Lex Humana, Petrópolis, v. 14, n. 2, p. 91-106, 2022, ISSN 2175-0947

JUDICIAL DISCOURSE ON CASTE-BASED RESERVATION IN INDIA FROM BALAJI TO INDRA SAWHNEY [1]

DISCURSO JUDICIAL SOBRE A RESERVA BASEADA EM CASTAS NA ÍNDIA DE BALAJI A INDRA SAWHNEY

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Abstract: In the recent past, the Indian courts have often passed critical remarks on the reservation policy, thereby reinforcing the existing upper caste narrative and rhetoric on caste and reservation. And while in all of these cases, the courts have not challenged the legality of caste-based reservation but the constant judicial scrutiny of reservation demonstrates the influence of majoritarian narratives on caste and reservation. The questions like for how many generations reservation will continue? Or suggestions to formulate reservation policy based on economic criteria display a certain judicial bias towards upper caste prejudice against reservations. Such opinions presented in the form of discourse give space to dilute or dismiss the reservation in the public sphere. This article argues that the judicial opinions on the reservation when looked at critically in the historical context demonstrate how the upper caste narratives find judicial space and the narratives of backward classes are marginalized. To understand how the Indian judiciary perpetuates majoritarian narratives, the article examines the judicial opinion on caste and reservation in the two landmark judgments- M.R. Balaji & others vs. the State of Mysore and Indra Sawhney & other vs. Union of India.

Keywords: Judicial Discourse. Reservation. India.

Resumo: No passado recente, os tribunais indianos têm frequentemente passado comentários críticos sobre a política de reservas, reforçando assim a narrativa e a retórica existente sobre castas superiores e reservas. E enquanto em todos esses casos, os tribunais não contestaram a legalidade da reserva baseada em castas, mas o constante exame judicial da reserva demonstra a influência das narrativas majoritárias sobre a casta e a reserva. As questões como por quantas gerações a reserva continuará? Ou sugestões para formular uma política de reservas baseada em critérios econômicos mostram um certo preconceito judicial em relação às reservas de castas superiores. Tais opiniões apresentadas sob a forma de discurso dão espaço para diluir ou dispensar a reserva na esfera pública. Este artigo argumenta que as opiniões judiciais sobre a reserva quando analisadas criticamente no contexto histórico demonstram como as

1 The article is based on and is a part of author's Ph. D research work title 'Political Consolidation of Other Backward Classes (OBCs) in India: A Historical Analysis.'

* Artigo recebido em 05/09/2022 e aprovado para publicação pelo Conselho Editorial em 18/09/2022.

narrativas das castas superiores encontram espaço judicial e as narrativas das classes atrasadas são marginalizadas. Para entender como o judiciário indiano perpetua as narrativas majoritárias, o artigo examina a opinião judicial sobre a casta e a reserva nas duas sentenças históricas - M.R. Balaji & outros contra o Estado de Mysore e Indra Sawhney & outros contra a União da Índia.

Palavras-chave: Discurso Judicial. Reservas. Índia.

1. INTRODUCTION

Among the various measures taken by the Indian state to redress caste-based discrimination and disadvantage in Indian society, reservation in jobs and educational institutions is perhaps the most significant. To this, articles 15(4) and 16(4) of the Indian constitution give a clear directive to the state to create policies of positive discrimination in educational institutions and jobs for the Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs). And barring reservation for the STs, caste is the determining factor for reservation in India. Further, the idea of reservation in India stems from the principle of social justice and the logic of equitable sharing of the nation's resources. Therefore, reservation in India is provided under a fixed quota system, which ensures that the marginalized caste groups/ communities have an equitable share. So, for instance in central government jobs- 7.5% of seats are reserved for the STs, 15% for the SCs, and 27% for the OBCs. However, if the articles of positive discrimination are spelled so clearly in the constitution, why there is still ambiguity over the caste-based reservation in India? Also, how does the anti- reservation discourse persist inside and outside the judiciary?

As argued by Satish Deshpande that to achieve a casteless society, the Indian state had to disengage with caste but to redress caste-based inequality in society it was also compelled to recognize caste (Deshpande:2013). It is this unease of the post-independent state with caste and the nation's desire for modernity that made the implementation of reservation difficult. The modern-secular sensibilities of the Indian state coupled with the language of merit and efficiency resisted caste in public spaces. In fact, the upper caste anti-reservation logic is also anchored in the idea that reservation is anti- merit and perpetuates the institution of caste. In other words, the Indian upper caste could deny their caste-based privilege and still could make claims about castelessness. Satish Deshpande calls this presumptive castelessness, as, "it did not require upper castes to give up their caste in reality; it simply assured they would be presumed casteless as long as they did not use their caste explicitly…caste was henceforth to be recognised only as a source of disadvantage or vulnerability, not as a source of privilege". On the other hand, the subaltern

narrative on caste required recognition of caste to record their lived experiences of oppression and discrimination. However, as the Indian state remained indecisive about the use of caste, it was left to the courts to interpret the constitutional intent of reservation and the criteria of reservation. This also meant that in the absence of the state, the Indian judiciary became the site of contestation between competing narratives over caste and reservation.

The usual exercise to understand the law is to insist that it functions on a system of rules and their interpretation. But as suggested by James White the law is also rhetorical in nature and operates under socio-political and cultural forces (White: 1985). This is not to argue that the law has no regard for the facts, it is just to say that the meaning-making process of law is far more expansive and complex. Therefore, the article argues that to understand the narratives used in the cases related to caste-based reservations, judgments have to be read beyond the mere ruling. The law has to be conceptualized as a discursive practice and as a text, where the legal application of logic is grounded in socially constructed narratives. Law seen as a text draws its meaning not only from the cannons of the discipline but also from the discursive practices existing within and beyond the law. Therefore, despite the intention of the judges to analyze law by the rules of the discipline, they reproduce certain kinds of positions and ideologies, while marginalizing others. Such as the subaltern identities evoking caste and seeking reservation become an anomaly to the unmarked casteless citizen.

The engagement of the Indian judiciary over the question of caste-based reservation is marred by two opposing approaches. A conservative reading of the Indian constitution, where the caste-based reservation is seen as an exception or an anomaly to the articles of non-discrimination (15(1) and 16(1)). The other is a more purposive reading of the constitution, where articles 15(4) and 16(4) are interpreted as an extension of the principle of equality and non-discrimination. Based on the above conceptual framework the article provides an analysis of two landmark judgments M.R Balaji vs the State of Mysore and Indra Sawhney vs Union of India.

Balaji Case

In 1962 the Mysore government issued an order reserving 68% of the seats for the SCs, STs, and, OBCs in the state-run educational institutions. The order also created two sub-categories among the OBCs, namely, backward classes and more backward classes. This decision of the Mysore state was immediately challenged by 23 petitioners in M.R. Balaji State of Mysore. It is important to note that the Balaji judgment came out in a time of hostility towards caste-

based reservations. The central government had spelled out its reluctance towards holding caste as a criterion for reservation. Consider this statement passed by the Indian Prime minister Jawaharlal Nehru in his letter to the Chief Ministers in June 1961.

… if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate. I am grieved to learn how for this business of reservations has gone a based on communal consideration. It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly but disaster. Let us help the backward groups by all means, but never at the cost of efficiency…[1]

Also, some prominent sociologists and political scientists had begun speaking on similar lines as the government and the media (only the print media had existed then) had served as a platform to hold out against caste-based reservations.[2] The reservation was presented as a divisive policy and therefore justified any restriction that was imposed on the caste-based reservation.

On the other hand, the importance of the Balaji case lies in the fact that it influenced the outcome of many backward class commission reports and the opinion of the judiciary for decades. More importantly, the decision in the Balaji case maintained ambiguity over the caste-conscious reservation policy and laid the foundation for the larger debate on the caste-based reservation that spanned more than three decades. To list down a few important issues that were raised in the Balaji case and shaped the contours of the debate over the issue of reservation in concern to OBCs:

1. What were the criteria for identifying social and educational backwardness?
2. What was the role of caste in determining social backwardness?
3. Was the sub-classification of backward classes into categories valid?
4. Was the quantum of reservation excessive?

[1]Jawaharlal Nehru, *'Letter to Chief Ministers*, New Delhi, 27 June 1961, in Parthasarathi (ed.), Letters to Chief Ministers 1947-64, Vol. V, 1968, New Delhi: Oxford University Press, 1989, pp. 456-457.' These comments were made after an event on the national integration where Nehru and other Congress members have condemned casteism as the antithesis to social progress.

[2] In his book Competing Inequality Galanter, gives an account of opposition towards caste based reservation among the scholars and even some of the newspaper has reflected the same concerns. See, Galanter (1984) pp.72- 82.

2. RESULTS AND DISCUSSION

Nature of Backwardness: Conflating Caste and Class

While the court in the Balaji case maintained the general hostility towards caste, it did spell out that caste can constitute a constitutional class if proved to be socially and educationally backward.[1] However, in doing so, the higher judiciary introduced the 'rule of caution' by arguing against the sole and dominant use of caste as it was feared by the court that reservation merely based on caste will end up perpetuating caste.[2] Besides this, the other reason put out by the court to rule out caste as the sole criteria to determine backwardness was based on the argument that caste was not practiced among religious groups other than the Hindus and therefore it will lead to their exclusion from the backward class list.[3] Even this interpretation was based on a faulty assumption that the caste system prevailed only among the Hindus and the court, in this case, failed to understand that caste as an institution was prevalent among the Muslims also.[4]

The judicial confusion over caste also stemmed from the conflation of poverty with caste-based discrimination. The learned judges argued that the problem of determining who are socially and educationally backward classes is undoubtedly very complex "*social backwardness is on the ultimate analysis, the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward* (emphasis added by author). They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens".[5]

This caste-neutral approach from the court claiming to give relevance to both caste and poverty opens the possibility of overlooking caste completely. The court failed to show novelty while interpreting constitutional provisions of such importance, whose purpose was quite clear, and even if there was any ambiguity left, the First Amendment to the constitution had cleared it,

[1] While clarifying that the impetus for reservation comes from the preamble of the constitution the court in Balaji case permitted the use of communal units such as communities, which included caste also. The court argued: "It is for the attainment of social and economic justice that Article 15 (4) authorizes the making of special provisions for the advancement of the communities there contemplated, even if such provisions may be inconsistent with the fundamental rights guaranteed under Article 15 or 29(2)". M.R. Balaji & Others vs. the State of Mysore, AIR 1963 SC 649.

[2] The court argued: "Therefore in dealing with the question as to whether any class of citizens is socially or educationally backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection, it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may -be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves". See, AIR 1963 SC 649.

[3] To this court argued …..if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society. How is the one going to decide whether Muslims, Christians or Jains or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups. M.R. Balaji & Others vs. the State of Mysore, AIR 1963 SC 649.

[4] For further details on caste hierarchy within the Muslims See, Azra Khanam (2013) Muslim Backward Classes: A Sociological Perspective. Sage Publications India Pvt. Ltd.

[5] M.R. Balaji & Others vs. the State of Mysore, AIR 1963 SC 649

which in an emphatic way gave the constitutional mandate for the caste-based reservations[1]. Further, it is wrong to suggest that both poverty and caste-based discrimination might result in the same kind of disability and disadvantage. The insistence of the court to secularise caste by placing emphasis on class paved the way for many to assume that reservation should be given on economic basis.

Right to Equality and Positive Discrimination

The court, in the Balaji case, committed another error by the 'rule of exception', where it held the Constitutional provisions on affirmative action -- 15(4) and 16(4)) -- as subordinate to the Article on Equality – Article 14 -- and non–discrimination – Articles 15(1) and 16(1).[2] This approach was infirm from two important premises. Firstly, the object of the law was to achieve the equality that was laid out in Article 14, and the direction to do so was explicitly mentioned in both the provisions on non-discrimination and positive discrimination were not taken into consideration. Secondly, it is clear from a reading of Article 15(4), which says that nothing in this article meant that the classification of classes under article 15(4) should not be held discriminatory or as an exception to article 15(1).

In any case, the interpretation of treating one above the other stood against both the constitutional and the general idea of equality, treating policies of preferential treatment not as a way to further the equality among the citizens but as a welfare bargain given to the backward classes in the form of exception against the provision of equality and non-discrimination. Therefore, perpetually creating two categories of citizens, one who availed reservation and therefore constituted an exception to the society as against those who were not entitled to the reservation. This reasoning was not new and was, in fact, rooted in the arguments that were framed in the Champakam Dorairajan case, where the court cancelled the colonial scheme of reservation in Madras as it constituted discrimination against the upper caste students.[3]

Here, it is important to highlight that Article 14 is a general statement on equality and claims for only formal equality or in other terms, it is a declaration of equality before the law, irrespective of the fact that society, in general, has not achieved equality in terms of the treatment meted out to the different sections of the society. Contrary to this, both Articles 15(4)

[1] See Parliamentary Debates (Lok Sabha), Vol XII(Pt II), Col 9830.
[2] The court observed: . . . it must not be ignored that the provision which is authorised to be made is a special provision, it is not a provision which is exclusive in character so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of society at large would be served by promoting the advancement of weaker elements in the society that Article 15 (4) authorises special provision to be made. But a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15 (4). See AIR 1963 SC 649.
[3] The irregularities in the judicial interpretation have been highlighted in the Havanur Commision Report, especially the attempt to build a relation between reservation and article 14. See Karnataka Backward Class Commission Report, Vol. I., pp. 93-154.

and 16(4) provided the means to achieve substantive equality. However, this was not an error in the constitutional interpretation as much as the ideological leaning towards the 'meritocratic norms' which become clear when the court passed comment on merit and efficiency, declaring reservation as anti-meritarian.[1]

This position is further clarified when the decision in the Balaji case imposed a 50 percent mathematical limit on the reservation by saying that Article 16(4) exists as an exception to 16 (1). This meant that a restriction was imposed on the reservation, as a rule, even without confirming whether the general category constituted the other half of the total population. Such argument aids the myth that the un-reserved groups are bigger in number than those who avail reservation. It is pertinent to recall this aspect of the judgment verbatim:

> A special provision contemplated by Article 16(4) like reservation of posts and appointments must be within reasonable limits. The interests of weaker sections of society which are, a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserve practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15 (4). In this matter again *we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case* (emphasis added).[2]

Not only did the apex court promote the language of meritocracy by holding reservations as dilution of merit and as an exception to equality and positive discrimination, but it also prevented any possibility of reform in the reservation model as it struck down the idea of sub-classification within the OBCs. The sub-classification was logical to address the issue of heterogeneity among the OBCs and also to check that the reservation benefits were not cornered by a single group. However, the court, in this case, was least impressed with these arguments and instead observed that if backward classes are categorized there are chances that the advanced sections will enjoy the privileges.[3] Further, according to the court, backwardness cannot be relative; however, this argument has been overruled in later judgments.[4] While it can still be

[1] Arguing against reservation court in Balaji case observed: The demand for technicians scientists, doctors, economists, engineers a experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by wholesale reservation of seats in all Technical, Medical or Engineering colleges or institutions of that kind. See AIR 1963 SC 649.
[2] AIR 1963 SC 649.
[3] Holding such a classification as unconstitutional, court held that Art. 15(4) authorizes special provision for the really backward classes. In introducing two categories of Backward Classes, what the impugned order, in substance, purports to do is to devise measures for the benefit- of all the classes of citizens who are less advanced, compared to the most advanced classes in the State, and that, in our opinion, is not the scope of Art. 15(4). See, AIR 1963 SC 649.
[4] Almost after a decade such classification was held important.

argued that the court in this was right to strike down the principle of comparing backwardness in relation to forward classes but the denial of categorization within backward was unfortunate.[1]

In terms of the final verdict, the Balaji case set a pattern wherein rather than directing the state to eliminate those flaws which were objectionable it paved the way for the judiciary to completely reject the scheme of reservation for the OBCs. This was done even after the state of Mysore had pleaded before the Supreme Court to apply the 'Doctrine of Severability' and strike down only the invalid portion of the Government Order so that the remaining part of the order could have been implemented. But the Supreme Court declined to do so and the order was rejected *in toto*.[2]

The cautious tone of Balaji on the use of caste as the sole criteria of backwardness and the regressive comments on the reservation being ant-merit perpetuated further stigma against caste-based reservations. Its effect, however, was not limited to the judiciary, but even the several backward class commission reports, since then, seemed to be hesitant to go by the caste criteria alone, and consequently increasing impetus was laid on the economic criteria. It was not that, only expensive schemes were struck down; even the minuscule reservation like one that existed in Bihar was successfully challenged.[3] And each time reservation was struck down it was argued that caste cannot be the sole criteria for determining backwardness. This was the common theme on which the court decided to strike down reservations in many Indian states

Indra Sawhney Case

On August 1990, V.P Singh the Prime Minister of India announced the implementation of the Second Backward Class Commission Report and declared 27% reservation to the OBCs in jobs under the central government. As the report was implemented a case was filed by the Supreme Court Bar Association, which included prominent counsels like Nani A Palikhwala, who had argued against reservations in a plethora of cases and most important among them being the implementation of reservations in the Akhil Bharatiya Soshitvs Union of India case.[4] The backward classes, on the other hand, were represented by Ram Jethmalani, who was appointed by the Bihar government. In this case, a nine-member constitutional bench was

[1] The principle of relative backwardness was attacked once again in Balaji after it was struck down in Rama Krishna, where court has held "The concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included… backwardness under Art. 15(4) must be social and educational". See, Ramakrishna v. State of Mysore, AIR 1960 Mys 338.
[2] AIR 1963 SC 649.
[3] See, AIR 1965, Patna 372.
[4] See Akhil Bhartiya Shosit Karamchari Sangh (Railway) vs. Union of India & Others, AIR 1981 (SC) 298.

formed to settle the legality of the government order. In the same case, the Supreme Court was also assigned the task to clarify other important issues that were attached to the reservation.[1]

The court carefully looked at the arguments that were made in the previous cases, and in a split verdict (where only three of the nine judges were in favor of exclusion of caste as a criterion and suggested identifying backwardness on a purely economic basis) the majority held that caste can be used as criteria for backwardness if it has qualified the social and educational backwardness. While saying that, the majority also held that reservation, in the case of the OBCs, can be valid only if the creamy layer is excluded.[2]

Caste and Class

Even in the Indra Sawhney case, similar sets of concerns were raised by the petitioners who pleaded to abolish caste in a secular manner, therefore also suggesting that caste should not be used at all for the purpose of reservation. The counsel for the petitioners held, on various moments, that:

> A secular, unified and caste- less society is a basic feature of the Constitution. Caste is prohibited ground of distinction under the Constitution. It ought to erase altogether from the Indian society.[3]

This perhaps was the legacy Balaji case, which along with the Indian state insisted on the secularisation of backwardness by justifying caste as a class. This was not just a constitutional requirement but it also reflected the anxieties of the modern nation-state towards caste, which privileged the upper caste discourse of caste blindness. Now, that being the context, the court had to decide on two sets of questions

1. Can 'caste' constitute 'class' or is that the 'caste' and 'class' are distinctive categories that cannot be merged into one; and
2. If that was considered to have been settled -- that is caste is a class or vice versa -- how can the court justify caste in a secular sense as argued by the petitioners?

To start with, the more important question was as to what is the constitutional definition of the backward class. From a socio-anthropological perspective, even though caste and class are distinctive, the two categories were not mutually exclusive and in fact, reinforce each other.[4] The point of similarity is that both 'caste' and 'class' maintain a certain form of hierarchical order and

[1] Indra Swahney vs. Union of India Union of India, AIR 1993 (SC) 477.
[2] Ibid.
[3] Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[4] For a general understanding on caste and class and how they intersect in the Indian context, See Beteille Andre (1971) Caste, Class and Power: Changing Pattern of Stratification in a Tanjore Village, University of California Press, pp.185-226.

even though admission to caste is principally based on religious-cultural ties, the concept of caste as a social class is not completely lost. The important point is the convergence of caste and class is possible. A point that is validated by the court in this case, where the majority decision keenly argued and held that there is a nexus between caste and class. Speaking for the majority in this case, Justice B.P.Jeevan Reddy, argued:

> To repeat, it is a socially and occupationally homogenous class. Endogamy is its main characteristic. Its social status and standing depends upon the nature of the occupation followed by it. Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation caste nexus is true even today. A few members may have gone to cities or even abroad but when they return — they do, barring a few exceptions — they go into the same fold again. It does not matter if he has earned money. He may not follow that particular occupation. Still the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions it is his social class —the caste— that is relevant.[1]

For the court, such an overlap of caste and class also presented an answer to the second problem which is how caste can be used in a secular sense. Once it is established that 'caste' is an extreme manifestation of 'class' and not vice versa, caste can be used for determination of backwardness. As argued by Justice S.Ratnavel Pandian, in a concurrent but separate judgment in this case:

> Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established accepted criteria to identify the 'Backward Class', a class per se without satisfying the agreed formulate generally cannot fall within the meaning of backward classes of citizens' under the Article 16 (4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of the lower starta--- indicating the social backwardness.[2]

The discussion above only provides an understanding of the manner in which the apex court, in this case, had proceeded to explain the term 'backward classes'; however, the reason to include caste as a prominent criterion of backwardness goes way beyond the operational definition of caste and class. In this case and a few others before it, the qualification of caste as a constitutional class is justified by looking both into the constitutional intent and the constitutional aspiration to construct a nation free from social inequalities.[3] In fact, on more than one occasion, the court in this case explicitly stressed this aspect. Justice K.T.Thomas emphasized this as important in his judgment and thus marked a new beginning of new judicial thinking.

[1] Justice B.P. Jeevan Reddy in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[2] Justice S.R.Pandian in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[3] See, Scott Grinsell (2010) Caste and the Problem of Social Reform in Indian Equality Law, 35 Yale J. Int'l

In doing so, the court, in this case, rejected the earlier practice where equality was interpreted in the constitutional abstraction distant from the social realities and therefore in principle some of the earlier judgments such as Devadasan and Chiterlekha decisions were put aside as wrong. The point of reminder is that the Indian constitution is not and was never a complete import of the western notion of equality and liberty. The Articles on equality and non-discrimination were supposed to be conditioned in the reality that the people of this Republic experienced. A point that Justice P.B. Sawant had raised in his concurring but separate judgment in the Indra Sawhney case is worth being cited here. Justice Sawant held:

> However painful and distasteful, it may be, we have to face the reality that under the hydraulic pressure of caste system in Hindu Society, a major section of the Hindus under multiple caste labels are made to suffer socially, educationally and economically. There appear no symptoms of early demise of this dangerous disease of caste system or getting away from the caste factor in spite of the fact that many reformative measures have been taken by the Government.[1]

In fact, the majority in the Indra Sawhney case constructed a similar narrative, where the court had recognized the interventionist role of the Indian state to not only guarantee equality but also to reform the social order. It is in this context that caste is used Justice Jeevan Reddy when he held:

> Merely burying our heads in the sand — ostrich — like would not help. One cannot fight his enemy without recognizing him. The U.S. Supreme Court has said repeatedly, if race be the basis of discrimination —past and present — race must also form basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far.[2]

It was the simple argument that caste being the source of discrimination, should be the basis of reservation in India. Therefore, as much as the court insisted on the fact that a 'caste' should demonstrate social and educational backwardness and then only it can qualify to be a 'backward classes' it did not refrain from using caste primarily based on their social backwardness. As argued by Justice Sawant:

> If an affirmative action is to be taken to give them the special advantage envisaged by Article 16(4), it must be given to them because they belong to such discriminated castes. It is not possible to redress the balance in their favour on any other basis. A different basis would perpetuate the status quo and therefore the caste system instead of eliminating it. On the other hand, by giving the discriminated caste groups the benefits in question, discrimination would in course of time be eliminated and along with it the casteism.3

[1] Justice Sawant in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[2] Justice J.Reddy in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[3] Justice Sawnat in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.

Finally, the bench settled that the caste-based identification of backward classes is within the constitutional limit and rejected the economic criteria and also the government order, under P.V.Narasimha Rao, which provided 10 percent reservation based on the economic criteria. The striking down of the 10 percent quota for the poor among the non-reserved caste was significant and exhibited how the progressive judicial ideology reflects on the constitutional spirit and the historical context of reservation.

Mathematical Limit to Reservation

Over the question of setting a limit to the quota, four different views were outlined by the judges in the Indra Sawhney case with the majority following the precedent set in the Balaji judgment, upholding the mathematical limit to the backwardness, however with a word of caution that such arrangement cannot be applied uniformly throughout India and in case of exception, the 50 percent rule can be revoked. Speaking for the majority, Justice Jeevan Reddy said:

> While 50 percent shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity in this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in the strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.[1]

To this, Justices T.K.Thommen, Kuldip Singh and R.M.Sahai recorded their dissent to this and held that reservation should stay strictly under the 50 percent rule.[2] There was yet another dissenting voice against 50 percent rule Justice S.R.Pandian, who for once did not believe in the idea that directives under 16(4) can be limited to a percentage, and instead argued for revoking the 50 percent rule. He held:

> As to what extent the proportion of reservation will be so excessive as to render it bad must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50 % is neither based on scientific data nor on any established and agreed formula. In fact, Article 16 (4) itself does not limit the power of Government in making the reservation to any maximum percentage; but depends upon the quantum of adequate representation required in the services.[3]

[1] Justice Jeevan Reddy for majority in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[2] Indra Swahney vs. Union of India. AIR 1993 (SC) 477.
[3] Justice Pandian in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.

But then, as is the norm in case of split verdicts, the opinion of the five judges constituted the majority in this case and the dissent recording that reservations shall not, in any case, exceed fifty percent as well as that there shall not be any mathematical limits were both minority and hence not carried through. The apex court held that there shall be a ceiling of 50 percent in reservations and all categories will have to be accommodated in this. The judicial approach to set a limit to the reservation feeds into the discourse that reservation disregard merit. The court fails to emphasize the fact that the idea of constituting reservation policy in India was to ensure that backward classes will have an equitable claim to the nation's resources and therefore such a limit to the reservation was unjustified.

Concept of Creamy Layer

This is one issue on which the court was not called upon to deliver its opinion but since the bench felt that unequal's should not be treated as equals and those who are well endowed, within the OBCs, should be eliminated based on an income criterion, the judiciary defended the applicability of the concept of creamy layer and exclusions thereof. This indeed, again was not a new understanding and the insistence from the judiciary to identify the 'legal claimants' among the OBCs was first propounded in Balaji and later on in the Chiterlekha case. The removal of the creamy layer is then based on the idea that the exclusion of forward among the backward promotes parity within the community; that is between the more backward and the less backward.[1] The connecting link, Justice Reddy stated was that "in a backward class was the social backwardness and if some of the members were far too advanced ….the connecting thread between them and the remaining class snapped. They would be misfits in the class and only after excluding them, the class would be a compact one. Such exclusion really would benefit the truly backward."[2]

However, the only problem with this assumption is that in the absence of the desired number, we fall into the risk of eliminating assertive sections from the backward classes that could possibly fill the vacant seats if the concept of the creamy layer is not applied. This, in fact, was the case with the OBCs who were highly under-represented in the central services. These set of concerns were reflected in the separate judgment by Justice Pandian against the majority judgment in this case:

> One should not lose sight of the fact that the reservation of appointments or posts in favour of 'any backward class of citizens' in the Central Government

[1] Balagopal K (2009), "Ideology and Adjunction: The Supreme Court and OBC Reservations", *Economic & Political Weekly*. Vol. 44, Issue No.43.
[2] Justice J.Reddy in Indra Swahney vs. Union of India. AIR 1993 (SC) 477.

> services has not yet been put in practice in spite of the impugned OMs. It is after 42 years since the advent of our Constitution, the Government is taking the first step to implement this scheme of reservation for OBCS under Article 16 (4). In fact, some of the States have not even introduced policy of reservation in the matter of public employment in favour of OBCs.[1]

In the end, Justice Pandian takes a position that is closer to that of Justice Chinnappa Reddy in the Vasanth Kumar Case, where the learned judge issued a note of caution over the role of the judiciary in designing the policy framework for issues like reservation.

[2] It is the question of whether the judiciary is the competent authority and Justice Pandian held:

> I have my own doubt whether the judicial supremacy can work in the broad area of social policy or in the great vortex of ideological and philosophical decisions directing the exclusion of any section of the people from the accepted list of OBCs on the mere ground that they are all 'creamy layers' which expression is to be tested with reference to various factors or make suggestions for exclusion of any section of the people who are otherwise entitled for the benefit of reservation in the decision of the Government so long that decision does not suffer from any constitutional infirmity.[3]

The nine bench judgment did not tamper with the existing understanding over the issue of reservation and for most parts followed both Balaji and Thomas. In Thomas vs. State of Kerala court observed reservation to be an indispensable instrument to achieve equality and therefore overruled the Balaji reading of reservation as an exception to the article of equality and non-discrimination[4]. The importance of this case, however, lies in the context in which the apex court was asked to deliver its opinion. It was a highly polarized atmosphere, where the Supreme Court held caste-based reservations to be a part of the constitutional scheme to achieve equality. Besides this, the decision, in this case, brought much-needed legal clarity on the various issues attached to the reservation and promoted the political parties to settle with the judicial reasoning, also making the upper caste protests if any, irrelevant.

However, this has not prevented the upper caste petitioners to drag the government, every now and then, over the issue of reservation, thereby upholding their own wisdom about the practice of reservation as being inconsistent with the idea of equality. As far as the judiciary is concerned, post-Indra Sawhney, there have been many attempts to dilute the principle objective of reservation by claiming it on an economic basis, which as argued by K. Balagopal amounts to judicial indiscipline, as a smaller bench shall revise or reverse positions that were settled by a

[1] Justice Pandian in Indra Sawhney vs. Union of India. AIR 1993 (SC) 477.
[2] See Justice Chinnapa Reddy in Vasanth Kumar & Anr. vs. State of Karnataka. AIR 1985.
[3] Justice Pandian in Indra Sawhney vs. Union of India. AIR 1993 (SC) 477.
[4] State of Kerala & Anr. Vs. N.M. Thomas & Ors. AIR 1976 SCR (1) 906.

larger Constitution Bench.[1] In the end, the judgments that have questioned the basis of the reservation have only led to the re-emergence of a crisis in the constitutional interpretation of reservation.

3. CONCLUSION

Close to four decades of judicial inquiry into caste-based reservation shows that reservation had to be routinely justified to the non-reserved communities and in doing so constant scrutiny of caste and reservation became normalized. The judicial discourse on reservation largely remained conservative and inconsistent, which restricted the implementation of the reservation programme for decades. And while the dominant discourse on the reservation was contested as reflected in the dissenting voice of judges in the Indra Sawhney case but as the law is written in the voice of the majority it meant that upper caste discourse on merit and caste-blindness was privileged over the subaltern sensibilities of caste-conscious policy. Take, for instance, the insistence on secularising the criteria of backwardness meant that even a progressive judgment like Indra Sawhney vs Union of India could not challenge the status quo. Therefore, as long the majoritarian logic on caste and reservation dominates the judicial space it will be difficult to locate reservation in its true historical context.

[1] Ashoka Thakur vs. Union of India and Ors. AIR (2008) 6 SCC 1

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