M. NAGRAJ V. *UNION OF INDIA:* LEGAL AND THEORETICAL REFLECTIONS

THE CONCEPT of reservation of jobs is based on the idea of fair equality of opportunity that takes into account the initial social and cultural handicaps faced by beneficiaries of reservation. From a Rawlsian perspective, it means that the 'arbitrariness of birth' and the problem of 'natural lottery' takes away the chance of individuals to have an 'equal start' in life.[1] One of the primary tools of affirmative action in India is the reservation of posts in government jobs for members of the backward communities. The concept of reservations is a shift from the strict formal notion of equality based on meritocracy, to a more substantive notion of fair equality of opportunity. Although the right to equality is a fundamental right under articles 14, 15(1) and 16(1) of the Indian Constitution, reservation in government jobs is a constitutionally sanctioned exception to equality by virtue of article 16(4). Such reservation of seats has been a hotly debated issue, legally and politically, ever since the Constitution came into force. It has gained particular significance in the past few years with the Congress party government at the centre proposing to extend such reservation to the private sector as well.[2] The Supreme Court's recent judgment in *M. Nagraj* v. *Union of India*[3] has been the high point of the debate in 2006 and has ruffled the feathers of politicians and organizations of backward communities. The paper seeks to analyze, legally and theoretically, the import of the decision**.**

Legal implications

The Supreme Court's judgment dated 19.10.2006 in *M. Nagraj* v. *Union of India*[4] should have ideally given the government a cause for celebration. The decision upheld the 77th, 81st and 85th amendments to

1. John Rawls, *A Theory of Justice* (1973).

2. In fact this was one of the stated objectives in the party's Common Minimum Programme that it has prepared when it assumed power in 2004. See "Common Minimum Programme", *available at* <http://www.ibef.org/Attachment/Com_Min_ Prog.pdf.>).

3. 2006 (8) SCC 212.

4. *Ibid*.

the Constitution that inserted articles 16(4A) and 16 (4B) into the fundamental rights. Article 16(4) that has been present in the Constitution since its inception permits the state to reserve posts in government services for any backward class of citizens which, in the opinion of the state, is not adequately represented in state services. These amendments allow the state to take this highly politicized scheme of affirmative action through reservation[5] a step further. The 77th amendment allows reservations for scheduled castes and scheduled tribes in promotions. The 85th amendment grants consequential seniority to such candidates who have undergone accelerated promotion. The 81st amendment on the other hand permits the state to carry forward unfilled vacancies of one year that were reserved under articles 16(4) or 16(4A) to any succeeding year(s) and such carry forward vacancies will be ignored while calculating the 50% ceiling[6] on reservation.

Several critical constitutional issues arose before the five judge bench in this case, the first being the limits on the power of Parliament to amend the Constitution. These amendments are particularly controversial because they, in effect, seek to nullify earlier decisions of the same court. In *Indra Sawhney* v. *Union of India*[7] the court had ruled that reservations were permissible only at the point of employment and not at the time of promotion. The majority in the same case further held that the 50% ceiling on reservation as laid down in *Balaji*[8] is to be applied on a yearly basis and carry-forward of reserved posts is subject to the overall limit of 50% for that particular year. After the 77th amendment but before the 85th amendment the court had held in *Ajit Singh II*[9] and *M.G. Badappanavar* v. *State of Karnataka*[10] that conferring consequential seniority on a person who has undergone accelerated promotion by virtue of belonging to a reserved category would violate the principle of equality, which is part of the Constitution's inviolable basic structure. The petitioners, therefore, alleged that Parliament, by abrogating the fundamental role of the Supreme Court as interpreter of the Constitution, had *per se* violated the basic structure. But the court paid deference to the parliamentary authority in an innovative manner and held:[11]

5. See Rajni Kothari, *Caste in Indian Politics* (1995) for a good overview of the role of caste based reservations in Indian politics.

6. See *Balaji* v *State of Mysore*, AIR 1963 SC 649.

7. AIR 1993 SC 477.

8. *Supra* note 6.

9. *Ajit Singh II* v. *State of Punjab*, AIR 1999 SC 3471.

10. AIR 2001 SC 260.

11. *Supra* note 3 at 227.

> [U]nder Article 141 the pronouncement of this court is the law of the land. The judgments of this court…were judgments delivered by this court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments.

According to the court, only those constitutional principles that constitute the "constitutional identity" and "stand at the pinnacle of the hierarchy of constitutional values" form part of the basic structure and are beyond the amending power of Parliament.[12] However, this cursory dismissal of the petitioners' contention is rather strange because there is a well-established jurisprudence on the power of Parliament to nullify a court's decision. Several cases have reiterated the point that the legislature cannot overrule a judgment except by making the decision ineffective by removing the very base on which it is founded.[13] All these rulings were ignored in the instant case. A probable reason may have been that the above cases dealt with ordinary legislations while the instant case concerns a constitutional amendment overriding a judicial pronouncement.

The court then gave a landmark ruling that effectively overturned its earlier stand on the constitutionality of reservation in promotions with consequential seniority.[14] It held that while equality was a facet of the basic structure the 'catch-up' rule that avoids consequential seniority by putting general category candidates on par with those who have benefited from accelerated promotion is not. The latter is merely a judicially evolved concept found in the service jurisprudence and "cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc…It cannot be said that 'equality code' under Article 14, 15 and 16 is violated by deletion of the 'catch-up' rule." Therefore, the court upheld article 16(4A) on the ground that insertion of the

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12. The court reviewed the earlier law on basic structure in great depth including *S.R. Bommai* v. *Union of India,* AIR 1994 SC 1918 and *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461 and held that "the word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and
it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle
of constitutional sovereignty…The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day".

13. *I.N. Saxena* v. *State of M.P.,* AIR 1976 SC 2250; *Sundar Dass* v. *Ramprakash,*

concept of 'consequential seniority' does not destroy or abrogate the basic structure.

The next question before the bench was whether article 16(4B) is within the uninfringeable parameters of the basic structure. Although the court validated the partial nullification of *Indra Sawhney*[15] and the lifting of the 50% cap on reservation for the purposes of vacancies that are carried forward the reasoning seems a bit sketchy. The judgment tags article 16(4B) to 16(4A) and proceeds on the assumption that the justifications used to validate the latter are applicable *mutatis mutandis* to the former.[16] It did not delve into the distinct issues that arise with respect to carry-forward rule and the basic structure. While elaborating on the equality code (which it said was certainly part of the basic structure) and its relation to reservation it remarked that "the conflicting claim of individual right under Article 16(1) and the preferential treatment given to a backward class has to be balanced...The question is of optimization of these conflicting interests and claims". It further cautioned that concerns of administrative efficiency under article 335 are a limitation on reservation. The court seems to indicate that these two aspects are integral components of the scheme of article 16 and part of the basic structure. Despite these observations the court did not examine whether a breach of the 50% ceiling in favour of the carry-forward rule as proposed by article 16(4B) disturbs the balance between individual claims and needs of the backward classes and whether it adversely affects efficiency. The author submits that examination of article 16(4B) on the touchstone of these two parameters was critical for deciding the validity of the 81st amendment.

Although the decision *per se* went in favour of the state, the limitations imposed on the government's discretion to make a law in furtherance of these enabling constitutional provisions have grabbed headlines. The court held:[17]

> [T]he State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on

15. *Supra* note 7.

16. The court merely held that Art. 16(4B) fell within the pattern of Art.16(4) and was a classification within the principle of equality.

17. *Supra* note 3 at 272.

> the width of the power the same would be liable to be set aside.

Therefore, a law will be valid only if the concerned state can place before the court the "requisite quantifiable data" and satisfy the court that reservations became necessary on account of inadequacy of representation of SCs/ STs in a particular class or classes of posts without affecting general efficiency of service.

The judiciary's passing comments on the 'creamy layer' have also been highly controversial. There have been several debates on the real effectiveness of the policy of reservation in light of the 'creamy layer'- the forward members of backward classes - cornering most of the reserved quota.[18] The 'creamy layer' principle entails that the affluent persons among the backward classes must be kept out of the reservation scheme as such persons neither require nor deserve the positive discrimination. For the first time the judiciary has categorically stated that the power of the state to reserve posts is controlled by the "*principle of creamy layer*". These comments have particularly irked the government because of their apparently wide scope. While article 16 (4A) is confined to reservation for SCs and STs the court's remarks are general in character and the limiting factors listed by it apply to all reservation schemes for backward classes. The court held that "reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country…if [the] creamy layer among backward classes were given some benefits as backward classes, it will amount to equals being treated as unequals." It emphasised that any law that fails to take this principle into account would go against the fabric of equality of opportunity and would be unconstitutional.

The judiciary has, through this decision, laid down the test for judging the validity of all future laws that provide for reservation under article 16. As a result, no government can implement the amendments and provide reservation in promotion, with consequential seniority, without ensuring that the creamy layer among the backward classes is kept out of the reservation scheme. Also, all existing and future laws made under article 16(4) that do not identify the creamy layer stand the risk of being declared unconstitutional.

As a consequence of these comments, particularly the ones relating to the creamy layer, this judgment has invoked a knee-jerk reaction from political parties across the spectrum. The Prime Minister has promised 'action' after studying the decision.[19] Demands have been

18. *Indra Sawhney* v. *Union of India*, *supra* note 7.

19. Subodh Ghildiyal, "Centre studying variants to 'creamy layer'" *The Times of India* 24 Oct 2006.

made to refer the issue to a larger bench or to reverse the judgment by passing a constitutional amendment.[20] There is demand that all legislations relating to reservation be put into the IXth Schedule of the Constitution to save them from judicial interference.[21] Dalit parties have gone to the extent of terming the decision as a 'bankruptcy of democracy'.[22]

Rawls' theories of justice, reservations in India and "creamy layer"

The inclusion of the creamy layer principle as necessary element of every reservation scheme marks a fundamental shift in the Indian jurisprudence on reservation. The judiciary and most academic works view equality under article 14 and its corollary right to equality of opportunity under article 16(1) as *individual* rights. In the Indian context, the right to preferential treatment through reservation, on the other hand, is seen as a *group* right - a right that is available to a class of persons as a whole and which can neither be conferred nor denied to particular individuals.[23]

The justifications for this group right can be traced back to centuries of discrimination against particular communities. Certain castes and communities remained marginalised due to their low social status that was based on the notions of ritual purity and impurity.[24] The rigid and immobile social structures ensured that the social retardation and educational backwardness was passed on to future generations. A sense of denial of opportunity to a group as a whole as a result of this discrimination was felt for the first time during the British rule. The

20. Manini Chatterjee, "Parties team up to scream against creamy order" *The Indian Express* 21 Oct 2006.

21. The IXth Schedule is a controversial provision that was added by the 1st Amendment in 1951. By virtue of Art. 31B any law that is added to the IXth Schedule is not questionable on the grounds of violation of fundamental rights by any court in the country. However, such a complete immunity from judicial scrutiny has now been denied by the apex court in *I.R. Coelho Dead by LRs* v. *State of Tamil Nadu*, AIR 2007 SC 861.

22. "Supreme Court verdict flayed" *The Hindu* 23 Oct 2006.

23. *Indra Sawhney* v. *Union of India, supra* note 7. Also see M.P. Jain, *Indian Constitutional Law* (2003).

24. The Indian Hindu society was characterised by a graded inequality based on ritual purity with the Brahmins occupying the topmost hierarchical level. This was originally based on nature of work performed by each caste. However, even after the caste based division of labour began to dissolve, the tags of ritual purity and impurity remained attached to the castes. These tags define and regulate various aspects of social life. For example, certain castes are prevented from entering temples due to their impure status.

British administration preferred to hire Brahmins, not so much for their claim of divine superiority, but for the high rate of literacy among them.[25] Thus, Brahmins armed with education, skills and other assets they had accumulated over the centuries carved out a large chunk of the government jobs for their exclusive consumption. The need for reservation in employment was first voiced by the economically well-off among the untouchables because despite occupational diversification they still faced the social disabilities, like being barred from temples or the village well, associated with the stigmatic tag of 'untouchable'.[26] The dominance of those who were historically higher on the social and educational ladder threatened to continue in perpetuity in independent India. Therefore, to undo the effects of this dominance, the Constitution permits preferential treatment through reservation in favour of those who are in a socially and/or educationally disadvantageous position due to past discrimination. Article 16(4) is one such provision.[27] Although the term 'backward classes' as used in this article is not defined but the Indian judiciary has gone to great lengths to explain its import. In *K.C. Vasanth Kumar* v. *State of Karnataka*[28] the five judges hearing the case delivered five separate opinions on the definition of backward classes. The most authoritative pronouncement on the matter till date is *Indra Sawhney*[29] where the court reviewed the previous case-law and held that backwardness need not be social *and* educational as is the case under article 15(4). The accent of article 16(4) is on "*social backwardness*". There is an integral connection between caste, occupation, poverty and social backwardness and caste may be used to identify a backward class because caste is often a social class in India. However, it cannot be the sole criterion of determination. Besides caste there may be several other communities, groups and denominations that represent the "*backward social collectivities*". Economic criterion too cannot be a sole determinant unless "*the economic advancement is so high that it necessarily means social advancement*". Once a backward class has been identified according to these principles preferential treatment is granted to all members of that class.

The concept of a creamy layer, however, brings in an element of individualism within this group of backward classes. An analysis of the

25. Pran Chopra, "The Reservation Policy: An Overview" in V.A. Pai Panandiker, (Ed.) *The Politics of Backwardness* 13 (1997).

26. Prakash, "Reservation Policy for Other Backward Classes" *id.* at 35.

27. Such is the importance of reservation that despite Art. 16(4) being enabling the Supreme Court has held that the "State is obliged to provide [a] level- playing field to the oppressed classes".

28. AIR 1985 SC 1495.

principles of justice propounded by the American scholar John Rawls will show why reservation cannot be entirely group centric and taking into account individuals within the group is justified. Rawlsian theories of equality and justice have been widely applied to justify various forms of affirmative action - from preferential treatment of minorities in American universities to equitable allocation of medical resources.[30] Central to Rawls' theory are his two principles of justice: [31]

(1) Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others, and

(2) Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all.

The second principle is the prologue to another important Rawlsian notion - 'fair equality of opportunity'. It is not sufficient that positions are left open to all, they must be arranged in such a manner that all are afforded an equal opportunity to attain them.[32] The quest for attaining a just and equal society has thrown up varied interpretations of the idea of equality of opportunity. Rawls' idea of fair equality of opportunity falls somewhere in between the two extremes of 'formal legal equality of opportunity' that demands that every person irrespective of his background is strictly treated on par, and 'equality of result' that ensures that every person irrespective of his background receives the same benefits.[33] All the three theories essentially aim at creating a 'level playing field', but each theory's idea of level playing field is drastically different. Fair equality of opportunity takes into account the initial social and cultural handicaps of an individual. Rawlsian theory is that birth into a particular social and cultural stratum will determine the talents and skills developed by the person and finally the opportunities he will have access to. In a formal system of equality, those with substantial initial social and educational endowments will end up with a substantial share of the available rewards, while those with meagre

29. *Supra* note 7.

30. Robert Fullinwider, 'Affirmative Action', *The Stanford Encyclopedia of Philosophy available at* <http://plato.stanford.edu/archives/spr2002/entries/affirmative-action/> (visited on 12-11-2006).

31. *Supra* note 1.

32. *Ibid.*

33. See Neil MacCormick, "Justice According to Rawls" 89 *LQR* 406 (1973). Also see Richard Arneson, 'Equality of Opportunity', *The Stanford Encyclopedia of Philosophy*, *available at* <http://plato.stanford.edu/entries/equal-opportunity/> (visited on 12-11-2006).

initial endowments will continue to receive only meagre returns.[34] Thus, the formal or legal idea of equality merely reproduces the patterns of initial distribution of resources, and there is no justification for allowing opportunities to be based on this arbitrary process. The liberal principle of equality which Rawls propounds addresses the root of the problem and clearly recognises that the initial distribution of resources dangles on the natural and social contingencies. Its primary goal is to negate the social and cultural disadvantages that a person is under by virtue of being born into a particular social stratum and provide all with an 'equal start' so that a person's social standing is not a hindrance in reaching the open posts and positions.

The Supreme Court in this case has also recognised that equality of opportunity does not mean mere formal equality. What Rawls calls 'fair equality' is termed as 'egalitarian equality' or 'proportional equality' by the court. But the Rawlsian theories clearly show that even this fair or egalitarian equality that is effectuated through affirmative action programmes like reservation is essentially an individual right. The right is conferred not on a group but on the individuals comprising the group to guarantee each one of them a level playing field. Therefore, only those individuals who have actually been denied an equal start in life and lack the initial social and educational endowments are entitled to preferential treatment and no one else. The court, while hesitant to say so authoritatively, seems to have recognised the need to see things differently and has observed that "the concept of 'equality of opportunity' in public employment concerns an individual, whether that individual belongs to general category or backward class".

Allowing persons who are not genuinely disadvantaged but are only part of a community where a majority of the members are socially and educationally backward, to take advantage of reserved quotas would violate the rights of two categories of individuals and cause an undesirable reduction in administrative efficiency. First, it would impede the rights of those who do not belong to the backward classes. This is because the right of a disadvantaged person to preferential treatment does not exist in abstraction. It is a serious abrogation of the right of other individuals to equality of opportunity in public employment that is guaranteed under article 16(1). In this regard, the court has interestingly analysed the relation between three concepts involved in reservation: *equity*, *justice* and *merit*. The backward seek justice. The others in public employment seek equity. But merit is what ensures efficiency in administration. Therefore, a stable equilibrium needs to be struck between

34. *Supra* note 1.

justice to the backward, equity for the forward and efficiency for the entire system. The fundamental right of the 'forward' persons can be compromised only when there is a compelling need to favour disadvantaged persons. There is certainly no such compelling need when it comes to the creamy layer. Consequently, if the creamy layer is included within the reservation scheme it would amount to an unjustified denial of the right to equality of opportunity to non-backward persons. Secondly, since the creamy layer is socially and educationally better off than the genuinely backward, the members of the creamy layer fill up most if not all the reserved posts. As a result they deny the right of a 'level playing field' to those who have suffered from what Rawls calls 'arbitrariness of birth' and 'natural lottery'.

Finally with respect to efficiency, article 335 of the Constitution expressly requires the state to keep in mind the maintenance of efficiency while prescribing reservations. The judiciary too has consistently maintained that efficiency must always be a consideration while formulating a reservation scheme. Since a trade-off in favour of justice for the backward, as opposed to pure merit, will undoubtedly lead to some reduction in efficiency (the quantum will vary according to the minimum qualifications set for the reserved category) such a trade-off can be made only when it is absolutely essential. Those who form part of the creamy layer are persons who despite having the necessary social and educational opportunities have failed to achieve a desirable level of merit. A reduction in efficiency of administration cannot under any circumstances be justified for the benefit of such persons.

The havoc created by ignoring individualism within the backward group had been recognised by the Indian judiciary earlier as well. In *N.M. Thomas* v. *State of Kerala*[35] Krishna Iyer J observed that the benefits of reservations are "by and large snatched away by the top creamy layer of the backward caste or class, thus keeping the weakest among the weak always weak". In *Indra Sawhney*[36] the court became more specific and suggested that one way of overcoming the creamy layer problem was to exclude children of IAS and IPS officers from the scheme of reservation. This was based on the assumption that their parents' social and economic status is sufficiently high to give them a full opportunity to develop their potential. Yet, these were not binding directions. As a result lawmakers have shown a lackadaisical attitude to the issue till date. While most state level governments ignored the problem altogether others put up a façade by adding unrealistically high

35. AIR 1976 SC 490.
36. *Supra* note 7.

conditions to the Supreme Court's parameters for identifying the creamy layer. An example is the State of Bihar where under a particular reservation law a civil servant belonged to the creamy layer only if the spouse was also a graduate and they owned a house in an urban area.[37] An even more absurd condition was that doctors and lawyers were eligible for reservations unless they had an income above Rupees one million, the spouse was educated and they owned family property worth Rupees two million.[38] Such misapplication of affirmative action programmes has ensured that over one million outcasts are still forced to work as manual scavengers clearing human faeces and animal carcasses and are segregated from the rest of society, that over 40 million of them still survive as bonded labourers despite the Bonded Labour System (Abolition Act), 1976 abolishing all forms of bonded labour.[39] This decision of the Supreme Court, however, has specifically made exclusion of the creamy layer a pre-conditionality for the validity of any law providing for reservation. The government, therefore, is now left with no choice but to take note of the judicial directions and ensure that the law actually helps those for whom it was designed.

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37. *Ashok Kumar Thakur* v. *State of Bihar*, AIR 1996 SC 75.

38. *Ibid.*

39. Smita Narula and Martin Macwan, *Untouchability: The Economic Exclusion of the Dalits in India* (2004).

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