# Justice for Dalits among Dalits

## All the Ghosts Resurface

*In a recent judgment, which is replete with arguments against reservations as such, the Supreme Court has argued that apportionment of the reservations made to SCs or STs to subgroups within cannot be done by the state legislatures. Indeed, even Parliament does not have the competence to do so since the Constitution has intended that the SCs and STs are an indivisible, homogeneous entity.*

**K BALAGOPAL**

Living apart as they do from social realities, judges sometimes come up with wrong judgments at disastrously wrong moments.

A notable feature of Indian society in recent years is that from out of disadvantaged people who are dealt with by the law as well as in the idiom of social justice as homogeneous classes (dalits, minorities, women, etc), categories asserting their further discrimination have emerged, seeking society's attention to their particular plight. The situation calls for a sensitive response that will neither deny them further discrimination nor use it as a stick to beat the parent category with.

The Madiga campaign for subdivision of the scheduled caste reservation in Andhra Pradesh is a very prominent such instance. Asserting that within the scheduled castes there is a local hierarchy of social status, worth, value (and even touchability), and also that the scheduled caste reservation is being taken disproportionately by two of them, namely, the Adi Andhras and Malas, the Madigas ran a successful campaign to persuade the state government to make a four-fold subdivision of the scheduled castes in the state, and apportion the reservation to the four subgroups in such a manner that all may in fact get a more equitable share. Almost nobody other than a section of the relatively better placed scheduled castes has denied the fact of further discrimination within the dalit communities, and all political parties have supported the campaign.

But it has foundered on the law as understood by the courts. The conclusive (for the present) view of a Constitution bench of five judges of the Supreme Court is that it is constitutionally impermissible to do what the Madigas wanted. Why and how the court said so we shall see below. But as a general caveat it must be said that whatever may be the defects of our Constitution, and there are many, any one who knows that document would view with scepticism any assertion of a disjoint between its prescriptions and any aspiration for social or political justice and the social or political impediments in giving effect to constitutional possibilities. The only exception to this would be the aspiration for self-determination of unwilling components of what would be the Indian Nation, which is irrefutably unconstitutional, as the Constitution now stands.

### Andhra Pradesh Order

Persuaded by the vigorous campaign launched by the Madigas, the government of Andhra Pradesh initially issued an order which was struck down by a full bench of the high court, principally on the ground that the government had not consulted the National Commission for Scheduled Castes and Scheduled Tribes, but also on more doubtful grounds. Later, after completing that consultation, the government passed an Act (Act 20 of 2000) to the same effect. As before, this was challenged by persons of the Mala and Adi Andhra communities, but a five-judge bench of the high court, by a majority of four to one, upheld the Act, overruling the other objections the previous bench had expressed. Against that the petitioners appealed to the Supreme Court, for which leave was granted by the high court, and in the apex court they have succeeded. A five-judge bench of the Supreme Court, in E V Chinnaiah vs State of AP, has unanimously held the Act to be unconstitutional, in a judgment that is poor in logic and poorer in judicial wisdom.

The Supreme Court says two things: (1) Apportionment of the reservations made to SCs or STs to subgroups within cannot be done by the state legislatures. Only Parliament has the competence to do so. (2) But even Parliament does not have the competence to do so since the Constitution has intended that the SCs and STs are an indivisible, homogeneous entity. Maybe in fact they are not, but for all constitutional purposes they are.

Both the contentions are demonstrably ill-founded. But until at least a bench of seven judges of the Supreme Court says so, or the Constitution is amended to clarify that it has been saddled with what the makers of the document never intended, all aspirations for inter se justice within the dalit and adivasi groups – aspirations which are only now finding voice – will have to stay mute, constitutionally speaking. In fact, the Supreme Court has gone to the extent of saying that it is not permissible to even appoint a commission of enquiry to identify the more backward among the scheduled castes.

Three separate but concurring judgments have been written by the five-judge bench, none of them more edifying than the others: N Santosh Hegde for himself, S N Variava and B P Singh; H K Sema for himself; and S B Sinha for himself. It is something of a strain to unravel the thread of the reasoning adopted by them, not because it is profound, but because lack of logical clarity and connectedness has become a very common characteristic of judicial pronouncements even at the highest level these days and this judgment is a classic instance.

The constitutional position concerning the scheduled caste and scheduled tribe

lists (there is a separate list for each state) is clear. Article 341 says: (1) The president may with respect to any State or Union Territory, and where it is a State, in consultation with the governor thereof, by public notification, specify the castes, races, or tribes, or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be scheduled castes in relation to that State or Union Territory, as the case may be. (2) Parliament may by law include or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Article 342 is a similar provision for scheduled tribes.

Thus, the president initially declares the list of scheduled castes in consultation with the governors of the respective states, and any inclusion or exclusion thereafter is done by an Act of Parliament. Except by an Act of Parliament the SC or ST list cannot be modified to include or exclude a caste. Every other authority including the state and central governments is bound by these lists so declared and amended.

## Discretion of Authorities

But subject to acceptance of these lists as they stand, the giving of reservations or the making of any other special provisions is a wide discretion available to the authorities at all levels. This discretion contrasts sharply with the very clear reservation of the power to declare a community to be SC or ST, to the president initially and Parliament thereafter. The courts have repeatedly held that it requires no Act of any legislature to give reservations or special provisions. Every instrumentality of the state and every local body is free to do so in the course of the exercise of its administrative authority, within the usual limits of fairness and reasonableness that apply to all governmental action.

Why should not this discretion include also the power to divide the special provisions it makes among the beneficiaries in such a way that it is more equitably accessed by them? No caste is added to or deleted from the SC/ST list thereby. The lists remain intact. If not every authority, the state executive and legislature certainly have this power since they have the power to administer and legislate in connection with education, employment and social welfare.

The Supreme Court says no, because the constitutional provision that only Parliament can add to or delete from the SC/ST lists means much more than what it says. It means (in the words of Santosh Hegde) that any action that "interferes, disturbs, rearranges, regroups or reclassifies the various castes in the list" unless it is an Act of Parliament is barred by the Constitution. How does the Court read so much into the plain language of Article 341? The Supreme Court is no Humpty-Dumpty to make words mean what it wants them to mean. It must obey and follow the meaning of the expressions themselves. Where the expressions are plain it has no discretion to add or subtract anything. It is only where the expressions are obscure or otherwise of doubtful meanings that the court steps in, not to give them the meaning it wishes but to elicit what the lawmakers may have meant. There is nothing whatsoever obscure or doubtful about Article 341.

It is true that legal theory holds that interpretation of the Constitution is different from interpretation of ordinary law, and that the Constitution must be interpreted liberally, broadly, and in a manner suitable for the changing times and social needs. This is not the place to go into a discussion of that seemingly attractive proposition, though one is entitled to be suspicious of the sudden eruption of respect for changing times in usually conservative circles ever since the rise of neoliberalism. But whatever that proposition means it cannot mean that the Supreme Court will rewrite the Constitution. Briefly it may be said that words used in the Constitution which are in the nature of *concepts* or *generalities* can be and must be given meaning keeping changed circumstances, hopes and aspirations in view.

The wide meaning sought to be given by the courts to the abstract noun 'life' in Article 21 is an instance. But, plain words which lay down who can do what and how, cannot be given any other than literal interpretation, since we do not want that judges rewrite the Constitution to suit their views and values. One major criticism of the only Constituent Assembly we ever had is that it was not elected on universal adult suffrage. We do not want to have an unelected second one now. In any case, if changing times is the touchstone for reading constitutional provisions differently than what they seem to plainly say, then the most relevant change in this context is the rising aspirations of the disadvantaged within the disadvantaged, and not the opposition of the more advantageously placed among them to the nascent grievance of those below.

## Ambedkar's Observations

In support of the wide meaning that Santosh Hegde has chosen to give Article 341, he quotes an observation of Ambedkar's in the Constituent Assembly debates. When a question was raised as to why the president, who declares the list of SCs and STs, should not be given the power to add or delete communities from the list, and why that power should be given to Parliament, Ambedkar is supposed to have said that it was to "eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President". That Ambedkar used the expression 'disturbance' in this context is relied upon to draw the far-fetched inference that any disturbance, and not merely addition or deletion of a community, is included in the meaning of "include or exclude" in Article 341(2). Ambedkar was talking of some thing else. He evidently apprehended that the president may act as an instrument of the party in power in adding or deleting communities from the SC/ST list, whereas even if the party in power has a majority in the Parliament, the very process of lawmaking with its debate and discussion would act as a check on mala fide politics. It is this problem that he was addressing and not the issue whether adding or deleting communities from the lists includes any and every 'disturbance'. A word used by a speaker can be given meaning in relation to an issue only if that issue was present in the mind of the speaker when the word was used. The Supreme Court has in recent times laid down the proposition that it is permissible to look into the Constituent Assembly debates to understand the meaning of provisions of the Constitution. That certainly does not mean that the sense of a word in relation to one context can be deducted from the use of the word in a different context in the debates.

The other and more portentous view of the Supreme Court is that scheduled caste is a single class, a homogeneous expression, and therefore no further subgrouping within the scheduled castes is permissible. The way the reasoning in support of this view is elaborated, the view would apply

also to the scheduled tribes. And it would also negate the power conceded to Parliament in the first limb of the court's decision to make a classification of the scheduled castes. It would make the regrouping unconstitutional, whether done by the state legislature or by Parliament.

S B Sinha's concurring and lengthy judgment is entirely devoted to making this point, but one may read it backward and forward a dozen times and still not find any reason in it. He cites provisions of the Constitution where the scheduled tribes of what we would today call the north-east are treated separately from the scheduled tribes of the rest of the country, and adds that this shows that where the Constitution wanted to make a sub-classification of the SCs or STs it has itself done so, and therefore where it has chosen not to do so, such classification is impermissible. All that it in fact proves is that inequality within the SCs or STs in general was not a given for the Constitution-makers the way the peculiar history of the tribal areas of what was in those days known as Assam. Nothing more can reasonably be concluded from this, unless one intends to stultify the Constitution, which is exactly what is sought to be provided against when legal theory says that the interpretation of constitutional law proceeds on a somewhat different footing than the interpretation of ordinary law.

It is important that neither S B Sinha nor any of the other judges has expressed doubt about the state government's stand that there is inequality within the scheduled castes and that the reservations provided for the scheduled castes are being preponderantly taken by a few of the 59 scheduled castes. It is better to hear this in S B Sinha's own language:

> It may not be necessary for us to delve deep into the question as to whether the factual foundation for enacting the said legislation being based on a report of a Court of Enquiry constituted under Section 3 of the Commissions of Enquiry Act, 1952 known as Justice Raju Report is otherwise laudable or not.

## Question of Law

The question then is reduced to a pure question of law: whether it is permissible to identify subgroups of the SCs which have benefited little from reservations and allot their quota separately to them, leaving the residue as the quota of those who have benefited disproportionately. No, says the Supreme Court. Before seeing the reasons, here is a statement of the job undertaken by the Supreme Court, in the words of the same judge:

> The approach to construe the impugned legislation should not be based on the subjective intention of legislation but should be given an objective meaning. The meaning is declared by the courts after application of the relevant principles so as to construe the constitutionality of a statute having regard to the object the Constitution-makers sought to achieve.

"Subjective intention of legislation"? It can only mean, if it means any thing at all, the object of the legislation. Or is it the subjective intention of the legislature that the judge is referring to? But how can intention be anything other than subjective? One hears of subjective assessment of a fact, subjective taking of a decision, subjective exercise of discretionary powers. In these matters the antinomy of subjective and objective makes sense. But there can be no objective intention. And what could be the "objective meaning" of legislation? What the judge wants to say perhaps is that whatever the legislature may have intended in enacting the law, his job is to look at its power to do so under the Constitution, in the light of the object the Constitution-makers sought to achieve by defining scheduled castes and making special provisions for them.

## Alleged Impermissibility

Here are some of the reasons offered by S B Sinha for holding that such power does not exist:

> Our Constitution permits application of equality clause by grant of additional protection to the disadvantaged class so as to bring them on equal platform with other advantaged class of people. Such a class which requires the benefit of additional protection, thus, cannot be discriminated inter se, i e, between one member of the said class and another only on a certain presupposition of some advancement by one group over other although both satisfy the test of abysmal backwardness as also inadequate representation in public service.

"Presupposition" is unfair. It is based on what the same judge has earlier described as the Justice Raju report. Having declared that it is not necessary to spend time on the factual foundation of that report, he cannot now use the expression "presupposition" for the opinion based on that report. Moving then to the logic of the alleged impermissibility, firstly the inter se classification is not between individuals but between clearly demarcated subgroups. These are separate castes, have separate names, sometimes separate traditional occupations and separate cultural practices. They do not intermarry, and the higher among them do not normally interdine with the lower. Thus they are clearly demarcated groups. As for provision of reservation in employment, it is after all the whole purpose of Article 16(4) to provide reservations for backward classes who are inadequately represented in the civil services:

> Nothing in this Article shall prevent the State from making 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.

Having identified 59 castes as scheduled castes and having found that they are inadequately represented in the civil services, reservation has been given to them in government jobs. But after a while it is found that some of the 59 castes continue to be under-represented in the services under the state because the reservation given in the name of all of them has been taken to a disproportionate extent by some of them. Cannot Article 16(4) be pressed into service? If it is said that it cannot, then the power given under Article 16(4) is declared to be curtailed by the supposed bar read by the court into Article 341. Is it permissible to read a plainly worded power in the Constitution that too one in the fundamental rights chapter, in such a manner that it is limited by a judicial interpretation – and a somewhat strained one at that – of another provision of the Constitution?

> As the Constitution itself treats the members of the scheduled castes as a single integrated class of most backward citizens, it is not competent for the legislature of a State to subdivide them into separate compartments with a separate percentage of reservation for each resulting in discouraging merit as well as the endeavour of individual members to excel – vide fundamental duty under Article 51-A(j).

The latter part of this is a position that tends against reservation itself. Indeed, as I will argue at the end, this judgment is in truth a view against reservations as such, though apparently only about the impermissibility of subdividing scheduled

caste reservations. That the victorious sections of the dalits are unable to see this point is a tragedy by itself. It has always been the argument of the upper castes in opposing reservations that it discourages merit and the endeavour to excel. The courts have for decades resisted this argument with cogent reasons. Is it permissible to use this argument now in to oppose subdivision of reservations?

As for the Constitution treating the members of the scheduled castes as "a single integrated class of most backward citizens", that is what needs to be demonstrated, not proclaimed. Where does the Constitution say so? In the judgment written by Santosh Hegde too, one finds this syllogistic conundrum: Scheduled castes are the backward-most in society. If you say that some of them are more backward than the others, then that means that the less backward among them can no longer be among the most backward in society, because there are some who are more backward than them. Ergo, the scheduled castes cannot be divided into the more and the less backward, since by definition they are all the backward-most.

## Syllogistic Conundrum

No where does the Constitution say that the scheduled castes are the backward-most in society, which is the proposition with which this syllogism starts. The Constitution does not define scheduled castes in social terms at all. Scheduled castes are those who find themselves in the scheduled caste list, as declared by the president and amended from time to time by Parliament. If a social indicator of what would constitute scheduled caste is needed, one can look into the debates in the Constituent Assembly, as the courts have frequently been doing to ascertain the meaning assigned to terms used in the Constitution. Or one can look at administrative practice in identifying the scheduled castes. It will be found that scheduled castes are none but the 'panchamas', untouchables, of Hindu society. Everybody knows this but in the reams and reams of judicial exposition on the matter, the courts have for some reason found it impossible to say so, though V R Krishna Iyer in his significant judgment in State of Kerala vs N M Thomas, 1976 consistently refers to scheduled castes as 'harijans' (the word dalit had not come into vogue then).

That the scheduled castes are the backward-most is an evaluation of their social status, but in fact what defines them is untouchability. Indeed, in many states there are some communities listed in the OBC list who may well be socially more backward than the scheduled castes, such as for instance the 'Dommaras' of Andhra Pradesh, but are not in the SC list because they are not untouchable.

## 1976 Judgment

The description of scheduled castes as backward-most (the most backward, the abysmally backward, etc) is owed to the Supreme Court itself, and in a very different context. State of Kerala vs N M Thomas, 1976 is also a Constitution bench judgment scriped by seven judges, each of whom wrote his own judgment. A conscious attempt was made by them, especially V R Krishna Iyer, to clear much of the confusion that had gathered around reservations, thanks to the inhibitions that clogged the conservative minds that have always ruled the courts. In the course of the attempt, V R Krishna Iyer used many expressions – inclined as he was to literary largesse – indicating the position and situation of the scheduled castes: 'lowliest and the lost', 'utterly depressed', 'stark backwardness', 'bottom layer', 'most backward classes', 'sunken sections', are among those expressions. He carried on the exposition in Akhil Bharatiya Soshit Karamchari Sangh (Rly) vs Union of India, 1981, where he said even more plainly that the scheduled castes are 'not merely backward but the backward-most'. This rhetorical device used as an expository technique to emphasise the justification for special provisions, seems later to have become definitive of scheduled castes, and has now been used to beat the more disadvantaged of them with. But the same judge, in State of Kerala vs N M Thomas, regularly used the word 'harijan' to describe the scheduled castes, which could equally have been taken as definitive of that category, which would have been closer to the intention of the makers of the Constitution and administrative practice. And then the syllogism that prohibits subgrouping and apportionment of the SC quota would no longer operate. It is found that some untouchables are untouchable for other untouchables, then why should they not be classified separately within the list of untouchables, what would be unreasonable about it?

The alternative contention that the scheduled castes constitute a 'homogeneous class', a 'single integrated class', a 'single class by themselves', and therefore cannot be grouped is even less tenable. Here are some of the elements of juridical wisdom found in the judgment:

> It is a well-settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the state concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which includes the scheduled castes, to reserve certain seats in educational institutions under Article 15(4) and in public services under the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to sub-classify a class already recognised by the Constitution and allot a portion of the already reserved quota among the State-created sub-classes within the list of scheduled castes (Santosh Hegde).

The giving of reservation is said to be not a constitutional mandate but a discretionary prerogative of the State. But once it is exercised in relation to a class recognised by the Constitution, the prerogative is lost, the discretion is gone, insofar as it concerns subdividing the allotted reservation among groups within the class. But why? The Constitution recognises the class, viz, the scheduled castes, in the sense that it is conscious that there are certain very specially placed peoples in our society who need to be endowed with special rights, shown special concern by the administration, etc. The list of those peoples is left to be declared by the president and amended from time to time by Parliament. The measures to be taken for their advancement or protection is the prerogative of the State. It is the discretion of the State to adopt such special measures as it would like, to realise the intention of the Constitution-makers in the matter. Where does the Constitution warrant putting a full stop to this prerogative after the State has made provision for the class as a whole, so long as the State does not add or delete castes from the list? Where is the State barred from looking at who is taking what is given for the class as a whole, and doing something reasonable to set that right?

> The whole basis of reservation is to provide additional protection to the members of the scheduled castes and scheduled tribes as a class of persons who have been

suffering since a considerable length of time due to social and educational backwardness. The protection and reservation is afforded to a homogeneous group…By the impugned legislation, the State has sought to regroup the homogeneous group specified in the presidential notification for the purpose of reservation and appointments. It would amount to discrimination in reverse and would attract the wrath of Article 14 of the Constitution. It is a trite law that justice must be equitable. Justice to one group at the cost of injustice to other group is another way of perpetuating injustice (H K Sema).

## Argument against Equity

It is trite indeed that justice must be equitable. But the rider that 'justice to one group at the cost of injustice to another group is another way of perpetrating injustice', without any reference to the unequal position of the two groups, which fact is nowhere disbelieved by the judge, is not an argument for but against equity. And it is an argument against reservations as such, and not just their categorisation, for 'justice to some at the cost of injustice to the others' has ever been the rallying cry of anti-reservationists. And if one is to talk of discrimination in reverse, it is the court's injunction against classifying the lesser among the dalits separately for the purpose of allotting their quota to them that deserves the appellation. For have the same courts not held again and again that not making a classification when it cries out to be made amounts to treating unequals as equals, which would truly 'earn the wrath of Article 14'? It is strange that the judge thinks it is the making of such a classification – whose factual basis, I must reiterate yet once more, is not in dispute – attracts such wrath.

The power of the State Legislature to decide as regards grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including scheduled castes. But it cannot take away the said benefit on the premise that one or the other group amongst the members of the scheduled castes has advanced and, thus, is not entitled to the entire benefit of reservation (S B Sinha).

The first two sentences are unexceptionable. Indeed that would suffice to uphold the law passed by the AP legislature. What is difficult to even make sense of is the last sentence. That should occasion no surprise since we have already seen more than one example of the judge's free flowing use of the language of the court. To answer it as best as one can, it must be pointed out that the benefit of reservation is not taken away from any one by the subgrouping effected by the law. The law does not identify a creamy layer among the SCs to be divested of the right of reservation. But if one group amongst the scheduled castes has advanced so much that it is taking 'the entire benefit of the reservation' (or much of it), then that situation can certainly be remedied? How can any one group be 'entitled to the entire benefit of reservation' given to a whole class? That too as a matter of right? Why cannot that opportunity be taken away?

But S B Sinha has another objection. He says that the provision of reservations is subject to Article 335 of the Constitution, which says that the claims of scheduled castes and scheduled tribes to posts in the services must be taken into consideration consistently with the maintenance of efficiency of the administration. He adds that "(this would) lead to the conclusion that the same cannot be done to favour less (it should be more) weak sections, i e, some castes out of the homogeneous class of scheduled castes". Once again, this is a view – the third one that I have listed – that hits at reservations as such, and not just their subdivision. The courts have never accepted Article 335 as a complete bar to reservations, but S B Sinha finds it sufficient reason to bar the giving of a separate quota to the more backward among the scheduled castes.

## 'Homogeneous' Class?

We may finally look at what the Constitution itself says in definition of the scheduled castes, and how 'homogeneous' the class is in the view of the Constitution. Article 341 has been cited above. It speaks of 'castes, races, tribes or parts of or groups within castes, races and tribes' which the president in consultation with each state governor notifies, and which shall thereupon for the purpose of the Constitution be deemed to be scheduled castes. Castes, races, tribes or parts of or groups within castes, races and tribes is certainly not a very homogeneous thing? The only thing that makes it homogeneous is that all of them are untouchables. What would be surprising if some of the castes, races, tribes or parts or groups thereof are in a position to take the full benefit of what is given collectively to all of them? And if that happens, why should it be assumed that the Constitution, which has revealed the awareness that untouchability has diverse social origins, prohibits subdivision of the reservation so that all may get some benefit.

In answer, apart from the pronouncements of homogeneity that abound in the three separate and concurring judgments, a precedent is offered by Santosh Hegde, by misreading Murtaza Fazal Ali and misquoting V R Krishna Iyer, both from State of Kerala vs N M Thomas, 1976. That judgment was the first time a broad view befitting the better aspect of the Constitution was taken by the majority of a Constitution bench in the matter of reservations. The judges found themselves answering the objection that since Article 16(2) prohibits discrimination on ground only of religion, race, caste, sex, descent, place of birth or residence, the 'backward class' of persons to whom reservations in government services can be given by virtue of Article 16(4) cannot be a caste or castes, it can only be a class.

Today it is commonplace that if a caste, say the caste of toddy tappers, is identified as a backward class for the purpose of Article 16(4), then it does not amount to giving reservations to a caste. It only means that toddy tappers have been found to be a backward class by virtue of some rational criteria of backwardness, and are given reservations as such. A caste after all is a class in the common sense meaning that it is a clearly defined group that is for all practical purposes well demarcated from the rest of society. If it is found to be backward according to some objective and rational criteria, then it can be the recipient of reservations or other special provisions, without facing the objection that there is discrimination in favour of a caste. It took time for the courts to arrive at this formulation, which accounts for the tortured language employed by the courts in the process.

V R Krishna Iyer says in State of Kerala vs N M Thomas:

A bare reading (of Articles 341 and 342 of the Constitution) brings out the quintessential concept that they (scheduled castes and scheduled tribes) are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities thereof found on investigation to be the lowliest and in

need of massive State aid and notified as such by the president. To confuse this backward-most social composition with *castes* is to commit a constitutional error, misled by a compendious appellation. So that, to protect harijans is not to prejudice any *caste* but to promote citizen solidarity. Article 16(2) is out of the way and to extend protective discrimination to this mixed bag of tribes, castes, races, groups, communities and non-castes outside the fourfold Hindu division is not to compromise with the acceleration of castelessness enshrined in the sub-Article. The discerning sense of the Indian Corpus Juries has generally regarded scheduled castes and scheduled tribes, not as caste but as a large backward group deserving of societal compassion.

Santosh Hegde quotes these lines, correcting the word 'they' in line 2 above as 'there' for no reason at all except that it suits his view, and says:

According to Justice Krishna Iyer, though there are no castes, races, groups, tribes, communities, or parts thereof in Hinduism, the president on investigation having found some of the communities within the amalgam as being lowliest and in need of massive state aid included them in one class called the scheduled castes. The sequitor thereof is that scheduled castes are one class for the purposes of the Constitution.

It is absurd to claim that V R Krishna Iyer or anybody for that matter could have held that there are no castes, tribes, groups, etc, within Hinduism. It merely serves the purpose of drawing the conclusion that from out of the 'amalgam' (of what?) called Hinduism the president has picked out the lowliest who are in need of massive state assistance and made out of them the class called scheduled castes, which is therefore an undifferentiated, indivisible class. Judicial reasoning could have sunk no lower.

Murtaza Fazal Ali from the same judgment is quoted by Santosh Hegde as having said:

Thus in view of these provisions the members of the Scheduled Castes and the Scheduled Tribes have been given a special status in the Constitution and they constitute a class by themselves.

From this it is again concluded that the communities included in the presidential list form a class by themselves and any 'division of these persons for any consideration' would amount to tinkering with the presidential list. It is intriguing the way the judge draws the conclusion of indivisibility from the mere fact that a group of persons constitute class in themselves. No such conclusion automatically follows. Logical pathologies apart, to be a class a group merely needs to be well defined and clearly demarcated from others. Whether it is thereafter legitimately further classifiable into subgroups does not follow one way or the other from this circumstance. A reading of Murtaza Fazal Ali's judgment cited shows that he was in fact only answering the objection stemming from Article 16(2), that making special provisions for the scheduled castes amounts to giving preferential treatment in the name of caste. No conclusion follows from this regarding further classifiability.

But at the end S B Sinha thinks it is the Rellis and Adi Andhras who are the disadvantaged scheduled castes as against the Malas and Madigas. The government's case in fact is that the Rellis and Madigas have been inadequately served by reservation whereas the Malas and Adi Andhras have benefited disproportionately. Anyway, acknowledging that this problem is real, S B Sinha says that a quota within reservation is not the solution. Instead, give them "scholarships, hostel facilities, special coaching, etc" he says. This is the fourth time we find a line of reasoning in the judgment that is against reservations as such and not merely a quota within reservations. It has always been the argument of upper caste anti-reservationists that the government may provide the backward classes with scholarships, hostel facilities, free books, etc, but please do not cut into our monopoly in colleges and offices.

## Against Reservations

At the end what we have is a judgment purportedly against subdivision of the scheduled caste reservation quota, but which is in fact replete with arguments against reservations as such. A little more than a decade ago, in the Mandal Commission case (Indira Sawhney vs Union of India, 1992) nine judges of the Supreme Court went into the whole gamut of the reservations question and answered all the issues, affirming some earlier judgments, overruling some, and laying down the law in quite a satisfactory manner. It was hoped that most of the ghosts that have haunted the provision of reservations/special provisions for the oppressed castes of Hindu society had been laid to rest.

Apparently not. But then, what more do you expect when a section of the dalits themselves go to court against those below them, and employ all the arguments the brahmins invented against reservations and special provisions for the deprived castes as such? Did they not ask for it? Did they not lay it open to the court to once again happily walk over what in law would be called 'covered ground'? Every one in Andhra Pradesh recalls the glee with which casteist society welcomed the arguments used by the Malas against the demand raised by the Madigas. There is in general in human affairs nothing more calculated to please than the appropriation of your arguments by your own opponent in the innocent assumption that he is protecting the right obtained against you from an encroacher. And like society, like judges, for the tortuous reluctance with which the courts came to accept that India is a caste society and something should be done about it if we are ever to be a real democracy is evident from the history of judicial pronouncements on reservations.

To the judges, one is tempted to read what a predecessor of theirs said two decades ago. In K C Vasanth Kumar vs State of Mysore, 1985, O Chinnappa Reddy said something about how the Constitution of India, at least in its more positive aspect, may be read:

…We must also remember that we are expounding a Constitution born…of an anti-imperialist struggle, influenced by constitutional instruments, events and revolutions elsewhere, in search of a better world, and wedded to the idea of justice, economic, social and political to all. Such a Constitution must be given a generous interpretation so as to give all its citizens the full measure of the justice promised by it.

This probably sounds terribly like 20th century discourse, but it was 20th century aspirations that shaped the Republic of India, and there is no cogent reason for declaring that Republic dead. EPW