



## OTHER SIDE OF RESERVATION\*

### INTRODUCTION

The swaying effect with which the judiciary has come out in favour of the minorities in 21<sup>st</sup> century really questions the viability of the individual rights who are dwindling under the ideological bias of the wisdom of the court. Some very apparent un-just have being given protection under the judicial veil. Such as upholding the validity of Art.16 (4A) by Supreme Court in **M.Nagraj vs. U.O.I 2006**<sup>1</sup> providing for consequential seniority to S.C and S.T in matter of promotion in government jobs really jostle's the Indian growth story. Reservation which had to be a temporary institution as per the **Indira Swahney case**<sup>2</sup> has commuted into a permanent adjective of our law's. Becoming a bane for present as well as for coming generation, Validating 50% reservation in job opportunities for minorities (**Balaji vs. State of Mysore**)<sup>3</sup> really alleviates the opportunities for normal general candidates and gives rise to an unfeasible competition with a thirst which can never be quenched. Our constitution talks about proportionate equality but due to ideological ambiguities its end result is un due advantage to the creamy layer of the un-privileged.

*"If we go in for reservation 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 far this business of reservations has gone based on communal considerations. 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. How are we going to build the public sector or indeed any sector with second-rate people?"<sup>4</sup>*

**Jawahar Lal Nehru**

Firstly we should try to critically analyze relevant judgements, articles of the Indian constitution and section on the aforesaid topic and what thought process was hired in reaching them. The exordium of the reservation and steps for the betterment for the S.C and ST's and other backward classes was first taken in 1955 when 1<sup>st</sup> commission was appointed by the presidential order U/A 340 on 29 Jan. 1953 under the leadership of Kaka Kalkar

*Which provided for 2,399 backward caste out of which 837 were most backward. The most outrageous recommendation of the commission was for providing 70%*

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<sup>1</sup> AIR 2007 SC 71

<sup>2</sup> Indra Sawhney vs. U.O.I AIR 1993 SC 477

<sup>3</sup> AIR 1963 SC 649

<sup>4</sup> Letter from former Prime minister to Chief minister's of states available at

<http://www.dnaindia.com/india/report-jawaharlal-nehru-had-warned-against-aarakshan-1575691>

*reservation for backward classes in all technical and professional institution. And caste should be regarded as a criteria for reservation.*

Though the recommendation was not accepted by the government but created a great apprehension for general candidate who were shuddered by the political proceeding

## **Relevant cases and Articles**

### **Antecedents and Conclusion of Indra Sawhney Case popularly known as Mandal case**

In pursuance of the Article 16(4) the Janata Dal party headed by Morarji Desai in 1979 appointed 2<sup>nd</sup> commission on backward classes under the chairmanship of B.P Mandal for the purpose of purging the defect of the previous commission and conduce a substantive data which can be relied on and is consistent with the Indian growth.

*In its report the Mandal commission identified 3743 castes as socially and educationally backward class and also recommended for 27% reservation in Government jobs for them.*

But due to political turmoil and ejection of Janata dal from the government the report could not be given impication and the successive Congress government did not entertain the Commission very well. It was only on august 13 1990 when the Janta dal came back in power and V.P Singh by Office Memoranda reserved 27% seat for backward classes as per the recommendation of the Mandal commission. This led to a great furore in the Indian Masses and anti- reservation procession were an ambient site. A petition was filed against the validity of the memo and the same was stayed by the court till the disposal of the case. Meanwhile Janata dal again collapsed and succeeded by Congress which re-issued the office-memoranda but with two changes firstly by adding economic criteria in granting reservation and preferring the poor classes of backward class and secondly by reserving 10% sits for socially and educationally backward classes of higher classes. Hearing the case the 5 bench judge transferred the case to the Constitution bench. The constitution bench consisting of 9 judges hearing the case decided by the ration of 6:3 that<sup>5</sup>

- ➔ *Reservation of 27% seat for backward classes except Creamy layer of the class to be constitutionally valid*
- ➔ *The reservation of seats shall only confine to the initial appointment and not to promotion (it was over-shadowed by 77<sup>th</sup> parliamentary amendment 1995)*
- ➔ *The court also held that reservation shall not exceed 50%*
- ➔ *though the rejected the congress govt. Memoranda providing for 10% reservation for higher class of SEBC*
- ➔ *The court also applied the proportional equality bulwark and held that art. 16(4) is not an exception of art. 16(1) and that reservation can be provided in the art. 16(1) itself*
- ➔ *the court also held that the SEBC determined U/A 16(4) were not analogous to that provided for U/A 15(4)*

Understanding the source of the affirmative action (positive discrimination) taken by the government one can easily come to a conclusion that these actions mostly are politically motivated and with no parity with the constitutional goal. The main reason for the assemblage of article 16(4) in the constitution was to juxtaposed different classes of people on the same start line but providing for 50% Reservation for

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<sup>5</sup> Pandey J.N , *The Constitutional Law Of India*, 48<sup>th</sup> Edition

backward classes really hamper's Indian goal and abate opportunity for general candidate. The basic purpose of the constitution is for social justice, full human body development and achievement of its full capability but this ideologue tend to shake due to hidden motives. While Supreme Court defining such volatile definition has to keep in mind that the prime goal of Indian constitution is secularism which is becoming oblique due to the lurching tendency which the apex court has been showing throughout its judicial journey

*While in some cases the court has come out strongly on the issue, declaring secularism as an un-amendable feature of the Indian Constitution, in some others the court's functional definition of secularism is susceptible to the interests of the majority impinging on the rights of minority communities, and in some others it privileges minorities. This results in 'a weak' secularism that is susceptible to the interests of the majority as the secular agenda toes a path of uniformity and oneness.*<sup>6</sup>

### **Case study of Balaji vs. State of Mysore<sup>7</sup> and its effect**

The antecedent of the **balaji** case can be date back to the Nangan Gowda committee which was appointed by the Mysore govt. For the purpose of determining the other backward classes, the committee in its report identified 10 sects of the Muslim to be backward and thus provided for reservation for them keeping in view of the committee the govt. Issued a notification whereby nullifying all reservation made hitherto and provided for 68% reservation in all technical and professional institution for backward classes taking the cognizance of the matter Supreme Court on the writ filed by 23 persons held that providing for 68% reservation is abuse of power vested in the govt. u/a 15(4) and held that in no case shall the reservation shall exceed 50% taking a jurisprudence view this was the first case which held that the state government by executive order can reserve seat for backward class provided it was based on some palpable fact.

### **Lacuna in the Judgement**

The most astonishing revelation of the judgement was that it granted an un-regulated right to the State to grant reservation by the executive order. It also consolidated reservation quota up to 50% for the un-privileged which stifles Indian growth story

### **Ashok Thakur Case<sup>8</sup>**

The uniqueness of the Ashok thakur case was that the petitioner was raising very bewildering questioning regarding viability about the whole system of reservation. The petitioner was of the view that the main aim of our constitution is for creating a classless society wherefore providing for reservation on the basis of caste or class was against the intrinsic nature of it. Contemplating the issue the Supreme Court consisting of justice Balakrishna , justice Bhandari , justice Thakker and justice Psayanjit held that our constitution talks about equal treatment and prohibition of discrimination it does not talks about classless society anywhere. The matter in issue in the case was the **93<sup>rd</sup> amendment to the Indian constitution** which has inserted Sub-article 5 in article 15

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<sup>6</sup> Sanghamitra Padhy, *Secularism and Justice A Review of Indian Supreme Court Judgments*, Economic and political weekly, Vol. 39 no. 46/47, Pg:- 5027

<sup>7</sup> Balaji vs. State of Mysore, AIR 1963 SC 649

<sup>8</sup> A K Thakur vs Union of India, 2008 (56) BLJR 1292

and the validity of Central Educational Institution (Reservation in Admission) Act, 2006. The Supreme Court upholding the validity of the article said that it was not in adversary of art. 15(4) but was an extension of it, here a perusal of art 15(5) becomes important

*Article 15 (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."*

Reading the underlined part it was clear that the said amendment gave great power in hands of the State to provide for reservation for SC/ST and OBC in any institution either private or Public. And upholding the validity of such amendment gave an arbitrary right to the state which was in direct contrast of the principle established in **TMA Pai foundation**<sup>9</sup> where the hon'able court has held that the state power of granting reservation did not extend to Private institution.

#### **Excerpts from the TMA PAI judgement**

*There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence.*

Further in the Ashok Thakur case the judges called for a 10 year review (Justice Balakrishnan and Justice Panyajit) for the determination of OBC. But with ambiguity around the term it augments the chances of inclusion of more classes than less and the privilege been utilized by un-qualified member

#### **Reason for extending reservation to private Institution**

*The main reason that the reservation for SC/ST were extended to the Private sector was that SC would gradually be absorbed into the mainstream wherefore eliminating reservation. Considering that caste are easier to divide than to unite<sup>10</sup> but this could not yield much result as the classification of Backwardness was based on caste itself which served as an identity for an Individual one which he was hanging unto for the caste based privileges.*

[www.lawmantra.co.in](http://www.lawmantra.co.in)

#### **Defects in the Judgement**

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<sup>9</sup> T.M.A.Pai Foundation & Ors vs. State Of Karnataka & Ors, [1995] INSC 377

<sup>10</sup> TELTUMBDE ANAND, *Reservations within Reservations: A Solution*, Economic and Political Weekly, Vol. 44,2009 pg -16

The judgement of the apex court in the **Ashok thakur** case has been in consonance with its previous stand where it has tantamount(ed) equality with reservation and has upheld that reservation is an essential element of Indian equality. In pursuance of the judgement all the judges have held that caste can be the basis of determining the category of OBC which is not in harmony with the **Indra Sawhney Case** (a larger bench) further the debate of Creamy layer's exclusion from the OBC was omitted from discussion of the court in deciding the case.<sup>11</sup>

### Relevant Article

Going through the constitution the very apparent predicament of the constitution is the proportional equality for which it aimed for. Our constituent assembly was well aware of the social structure of the Indian society and its intrinsic discrimination and thus to outweigh it the assembly created certain privileges for the un-privileged in which the primordial were Article 16 (1), 16(4), 15(3), 15(1), 17, 26, 27, 29, 30, 46. Studying the following article along with article 14 gives a very clear view that these were established for progressive and inclusive India. But in last 20 or 30 years the amendment in these articles are with the political intention thus creating a great remora in the way of an inclusive growth. In hanker for privileging the un-privileged the parliament today has truncated possibilities for general candidate who envisages a stiff road for getting a selection whether it be in an recognised institution or getting a government job. Further we analyze the amendments which are manifestly wrong



Source: <http://www.brainbuxa.com/blog/reservation-of-cast-in-indian-education-system-promoting-the-rights-for-everyone>

### Understanding the 77<sup>th</sup> amendment 1995 addition of 16(4A)

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<sup>11</sup> After the OBC Judgment, Economic and Political Weekly, Vol. 43, No. 16, pg- 5

The landmark judgement of Indra Sawhney though consolidated the quota raj in India but at the same time it devoid(ed) the SC/ST of the right of consequential seniority which was enjoyed by them since 1955. The case clearly out-excelled the right of consequential seniority out of the privilege provided under article 16(4) but keeping note of the judicial act the parliament soon brought a bill to nullify the effect of the judgement and to grit the sacrosanct flux of reservation in consequential seniority it brought the 77<sup>th</sup> amendment for that purpose. It was overtly proved that the bill was brought with the object of nullifying the effect of Indra Sawhney case as the reason and object of bill read as following

*The bill was introduced with object of corrode the effect of the Indra Sawhney case on the right of consequential seniority which was enjoyed by the ST/SC ever since 1955 and to keep this privilege in consonance with the constitutional goal of social justice and thus by the amending act of 1995 Clause 4A is been added in the article 16 and whereof validating consequential seniority in promotion for ST/SC.*

The amendment was a clear un-just with the vision of an Inclusive India and in direct contrast to the principle of **merit first** it was much more fomented by political gain rather than with the aim social equality.

The validity of the 77<sup>th</sup> amendment was contested in the case of **M.Nagraj vs. U.O.I**<sup>12</sup> case where the Supreme court up held the constitutional validity of the amendment on the ground that article 16(4A) was an extension of article 16 and was in consistency with the object of the article of providing privilege to SC/ST who does not have adequate representation. Excerpts from the judgement

*The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from article 16(4.) They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation.*

The lurching effect that the judiciary and politician our having on matter of reservation really is a lurid story, a story which debilitates the vision of progressive and skill-full India We need to ask ourselves, once again, whether it is equality of opportunity that we strive for, or whether we want to rid our society of the caste system. If indeed the reservation policies are aimed at achieving both these ideals, we ought to be shown proof of how the present policies are working.<sup>13</sup> The main constitutional goal has obfuscated behind this reservation race article 16 which was for the purpose of equality of opportunity in government jobs has gradually been providing opportunity only to BC, OBC classes and SC/ST whereof insulating general class this process of alienation under the gist of social justice is emulative to the egalitarian state. The most potent reason behind 77<sup>th</sup> amendment is the political mileage there is no far or close relation with social justice.

### **Anomalies of Article 335**

A perusal of article 335 overtly expresses the paradox it inherent in itself while reading the first part of the article one can easily conclude that reservation will not be made an impediment in way of efficiency but this part is fully succumbed as we move on to the second part of the article which say's "**Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for**

<sup>12</sup> M.Nagraj vs. U.O.I AIR 2007 SC 71

<sup>13</sup> Parthasarathy Suhrith, *The politics of quota and merit*, The Hindu, Dated 18/04/2014

*relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”*

Such paradoxes jostle's one thinking that actually what does the article Comprehend to achieve. Before the 82th amendment the article read as following: -

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

It is very clear that the constituent assembly were well aware of the muss which may be created in the name of affirmative action by the coming political ideologue so to overpower their deed the assembly assimilated article 335 to maintain the efficiency in the work force but the same was vitiated by the Parliament in 2000 by the 82<sup>nd</sup> amendment.

### **What led to the 82<sup>nd</sup> Amendment**

In case of **S.Vinod**<sup>14</sup> Supreme Court hearing the case was of the opinion that reservation can be a part of Indian structure but providing other facilities such as lowering the qualifying marks required for admission or for consequential seniority for SC/ST or for OBC was not in harmony with the article 335 the decision was in consonance with the **Indra sawhney case**<sup>15</sup>

### **Excerpts from the judgement (Justice Sawant)**

*There is no doubt that the meaning of the various expressions used in Article 16 viz., 'matters relating to employment or appointment to any office', and 'appointments or posts' cannot be whittled down to mean only initial recruitment and hence the normal rule of the service jurisprudence of the loss of the birth marks cannot be applied to the appointments made under the article. However, as pointed out earlier, the exclusive quota is not the only form of reservation and where the resort to it such as in the promotions, results in the inefficiency of the administration, it is illegal. But that is not the end of the road nor is a backward class employee helpless on account of its absence. Once he gets an equal opportunity to show his talent by coming into the mainstream, all he needs is the facility to achieve equal results.*

To overcome the effect of the aforesaid judgement parliament brought in the 82<sup>nd</sup> amendment. Constitutional validity of the 82<sup>nd</sup> amendment was challenged in case of **M. Nagraj**<sup>16</sup> in which upholding the constitutional validity of the amendment the court said that

*In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335.*

Thus an article which was assimilated in the constitution as a watchdog for the purpose of maintaining the sanctity of public services was gutted in the name of social justice. This shows

<sup>14</sup> S.Vinod Kumar And Anr vs Union Of India And Ors, , (1996) 6 SCC 580

<sup>15</sup> Indra Sawhney vs. U.O.I AIR 1993 SC 477

<sup>16</sup> AIR 2007 SC 71

the apathy of Indian politics who sacrifices general candidates opportunity for staying in the power and the opaqueness with which are judicial system are working on such issue

### The Carry Forward Rule

The carry forward rule was framed by the Government, According to this rule if in any year, the suitable candidate belonging to the SC or ST are not found and due to that reserve vacancy for them remain un-fulfilled then such vacancy are to be carry forward to the next year, if in the next year the same happens then the same shall be carried forward to next year , In this way all these vacancy shall be considered to be reserved. The constitutional validity of the same was challenged before the Apex Court in **T. Devdasan**<sup>17</sup> case where the court has held the same to be constitutionally valid but it was reversed by the apex court in **Indra Sawhney**<sup>18</sup> case to overcome the effect of the decision the parliament brought in the 81<sup>st</sup> amendment which inserted clause 4B in the article 16 in 2000. The constitutional validity was of which was challenged in the **M.Nagraj** case where it was held constitutionally valid.

### Dilemma of Affirmative action in India

Affirmative action are the species of social justice, it is the achieving of social justice that the concept of affirmative action came in to existence. In easy word affirmative action means by those positive discrimination which are meted out against the social evil of the society in brevity it means **fighting discrimination by discrimination (refer to the N.M Thomas case**<sup>19</sup>) though social justice is one of the basic goal which our constitution wants to achieve. The term Affirmative action is a nomenclature adopted from the American's which in India gets commuted for reservation. Reservation has been a volatile issue for parley in India as India is an abode for plethora of classification on the basis of caste, religion, dialect and residence with no certain procedure to determine the backwardness of a class of people. But more often it is seen in the light of providing impetus to those who due to their social, economic or other disability are not able accumulate enough to survive.

*The rationale behind affirmative action is that it releases suppressed talents and expands the pool of social assets in society for the general good*<sup>20</sup>.

Existence of backward class of people precedes affirmative action. The contention dwells here in India is the absurdity about the backward classes still subsists even after the appointment of galore of committee's and commission on this issue there is still no certain yardstick to gauge the backwardness of any class of people . In fact everyday a new group pop ups claiming itself to be backward. According to the data available with the NSSO (National Sample Survey Organisation) backward classes constitute for 40.94% of the Indian population<sup>21</sup>. While caste has been a determinative factor for whether a class of people are backward or not, it was held by the Supreme Court in **Pradeep Tandon**<sup>22</sup> case that

*Caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Art 15(4) When Art. 15(1) forbids discrimination on grounds only of religion. Race and caste, caste cannot be made one caste the criteria for determining social and educational backwardness. If caste or*

<sup>17</sup> T.Devdasan vs. U.O.I AIR 1964 SC 179

<sup>18</sup> Indra Sawhney vs. U.O.I AIR 1993 SC 477

<sup>19</sup> State of Kerala vs. N.M Thomas AIR 1976 SC 490

<sup>20</sup> Gupta Dipankar, *Towards Affirmative Action*, India International Centre Quarterly, Vol. 33, pg:- 151

<sup>21</sup> Available at <http://www.hindustantimes.com/india-news/survey-puts-obc-population-at-40-pc/article1-245897.aspx>

<sup>22</sup> 1975 AIR 563



*religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Art. 15(1)*

The main concern for the Indian affirmative action has been of it becoming a means of vote bank politics which is an epithet for Indian politics whether it be reservation of Maratha in Maharashtra (32% population) being the maximum population in the state or the Jat reservation in Haryana this has eventually reduced Indian endeavour into farce. Before working in this direction the state has to recognize the subjects but after endless endeavour no substantive result has come out which in result has pressurised judiciary to work out frame work with case which comes forward for ponder before. The obscurity and ideological unclarity has always resulted in.

### **Does affirmative action helps**

The exponent of reservation have now realised that more than that of eradicating individuals of their structural disability it has led to further division of classes in India, it has riled caste-ism to its peak. The sub classification of caste into creamy layer or backward classes or extremely backward classes have just fragmented Indian society more than ever the empathy of all this is that this has got judicial sanctions. The ultimate goal of fraternity has been sacrificed in aim of materialising equality. *Firstly we try to analyze the situation of the place from where affirmative action concept was lent that is America in American affirmative action the focal point is not eradication of the race but more on the representation of it which is in direct converse to the Indian story where the aim is to eradicate the difference itself further in the American affirmative action the social justice is not compromised for the purpose of representation but in India art. 335 which was the watchdog for this purpose itself has been sullied<sup>23</sup>.*

### **Politically induced reservation**

Since the commencement of the Indian constitution the extensive power allotted by the constitution for the affirmative action has not been done justice with. More than often the reservation for the degraded masses of our society is en-clasped by the creamy layer of the targeted section. In fact the privilege has been availed by the creamy layer for last 64 years. *And rather, it has resulted in creation of a vested interest class among SCs and STs which are behaving like upper castes with extremely backward dalit communities.<sup>24</sup>*

Taking cognizance of the misuse of the reservation the **Lokur committee<sup>25</sup>** going a step further made a recommendation in 1965 for exclusion of certain tribe and caste as they do not avail the criteria by which they qualified to enjoy the privileges, the main problem with affirmative action in India has been its ill-proper use. Generally the real intention behind such action are obfuscated under the veil of social justice, it has nothing less than a sheer fraud with the constitution and with the admiration of the people. In the **O.P Shukla<sup>26</sup>** case the petitioner stated some prolix prodigious facts

*He said benefits were cornered by a handful of communities out of the 1,091 Scheduled Castes and 586 Scheduled Tribes, leaving a vast population of the reserved class out of the social welfare measure. He contended that socially and economically advanced SCs and STs be kept*

<sup>23</sup> Dipankar Gupta, *Towards Affirmative Action, India International Centre Quarterly*, Vol. 33, pg-155

<sup>24</sup> Choudar Amit, *Can't keep SC/ST creamy layer out of quota benefits*, Times Of India, dated 14/04/2015

<sup>25</sup> Lokur committee, *ADVISORY COMMITTEE ON THE REVISION OF THE LISTS OF SCHEDULED CASTES AND SCHEDULED TRIBES 1965*, available at

<http://hlc.tribal.nic.in/WriteReadData/userfiles/file/Lokur%20Committee%20Report.pdf>

<sup>26</sup> O.P Shukla vs U.O.I, SCC 2011

out the policy and referred to the Lokur Committee report which had recommended that certain castes/tribes be excluded.<sup>27</sup>

The main discourse on the reservation has been that no heed has been paid to the consequences of the reservation while policies have been made on the affirmative but what conclusion it is leading to has been totally oblivious, it has resulted in bifurcation of nationalist feeling with individualistic thought process as people identifying themselves by the surname or by the caste they belong to

*While affirmative action or preferential policies have been implemented to deal with the inherited caste-based injustices and discrimination, its negative consequences have not been properly analysed because reservation which has created vested interests in caste identities has been kept out of the public discourse.*<sup>28</sup>

*It is a truism that public life in India is conditioned and controlled by caste identities. It can be stated un-ambiguously that 'casteisation' of politics has become a reality because the political class has nurtured and manipulated caste versus caste identities to win an election on the basis of assured caste-based social constituencies*<sup>29</sup>

On the contrary the vote bank politics has been so prevalent and ever potent that if any step is taken by the judiciary to emancipate society of any un-just that un-just has been give political validity. Being on the same line one of the biggest blunder done by the apex court was in the case of Jagdish Lal<sup>30</sup> in which the apex court has held that “when the reserve candidate is promoted earlier to a general candidate the seniority in new cadre would rank from the date he joins the post on promotion” keeping the negative effect which such judgement would have on Indian youth they said judgment was overruled in the Ajit Singh Case<sup>31</sup> in which the apex court held that “The rule of reservation gives accelerated promotion but not the accelerated seniority”

To overcome the effect of the Ajit Singh case the Parliament brought in 85<sup>th</sup> the amendment with the purpose of giving validity to the seniority from the date of first appointment therefore Sub-sec. 4A was added to the Article 16 in 2001 which provided has “in matters of promotion to any class”, the words “in matters of promotion, with consequential seniority, to any class” shall be substituted.

. The constitutional validity of the amendment was challenged in the Supreme Court in the M.Nagraj Case<sup>32</sup> but the same was held valid the Supreme Court thus adding to the misery of general candidate

#### Apathy of Indian judiciary regarding OBC

The apathy of Indian judiciary regarding OBC has been a matter for concern for whole of India as the determination of this question has an effect on all of us. In hanker for creating a judicial bulwark the judges are paying no heed to what effect it is having on other classes. Sometimes over sympathising, sometimes runagating in the concept itself, sometimes under the gist of up lift ment of poor it has led to the misery of others.

<sup>27</sup> O.P Shukla vs U.O.I, SCC 2011

<sup>28</sup> Bhambhri C. P, *Reservations and Casteism*, Economic and Political Weekly, Vol. 40, No. 9 pg:- 806

<sup>29</sup> BHAMBHR C P, *Reservations and Casteism*, Economic and Political Weekly, Vol. 40, 2005 pg- 806

<sup>30</sup> Jagdish Lal & Ors vs State Of Haryana & Ors on 7 May, 1997, 6 SCC 538

<sup>31</sup> Ajit singh vs. State of Punjab AIR 1999 SC 3471

<sup>32</sup> M.Nagraj vs. U.O.I AIR 2007 SC 71

For instance in TMA foundation<sup>33</sup> case it was held by the hon'able court that caste cannot be the basis for determining the backwardness but the same was overruled in the case of A K Thakur<sup>34</sup> case further in the former case as well as in P.A Inamdar<sup>35</sup> case it was also held that private institute will be out of the purview of reservation the same was refuted in the A K Thakur judgement. Caste can be a viable factor for the purpose of determining SEBC was also held in A.Periakaruppan<sup>36</sup> and in U.S.V Balaram case<sup>37</sup>. There are several instances in which the apex court has overruled its decision regarding the determination of to actually what class of people can be classified as OBC. The muss regarding the OBC was firstly started by the 1<sup>st</sup> amendment to the constitution which provided for reservation for socially and educationally backward classes of citizen (to nullify the effect of judgement given in P. Dorairajan case<sup>38</sup>). What are backward classes is not defined in the constitution. Article 340 however empowers the president to appoint the commission to determine SEBC. In **Ramakrishna Singh**<sup>39</sup> case it was held by the apex court though power to determine SEBC is with the government but it has to go through the ordeal of Court to check whether the classification is made arbitrary or not. Whereas in **K.S jayshree**<sup>40</sup> case the apex court held Income of the Individual as a essential factor for determining whether he felled within the preview of SEBC or not, though the court further held that nor caste nor poverty alone can be the determining factor for SEBC. In **Pradeep tandon**<sup>41</sup> case the apex court held candidates coming from hill area to be coming within the ambit of SEBC.

*The biggest flaw which can overtly be seen is that the term OBC is an offspring of Indian constitution but the constitution itself does not define it, this task is left to the parliamentarian and the Judicial body who more than often percussion each other upon its determination.*

While in some cases the apex court has deserted from its stance of 50% reservation such as in the case of **K.C Vasant kumar**<sup>42</sup> case where it held that *the rule of 50% reservation can be relaxed for people coming for far flung area of the country as it may be desirable to treat them differently*<sup>43</sup>. But the same again was overruled by the apex court.

## Conclusion

Finally coming to the conclusion several questions still await a justifiable answers such as why do we still need caste based reservation? Why some overtly biased provision of constitution has been given judicial acquiescence [emphasis laid on article 16(4A) and (4B)]. It really digresses the whole aim of the constitution, and also leave us with a task to introspect about the substratum on which our society is standing, are we too feeble to be broken down or classified by the caste we are known or it is just the judicial ambiguity which has led to our sub-division.

<sup>33</sup> T.M.A.Pai Foundation & Ors vs. State Of Karnataka & Ors, [1995] INSC 377

<sup>34</sup> A K Thakur vs Union of India, 2008 (56) BLJR 1292

<sup>35</sup> P.A Inamdar vs. State of Maharashtra AIR 2005 SC 3226

<sup>36</sup> A.Periakaruppan vs. State of Tamil Nadu AIR 1971 SC 2303

<sup>37</sup> State of A.P vs. U.S.V Balaram AIR 1972 SC 1875

<sup>38</sup> State of Madras v. Champakam Dorairajan (AIR 1951 SC 226)

<sup>39</sup> Ramakrishna Sing Ram Singh vs. State of Mysore And Ors.

<sup>40</sup> Kumari K.S. Jayasree & Anr vs The State Of Kerala & Anr AIR 1976 SC 2381, (1976) 3 SCC 730

<sup>41</sup> State Of Uttar Pradesh vs Pradip Tandon & Ors AIR 563 1975

<sup>42</sup> K.C Vasant kumar vs. State of Karnataka

<sup>43</sup> Pandey J.N , *The Constitutional Law Of India*, 48<sup>th</sup> Edition pg-135

*Throughout the history of Indian reservation it has been used as an apparatus of governance, a mechanism for social and political representation, rather than a way of achieving social justice*<sup>44</sup>

When we see for the purpose of eliminating racial, lingual, caste differences from the society there has been a lot of work been done by the State government legally by providing for various provision for their up lift ment but on the contrast it has abstained itself from taking any step for convalescence-ing the feeling of common citizen instead it has latently strengthened the normative, upper caste and Hindu formation<sup>45</sup> such sub-division only help in dividing a country not uniting it, call it politically motivated or judicial ambiguities or just sheer negligence but it has crossed the barrier of endurance of a common citizen( a person who by Gods chastity does not come within any reserved class) . Today we talk about government job knowing that 50% are reserved of it how so skewed are the opportunities that private sector remains the only hope for bread and butter. *In making reservation for backward classes the State cannot ignore the Fundamental rights of the rest of the citizen*<sup>46</sup>



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<sup>44</sup> Susie Tharu, M. Madhava Prasad, Rekha Pappu and K. Satyanarayana, *Reservations and the Return to Politics*, *Economic and Political Weekly*, Vol. 42, No. 49, 2007, pg-39

<sup>45</sup> Pandey J.N , *The Constitutional Law Of India*, 48<sup>th</sup> Edition pg-135

<sup>46</sup>P.G Institute of Medical & Research vs. Faculty Association AIR 1998 SC 1767