Amendments to Article 15 of the Constitution of India

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Abstract: A social class is a homogeneous unit, from the point of view of status and mutual recognition whereas, caste is homogeneous unit from the point of view of common ancestry, religious rites and strict organized control. Thus the manner in which the ‘caste’ is closed both in organizational and biological sense causes it to differ from ‘social classes. Moreover, its emphasis upon ritual and regulations pertaining to cleanliness and purity differs radically from the secular nature and informality of social class rules. In a social class, the exclusiveness would be based primarily on status. Social classes divide homogeneous populations into layers of prestige and esteem, and the members of each layer are able to circulate freely within it. In this milieu, the author has tried to comprehend the development of Article 15 (4) and Article 15 (5) in the Constitution of India for advancement of the weaker sections in the society.

Key Words: Amendment, Article 15 (4), Article 15 (5), Caste, Class.

1 Historical Precepts of Article 15 (4)

During June 1950, the Government of Madras issued a Government Order allotting seats community wise for pursuing varied courses of study in the State Government Colleges. Shrimati Champakam Dorairajan¹ challenged the Communal G.O. by which admissions into the Madras Medical Colleges were sought or purported to be regulated in such a manner as to infringe and involve the violation of her Fundamental Rights provided in the Article 15 (1) and 29 (2). From her Affidavit, it was concurred that she had not actually applied for admission, however, upon inquiry she had come to know that she would be denied admission despite her academic qualification as she belonged to the Brahmni community. Shri C.R. Srinivasan², who had actually applied, appeared and passed the requisite examination for admission into the Government Engineering College at Guindy, Madras also challenged the Communal G.O. on the similar grounds. The High Court of Madras held that the Communal G.O being inconsistent with the provisions of Article 29 (2) is void under Article 13.

Subsequently, the Government of Madras, appealed to the Supreme Court. The Advocate General of Madras Shri V.K.T. Chari argued that the Government of Madras was seeking to protect the weaker sections of society under Communal G.O. by reading Articles 29 and 46 together besides, Article 46 ought to override Article 29 (2) even though the Directive Principles of State Policy were not justiciable. Das, S.R. J. for the majority opined that the Directive Principles of State Policy cannot override the Fundamental Rights which are sacrosanct and not liable to be abridged by any legislative or an executive act or an order. Thereby Das, S.R. J. concluded that the Communal G.O. is inconsistent with Article 29 (2) and is void under Article 13 which states that the Government may not make any law inconsistent with or in derogation of the Fundamental Rights. Also, as the classification was based on caste, race and religion for the purpose of admission to educational institutions on the ground that Article 15 did not contain a Clause such as Article 16 (4).

Furthermore, the Supreme Court, in subsequent decisions related closely in substance and proximity of time to the above ruling, also struck down similar other Communal G.O. such as in case of B. Venkataramana v. State of Madras³.

2 Legislative Developments

The imminent prospective jeopardy presented these decisions to many of the ‘special care’ provisions of the Constitution convinced the Cabinet Committee on the Constitution that amendment of Article 15 in milieu to the suggestions of Ministry of Law. The then Chief Minister of Madras, Shri P.S. Kumarswami Raja preferred amending the Constitution to retain the Communal G.O. ‘in the

¹ The State of Madras v. Srimathi Champakam Dorairajan 1951 AIR 226, 1951 SCR 525
² The State of Madras v. Shri C. R. Srinivasan 1951 SCR 525
³ W.P. (Civil) 318 of 1950
interests of South India’. Consequently, the Cabinet Committee on the Constitution recommended that Article 15 read that nothing in it should prevent the Government from making special provision for promoting the educational and social interests of the backward classes.

On May 11, 1951, a day before the Constitution of India (First Amendment) Bill, 1951 was to be introduced in the Parliament, Shri Alladi Krishnaswamy Ayyar advised Shri K.V.K. Sundaram Article 29 (2) might be altered in the manner of Article 15. The Cabinet Committee at its meeting on May 15, 1951 had before them a Telegram from Shri P.S. Kumaraswami Raja which stated that the amending Bill’s alteration of Article 15 (3) was insufficient to protect the ‘backwards’, and hence a new Clause (4) should be added to the Article 15 to the effect that nothing in the Article 15 or in Article 29 (2) should prevent special provisions for the educational, economic and social advancement of the backward classes. Thereby the Cabinet Committee agreed to discuss this change with Select Committee of the Parliament to which the amending Bill was about to go. The Select Committee accepted the recommendation of the Cabinet Committee, thence, when it reported on May 23, 1951 recommended that ‘economically’ is dropped. The Cabinet Committee agreed to this, leaving the language limited to ‘socially and educationally backward’. While in the Parliament, J.L. Nehru and Dr. B.R. Ambedkar forcefully supported the revised Article 15 against limited opposition, linking it to the Supreme Court’s invalidation of the Communal G.O. issued by the Government of Madras for the advancement of the socially backward classes. Thereby Clause (4) was inserted in the Article 15.

3 Objects and Reasons of Article 15 (4)

Clauses (1) and (2) of Article 15 of the Constitution proscribes discrimination against citizens on grounds of religion, race, caste, sex or place of birth. However, Clause (3) provided that State may create any special provisions women and children. In this milieu, Clause (2) of the Constitution of India (First Amendment) Bill, 1951 was introduced to amplify the scope of Article 15 (3) so that any special provision that the State may make for the advancement of the educational, economic or any backward classes of citizens may not be challenged on the ground of being discriminatory.

4 Scope of Article 15 (4)

Article 15 (4) of the Constitution provides that the State is not prevented from making any special provisions for ‘the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes’. Article 15 (4) is only an enabling provision which merely confers a discretion and does not create any constitutional duty or obligation on the State to take any special action under it. Hence, no Writ of Mandamus can be issued either to provide for reservation or for relaxation. The principle behind Article 15 (4) is that a preferential treatment will be deemed to be valid where such actions are required for the advancement of socially and educationally backward classes. Article 15 (4) is not an exception but only makes a special application of the principle of reasonable classification. However, the class contemplated under the Clause must be both socially and educationally backward.

5 Later Developments

A major difficulty raised by Article 15 (4) is regarding the determination of who are ‘socially and educationally backward classes’. Article 15 (4) does not lay down any specific criteria to designate ‘backward classes’; it leaves the matter to the State to specify backward classes. However, the Court can go into question whether the criteria used by the State for such purpose are relevant or not.

After the enactment of the Constitution of India (First Amendment) Act, 1951 M.R. Balaji v. State of Mysore was the first case which came up before the Supreme Court during 1960. The Government of Mysore issued a G.O. under Article 15 (4) which reserved seats for admission to the State Medial and Engineering Colleges for ‘backward classes’ and ‘more backward classes’. This was in addition to the reservation of seats for the Scheduled Castes (15%) and Scheduled Tribes (3%). The backward classes were designated on the basis of ‘castes’ and ‘communities’. The Supreme Court declared the G.O. as ‘bad’ on varied grounds. Firstly, the G.O. was based solely on ‘caste’ without regard to other relevant factors which is prevented by Article 15 (4). Secondly, the test adopted by the State to measure the educational backwardness was rational and permissible to judge educational backwardness. However, it was not validly applied in the instant case. Thirdly, Article 15 (4) does not envisage classification between ‘backward’ and ‘more backward classes’ as was made by the G.O. issued by the State. Article 15 (4) authorizes special provisions being made for really backward classes and not for such classes as were less advanced than the most advanced classes in the State. ‘The interests of weaker sections of society which are a first charge on the State and the Centre have to be adjusted with the interests of the

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4 1963 AIR 649. 1962 SCR (1) 439
community as a whole. Pertinently, the adjustment of these competing claims is undoubtedly a difficult matter. But, if a State practically reserves all the seats available in the Colleges would clearly subvert the object of Article 15 (4)
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Sensing the danger in treating ‘caste’ as the sole criterion for determining social and educational backwardness, the Court drew distinction between ‘caste’ and ‘class’ and held that economic backwardness would provide a much more reliable yardstick for determining social backwardness since often educational backwardness is the outcome of social backwardness. Such reservation should be reasonable.

Thereafter in 1964, in R. Chitralekha & Another v. State of Mysore & Others two new factors i.e. economic condition and profession were taken into account to define backwardness, but caste was ignored for the purpose. During 1968 in Minor P. Rajendran v. State of Madras & Others, the Supreme Court pointed out that ‘if the reservation in question had been based only on caste and had not been taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15 (1). However, it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15 (4).

The Supreme Court observed during 1992 in Indra Sawhney v. Union of India & Others that the policy of reservation has to be operated year wise and there cannot be any such policy in perpetuity. Furthermore, Article 15 (4) does not mean that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total population. It is in the discretion of the State to keep reservations at reasonable level by taking into consideration all legitimate claims and the relevant factors.

In 1997, the Supreme Court clarified in Jagdish Negi, President, Uttarkhand Jan Morcha & Another v. State of Uttar Pradesh & Another, that ‘no class of citizens can be perpetually treated as socially and economically backward’. The State may review the situation from time to time and decide whether a given class of citizens which has been characterized as ‘socially and educationally backward’ has continued to form part of that category or had ceased to fall in that category.

While the Supreme Court has shown flexibility of approach to some extent in matter of fixation of criteria or reservation for admission to Graduate courses, however, it has adopted some stringent approach towards admission to Post Graduate courses, still more stringent measures in Super Specialty courses of study since 1980s.

In Jagdish Saran & Others v. Union of India & Others, the Court observed that the State may provide reservation at the Under Graduate level for the advancement of the Scheduled Tribes, the Scheduled Castes and backward classes, however, at much higher levels of study or higher proficiency, ‘equality’ must be measured by ‘matching excellence’, the ‘best skill or talent’ must be handpicked by selecting according to capability. Furthermore, the Court went on to observe that, at that level, ‘where international measure of talent is made, where losing one great scientist or technologist, etc. is a national loss, the considerations expanded upon as important lose their potency.

On the same note, in Dr. Pradeep Jain Etc. v. Union of India & Others, the Supreme Court was reluctant to accept any reservation for admissions to Post Graduate courses of study where ordinary merit should prevail. Furthermore, excellence cannot be allowed to be compromised by any other considerations because that would be detrimental to national interests. In Dr. Preeti Sagar Srivastava & Another v. State of Madhya Pradesh & Others, the Supreme Court opined that there should be some minimum qualifying marks for Reserved Category candidates, if not the same as prescribed as bench marks for General Category candidates. After some time later, in Dr. Sadhna Devi & Others v. State of Uttar Pradesh & Others, the Supreme reiterated that for admission to Post Graduate courses of study there ought to be prescribed a minimum cut off percentage of marks at the entrance examination for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes. It would be unconstitutional as being violative of the right to equality to keep this ‘cut off point’ at ‘zero point’. Lucidly, the Supreme Court viewed that ‘opportunities for such training are few and it is in the national interest that these are made available to those who can profit from

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5 1964 AIR 1823, 1964 SCR (6) 368
6 1968 AIR 1012, 1968 SCR (2) 786
7 AIR 1993 SC 477, 1992 SCR (2) 454
8 1980 AIR 820, 1980 SCR (2) 831
9 1984 AIR 1420, 1984 SCR (3) 942
10 1999 AIR 2894 SC
11 1999 AIR 2894 SC
them, viz. the best brains of the country, irrespective of the class to which they belong’.

It can be understood from the above discussion that the question of defining backward classes has been considered by the Supreme Court in a number of cases. The approach of the Supreme Court in this regard has been that State’s resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and the efficiency and public interest have to be maintained in public services because it is implicit in the very idea of reservation that a less meritorious person is being preferred to a more meritorious person. The Court also seeks to guard against the perpetuation of the caste system in India and the inclusion of advance classes within the term ‘backward classes’.

Several propositions emerge from several judicial pronouncements concerning the definition of ‘backward classes’. Firstly, the ‘backwardness’ envisaged in Article 15 (4) is both ‘social and educational and not either social or educational’. Secondly, ‘poverty alone cannot be the test of backwardness in India’ because by and large people are poor and therefore, large sections of population would fall under the backward category, thus, the whole object of reservation would be frustrated. Thirdly, ‘backwardness’ should be comparable, though not exactly similar, to the Scheduled Castes and Scheduled Tribes. Fourthly, ‘caste’ may be a relevant factor to define backwardness, but, it cannot be the sole or even the dominant criterion. If the classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society. Fifthly, ‘poverty, occupations, place of habitation, all contributes to the backwardness’. Such factors cannot be ignored. Lastly, ‘backwardness’ may be defined without reference to any ‘caste’. Article 15 (4) ‘does not speak of castes, but only speaks of classes’, and that ‘caste’ and ‘class’ are synonymous. Therefore, ‘exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests’.

6 Historical Precepts of Article 15 (5)

Ever since inception, India grappled with issues of education. During the 1990s the intelligentsia was concerned with how to regulate the rapidly proliferating private education space. After reading the judgments pronounced in Miss Mohini Jain v. State of Karnataka & Others, J.P. Unni Krishnan & Others v. State of Andhra Pradesh & Others one can concur that the Government alone cannot fulfill the educational needs of the populace and parallel private educational mechanism would rebound. Subsequently various State Governments resorted to trespass upon private sphere with the objective of advancing their social objectives. Almost immediately, it encroached into minority educational institutions as well as issues related to ‘fees’ and ‘cross subsidies’ in privately run educational institutions.

In this milieu, in T.M.A. Pai Foundation & Others v. State of Karnataka & Others, the Supreme Court held that the State cannot make reserve seats in privately run educational institutions. The admissions have to be done on the basis of Common Admission Test conducted by the State or by the privately run educational institutions themselves and on the basis of merit. The Court emphasized that ‘private educational institutes established by minorities and non-minorities were to be held on an equal footing’. It is noteworthy to mention here that this decision was an unmitigated disaster for the minorities. Further, in Islamic Academy of Education & Another v. State of Karnataka & Others, the Supreme Court overruled the aforementioned ruling to the extent that ‘the State can fix quota for admissions to privately run educational institutions. But, the State cannot fix the fees. Conversely during 2005, in P.A. Inamdar & Others v. State of Maharashtra & Others, the Supreme Court overruled the aforementioned ruling to the extent that ‘the State can fix the quota for admissions to private professional educational institutions’. It can be construed that the principle of parity between minorities and non-minorities had emerged ‘unsathed’ and minority preferences had reached a judicial cul de sac.

In this environment, the then Congress Government urged to move Constitution of India (One Hundred and Four Amendment) Bill, 2005 to obliterate the effects of the above discussed judicial pronouncements. The prima facie idea behind such development was to allow the State to take upon the unaided privately run educational institutions, to explicitly exempt the minority run institutions and explicitly encode the exemption in Article 15 (5). The Bharatiya Janata Party vehemently opposed the exemption of the minority governed educational institutions. Instead, they sought to include the ‘backward’ among ‘minorities’. On

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12 1992 AIR 1858
13 1993 AIR 2178
14 AIR 2003 SC 355
15 W.P. (Civil) 350 of 1993
16 Appeal (Civil) 5041 of 2005
December 22, 2005 the Constitution of India (One Hundred and Four Amendment) Bill, 2005 was passed.

7. **Objects and Reasons of Article 15 (5)**

Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is a matter of major concern. Till 2005, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, was limited in comparison to those in private unaided institutions.

Furthermore, it is provided in Article 46, as a Directive Principle of State Policy, that State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. Access to education is important in order to ensure advancement of persons belonging to the Scheduled Castes, the Scheduled Tribes, and the socially and economically backward classes. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in Clause (1) of Article 30, Article 15 (5) was proposed to amplify Article 15.

8. **Scope of Article 15 (5)**

Article 15(5) of the Constitution provides that under Article 15 or Article 19 (1) (g) the State is not prevented from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions other than the minority educational institutions including private educational institutions other than the minority educational institutions referred to in Article 30 (1).

Clause (5) in the Article was added by the Constitution of India (Ninety Third Amendment) Act, 2005. The Constitution of India (Ninety Third Amendment) Act, 2005 was in response to the Supreme Court’s explanation in *P.A. Inamdar* of the ratio in *T.M.A. Pai* that imposition of reservations on the non-minority aided educational instruments, covered by Sub-Clause (g) of Clause (1) of Article 19, to be unreasonable restrictions and not covered by Clause (6) of Article 19. The purpose of the amendment was to clarify or amend the Constitution in a manner that what was held to be unreasonable would now be reasonable by virtue of the constitutional status given to such measures.

It has been held the provision under Article 15 (5) of the Constitution is to be taken as an enabling provision to carry out certain constitutional mandate and thus it is constitutionally valid and it does not exclude Article 15 (4) of the Constitution. The Constitution of India (Ninety Third Amendment) Act, 2005 does not violate the ‘basic structure’ of the Constitution so far as it relates to aided educational institutions subject to the exclusion of ‘creamy layer’.

The provisions of new Clause (5) of Article 15 do not purport to take away the power of judicial review, or even access to Courts through Article 32 or 226. Neither do the provisions of Clause (5) of Article 15 mandate that the field of higher education be taken over by the State itself, either to the partial or total exclusion, of any private non-minority aided educational institutions, a power that was most certainly granted under Clause (6) of Article 19, which had been inserted by the First Constitutional Amendment in 1951. Article 15 (5) does not abridge the basic structure of the Constitution.

Article 15 (5) of the Constitution excludes the minority educational institutions from the power of the State to make any provision by law for the advancement of any socially or educationally backward classes of the citizens or for Scheduled Castes and Scheduled Tribes in relation to their admission to educational institutions including private educational institutions whether aided or unaided. Article 15 (5) of the Constitution is capable of very wide interpretation and vests the State with power of wide magnitude to achieve the purpose stated in the Article. But, the framers of the Constitution have specifically excluded minority educational institutions from the operation of this Clause.

Exclusion of minority educational institutions from Article 15 (5) is not violative of Article 14 of the Constitution as the minority educational institutions by themselves are a separate class and their rights are protected by other Constitutional provisions. Principle of strict scrutiny does not apply to affirmative action under Article 15 (5) but a measure that disadvantages a vulnerable group defined on the basis of characteristic that relates to personal autonomy shall be subject to strict scrutiny.
9. Later Developments

The Right to Education Act, 2009 provided an opportunity to test the Constitution of India (Ninety Third) Amendment Act, 2005 against the ‘Doctrine of Basic Structure’. The instant Act imposed severally on privately run educational institutions while exempting minority governed educational institutions.

Eventually, in Pramati Educational and Cultural Trust v. Union of India, the Supreme Court held that Clause (5) of Article 15 is ‘not an exception or a proviso overriding Article 15, but an enabling provision to make equality of opportunity as promised in the Preamble of the Constitution of India. Article 15 (5) in so far as it treats unaided privately run educational institutions and aided privately run educational institutes alike is not violative of Article 14 of the Constitution. However, it is not immune to challenge under the same’. Thereby excluding the minority institutions referred to in Article 30 (1), the secular character of India is maintained and not destroyed. They are ‘separate class’ and their exclusion from Article 15 (5) is not violative of the Constitution of India. Subsequently in 2008, in Ashoka Kumar Thakur v. Union of India & Others, the Supreme Court negative the contention that special provision for admission of socially and educationally Backward Classes, the Scheduled Castes and the Scheduled Tribes would render it impossible to achieve excellence in education. Bhandari, D. J. opined that Constitution of India (Ninety Third Amendment) Act, 2005 has not abrogated Article 19 (1) (g), a ‘basic feature’ of the Constitution of India by inserting Clause (5) in Article 15.

10. Inference

The Constitution of India (First) Amendment Act, 1951 was consequential far beyond its immediately visible content. It established the precedent of amending the Constitution to overcome judicial judgments impeding fulfillment of the State’s perceived responsibilities to the seamless web and to particular policies and programmes.

Post Constitution of India (Ninety Third Amendment) Act, 2005, the sectarianism in Indian educational system has taken deep roots. Minority educational institutions have flourished. Interestingly, even aided minority institutions are exempted from quotas that are applicable to unaided non-minority educational institutions. Contemporary meshed trajectory in the Indian educational scenario can be best understood from the views of High Court of Madras in The Federation of the Catholic Faithful v. The Government of Tamil Nadu & Others where ‘even in respect of aided courses run by minority colleges, there cannot be any direction to follow the rule of communal reservation’.

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