

## **Role of the Judiciary in the Evolution of the Principle of Equality and Positive Discrimination in Education Under the Constitution of India**

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### **Abstract**

*Article 14 of the Constitution of India states, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Whereas, Article 15 and 16 speaks for reservation of special positions for woman, children and others. The Constitution through will of people commands the State not to deny to any person 'equality before law', it also commands the State not to deny the 'equal protection of the laws. Equality before law prohibits discrimination. It is a negative concept. Whereas, the concept of 'equal protection of the laws' requires the State to give special treatment to persons in different situations in order to establish equality amongst all is a positive discrimination. It is a positive concept. Therefore, the necessary corollary to this would be that equals would be treated equally, whilst un-equals would have to be treated unequally. The paper discusses the laws on equality from 1950 has evolved in nature and the how judiciary has safeguarded the interest of its people by interpreting the principle of equality at par with equity.*

**Key words-** Article 14, Constitution of India, State, Reservation and equity.

### **I. The Genesis of Reservation Policy and Education in India**

Education is the overall development of a child, which can remove illiteracy and injustice from the world. Through education, one can uplift his/her psychology and emotions. Similarly, a child becomes creative, tends to recognize his virtues and develops the ability to understand his/her skills, expression and modify the existing inequalities in our culture, civilization and society.

The practice of Indian education started with 'guru-sishya' practice in which children were sent to gurukuls or ashrams to take classes from gurus. These

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ashrams or gurukuls were situated in forests or far-flung places in which students had to leave their houses and lead a life of celibates until their education was complete. Sometimes one guru was sufficient to give all the classes related to Vedas, behaviourism and archery. The Vedas or ancient scriptures were the source of knowledge, and students were expected to learn in the way of shrutis and smritis.

India's history has witnessed and practised discrimination in the education sector. Scriptures like 'manusmriti' quoted offences which, if committed by shudras will invite more punishment than brahmins. The policy of reservations had their origins in the practice of Untouchability and Caste System. The caste system in ancient times was a form of reservation where the upper caste, like the Brahmins were only and essentially engaged in teaching, learning and worship. Whereas, Kshatriyas were supposed to perform 'elite' functions they were entitled to engage gurus personally and learn all the vidyas like Rajdharma, 'dhanur vidya' and other sorts of weaponry. But the castes like vaishyas and shudras were not entitled to get education or visit temples. Their jobs were also restricted to professions like agriculturists, cobblers, housemaids, sweepers etc. hence getting education even in ancient period was imaginary as the practice followed discrimination itself. From the epic of Mahabharata one can understand the teacher-pupil relationship in 3137 BCE. Though the famous characters of Mahabharata were *Pandavas*, *Kauravas*, *Bhisma*, *Shakuni*, *Kunti*, and *Drona* but, the characters like **Eklavya**<sup>2</sup> and **Karna**<sup>3</sup> created a profound impact on us and showed the ugly picture of existed caste-ridden society.

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<sup>2</sup> Eklavya was the son of Hirnadhenu (the King of Jungle) belonged to a Nishada (low-caste) community, Guru Drona denied giving education to Eklavya as he was not Kshatriya and asked for his thumb as *Guru Dakshina* (fee) making him disable for future use of Dhanush-teer. When Arjuna asked Guru Drona why he did so? Drona said that he couldn't train Eklavya because he will fight against enemy of Hastinapur Drona didn't train Eklavya because he belongs to Nishad community on the other side he wants Arjuna (Kshatriya) to become greatest warrior.

<sup>3</sup> Karna was adopted by *Adhiratha* (sarathi) who belongs to *sutta* (low-caste) community. The *suttas* are allowed to run Rathas of kings, not to become Archer like kings. Karna desperately wanted to become an archer being son of Surya(Sun); he was given *kavach* and *kundal* by birth, When Bhisma saw the archery skills of Karna, he was astounded and told his father (Adhirath) that "indeed your son has an excellent quality like kshatriyas but he cannot practice weaponry as this is reserved only for kshatriyas If a son of *sutta* becomes archer it will go against the Tradition which is violation

The discrimination in education was present in colonial India too. The caste associations were formed<sup>4</sup> for the welfare of backward and lower castes. Caste organizations largely concerned themselves with the idea of giving representation and voice to the marginalized; however, with the entrenchment of liberal democracy and expansion of adult franchise, their aim began to change with the rise in demand for their representation in the administrative, educational and political spheres.

It was upper-caste people who opened schools for upper-caste students where lower-caste students were not allowed to be admitted.<sup>5</sup> Backwards and untouchables didn't have sufficient money and power to open schools and colleges for their castes; thus, they were dependent on government schools and colleges where they were discriminated in terms of education, sitting arrangements, using toilets and drinking water. They were made involved in the cleanliness and guarding of the schools; the upper-castes teachers often refused to teach them as well.<sup>6</sup> **Tulsiram**, in his autobiography has highlighted the difficult struggle of his educational journey; when he was born in a Dalit community, no other member of his Dalit community was literate in his village, they had to go to Brahmins in order to read their letters, he was the first member from his community who went to school, and in school also he was abused by his upper-caste teachers, the teacher calls him "chamarkit"(derogatory word) he had to face taunts, mockery by Brahmins of his village.<sup>7</sup> **Dr. Ambedkar**, in his book, highlighted that Brahmin wanted to maintain monopoly over the education system as a reason they firmly tried to maintain the varna system so that they could enjoy the status of priestly and educationist class.<sup>8</sup>

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of Dharma. Hence, in the veil of tradition and Dharma a sutta-putra was not allowed to learn archery. In one incidence when Karna wanted to show his skills challenging Arjuna then he was not allowed to do so as only Kshatriya can challenge a Kshatriya.

<sup>4</sup> For example, Nadar caste Association of Tamil Nadu, Mahasabha the Bengal Association, Triveni Sangh, a caste coalition and Political Party of Bihar etc.

<sup>5</sup> PRASANNA KUMAR CHAUDHURY & SRIKANT, SVARG PAR DHAVA: BIHAR ME DALIT AANDOLAN-1912-2000 (Wani Prakashan, 2005)

<sup>6</sup> *Ibid.*

<sup>7</sup> DR. TULSIRAM, MURDAHIYA, 134 (Rajkamal Prakashan 2016).

<sup>8</sup> DR. B. R. AMBEDKAR, THE UNTOUCHABLES: WHO WERE THEY AND WHY THEY BECAME UNTOUCHABLES? (Namaskar Books 2023).

Technically the Caste system so far has been misunderstood or misinterpreted which is said to have its origin in birth, but examples have shown that one who was born in a lower caste can attain the status of upper caste by engulfing the education.<sup>9</sup>

In Tamil Nadu, the first imitative of reservation policy occurred. In 1831, other backward classes and other backward communities in Tamil Nadu started the Dravidian Movement. The movement of power led to the reservation in the education sector and public services in the Madras Presidency and Princely state south of the Vidhya. The Britishers introduced this reservation in response to several petitions from various groups. The agenda of princely states and the British government was to introduce representation and reservation policy to backward communities. Hereby subsequently, **Mahatma Jyotirao Phule** demanded free and compulsory education for everyone with proportional reservation in the government's jobs. After that, in 1848, she became the first person who realized the need for education and started the first school for the untouchable in Poona (Pune).<sup>10</sup> Between 1874 and 1885, the Governor of Mysore reserved 20% of middle and lower levels jobs in the Police department for the Brahmins and 80% for Muslim, Hindu, and Indian Christian. With the huge discrimination, Hunter Commission was appointed in 1882 by the Princely state. Similarly, during 1901 other states like Maharashtra (in the princely state of Kolhapur where, **Shahu Maharaj** introduced reservation in Maharashtra) in favour of non-Brahmin and backward classes.

Since independence, India in its Constitution and through judicial interpretation, has introduced various reservation policies and amendments in the field of caste, religion, gender, management, sports, physically handicapped so on and so forth for bringing up positive discrimination as an affirmative action.

## **II. Evolution of The Principle of Equality and Article 14 Of the Constitution of India**

Human progress is a process of enlarging the choices of all people of all section of the society. The rights are mentioned not only in Fundamental Rights but also

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<sup>9</sup> For example, Mahakavi Kalidas, who belong to Kurba Community (main occupation of sephards) attained the status of higher caste.

<sup>10</sup> Sonkhothang Haokip, *Reservation Policy in India: The Practice of Reservation Policy on Education in India*. P. 620, 2019 *JETIR* May 2019, Vol. 6, Issue 5.

in the Preamble and directive principles of State policy. **Lyndon Johnson**,<sup>11</sup> as a way of establishing the foundation of affirmative action in his speech in 1965 said, "You do not take a person who, for years, has been hobbled by chains, bring him to the starting line in a race and then say, 'you are free to compete with all others'. It is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates".

Equality before law or equal protection of the laws does not mean the same treatment for everyone. Equal treatment of those who are unequally circumstanced would result in inequality. Therefore, the underlying principle of equality is not uniformity of treatment to all irrespective of their different situation. Instead, it means persons in similar situation must be treated similarly. This means differentiating between the various situational locations of the people. This distinguishing is called reasonable classification.

However, this principle was not very clearly made out in *Chiranjit Lal Choudhuri v. Union of India*,<sup>12</sup> the petitioner approached the Supreme Court for the protection of the fundamental rights under Article 14 and Article 31 against the enforcement of the Sholapur Spinning and Weaving (Emergency Provisions) Act, 1950. The petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. the company, through its directors had been managing and running a textile mill of the same name. The action of the company affected the production of essential commodity and caused unemployment and unrest among its workers consequent upon this, the above-mentioned Act was passed by the government. By virtue of this Act the management and administration of the asset of the company vested in the hands of directors appointed by the government. The old directors were dismissed. The shareholders were prohibited from appointing new directors and they were not allowed to initiate winding up of the company.

The petitioner contended that the impugned Act infringed Article 14 of the Constitution of India because a single company and its shareholders were subjected to these restrictions vis-à-vis other companies and shareholders.

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<sup>11</sup> Lyndon B. Johnson, 36<sup>th</sup> U.S. President gave speech in 1965 in the assembly.

<sup>12</sup> AIR 1951 SC 41.

The Supreme Court dismissed the petition and held the legislation valid. It laid down that a law may be constitutional even though it applies to a single individual, if on account of some special circumstances or reasons applicable to him and not applicable to others. That single individual may be treated as a class by itself and unless it can be shown that there are other companies in similar circumstances. Hence, the Act was held to be constitutional. The Sholapur company formed a class by itself because of the mismanagement of the company's affair resulted in serious unemployment of workers and prejudicially affected the production of essential commodity.

The Court further held that legislative proceedings cannot be referred to for the purpose of construing an Act or any of its provisions, but they are relevant for the proper understanding of the circumstances in which it was passed and the reasons that necessitated it.

Interestingly the judgment of *Chiranjit Lal Chowdhury v. Union of India* has within it implicit equity principle of doing justice to the weak and the sufferings in keeping with the principle of welfare state. Hence, this judgment may *prima facie* appear to be based in favour of the government, but implicit within it is the value incorporated within Article 14 of the Constitution of India. Further, it also gives rise to the possibility of the evolution of new legal principle. *Chiranjit Lal Chowdhury's* case is illustrative of the ground level operational difficulty of Article 14 and how the equity principle in equality fails when there are circumstantial variables affecting the law, and strict textual interpretation may lead to miscarriage of justice.

*State of Madras v. Champakam Dorairajan*<sup>13</sup> is a landmark decision of the Supreme Court of India that led to the First Amendment to the Constitution of India.

With regard to the admission of students to the engineering and medical colleges, the province of Madras had issued an order that popularly came to be known as Communal G. O. stating that seats be filled by the selection committee strictly on the following basis.

Out of every fourteen (14) seats-  
6 were to be allotted to non-Brahmin Hindus

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<sup>13</sup> AIR 1951 SC 226.

- 2 seats were to be allotted to backward Hindus
- 2 seats to be allotted to Brahmin Hindus
- 2 seats to be allotted to Harijans
- 1 seat to the Anglo Indians and Indian Christians and
- 1 seat to Muslims.

The full bench comprising of Kaniya C.J., Fazal Ali, Patanjali Shastri, Mehr Chand Mahajan, Mukherjea, S.R. Das and Vivian Bose JJ., that the communal G.O. constituted a violation of the fundamental rights guaranteed to citizens of India by Article 29 (2) of the Constitution of India, namely “no citizen shall be denied admission to any educational institution maintained by the state or receiving aid out of the state fund on grounds only of religion, race, caste, language or any of them” and was therefore void under Article 13. The Directive Principles of the State Policy laid down in Part IV of the Constitution cannot in any way override or abridge the fundamental rights guaranteed in Part III of the Constitution of India. On the other hand, they have to run as subsidiary to the fundamental rights laid down in part III.

The argument that the object of the communal G.O. was the promotion of the cause of backward classes in furtherance of the directives contained in Article 46 and, therefore could not be violative of Article 29 (2) was rejected by the court.

This situation was changed by the Constitution (1<sup>st</sup> Amendment) Act, 1951 that introduced clause 4 to Article 15. Article 15(4) is the enabling provision under which the state may make special provisions for the socially and economically backward classes.

Hence, both Charanjit Lal Chawdhury case and Champakam Dorairajan case could not offer much clarity regarding reasonable classification.

In the same year (1951) in the *State of Bombay v. F. N. Balsara*<sup>14</sup> the Constitution validity of the Bombay Prohibition Act, 1949 was challenged. The question was whether the Act fell under Entry 31, List II of the Government of India Act, 1935 (corresponding to Entry 8, List II of the Constitution of India) namely intoxicating liquors, that is to say the production, manufacture or possession, transport, purchase and sale of intoxicating liquor read with entry 41 of the Constitution in the Central List (List I). it was argued that the prohibition would

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<sup>14</sup> AIR 1951 SC 318.

affect Entry 41 of the List I. The court rejected this argument stating that the pith and substance of the Act related to Entry 31 of List II. The impact on the central list was a mere coincidence. Only eight sections of this Act were to be *ultra vires* the Constitution but rest of the Act was allowed to stand. The Court held that a classification for the purpose of a prohibition law between civilian population and military personnel and between citizens and foreigners is justified as a reasonable restriction in public interest. Special treatment to a class of people who are treated as different class altogether in other statutes and provision of other Acts cannot be said to be violative of Article 14. This sowed the seed of the idea of reasonable classification.

But in case of *State of Bombay v. Narasu Appa Mali*,<sup>15</sup> the High Court Bench comprising of Chief Justice M. C. Chagla and Justice P. B. Gajendragadkar to an extent supported the classification on the basis of religion and considered it a reasonable classification. The court to an extent interpreted- “personal law” by saying it is not included in the expression “laws in force” mentioned under Article 13(1) of the Constitution. Effectively, it meant that personal laws are not subjected to undergo the test of fundamental rights.

In this case, The Bombay Prevention of Hindu Bigamous Marriage Act, 1946 (the impugned Act makes bigamy a punishable and non-compoundable offence) was challenged as it contended that it violated the fundamental rights (Article 14, 15 and 25) of Hindus to practice its religion whereas, on the other hand Muslims are permitted to have wives.

The Court again took a textual interpretation of Constitution and refused to acknowledge the unwritten principles of law. On the contrary it agreed to the philosophy that there can be reasonable discrimination for a social reform.

But gradually in *Kedar Nath Bajoria v. State of West Bengal*<sup>16</sup> Supreme Court began to elaborate and bring clarity to the concept of reasonable restrictions to highlight the equitable principles implicit in the concept of equality as perceived under Article 14 of the Constitution of India. The Court said, the equal protection of laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be of general character with universal application and the state no

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<sup>15</sup> AIR 1952 Bom 84.

<sup>16</sup> AIR 1953 SC 404.

longer has the power of distinguishing and classifying persons or things for the purposes of legislation. Hence, the government of India is entitled to make classification and differentiation in laws as it is being permitted under Article 14. Here, the Supreme Court emphasized that legislators in order to make classification must satisfy three tests which are:

1. It must be a reasonable classification;
2. It must have a rational or just object to achieve and
3. Law must not be arbitrary in nature.

Therefore, any unreasonable classification or arbitrary laws may hamper the fundamental tenants of the Constitution which are also incorporated in the preamble in the form of equality of opportunity and social, economic and political justice. A reasonable classification must be based on smart differences or an intelligible differentia. This means that collectively grouped persons or things make a properly defined, distinct class and may be exceptional from those left out of the group. Furthermore, this classification basis must have a rational nexus to the object that the legislation in question seeks to achieve.

Thus, right to equality in the Constitution of India is not merely a negative right as not to be discriminated against but also a positive right to be treated as in equal. The core of the right to equality as stated in Article 14 is that the state is under an obligation to take necessary steps so that every individual receives an equal respect and concern to which he is entitled as a human being.<sup>17</sup> Equality before the law and equal protection of the law does not mean same treatment for everyone as no two human beings are equal in all respects the same treatment to them in every respect would result in unequal treatment. Thus, it is not equal treatment to all in all respect but to give them the same treatment equally in which they are similar and differently in which they are dissimilar.<sup>18</sup>

Article 14 of the Constitution of India forbids class legislation but it does not prohibit the reasonable classification of objects, persons, and transactions for the purpose so as to achieve specific ends by the parliament. Such classification should not be artificial, arbitrary or evasive and it must rest on substantial

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<sup>17</sup> R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 223 (1977).

<sup>18</sup> M. P. SINGH, *V. N. SHUKLA'S CONSTITUTION OF INDIA*, (12<sup>th</sup> edn.).

distinction which is real. It must bear a reasonable and just relation to the object sought which is to be achieved by the legislation.

The judiciary initiated the course of transformation and through its interpretative techniques that is neither confined to the English Maxwellian rule nor to the Mimamsa principles of interpretation; it incorporated the idea of justice, equity and good conscience and developed its own rational principle of classification. The seven judges' bench of Supreme Court, in *State of West Bengal v. Anwar Ali Sarkar*,<sup>19</sup> examined the authority of the West Bengal Special Courts Act, 1950. The court held that, the provisions of Section 5 (1) which authorizes the State Government to direct "cases" that are to be tried by the Special Court is unreasonable in nature because the word "cases" in this case has been used to signify a distinct category from the entire "classes of cases". As the part of the section 5(1) empowers the State Government to select particular cases arbitrarily against particular persons and sent them up to the Special Court for trial was considered *ultra vires* to the Constitution, insofar as it allows the state government to direct any case to be tried by a special court. Here, the idea of classification is excluded and found unreasonable. While agreeing with the majority opinion, and defining what is meant by 'classification,' Justice Vivan Bose leaned in favour of an interpretation which amounted to introducing the 'due process' principle.

So, while expanding the horizons of equality, judges have been pointing out from the very beginning that equality is a dynamic concept which goes on changing with changing times and social contexts which must be understood in its original sense.

The dynamism of equality is seen in the case of *Budhan Choudhury*<sup>20</sup> where J. Das says, classification may be founded on different bases namely, "geographical or according to the objects or occupations or the like". By using the expression "or the like" J. Das kept the categories flexible and did not intend to exhaust them or make them rigid. Geographical, occupational or objective classification may therefore be enlarged by finding newer bases for classification where the

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<sup>19</sup> AIR 1952 SC 75.

<sup>20</sup> *Budhan Choudhury v. State of Bihar*, AIR 1955 SC 191.

potentiality of development and growth of the Constitution is preserved.<sup>21</sup> Hence, in this case it was rightly pointed out that Sec. 30 of the Code of Criminal Procedure<sup>22</sup> did not infringe the fundamental right guaranteed by Article 14 of the Constitution.

In *Bidi Supply Co. v. Union of India*<sup>23</sup> also the majority of the constitutional bench through Das C.J. adopted a dynamic and citizen centric interpretation of Article 14 where it opined that, the income tax authorities by an executive order which is unsupported by law cannot pick out a particular petitioner and transfer all his tax related cases to a distant place far from his residence and place of business by an omnibus order unlimited in point of time. If it is done then it will be regarded as an arbitrary action which did not even give the petitioner the opportunity to be heard. This order was presumed to have considerable inconvenience and harassment on the petitioner which does not fall under the criteria of reasonable classification.

With this case the judiciary upheld the rights of citizens by putting a check on unreasonable classification by the state.

In *Ram Krishna Dalmia v. Justice S.R. Tendolkar*<sup>24</sup>, the Supreme Court held that, “It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. It condemns discrimination not only by a substantive law but also by a law of procedure.”

With reasonable classification the judiciary and legislature welcome positive discrimination in the form of affirmative action.

Hence, Article 14 is a classic example of how the judges have evolved the equitable principle of ‘reasonable classification’ and ‘causal nexus’. This evolution took place over a number of cases where precedent and consistent reasoning played a vital role rather than Maxwellian or Mimamsa interpretation. This also reflects upon the fact that there were similar minded judges during the

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<sup>21</sup> P. B. Mukherjee, Justice S. R. Das and Equality Before Law, p. 161-182, Journal of the Indian Law Institute, Vol. 2, No. 2/3 (JANUARY—JUNE 1960).

<sup>22</sup> Notwithstanding anything contained in section 28, a chief Metropolitan Magistrate or Chief Judicial Magistrate may try all offences not punishable with death or with imprisonment for life or with imprisonment exceeding seven years.

<sup>23</sup> AIR 1956 SC 479.

<sup>24</sup> AIR 1958 SC 538.

period, who upheld the power of sovereign and at the same time were deeply conscious of the socio-economic and political rights of the people.

### **III. Evolution of the Concept of Positive Discrimination and Article 15-16 Of the Constitution of India**

Reservation in terms of discriminating against a certain population in a positive sense refers to the setting aside of certain vacant positions in any field, like education or public employment for a particular group of people who can be recognized as underprivileged when compared to the general populace. Reservation is about adequate representation and not poverty eradication. Articles 16(4), 4(A) and Article 15 provide the scope for implementation of positive discrimination against the deprived sections of the society. With SCs, STs and OBC, the reservation policy also includes Muslims and other religions as they are also the representatives of minorities in India like the others.

In matters related to reservation in India, Article 16 of the Constitution ensures Equality of opportunity in matters of public employment. Article 16 (1) states-

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The rule applies only in respect of employments or offices which are held under the state. The clause does not prevent the state from laying down the requisite qualifications (like mental excellence, physical fitness, sense of discipline, moral integrity and loyalty to the state) for recruitment in government services, and it is also open to the authority to lay down such other conditions of appointment as would be conducive for the maintenance of proper discipline among the servants.<sup>25</sup>

The expression under this clause, 'matters relating to employment and appointment' is also a form of affirmative action that is inclusive of all matters in relation to employment *i.e.*, prior and subsequent to the employment which are incidental to the employment and form parts of the terms of the conditions of the such employment. Thus, clause (1) covers-

(a) initial appointments, (b) Promotions, (c) Termination of employment; (d) Matters relating to the salary, periodical increments, leave, gratuity, pension, age

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<sup>25</sup> Siksha, Reasonable Classification under Article 14, (last visited on 07Aug 12 AM), <http://www.legalservicesindia.com/article/1061/Reasonable-Classification-under-article-14.html>

of superannuation etc. and principle of equal pay for equal work is also covered under Article 16(1).

Article 16 Clause (2) states, no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. The prohibited grounds of discussions are religion, race, caste, sex, descent, place of birth, residence, or any of them. The words, any employment or office under the State make it clear that **Article 16(2)** applies only to the public employment.<sup>26</sup>

**The first issue of affirmative action came up in State of Madras v. Champakam Dorairajan** where Constitution (1<sup>st</sup> Amendment) Act, 1951 was added which introduced clause 4 to Article 15. Article 15(4) is the enabling provision under which the state may make special provisions for the socially and economically backward classes.

In *M. R. Balaji v. Mysore*,<sup>27</sup> Court put 50% cap on reservations in almost all states except Tamil Nadu (69%, under 9th schedule) and Rajasthan (68% quota including 14% for forward castes, post-Gujjar violence 2008). Tamil Nadu exceeded the limit in 1980. Andhra Pradesh tried to exceed the limit in 2005 which was again stalled by the High Court.

Article 16 Clause 4 provides, nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The scope of Article 16 (4) was taken into consideration by the Supreme Court in *Devadasan v. Union of India*.<sup>28</sup> In this case “carry forward rule” made by the Government to regulate the appointment of persons of backward classes in government services was involved. The Supreme Court struck down the “carry forward rule” as unconstitutional on the ground that the power vested in the government cannot be so exercised so as to deny reasonable equality of opportunity in matters of public employment for the members of classes other than backward classes.

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<sup>26</sup> *Ibid.*

<sup>27</sup> AIR 1963 SC 649

<sup>28</sup> AIR 1964 S.C. 179.

Hence, the judgment was a way forward to the affirmative action with a rational application of laws.

But the Supreme Court in the case of *General Manager, Southern Railway v. Rangachari*<sup>29</sup> and later on in few judgments<sup>30</sup> allowed reservations not only in appointments but also in promotions even when the explicit power to provide reservation in promotion was not given to the states. The Hon'ble Supreme Court of India, as early as in 1961, said such a power is implicit under Article 16(4) and as an exception to the broader principle of equality enshrined under Article 16(1) confers equality to citizens not only in terms of initial appointment but also in respect of other matters relating to employment like, gratuity, superannuation, terms of service, promotion, etc. The Hon'ble Court had also read the inherent limitation of-

- (i) Maintaining administrative efficiency as underlined in Article 335 and
- (ii) Adequacy of representation of such backward classes within the services of the states, in providing such a benefit to the backward classes.

The above interpretation was further endorsed by the Hon'ble Supreme Court in *C.A. Rajendran v. Union of India & Ors.*<sup>31</sup>, in which 5 judges bench held that, States have power to provide reservations in promotions under Article 16(4), however the method evolved by the Government must be such as to strike a reasonable balance between the claims of the backward classes and claims of other employees with a need to maintain efficiency in administration. Here, the Court concluded that Article 16(4) does not confer any right on the members of backward classes neither there is any constitutional duty imposed on the States to make reservations, either at the initial stage of recruitment or at the stage of promotion.

Through which it can be deduced that Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments

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<sup>29</sup> AIR 1962 SC 36

<sup>30</sup> State of Punjab v. Hiralal, **1970(3) SCC 567** and Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India, (1981) 1 SCC 246.

<sup>31</sup> AIR 1968 SC 507.

in favour of backward class of citizens, which, in the opinion, is not adequately represented in the Services of the State.<sup>32</sup>

The Supreme Court in the case of *E.P. Royappa v. State of Tamil Nadu*,<sup>33</sup> discovered a fresh dimension of equality based on non-arbitrariness, and a new concept of equality was laid down through Bhagwati J., who stated that “Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined, and confined with traditional doctrinaire limits.” It was held that any arbitrary action would necessarily involve negation of equality which was also laid down in *Maneka Gandhi*<sup>34</sup> in 1978.

*The matter of reasonable classification and exclusion of arbitrary rules was reiterated in Madhu Limaye v. Supdt. Tihar Jail, Delhi.*<sup>35</sup> *There were Indian and European Prisoners in the Delhi correctional home, and both were treated differently. European prisoners get a better diet while Indian prisoners do not. The Court held that the difference between Indian and European prisoners in the matter of treatment and diet violates the right to equality under Article 14 as they all are all prisoners they must be treated equally.*

In the case of *M. Thomas v. State of Kerala*,<sup>36</sup> Justice V.R Krishna Iyer, in the matter of reservation rightly pointed out that the experience of reservation in reality showed that the benefits were, by and large, snatched away by the top creamy layer of the backward classes which is an obstacle in the path of positive discrimination by not fulfilling its very purpose of upliftment of the society and equality.

In *Ajay Hasia v. Khalid Mujib Sheravardi*<sup>37</sup> it was understood that the Regional Engineering College, Srinagar, was a society registered under the Jammu and Kashmir Registration of Societies Act, 1898, which makes it a ‘state under Article 12 of the Constitution of India as it passed the test for the instrumentality

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<sup>32</sup> Anurag Bhaskar, Article 16(4) stands on its own. Constitution made no room for ‘merit’ that courts invoke, (Published on 1 June, 2021 10:00 am IST), <https://theprint.in/opinion/article-164-stands-on-its-own-constitution-made-no-room-for-merit-that-courts-invoke/669215/> THE PRINT.

<sup>33</sup> AIR 1974 SC 555.

<sup>34</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>35</sup> AIR 1975 SC 1505.

<sup>36</sup> AIR 1976 SC 490.

<sup>37</sup> AIR 1980 SC 487.

of the state. The court held that a *viva voce* examination cannot be the sole factor for admissions. The viva should not have exceeded 15% weightage of the selection process, and every candidate should have been questioned in the same manner for analyzing their potential. The examiner should be a person with good knowledge of the subject who must ask questions related to the subject only. Hence, the *viva voce* not following the said requirements is arbitrary and a violation of Article 14

In *K.C. Vasanth Kumar v. State of Karnataka*,<sup>38</sup> also the Supreme Court has suggested that the reservations in favour of backward classes must be based on the mean test, where the policy of reservations should be reviewed every five years and if a class has reached up to that level where it does not need the reservation its name should be deleted from the list of backward classes.

In case of *Prasanna v. Director-in-Charge, LIT, Nagpur*,<sup>39</sup> the Nagpur University made some reservation for wards of the university employees for admission to the Institute of Technology. The reservation was sought to be justified on the ground of 'welfare of the employees.' The High Court held the scheme to be irrational.

The Hon'ble Supreme Court of India made it very clear in *Roop Chand Adlakha v. DDA*<sup>40</sup> that the process of classification is in itself a product of inequality and in that sense, antithetical of equality. The process would be constitutionally valid if it recognises a pre-existing inequality and acts in aid of amelioration of the effects of such pre-existent inequality. But the process cannot in itself generate or aggravate the inequality. The process cannot merely blow up or magnify insubstantial or microscopic differences on merely meretricious or plausible differences. The overemphasis on the doctrine of classification or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the Article of its precious content and end in replacing doctrine of equality by the doctrine of classification.

Therefore, in the present case, the differential treatment of Diploma-Holders and Graduates candidates by the prescription of different standards of service-

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<sup>38</sup> AIR 1985 S.C. 1495.

<sup>39</sup> AIR1984 Bom. 176.

<sup>40</sup> (1989) Supp (1) SCC 116.

experience for purposes of eligibility for promotion to the higher cadres is found unconstitutional.

The much awaited and landmark judgment of *Indira Sawhney*<sup>41</sup> recognized, right to equality as one of the basic features of the Constitution. The judgment overruled the previous judgments which supported reservation in promotion and concluded that reservation under Article 16(1) is only contemplated at the stage of direct recruitment and not at the stage of promotion (only till 5 years for SC and ST). Any effort to provide reservation at promotion would affect the efficiency of administration and violate the principle of equality enshrined under Article 16(1).

Therefore, to nullify the Indira Sawhney judgment and provide reservations in promotions, Parliament amended the Constitution, and Article 16 (4-A) was inserted,<sup>42</sup> which introduced the provision of reservation in matters of promotion with consequential seniority.<sup>43</sup> The essential elements of the Article are as follows-

- (a) The States can make provisions for reservations in the matters of promotion to any class or classes of posts in the services under the state in favour of the SCs and STs.
- (b) The said SCs or STs should, in the opinion of the State, have not been adequately represented in the services under the State.

After Indira Shawney, to uphold the light of equality, the High Court of Guwahati, in case of *Teachers Association, Silchar Medical College v. State of Assam*,<sup>44</sup> held the reservation seats in medical colleges for sons and daughters of employees serving in the Health Department of the State was quashed as being arbitrary and irrational.

It is to be noted that the reservation falls under Art. 15 (1) and not under Art. 15 (4), and this can be valid only if it fulfils the tests of reasonable classification as laid down under Art. 14.

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<sup>41</sup> *Indira Sawhney & Ors v. Union of India*, AIR 1993 SC 477.

<sup>42</sup> Constitution (Seventy-Seventh) Amendment Act, 1995.

<sup>43</sup> The provision of 'Consequential Seniority' was introduced vide Constitution (Eighty-Fifth) Amendment Act, 2001.

<sup>44</sup> AIR 1996 Gua 97.

The Supreme Court, after Indra Shanny in *State of Haryana v. Rajpal Sharma*<sup>45</sup> gave a remarkable judgment in which it refused to classify those teachers on the basis of sectors of their employment. Hence, the teachers employed in private-aided schools in the State of Haryana and the teachers of Government Schools are entitled to get the same amount of salary and dearness allowances.

Another case of irrational discrimination by college authorities was the case of *Dr. Sadhna Devi v. State of Uttar Pradesh*,<sup>46</sup> The Supreme Court insisted that for admission to postgraduate medical course, there ought to be prescribed a minimum cut-off percentage of marks at the entrance examination for Schedule Castes, Scheduled Tribes and other Backward Classes. It would be unconstitutional or will be violative of the right to equality under Article 14 to keep this cut-off at 0%.

Similarly, in *Dr. Preeti Sagar Sriwastata v. State of Madhya Pradesh*<sup>47</sup> the apex court quashed the admission procedure to post-graduate degree/diploma courses in medicine, where candidates of backward classes were not given any minimum marks to appear at an entrance examination. In this case, the State Government fixed a cut-off percentage of 45% marks in this examination for admission of the general category students while no cut-off percentage of marks was fixed for SC/ST candidates. This meant that there were no minimum qualifying marks in the entrance examination prescribed for the reserved category candidates for admission to the post-graduate medical course. Hence, the Supreme Court said that even reserved category candidates should acquire some minimum qualifying marks, if not the same as prescribed as benchmarks for general category students. **Thus, there cannot be zero qualifying marks for reserved category candidates in the entrance test for admission to the post-graduate course.** Therefore, if these students fail to secure the minimum qualifying marks, then the seats reserved for them should not get wasted but rather be released for the general category candidates. Otherwise, there will be a national loss.

Meanwhile, the Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*,<sup>48</sup> and in *P.A. Inamdar v. State of Maharashtra*<sup>49</sup> ruled that

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<sup>45</sup> AIR 1997 SC 449.

<sup>46</sup> AIR 1997 SC 1120.

<sup>47</sup> AIR 1999 SC 2894.

<sup>48</sup> (2002) 8 SCC 481.

<sup>49</sup> 2005 AIR (SC) 3226.

reservations cannot be enforced on Private Unaided educational institutions. Supreme Court further in *John Vallamttom v. Union of India*<sup>50</sup> stated that an object which may be valid at one point of time or situation may become invalid at another point of time or situation.

Hence, the Supreme Court affirmed Article 16 (4-A) in 2006 in the case of *M. Nagaraj v. Union of India*.<sup>51</sup> Because it was noted that the Parliament has come forward with the policy of reservation which is a method of encouraging the depressed and the ignored classes to participate in the decision-making process.

But a number of High Courts after following Nagaraj Case have struck down reservations in promotion after applying the principles of compelling reasons and inadequacy of quantifiable data of SC and ST's.

In February 2020 through *Mukesh Kumar & Anr. v. The State of Uttarakhand & Ors*<sup>52</sup> the Hon'ble Apex court reinterpreted Article 16 and broadened the scope of equality it stated,- "It is a settled law that the state government cannot be directed to provide reservations for appointment in public posts and the state is not bound to make reservation for ST's and SC's in matters of promotions." Similarly, an individual does not have a fundamental right to claim reservation; it is for the government to decide whether reservations are required in appointments and promotions based on the quantifiable data gathered.

In a sense, the Court made reservation optional. If a state wishes to exercise their discretion and make a provision for reservation, the state has to collect 'reliable quantifiable data' of inadequacy of representation of that class in public service.

This may be interpreted as a departure from the conservative rule of equality to a much liberal and affirmative rule of equality. The earlier ruling of Supreme Court fixing the limit of reservation at 50% of the total vacancies has been interpreted as a **mandatory rule** for the government to provide reservation to

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<sup>50</sup> AIR 2003 SC 2902.

<sup>51</sup>(2006) 8 SCC 212. The observation of the Court in *Nagraj case* states that the State has to collect quantifiable data showing backwardness in respect of the SCs and STs and application of the principle of creamy layer in respect of SCs and STs is contrary as to the decision in *Indra Sawhney*. The court stipulated that the concerned state will have to show, in each case, the existence of "compelling reasons" which includes backwardness, inadequacy of representation and overall administrative efficiency before making provisions for reservation.

<sup>52</sup> Civil Appeal No. 1226 of 2020.

SC, ST and OBC's in all fresh appointments. But in the judgment of 2020 the Supreme Court held that the Constitution empowers the State to provide reservations in matters of appointment and promotions "if in the opinion of state, they are not adequately represented in the service of the state." Further, such opinion of giving reservation is subjected to judicial review and the state needs to prove before the court that reservation was necessary and does not affect the efficiency of administration.

Hence, the judiciary time and again evolved the dynamic concept of equality by way of affirmative action through the art of interpretation and by acknowledging the ultimate sovereignty.

#### **IV. Conclusion**

The system of reservation is not a new concept; rather, it has existed since the epic period of Ramanaya and Mahabharata. The instances of reservation started in the pre-independence period and went on to the post-independence period as a form of affirmative action. The system of reservation was framed by the Constituent Assembly, which was chaired by **Dr. B. R. Ambedkar** to minimize the pain of historical atrocities.

Reservation is fair, as far as it provides appropriate positive discrimination for the benefit of the backward, downtrodden, and economically poor sections of society. But when it tends to harm society and ensures privileges to some at the cost of others for narrow political ends, it should be done away with as soon as possible. When more people aspire for backwardness rather than forwardness, the country itself stagnates. Meritocracy should not be polluted by injecting relaxation of entry barriers, rather than it should be encouraged by offering financial aid to the underprivileged. India's first President, **Dr. Rajendra Prasad** assured the Nation that the assembly and the Government's aim was to "end poverty and squalor to abolish distinction and exploitation and to ensure decent conditions of living". For providing equality and a way of affirmative action, the judiciary and the legislature have done and been doing the fullest in order to preserve the true spirit of the rule of law. In the United States, affirmative action is defined as a system of preferential treatment for minorities and women which attempts to compensate them for being denied opportunities of advancement due to past and present discrimination. Surprisingly, India initiated to adopt Positive discrimination as a way of affirmative action towards caste divisions even before United States adopted it.