

CHAPTER I

I N T R O D U C T I O N

The National Commission for Scheduled Castes and Scheduled Tribes completed two years of its existence as a Constitutional body on 12-3-94. The First Report of the Commission was submitted to the President of India on the 15th August, 1994. The historical background which led to the setting up of the Constitutional National Commission for SC & ST after the amendment of Article 338 of the Constitution of India by the Constitution (Sixty-fifth Amendment) Act, 1990, has been covered in the First Report of the Commission.

1.2 The Commission handled 7918 complaints and petitions. It also made 44 field enquiries in reported cases of atrocities on persons belonging to the Scheduled Castes and Scheduled Tribes. The present Report is based largely on the complaints received in the Commission and action taken thereon and the field enquiries.

Meetings of the Commission

1.3 Between April 1993 and March 1994 the Commission held six meetings on the following dates:

Fourth Meeting	21-4-93
Emergent Meeting	16-7-93
Fifth Meeting	18-8-93
Sixth Meeting	15-9-93
Seventh Meeting	29-9-93
Eighth Meeting	22-3-94

1.4 The Rules of Procedure of the Commission under Clause (4) of Article 338 were finalised at the meeting on 22-3-94 and notified in the Gazette Extraordinary on 5-4-94.

Changing scenario in the country

1.5 India will soon complete five decades of its existence as a free and democratic nation committed to secure to all its citizens social, economic and political justice. The highest ideals enshrined in the Constitution

of India have been sought to be converted into reality through various legislative, administrative and developmental measures over the last four decades. These measures have no doubt brought about a change and, more importantly, they have brought in a sense of awareness amongst the downtrodden. The sections of the society which had been neglected since times immemorial and whose existence was often pathetic beyond contemplation, not only in economic terms but also in terms of social hierarchy, have begun to assert their rights. The provisions of the Constitution backed by a series of measures have also brought about a certain degree of insistence about the enjoyment of rights guaranteed to them. They also claim for themselves a more significant role in the management of the affairs of the country at all levels. It is a matter of satisfaction that this has started to happen although it has taken much longer than was desirable.

1.6 In today's world changes take place very quickly. What took decades to happen earlier now happens within a matter of weeks. Information and news flow from one part of the world to another in matters of seconds. Influence of alien cultures, specially of the West, is penetrating deep into the roots of society in many developing countries. In India too rapid changes have occurred in many spheres in the last eight to ten years. In the recent years the Indian economic scene has also been undergoing a major transformation. Two important policy directions of liberalisation and privatisation of industrial and economic activities and opening up of certain segments to private sector are significant changes whose impact will have long term consequences. Coupled with this is the importance being laid on up-to-date technology as it is felt that without access to high technology the country would be left behind in the race that is constantly affecting the international scene. The new policy direction no doubt has its protagonists and antagonists and arguments can be advanced both in favour of and against these measures. This Commission would not be concerned with purely economic arguments but it would be failing in its responsibility if it does not take note of the realities of the present and the hopes and fears of the future of the Scheduled Castes and Scheduled Tribes. While it is too early to take a clear cut view on the new direction the Commission would urge that alongwith the measures of privatisation parallel measures should be initiated simultaneously to protect the legitimate interests of SC & ST. It may happen that those who are already advanced and equipped to face competition only get to gain in the changed dispensation. Therefore, it is necessary to build up stronger support system alongwith very special efforts to equip those who had been deprived of opportunities and support in the past.

Other Backward Classes - Supreme Court Judgment in Indira Sawhney Case

1.7 Alongwith changes in the economic and industrial policy, another matter of great importance needs to be mentioned in the overall context of the Constitutional safeguards provided for SC & ST. The Constitution provides for appointment of a Commission to investigate the conditions of socially and educationally backward classes and the difficulties under which they labour and to make recommendations for improvement of their condition and removal of such difficulties. Accordingly the Second Backward Classes Commission was appointed under Article 340 of the Constitution, commonly known as the Mandal Commission, which submitted its Report on 31-12-1980. The Government of India issued an Office Memorandum on 13-8-1990 to the effect that the Government having carefully considered the Report and the recommendations regarding the benefits to be extended to the socially and educationally backward classes as opined by the Commission were of the clear view that at the outset certain weightage had to be provided to such classes in the services of the Union and their Public Undertakings. Accordingly orders were issued for 27% of the vacancies in civil posts and services under the Government of India to be reserved for SEBC in case of direct recruitment.

1.8 It is a fact of history that soon after this decision of the Government there was widespread protest in certain northern States against it. Writ petitions were filed in the Supreme Court challenging the Memorandum issued by the Government. The judgment in the Writ Petition (Civil) No.930 of 1990, Indira Sawhney and Others v/s Union of India and Others was delivered on 16-11-1992 by the Supreme Court of India. In the judgment the Supreme Court went into several basic questions including those relating to reservation some of which have far reaching implications.

Summary of Supreme Court Ruling

1.9 The summary of the answers to various questions dealt with by the Supreme Court in the above cases relevant to SC & ST is reproduced below:

- "(1) (a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, statutory corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision.

(b) An executive order making a provision under Article 16(4) is enforceable.

(2) (a) Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1).

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment.

(c) Reservations can also be provided under clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' -- as explained in this judgment.

(3) (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectives for the purposes of Article 16(4).

(b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor it is possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with the occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire

populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes.

(c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes.

(d) 'Creamy layer' can be, and must be excluded.

(e) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-twined in the Indian context.

(f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority.

(4) (a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria.

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised.

(5) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories.

(6) (a) & (b) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of

consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be.

(d) Devadasan was wrongly decided and is accordingly over-ruled to the extent it is inconsistent with this judgment.

(7) Article 16(4) does not present provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion -- be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12 -- such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so. (Ahmadi, J., expresses no opinion on this question upholding the preliminary objection of Union of India.) It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

(8) While the rule of reservation cannot be called anti-meritian, there are certain services and posts to which it may not be advisable to apply the rule of reservation.

(9) The distinction made in the impugned Office Memorandum dated 25th September, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as other backward classes, as explained in para 114 of this Judgment.

(10) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned office memorandum dated 25-9-1991 is constitutionally invalid and is accordingly struck down.

(11) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4).

(12) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism -- in the nature of a Commission -- for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of OBCs and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor.

(13) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of Five Judges.

1.10 For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 26. Our answers question-wise are:

(1) Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under clause (1) of Article 16.

(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', SCs, STs and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to

educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to in Article 46 do include SEBCs referred to in Article 340 and covered by Article 16(4).

(3) Even under Article 16(1) reservations cannot be made on the basis of economic criteria alone.

(4) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situation inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.

To the extent, Devadasan is inconsistent herewith, it is over-ruled.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable -- nay, necessary -- to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement.

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4). It is not possible or necessary to say more than this under this question.

(8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotion already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion -- be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12 -- such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so."

Effects of the ruling

1.11 The supreme Court ruling will have effect on a number of aspects of the situation of the Scheduled Castes and Scheduled Tribes in the matter of their representation at various levels in the Government services. In the first place, another segment of the disadvantaged class of society would enter the sphere of reservations and although such reservations have been in existence for a long time in some States of the South, it would be a new concept in the Central Government services and some States. It is felt in some quarters that percentage of reservation in Government jobs could form a plank for populist moves by appearing to help more and more sections of society on the basis of caste specially those who are vocal or who are perceived to be disadvantaged in the eyes of the Government of the time. Higher percentages of reservation may create a hue and cry from those advanced sections of population. On a different dimension this may adversely affect the general sympathy for SC & ST, as many people are unable to see the distinction and associate reservation with SC & ST only and feel that all the high reservation is for SC & ST. With the extension of the reservation benefits in recruitment there would soon be a demand for extending all the benefits enjoyed by SC & ST to OBC. While the Commission has no objection for the measures taken for the advancement of OBC, the Government must ensure that there is no dilution in the application and implementation of the safeguards provided for SC & ST under the Constitution or under any other provision made by the Government.

1.12 The dimension of the safeguards meant for SC & ST which is likely to be adversely affected by the Supreme Court judgment is the area of promotions. According to the ruling reservation in promotion shall cease to be operative after five years. Within the period of five years from the date of pronouncement of the judgment (16-11-92) it would be open to the appropriate authorities to revise, modify or reissue the relevant rules to ensure the achievement of the objective of Article 16 (4).

1.13 The Commission is happy to report that suitable measures have been taken to ensure that there is adequate representation of SC & ST at all levels ensuring reservations in promotions and by adding clause 16 (4A) to the Constitution. "Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State, are not adequately represented in the services under the State", thus nullifying the effect of the judgment and keeping continuity of reservations in promotions.

1.14 The country is passing through a phase of transformation. There are visible signs of the rich sections of the society becoming richer with every passing year and there are indications of general upward mobility. At the same time the deprived sections of the society, especially in the backward and remote areas, are finding their lives more miserable than before due to high prices and growing contrast in the standards of living. The Government sector seems to be shrinking or at least not growing as in the past and, therefore, its capacity to provide jobs is becoming limited. In this scenario it becomes imperative to think of new and effective planning strategy for the development of the weaker sections of the population. Perhaps a time has come, as an old saying goes to teach them how to fish rather than giving them a fish. Only that path would create a far reaching and lasting generation of wealth and capacity.