵ Compensatory discrimination programs should also be implemented at the grade school level while children are still young.¹²⁶ Additionally, financial assistance should be made available to students from backward classes who wish to pursue a university degree.¹²⁷ The increased concentration on education and financial assistance to the backward classes will result in their progress.

Ideally, the purpose of these programs should be to raise the backward classes to a point where they can compete with advanced classes in education and employment.¹²⁸ The advancement of the backward classes to positions where they can compete with the rest of society will be a difficult task. The main value of improved education is that many backward class members will eventually be capable of securing employment in private organizations based on merit alone. This will mean a complete restructuring and expansion of the current educational infrastructure.¹²⁹ Restructuring will be difficult because a government that reduces or ends

¹²³ Ministry of Information And Broadcasting, India 1992: A Reference Annual 107-08 (1993)

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Paul Lansing & Sarosh Kuruvilla, *Job Reservation in India*, 37 LAB. L.J. 653 (1986)

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

reservations will most likely not remain in power for very long, and thus will be more likely to use reservations as a means of improving education rather than reducing them in favor of restructuring the system.

Compensatory policies also need to be expanded to the private sector.(OECD 2016) The Indian Government should offer incentives to private companies who employ members of the backward classes by granting tax reductions and other incentives. Labor unions, social organizations, and other civic bodies should also put pressure on the private sector. Many of these organizations are caste-based and do excellent work to increase job recruitment of members from their caste. Political parties, social organizations, and private individuals often apply pressure to these civic groups to approach local industries and request that they employ members from their respective castes or communities. These organizations could also function as informal job placement and career counseling services.

After close to fifty years of experimentation with reservations there is still no adequate evaluation of their accomplishments and costs.¹³⁰ Periodic evaluations are the most critical element of monitoring the performance of a reservation scheme. Accordingly, as recommended by the Mandal Commission, the Indian government should set up a permanent ministry to manage backward class identification and to set the percentage of job and university seats reserved for the Other Backward Classes. This ministry should follow the Indra Sawhney decision and use caste as a criterion for determining backwardness. Only by recognizing the reality of the India's caste hierarchy can the government implement programs to advance the backward classes(Smarandache, Vasantha Kandasamy, and Kandasamy 2016).¹³¹ As larger percentages of backward class members are raised to reasonable levels of social and educational advancement, they should no longer be classified as backward so that government efforts are concentrated on those who genuinely need assistance

Instances of fraud and the exclusion of the creamy layer - those members from backward classes who have the economic means to advance themselves - should also be examined by this specialized government ministry. Additionally, the percentage of reservations, criteria for

¹³⁰ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 64-72 (1984)

¹³¹ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

backwardness, and policies to detect fraud should be reviewed at least every five years.¹³² This is necessary because the criteria for backwardness must be relevant to present conditions. Ideally, in the future all reservations should be gradually phased out once the backward classes achieve social and educational advancement. Though this may be a lofty goal, it should, nonetheless, be the central aim of the policy. A periodic review of backwardness criteria and a slow phasing out of reservations is the best way to meet India's long-term interests, as failure to periodically review these policies will provide an incentive for backward classes to remain "backward" so they can profit from government guarantees of educational and employment opportunities with little effort.

India's policy of compensatory discrimination was initially designed to be self-liquidating; to the degree that these policies succeed, they in turn are to be phased out as specific performance goals are reached. Continued protection based upon class status may perpetuate the social division that the policy was designed to eliminate. The belief that permanent protection is needed for the backward classes reflects the original caste hierarchic ideology that the measure of one's natural ability was based on caste.(Sharma 2002)¹³³

5. CONCLUSION

From a bewildering kaleidoscope of religions, castes, languages, and ethnic communities, the Indian Constitution and subsequent case law has directly confronted issues of caste and ethnic discrimination. In a legal system similar to our own, India has established guarantees of constitutional liberty and spirited protection of human rights despite overwhelming poverty, cultural diversity, and political tension.

India deserves credit for embarking on a daunting project to reduce caste-based inequalities. Caste-based inequalities will not disappear overnight and that the government must take special steps to alleviate the situation of the SCs, STs, and the genuinely needy among the "backward classes." However, quotas are not the only way in which caste-based inequalities can be reduced. Although a system of reservations has played an important role in uplifting the Dalits, it has been ineffective in helping the genuinely needy among the OBCs. Furthermore, the reservation system

¹³² Paul Lansing & Sarosh Kuruvilla, *Job Reservation in India*, 37 LAB. L.J. 653 (1986)

¹³³ Marc Galanter, *Competing Equalities: Law and the Backward Classes of India* 363 (1984);

for OBCs has played a role in the continued suppression of the Dalits. Thus, new measures must be contemplated to assist the truly needy sections of the OBC community.

While poverty exists in almost every country, no other country has had the misfortune of having a rigid four-tier caste social division superimposed on poverty. The founders of the Indian Constitution were aware of the problems faced by India's lower castes and wrote the Constitution with the intention of surmounting these obstacles. By refining, modifying, and monitoring compensatory discrimination policies and programs, India will be able to better protect the interests of all its citizens and serve as an inspiration to other nations confronting racial and ethnic disparities.

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