BREACHING THE LIMIT: A CRITICAL EVALUATION OF THE INCREASE IN RESERVATION LIMIT IN KARNATAKA

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ABSTRACT:

The Government of Karnataka had, in October 2022, promulgated an ordinance to increase the reservation limit of Scheduled Castes and Scheduled Tribes to 17 percent and 7 percent respectively. The ordinance was promulgated in furtherance of the recommendations made by the Justice HN Nagamohandas Commission which is also supported by the Justice Subhash Adi Committee report. Further, in December 2022, the Government of Karnataka had, seemingly as an act of appeasement and prior to the 2023 Assembly elections, tabled a Bill [The Karnataka Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Bill, 2022] in the Legislative Assembly which reiterates the increase in reservations for Scheduled Castes and Scheduled Tribes in the State just as the previously promulgated ordinance. The bill was eventually passed. The relevance of the ordinance and the bill is based on the observation that such an increase in reservation quota for the Scheduled Castes and Scheduled Tribes would bring the overall reservation quota above 50 percent, which is against the desirable limit prescribed by the Supreme Court on reservation. This paper mainly aims to critically analyse the bill and the possible legal hurdles it might encounter. The paper shall, in the first part, deal with the history of reservation in India and the various constitutional provisions regarding the same. Secondly, the various landmark Supreme Court judgements on reservation, especially the decisions on the desirable limit of reservation, would be elucidated. The paper would also delve into the recommendations of the Commission and Committee that have been cited as the main reasons for the introduction of such an ordinance and thereafter the bill. This shall be

followed by an analysis of whether this is an exceptional circumstance which demands the breach of the 50 percent rule. The paper shall, in conclusion, pose the various challenges that the Bill raises if the introduction of it is merely a political gimmick rather than a special circumstance requiring the breach of the desirable 50 percent reservation limit.

Keywords: Reservation, Karnataka, Schedule Caste, Schedule Tribe, Constitution, Fifty Percent, Quota, Indra Sawhney, Supreme Court.

I. INTRODUCTION

The word 'reserve' as per the Oxford Dictionary is defined as arranging for a seat, ticket, etc. to be kept for the use of a particular person and 'reservation' is the act of reserving.[i] The concept of reservation in India can be understood as an affirmative action by the government to uplift certain sections of society that have over decades faced discrimination and as a result, led them to social, economic and educational backwardness. The affirmative action put forth by the Constitution under Articles 15 and 16 for these weaker sections of society includes access to education and opportunities for public employment. The weaker sections of society that such affirmative action/reservation is applied to are Scheduled Castes (hereinafter referred to as SC), Scheduled Tribes (hereinafter referred to as ST) and Other Backward Classes (hereinafter referred to as OBC).

Since, affirmative action in the Indian Constitution is based on the concept of equity enshrined in Article 14, there are various rules and guidelines that are provided by Department of Personnel and Training (of the Ministry of Personnel, Public Grievance and Pensions) and the Ministry of Social Justice and Empowerment of the Government of India as well as the Courts in interpretation, application and identification of the various classes to whom the same would be applied.[ii] Further, since the classification into SC, ST and OBC are determined based on their conditions in each State, the State Government also plays an important role in the determination of categories to whom the reservation policy is applied.

This paper looks into the recent move by the Karnataka Government (through the passing of the ordinance and now tabling the bill in the legislature) in increasing the quota of reservation for SC and ST to 17% and 7% respectively. The paper explores the legal tenability of such a move of the Karnataka Government by going through the history and purpose of reservation as well as the limitations imposed by the Courts through various decisions on the implementation, application and limit of reservation in India.

HISTORY OF RESERVATION IN INDIA

In India, the practise of allocating a specific proportion of seats (vacancies) in governmental institutions to members of underprivileged and backward communities—communities primarily characterised by caste and tribe—is known as reservation. Reservation is a type of affirmative action based on quotas.[iii] Before India gained independence, certain regions of British India had quota systems that favoured specific castes and tribes. For instance, requests for various forms of positive discrimination were made in 1882 and 1891. A caste-based reservation scheme was proposed in 1882 by William Hunter and Jyotirao Phule. Rajarshi Shahu, Maharaja of the princely State of Kolhapur, established quota measures in support of non-Brahmin and disadvantaged castes, the majority of which took effect in 1902. On September 16, 1921, the first Justice Party administration approved the first Communal Government Order, becoming the first elected body in Indian legislative history to enact reservations, which have since become the standard across the entire nation. Reservation was included in the Government of India Act of 1909, and the British Raj also put other policies in place before India gained her independence. A noteworthy one resulted from the 'Round Table Conference' in June 1932, when Ramsay MacDonald, the Prime Minister of Britain, suggested a communal award.[iv] This form aggrieved certain members, Gandhi for instance and an agreement was ultimately reached in the form of the Poona Pact. The time period, which was being discussed during the Poona negotiations, was not for the end of reservations, but for the referendum in which the Depressed Classes got to decide the future method of choosing their own representatives. The Poona Pact was later incorporated into the Government of India Act 1935.[v]

According to *Jeevan Reddy*, J, statesman of the highest order belonging to the fields of law, politics and public life came together to fashion an instrument the change-the Constitution of India. The members of the constituent assembly recognised the division of the Indian society into four watertight compartments. The lowliest of the 4 varnas were the Shudras. Those outside the four-tier system (*chaturvarnya*) were the outcastes (Panchamas). There was to be no deliverance for them from this social stigma, except perhaps death.[vi] Reservations are supportive of affirmative action programmes holding the members of the historically disadvantaged groups for centuries to catch up with the standards of competition set up by a well-advanced society. The stark grim reality of the depressed classes is that they are suffering from social stigma and ostracism in the present-day scenario of hierarchical caste system and thus the very object of Article 16(4) is to ensure equality of opportunity in matters of public employment and give adequate representation to those who have been placed in a very discontent position from time immemorial on account of sociological reasons. Hence, the very purpose of Clause (4) is to ensure the benefits flowing from the fountain of this clause on the beneficiaries - namely the Backward Classes - who in the opinion of the Constitution makers, would have otherwise found it difficult to enter into public services, competing with advanced classes and who could not be kept in limbo until they are benefited by the positive action schemes and who have suffered and are still suffering from historic disabilities arising from past discrimination or disadvantage or both. Candidates from the depressed classes i.e., SC, ST, OBC (Other Backward Classes), SEBC (Socially and Educationally Backward Classes) etc., who are seen by anti-reservationists as being "mediocre," would undoubtedly face "built-in headwinds" if they had to compete in an open field competition alongside candidates from more affluent communities without receiving any preferential treatment in public services. They would also have to pass a stringent selection process that included an aptitude test and a professional ability test. Therefore, Clause 4 of Article 16 gives the State the authority to provide reservations as a remedy so as to correct the obvious imbalance in the field of public employment in order to ensure equality of employment opportunities.[vii] Following independence, reservations were formerly only available to S.C. and S.T. individuals. OBCs were included in the scope of reservations in 1991 based on the recommendations of the Mandal Commission, whose validity was challenged in *Indra Sawhney.*

There was no discussion about a time limit on reservations in public services, in contrast to the discussions surrounding the ten-year limit on political reservations.[viii] One year following the

Constitution's adoption, in 1951, the reservation policy was implemented in educational institutions through the First Constitutional Amendment. There was no mention of a time restriction during the deliberations that led to the first constitutional amendment (the insertion of Article 15(4)).[ix] This amendment was brought about to undo the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*[x].[xi]

As a result of confirmation bias, selective avoidance and biased assimilation, a healthy discourse over the issue of reservation is difficult.[xii]

CONSTITUTIONAL PROVISIONS DEALING WITH RESERVATIONS FOR SC/ST:

The reservation and protections for individuals of the S.C., S.T. and Other Backward Classes in public employment are covered by Articles 14, 15, 16, 31-B, 31-C, 335, 338, 338-A, 340, 341 & 342 of the Indian Constitution. The content of the Article 14[xiii] expression '*equality before the law*' is illustrated not only by Articles 15 to 18[xiv] but also by the several Articles in Part IV of the Indian Constitution, in particular, Articles 38, 39, 39A, 41 and 46[xv].

Article 15 (4) provides for the authority of the State to make any special provision for the advancement of SC/ST/SEBC. This was added via the first amendment to the Constitution. Article 16 (4) provides for the authority of the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Following consultation with the Governor of that State, Article 341(1)[xvi] gives the President the authority to name the castes, races, tribes, or parts of those groups as Schedule Castes in relation to that State or Union Territory. Clause 2 gives the Parliament the legal authority to include or exclude any caste, race, tribe, tribal community, or subset thereof from the list of Schedule Castes/Tribes specified in the notification. With regard to Schedule tribes, Article 342[xvii] gives the President and Parliament similar authority. Articles 31-B and 31-C deal with the Ninth Schedule and the saving of laws giving effect to certain directive principles respectively.[xviii] The claims of SCs/STs to services and posts should always be taken into consideration in consistence with the maintenance of efficiency of administration in the making of appointments as per Article 335[xix]. Articles 338 and 338-A provide for a National Commission for SCs and STs respectively whose powers and duties are as laid down under the respective Articles. Their

basic function is to investigate and monitor all matters relating to the safeguards provided for the SC/ST population.[xx]

Article 38 obligates the State to secure a social order for the promotion of welfare of the people while Article 39 provides for certain principles of policy to be followed by the State. Article 46 holds that the State shall promote with special care the educational and economic interest of the weaker sections of the people and in particular, of the SCs/STs. It aims to protect them from social injustice and all forms of exploitation.

The socio-economic circumstances of each caste, however, differ from one State to the next, hence it would not be appropriate to designate any caste or tribe as a Scheduled Tribe or Scheduled Caste throughout the entire nation. The wording "*in relation to that State*" would become meaningless if a Scheduled Caste or Scheduled Tribe member received the benefits of that status across the entire area of India. Articles 341 and 342 of the Constitution prohibit any authority, including courts, from changing or amending a Presidential order. Such authority has only been given to the Parliament. If a State believes it is necessary to extend the benefit of reservation to a class or category of Scheduled Castes or Scheduled Tribes other than those listed in the Lists for that specific State, constitutional discipline would require the State to influence the central authority to allow for an appropriate parliamentary exercise to be made by amending the Lists of Scheduled Castes or Scheduled Tribes for that specific State. A State cannot take unilateral action under Article 16(4) because doing so would lead to constitutional chaos.[xxi]

II. SUPREME COURT JUDGMENTS AND THE CURRENT POSITION OF LAW:

Reservation has, since its inception, been subject of scrutiny by the constitutional courts of India. Two major aspects that have been under constant scrutiny with regard to reservation have been the percentage of reservation and the criteria of reservation.

In this part of the paper, we concentrate on the percentage of reservation prescribed by the constitutional courts of this country. As discussed earlier, reservation in India is a concept of positive affirmation in order to compensate for the years of discrimination that SC, ST and OBCs faced over the years. However, it is important that the reservation policy does not go

against the principle of equity enshrined in the Constitution by excessive reservation. Dr. B. R. Ambedkar too has stated that the basic principle of equality and equity should not be tampered with when trying to cope up with the demands and requirements of the discriminated communities. It is in this context, that the constitutional courts have examined the limit of reservation that can be permitted for education and opportunities of public employment on the basis of data.[xxii]

The Supreme Court was faced with two cases from the State of Madras as soon as the Constitution came into effect. One of the cases were filed challenging Article 15 and the other Article 16 being *Champakam Dorairajan*[xxiii] and *Venkataraman*[xxiv] respectively. After hearing the case, a Special Bench of seven Judges unanimously determined that the allocation of seats solely on the basis of caste violates Articles 15(1) and 29(2).

The Parliament acted quickly and, in the exercise of its constituent power, amended Article 15 via the First Amendment Act, 1951 by inserting Clause (4), which says:

"*Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.*"

The first case heard by the Supreme Court after the enactment of the First Amendment was *M.R. Balaji v. The State of Mysore*[xxv]. The following principles among others, were laid down by the Supreme Court:

1. Clause (4) of Article 15 is a proviso or an exception to Clause (1) of Article 15 and to Clause (2) of Article 29;
2. The reservation made under Clause (4) of Article 15 should be reasonable. It should not be such as to defeat or nullify the main Rule of Equality contained in Clause (1). While it is not possible to predicate the exact permissible percentage of reservations, it can be stated in a general and broad way that they should be less than 50 per cent;
3. A provision under Article 15(4) need not be in the form of legislation; it can be made by an executive order.

Thus, the Court reiterated the view of the drafters of the Constitution that equality is the rule and protective discrimination should be used with caution. On prescribing the limit of

reservation, the Court stated that a strict rule cannot be laid down on the limit, however it can be generally considered that not more than 50% of the opportunities should be subject to reservation.[xxvi]

Similarly in *Rangachari*[xxvii], the Supreme Court held that what is true for Article 15(4) would also be applicable to Article 16(4), as unreasonable, excessive or extravagant reservation would eliminate general competition in a large field and materially affect efficiency. Reservation made beyond the permissible and legitimate limits can be considered as a fraud on the Constitution.

Further, the Supreme Court faced a case arising under Article 16 (*Devadasan v. Union of India*[xxviii]) shortly after the *Balaji* ruling. It had to decide whether the 'carry-forward' rule that applied to the Central Secretariat Service was still valid. The Court in the case held that the carry forward rule also has to comply with the 50% limit. This means that the total reservation in a year including the carry forward opportunities of reservation shall not exceed fifty percent of the total opportunities/seats in a year. Thus, all the aforementioned cases starting from *Balaji* adhered to the 50 percent rule.

However, in *N. M. Thomas*[xxix], the then accepted 50 percent rule was placed on an uneven footing when two judges of the seven judges bench observed that the rule is not absolute and need not be applied in all circumstances. *Fazal Ali*, J observed that the 50 percent rule is merely a 'rule of caution' and if around 80 percent of a State's population consisted of backward communities it would be unfair to demand that the State should stick to 50% reservation. *Krishna Iyer*, J also supported the view, while the rest of the judges did not discuss about the limit on reservation, thereby bringing in a different point of thought.

Since reservation has always been a topic of wide interpretation, one of the landmark judgements on reservations in India, is undoubtedly *Indra Sawhney v. Union of India*.[xxx] The case dealt with a challenge to the Office Memorandums following the recommendations of the Mandal Commission. The nine judge bench laid down several important principles of law regarding reservation in India. Among other important aspects on the criteria and determination of reservation in India, the Court held that the power granted by Clause (4) of Article 16 should be used fairly and within reasonable bounds, and that the reservation under Clause (4) should not exceed 50% of the appointments or posts, barring certain extraordinary

circumstances. The rationale for this limit of 50% was well elucidated and reasoned using the speech of Dr. B.R. Ambedkar in the Constituent Assembly regarding draft Article 10(3). It reads as follows:

> *"Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent. of the total posts under the State and only 30 per cent. are retained as the unreserved. Could anybody say that the reservation of 30 per cent. as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment.* ***Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.****"*[xxxi]
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> **(emphasis supplied)**

The Court distinguished between the concept of adequate representation and proportionate representation and stated that clause (4) of Article 16 deals with the former and not the latter. Adequate representation ensures that adequate opportunities are provided to the backward communities to be represented in public employments whereas proportionate representation would mean that representation is proportionate to the population of backward classes in a particular areas. The Court held that only Articles 330 and 332 of the Constitution provide for proportionate representation, that too for a limited period with regard to reservation of seats in the Lok Sabha and State legislatures. Thus, the rule for reservation being adequate representation, the 50 percent upper limit on reservation is adequate and necessary. However, in doing so, extreme caution is to be exercised and a special case has to be made out. Thus, the case, among other principles of reservation, made it mandatory to follow the 50 percent rule and also laid down the conditions when the rule can be deviated. Paragraphs 809 and 810 of the judgment read as follows:

> *"809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.*

> ***810. 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 conditions peculiar to and characteristical to 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.***"[xxxii]
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> **(emphasis supplied)**

After the *Indra Sawhney* decision, the Legislature in order to partially nullify the effect of the decision introduced two amendments to the Constitution namely the 81st Amendment which included Article 16(4B), allowing reservations made as part of promotions to exceed the 50% cap by allowing the carry forward rule to increase the total reservation in a year and the 82nd Amendment which amended Article 335 to allow relaxation in conditions for promotion of SC and ST candidates. However, the Supreme Court in *M. Nagaraj*[xxxiii], reinstated the rule that the 50 percent rule can be vitiated only in special cases as laid down in *Indra Sawhney*. The same was reiterated by the Court in *N.M. Joshi*[xxxiv], that the exception to the 50% rule should be based on quantifiable data failing which the deviation of the rule would amount to the increase in reservation being against the Constitution.

Thus, it has been clearly established that one of the limitations posed by the judiciary on reservation is that there can be no deviation to the 50% rule except in exceptional situations. There are States that have been permitted to deviate from the rule owing to the special circumstances. For example, a State like Assam owing to a large part of their population falling under Scheduled Tribes category due to their unique ways of living and local self-government. In *Rakesh Kumar*[xxxv] it was held that:

> *"44. We believe that the case of Panchayats in Scheduled Areas is a fit case that warrants exceptional treatment with regard to reservations. The rationale behind imposing an upper ceiling of 50% in reservations for higher education and public employment cannot be readily extended to the domain of political representation at the Panchayat-level in Scheduled Areas. With respect to education and employment, parity is maintained between the total number of reserved and unreserved seats in order to*

maintain a pragmatic balance between the affirmative action measures and considerations of merit."

Again in *K. Krishna Murthy*[xxxvi], the Constitution Bench of the Supreme Court applied the 50% ceiling in vertical reservations in favour of Scheduled Caste/Scheduled Tribe/ Other Backward Class in the context of local self-government. However, it was held that exception can be made in order to safeguard the interest of Scheduled Tribes located in the Scheduled Area.

To demonstrate the law as is, a recent judgment of the High Court of Chhattisgarh is worth mentioning.

THE CASE AS WAS IN CHHATTISGARH - Section 4 of the 1994 Chhattisgarh Act allowed for the establishment of evaluation criteria and a percentage for reservation. Section 4(2)(i) of the Act of 1994 was substituted by the Chhattisgarh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichere Wargon Ke Liye Aarakshan) Sanshodhan Adhiniyam, 2011 (also known as the Amendment Act of 2011). The limit of reservations was raised to 58%. The ST population made up around 31.76% of the State's total population, while the SC population made up roughly 12%. It was argued that the Government of Chhattisgarh decided to review and re-frame the existing reservation policy for the State- cadre posts, based on the data from the 2001 Census, as a result of a demographic change in the population of the SCs and STs, as a result of the formation of the two States, i.e. State of Madhya Pradesh and State of Chhattisgarh. It was pleaded in the case that the State can take into account special circumstances and in order to uplift the lot of the ST communities, apart from increasing reservation in Government posts, many welfare measures to promote their educational and economic interests have also been undertaken. It was determined that the respondents had increased the reservation beyond the legal maximum of 50% while abusing their discretion, and that their decision to make the reservation proportional to the population was unlawful. It was claimed that there was absolutely no justification for altering the percentage of reservations or exceeding the 50% cap. Inadequacy of representation in Government services or in educational institutions is relevant to the extent that reservation is sought to be pegged below 50%, but if the ceiling is to be crossed, then there must be exceptional circumstances and inadequacy in representation cannot be the only determining factor.[xxxvii]

To the contrary, the 2018 Karnataka Reservation Act's consequential seniority principle, which overturned *B.K. Pavitra I,* was upheld because the State of Karnataka was successful in demonstrating quantitatively through data that SC/STs were in fact underrepresented and that their reservations for promotions would not harm administrative effectiveness. In other words, concrete quantifiable data needs to be provided to save the actions of the State.[xxxviii]

Recently, the Supreme Court examined the meaning of '*an extraordinary situation*', which demanded an exception to the prescribed limit of 50% in the Maratha Quota judgment.

The Maratha Reservation Case

The Maharashtra State Backward Class Commission was established by a notification that the Maharashtra state government published on January 4th, 2017. The Commission, presided over by Justice Gaikwad, recommended reservations for Marathas in public employment and educational institutions of 12% and 13%, respectively. The Government was of the view that there was reliable, scientific, and adequate evidence to support the Maratha people's backwardness or the extraordinary circumstance of raising reservations in Maharashtra from 52% to 68%. Thus, on November 29, 2018, the Maharashtra State Legislature approved the Socially and Educationally Backward Classes Act, 2018 (SEBC Act, 2018) in accordance with the Maharashtra State Backward Class Commission's recommendations. The Act gives Marathas 16% more reservation than the suggested quotas in public employment and State-run educational institutions in Maharashtra. The Bombay High Court upheld the constitutionality of the Act and this judgement was later appealed. The Constitution Bench of the Supreme Court delivered its judgement on May 5, 2021. It insisted that the 50% reservation cap should not be reconsidered. The SEBC Act, the Bombay HC decision, and the Gaikwad Commission all failed to define an "exceptional scenario" that would qualify as an exception to this breach of 50%. Therefore, the SEBC Act was declared invalid insofar as it identifies and accords reservations to Marathas. Referring to Scheduled Castes and Scheduled Tribes, the Attorney General's claim was accepted by the Court that States had no concern whatsoever with Scheduled Castes/Scheduled Tribes and that the President was granted the authority under the Constitutional Scheme vide Articles 341-342 to determine the categorisation of communities under the respective SC/ST lists. The Gaikwad Commission's entire basis to exceed the 50%

limit was that since the population of backward class is between 80% to 85%, reservation to them within the ceiling 50% will be injustice to them. This argument was repelled and rejected by the Supreme Court referring to *Indra Sawhney* and it also observed that the Marathas are a politically dominant caste. Hence, it was not an extraordinary situation since the Marathas did not pass the social test.[xxxix]

III. THE CASE IN KARNATAKA

Despite such a prominent decision by the Supreme Court in recent times, the Government of Karnataka had, in October 2022, promulgated an ordinance to increase the reservation limit of Scheduled Castes and Scheduled Tribes to 17 percent and 7 percent respectively. The ordinance was promulgated in furtherance of the recommendations made by the Justice HN Nagamohandas Commission which is also supported by the Justice Subhash Adi Committee report. The increase in reservation for SCs and STs would lead to an overall increase in the reservation percentage in the State to 56%, which is clearly beyond the limit set by the Supreme Court.[xl]

Regarding the distribution of benefits of reservation quotas among SCs in political, educational, and government employment prospects, the context of Karnataka presents a distinct "policy problematique". Among others, Vokkaligas (Category III; A=4%) and Lingayaths (Category III; B=5%) are two prominent landed castes that are eligible for a proportionate degree of quota and are subcategorized as OBCs. The State has compressed 52% of OBCs, 18% SCs, 7% STs within the limit of 50% reservation quota benefit.[xli] Lack of opportunities for 18% (according to the 2011 Census) SCs persists, who are currently only entitled to 15% of reservations and receive scarcely 10% of effective reservation benefits, and must share the benefits among 101 SC communities. Thus, there is '*continuous infighting*' in Karnataka as a result of having the highest number of SCs notified.[xlii] A very wide spectrum, ranging from bonded labour to manual scavenging to cabinet minister to IAS officials, is found in the SC category. However, this is not a universal story; 38% of them continue to live in poverty, less than 2% of SCs own land, and 83% of the land that was allocated is unproductive because it is not irrigated. In terms of land ownership, there is a significant gap between SCs

and Non-SCs; OBCs possess 33.4% of agricultural land, while other upper castes own 52.4%.[xliii] In Karnataka, the SC population has increased significantly over the past few decades as reflected in the following Table:

Years	Karnataka Popln.	Decadal Growth (Kar) %	SC Popln.	Decadal Growth (SC)%
1981	3,71,35,714			
1991	4,49,77,201	21.11%	73,69,279	16.38%
2001	5,28,50,562	17.5%	85,63,930	16.2%
2011	6,11,30,704	13.54%	1,04,74,992	17.13%

(**Source: Various Census Reports)**

Karnataka's tribal population increased from 19.16 lakh in 1991 to 34.64 lakh in 2001 to 42.49 lakh in 2011. The accession of multiple new tribes to the Scheduled Tribes list is not attributable to an increase in fertility rates. The ST population in the State is 6.9% of the total[xliv], compared to the SC population of 17%, as per the 2011 census[xlv]. However, there are many differences between the Census data from 1991 and 2011 when compared. The information provided by the Census statistics differs from the field reality. According to census data, some communities are actually going extinct as a result of population decline.[xlvi]

It has been clearly established that the prescribed limit can be breached only in exceptional cases that needs to be supported by quantifiable data.[xlvii] The Nagamohandas Commission report may have tried to justify the suggested increase (though according to reports there is no confirmation on whether the report states so) on the ground of increasing numbers of SC/ST population in the State. According to Justice Nagamohandas, despite advancements in a number of areas, including employment, education, and the human development index, SCs and STs still lag behind other communities. For instance, they are underrepresented in employment in grades A and B while they are overrepresented in jobs in grades C and D. Other signs of their backwardness include the underrepresentation of them in higher education. There have also been reports on the Commission's report that despite the existing reservations, the same has not been able to cater to the education and employment requirements of a signification section of the backward communities.[xlviii]

A research by the National Law School of India University, Bengaluru, which claims that 74% of tribal communities have remained invisible and their literacy rates are less than 3%, was highlighted in the Justice Subhash Adi Committee report. According to the research, other States have notified fewer castes than Karnataka, but their percentage of reservation is higher. This is because of a comparison between the number of castes listed under the SC and ST categories in Karnataka and other States. As instances, Madhya Pradesh, Rajasthan, and Uttar Pradesh were offered.[xlix]

The Statement of Objects and Reasons of the Bill of 2022 states the following among others[l]:

a. The Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 (Central Act 108 of 1976) removed the geographical limitations on castes, which also caused the population of the Scheduled Castes and Scheduled Tribes in the State of Karnataka to expand dramatically.
b. According to Government Order E- 185-285 RBS-35-34-2 issued by the State of Karnataka in April 1955, a total 18% of seats were reserved for members of the Scheduled Castes and Scheduled Tribes.
c. The reservation quota provided to the Scheduled Castes and Scheduled Tribes continued to remain the same as it was in the year 1958, i.e., 15% for the Scheduled Castes and 3% for the Scheduled Tribes, though their population and coverage of number of castes increased subsequently.
d. The High Court of Karnataka in W.P.No.16852/2015 directed the State Government to consider the representation filed by Nayak Students' Welfare Federation for increase of reservation to the Scheduled Castes and the Scheduled Tribes.

This being said, it is highly unlikely that the Government will be able to pass the exception test merely on the aforementioned grounds because India follows the system of adequate representation and not proportionate representation. Therefore, increase in SC and ST population in the State cannot be considered as a ground to breach the rule. Further, the observation of the Commission that the existing reservation policy cannot cater to the requirement of education and employment to various sections of this community needs to be scrutinized based on 'test of creamy layer' and implementation of reservation policies. The

Government's improper implementation of reservation policy and the benefits offered therein cannot be considered as a valid reason to breach the prescribed limit of 50 percent.

In such circumstances, it is likely that the Bill having passed by the State legislature, if it receives the assent of the Governor and thereafter becomes an Act, the same would be struck down by the Court for being in violation of the Constitution. There are two alternatives that the Government may opt for in order to avoid the law being struck down as aforementioned.

a) The First Alternative Method

The first alternative would be considering internal reservation- wherein the Government would not have to increase the total percentage of reservation but provide a change in reservation quota *inter se* within the communities. There has been a recent Supreme Court decision on internal reservation policy and the factors needed to be considered for the same.

The Vanniyar Reservation Case

The Supreme Court in *Pattali Makkal Katchi* considered the Tamil Nadu Special Reservation of Seats in Educational Institutions including Private Educational Institutions and Appointments or Posts in the Services under the State within the Reservation for the Most Backward Classes and De-notified Communities Act, 2021, which provided an internal reservation of 10.5% for the Vanniyar community within the 20% quota for all Most Backward Classes (MBCs) and De-notified Communities (DNCs). It was claimed that they are numerically predominant community but were unable to compete with the other communities in the MBC/DNC category. The Janarthanam Commission Report, Justice Thanikachalam's Report, Ambasankar Commission Report and Sattanathan Commission Report were relied upon. On November 1, 2021, a division bench of the Madras High Court ruled that the law was passed without any quantifiable data and there was no objective criteria for sub-classifying them. It noted that the remaining 115 MBCs will get only a 9.5% share. It was submitted that there cannot be a preferential treatment from among the same class. On appeal, the Supreme Court held that there was no basis to treat the Vanniyar community as a separate group and hence it struck down the reservation of 10.5%. It reiterated the position stated in *State of Andhra*

Pradesh v. U.S.V. Balram[li], that judicial scrutiny is permissible to enquire into whether the conclusions arrived at by the Commission are supported by the data and materials referred to in its report. It observed the law that reservation is based on adequate representation and not proportionate representation is a settled rule. Further, it stated that sub-classification would be permissible only on the ground that a class is too far backward from the advanced sections of that class.[lii]

The Court held that even though it was observed in *E.V. Chinnaiah*[liii] that all castes including the subcastes, races, tribes mentioned in the list are to be members of one group for the purposes of the Constitution and cannot be further subdivided to give more preference to a minuscule portion thereof, it was held in *Indra Sawhney* that sub-classification of backward classes is permissible. But this sub-classification dealt with by *Indra Sawhney* related only to OBCs and not to Schedule Castes and Scheduled Tribes. The Court observed that backward classes can be identified, as a beginning point, by caste, and wherever they are located, the criteria developed for evaluating backwardness can be applied to check if they fit the requirements. Caste can be the basis for reservation but it can never be the sole basis. Population being cited as the sole factor to support classification is in the teeth of the judgements of the Supreme Court in *Indra Sawhney* and *Jarnail Singh*[liv]. Accordingly, the Supreme Court held the classification to be unreasonable and hence violative of Articles 14, 15 and 16 as there was no substantial basis for differentiating the Vanniakula Kshatriyas (‘the Vanniyars’) and granting them separate reservation. In concluding paragraphs of the judgement, it was noted that no express opinion has been stated on the merits of the writ petition challenging the 1994 Act which was pending consideration before the Supreme Court. The 1994 Act extends reservation in Tamil Nadu to 69% and the same is sub-judice.

Thus, based on the reports of the Committee that has been formed in December, 2022 as well as reports of the Government considering the Sadashiva Report of 2012 (that suggested internal reservation), the Karnataka Government may opt for this option of internal reservation. The Sadashiva Report of 2012 had proposed a sub-classification according to the criteria of "touchables", "untouchables," and "others".[lv] Even if the government pursues the remedy of internal reservation, the limitations laid down by the Supreme Court in *Vanniyars* case needs to be fulfilled and the increase in population and caste cannot be sole grounds for such an internal reservation policy as mentioned above. A ‘caste-based census’, whose demand is on

the rise, was supported by Dr. Ambedkar too and it may prove to be crucial in providing reliable data.[lvi]

Hence, since sub-classification among SCs is not possible, individual castes to whom such affirmative action is desired towards, would have to be de-notified as SCs and notified as OBCs. They would then have to be given a higher quota within the OBC category, provided they meet the aforementioned requirements.

b) The Second Alternative Method

The second alternative route that the Karnataka Government would try to adopt is by taking the help of Article 31-B and placing the Act, so passed by the Legislature, in the Ninth Schedule by means of a Constitutional Amendment which would not be such a tedious task considering the fact that the ruling parties at the State and Central Governments are the same. It has been established that politics plays an important role in federalism and therefore the same party at the State and Central governments pave a better and easier way for such State Governments to ensure that the Central Government complies with their requests. This being said, according to CS Dwarakanath, a former chairperson of the Backward Classes Commission, the Centre would find it exceedingly difficult to grant the state's request for a constitutional amendment and place the Act in Schedule IX given that groups like the Kurubas and Panchamasali Lingayats are also demanding an increase or change in quota. Even if it succeeds, it will be like unleashing a Pandora's box since other communities will also make similar claims.[lvii]

The benefit of placing a legislation into the Ninth Schedule is that the Courts cannot scrutinize any such legislation and judicial review is not permitted by the Constitution (Article 31-B). However, since judicial review has been considered as part of the basic structure of the Constitution, it cannot be absolutely restricted and can only be partially restricted.[lviii] The paper shall now deal with limitations and conditions to be fulfilled for a legislation to be placed under the Ninth Schedule of the Constitution.

Articles 31-B, 31-C and the Ninth Schedule

Article 31-B is a constitutional device to place any legislation beyond any attack on the ground that they infringe Part III of the Constitution. It holds that none of the Acts and Regulations

specified in the Ninth schedule nor any of the provisions there of shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any of the provisions of Part III. It reserves the right of the competent legislature to repeal or amend the enactment. Basically, it provides immunity to all legislations contained therein against fundamental rights. This Article and the Ninth Schedule was introduced via the Constitution (1st Amendment) Act, 1951. Initially enacted to validate land reform legislations already invalidated by the courts or in the process of challenge before them, numbering 13 in all, the Schedule at present consists of 284 legislations.[lix]

However, it was held in *Sajjan Singh*[lx] that if the legislature amends any of the provisions contained in the said Acts, the amended provision would not receive the protection of Article 31-B and its validity could be examined on merits.

Further, in *Waman Rao*[lxi], the Apex Court held that amendments in the Ninth Schedule made before the date of decision in *Kesavananda Bharati v. State of Kerala*[lxii] i.e., before 24 April 1973 were beyond challenge but the amendments which were made after could be tested on the ground of amendment of the basic structure of the Constitution.

Similarly in *I.R. Coelho*[lxiii], a nine judge bench of the Supreme Court unanimously reiterated *Waman Rao* and held that the laws included after the said date shall be open to challenge on the ground that they are against or destructive of the basic structure of the Constitution while also reaffirming that Article 31-B did not destroy or damage the basic structure of the Constitution. The case also reiterated the fact that Articles 14, 19 and 21 form part of the basic structure of the Constitution and Article 31 -B cannot support abrogation of the basic structure.

Thus, it is established that judicial scrutiny cannot be completely taken away by placing a legislation under the Ninth Schedule and even Article 31-B cannot abrogate the basic structure of the Constitution.

Another aspect that was considered by the constitutional courts has been the 25th amendment which inserted Article 31-C that granted complete immunity from judicial scrutiny to a law if the law add a declaration to the effect that it was made to implement the directive principles enshrined in Article 39 (b) and (c). However, the Supreme Court reserved its power of judicial

review on the question whether a law made by a legislature had nexus with the principles enshrined in Article 39 (b) and (c). Hence, as observed in *R.C. Cooper v. Union of India*[lxiv], neither a declaration by the legislature is conclusive nor its absence takes a law out of the protective umbrella of Article 31-C.

Therefore, it has been established that even placing of a law under Ninth Schedule will not preclude the law from the ambit of judicial review if such law violates the basic structure of the Constitution.

In the instant case, if the Karnataka Government decides to place the Act under the Ninth Schedule, by means of a Constitutional amendment, with the political support of the political party at the Centre, it would still be subject to judicial scrutiny and can be struck down. This is because, if the reservation limit is increased only on the ground of population and proportionate representation in education and employment, the same would be in violation of the principles of equality and equity laid down in our constitution under Articles 14, 15 and 16. As aforementioned, equality as well as Article 14 is considered as part of the basic structure and violation of the same would make the law liable to be struck down regardless of the umbrella of protection provided by Articles 31- B, 31- C and the Ninth Schedule.

IV. CONCLUSION

Thus, it is clear that while reservation or positive discrimination has been recognised by our Constitution as a requirement to ensure equity and equality, there are also various limitations that have been posed on the application and implementation of reservation policy by the provisions of the Constitution as well as by the constitutional courts of this country. One such limitation, among others, is the maximum prescribed limit of reservation in a particular State that can be permitted. The prescribed limit of 50% was decided by the Courts through a plethora of cases and is supported by valid reasons grounded on the principles of equity and equality.

In such circumstances, the move of the Karnataka Government in passing of the ordinance and now tabling the bill before the Legislature to increase the reservation for SC and ST to 17% and 7% respectively would also lead to an increase of the overall reservation in the State to 56%. While the courts in this country have given exception to the 50 percent rule in ‘extraordinary and exceptional’ situations, the move by the Karnataka Government does not

prima facie seem to cater to the exceptional situation provided under the rule. It seems unlikely that the other two alternatives discussed above, of internal reservation or placing the Act under the Ninth Schedule, is legally justifiable.

Therefore, it puts one to doubt the intention of the Karnataka Government in bringing about such an ordinance and Bill just months away before the 2023 State Assembly elections. The decisions of the Supreme Court in this regard are quite clear, given the judgments in the Maharashtra, Chhattisgarh and Tamil Nadu cases as mentioned above. A reasonable Government would take caution in proceeding with a breach on the prescribed rule of 50 percent and would ensure that there exists an exception that validates the breach. According to the various excerpts and reports made available of the Nagamohandas Commission Report, which forms the basis for such a move by the Karnataka Government, it can be *prima facie* concluded that the Act will not survive judicial scrutiny and would be struck down as it does not provide adequate quantifiable data on the requirement of such an exception. This brings one to the conclusion that, based on the available portions of the report and *prima facie* perusal of facts and circumstances existing in Karnataka, the Karnataka Government has yet again used reservation as means to garner political support in the State.

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