

## CONSENSUS IN THE CONSTITUENT ASSEMBLY-ON POSITIVE DISCRIMINATION

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The politics of caste initiated by British rulers during the last decade of the nineteenth century had taken a big form by the thirties and forties of the twentieth century. By the end of 1940s the preferential treatment of certain classes of the Indian people through the policy of reservation had become a hard reality of nation's politics constitutional life and the nation could not afford to divest the beneficiaries of reservation policy what could be done at the time of the framing of the constitution was a compromised approach with ultimate goal of the assimilation of all the classes of the people into the mainstream of the national life. By the time of independence, caste consciousness had given way to egalitarian humanism. "The hardships inflicted on the lowest castes inspired humanitarian revolution. It was widely accepted that the caste would have no place in independent India and that efforts to ameliorate the effects of past inequalities were in order" \*1. The feeling was not one sided, but all the classes were compromising and accommodative. Minorities too shared the national feeling and responded favorably. The representatives of the minority communities in the constituent Assembly participated actively and fearlessly in its debates and their views were not only heard patiently but also respected by the majority community in the Assembly.

The constituent Assembly of India was formed under the Cabinet Mission Statement of May 16, 1946. The representation of all the sections was envisaged by the plan. The main diversion into Muslim, Sikhs and the General were recognized for the purpose of giving representation of this body. But there was no such provision for other minorities, which were in so small number in India, such as Parsis, Anglo-Indians, Indian Christians and citizens belonging to Scheduled Castes and Scheduled Tribes

(SCs and STs). Later they were accommodated in the general category in large number.

The representatives in the Constituent Assembly were elected by the provincial Legislative Assemblies. The representatives of each community in a province were to be elected by the members of that community in the provincial legislature. The division of 296 seats was as follows: Hindu 163, Muslims 80, Anglo-Indians 3, Indian Christians 6, Parsis 3, Sikhs 4, Scheduled Castes 31 and Backward Tribes 6. \*2

This shows that every community in India was given due representation into it, but some contentions arose. The Muslim League withdrew itself from its earlier stand and decided to boycott the proceedings of the assembly. The main apprehension was that since Congress return in overwhelming majority in the house, it would rest entirely with the majority to take such decisions as they may think proper or to suit them \*3. The contention of the Sikhs was that they were on the mercy of the Muslims, but after the appeal of the working committee of the Indian National Congress, they decided to join the Constituent Assembly. \*4

The provisions of safeguards were discussed in the Constituent Assembly which were later included in the Indian Constitution. On 13th December 1946, Jawahar Lal Nehru moved a resolution which was in the nature of a pledge \*5. Clause 5 of the resolution was 'Wherein shall be guaranteed and secured to all the people of India Justice, Social, Economic and Political, Equality of status, of opportunity, and before the law, freedom of thought and expression, belief and faith, worship, vocation, association and action, subject to law and public morality'.

Clause 6 provided 'Wherein adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and other backward classes'.

The objective resolution was welcomed by different sections of the society and ultimately found expression in the Preamble of the constitution, which proclaims in unequivocal terms justice, liberty, equality and fraternity as the inalienable rights of citizens. M.R. Masani, the representative of the Parsi Community expressed his gratitude to the mover of the resolution and considered it as good thing as the legal and constitutional safeguards #6. The representative of the Sikhs community, Sujjal Singh welcomed the resolution as an assurance to the minorities and the backward classes for safeguarding their interests \*7. Speaking on behalf of the Scheduled Caste P.R.Thakur, found the resolution the best document to extend hopes to the minds of the people of India for freedom \*8. The representative of the Christian Community welcomed it in the same fervor \*9.

The objective resolution comprises justice, equality and liberty. These are the essential pillars of democracy and they are used in wide and varied connotation. The essence of justice impresses the entire social, economic and political spheres of Human life. The equality signifies the equality of status, equality of opportunity and equality before law. It promises as a safeguard against all types of discrimination. The 'freedom' is not absolute and unlimited.

The resolution also suggests safeguards for minorities including the Scheduled Castes and Scheduled Tribes for consolation and confidence. But a controversy was gaining ground for some time between Muslim League and Congress Party over the question of job reservation of Muslim minorities. The Muslim League demanded the share of Muslims in the public services and in corporation of such assurance in the constitution in statutory enactment. But this demand was opposed by Nehru, not only for Muslims but for other minorities too. In his opinion the community wise reservation would mean a rigid compartmental state structure which will impede

the progress and development. \*10 He conceded that state appointments should be fairly and adequately distributed and that no community should have a cause to complaint, but such fairness could be attained by convention and agreement and by giving the backward communities special education and training to bring them up to a higher level. Congress party opposed any attempt to continue the British policy of communal reservation.

A number of constitutional committees were set up to deal with different problems facing the constituent assembly. The Advisory Committee was one of the most important constitutional committees set by the Assembly. The Cabinet Mission Plan which was the instrument of the setting up of constituent assembly had also suggested for an Advisory Committee on the rights of citizens, minorities and tribal and excluded areas. \*11 It was also laid down that this committee should contain due representation of the interests affected. \*12

The assembly resolved to constitute an Advisory Committee with not more than 72 members. This was represented by all sections of the society- Hindus, Muslims, Scheduled Castes, Sikhs, Indian Christians, Parsis, Anglo Indians and Tribals. \*13 Sikhs and Anglo Indians made special demand for reservation of posts for their communities.

The Advisory Committee appointed five sub-committees:-

1. Fundamental Rights Sub Committee
2. Minorities Sub Committee
3. North East Frontier Tribal Areas Sub Committee
4. North West Frontier Tribal Areas Sub Committee, and
5. Excluded Areas Sub Committee.

The Minorities Sub Committee included the representatives of all minorities and its Chairman was Dr. H.C. Mookherjee- A Christian Leader. Dr. B.R. Ambedkar submitted an exhaustive note which was concerned with the political and social safeguards for the scheduled castes. He suggested that

Scheduled Castes should have a minimum representation with their proportion of population in the legislature. These representatives were to be elected through separate communal electorate. It was also suggested that in the executive the representatives of the Scheduled Castes be equal to the ratio of their population to the total of population. Similar provisions in public services was also suggested. He demanded minority status for Scheduled castes and that promoting and instigating a social boycott should be declared an offence. <sup>14</sup> He suggested the continuance of the safeguards for 25 years when the position might be reviewed. But when the committee decided a period of 10 years, he agreed to it with a note that if it was considered necessary who extend the period at the end of 10 years, it would not be beyond their capacity or their intelligence to invent new ways of getting the protection which they were promised here. <sup>15</sup>

Sikh Community presented the memorandum with the point that they constituted the third largest community in British India. Shiromani Akali Dal had placed 5 demands 1. That the Sikhs should have the right to elect representatives to the legislature through a purely communal electorate, 2. That in the provincial legislature of East Punjab 50% of the seats and in the Central legislature 5% should be reserved for Sikhs, 3. That seats should be reserved for them in the U.P. and Delhi, 4. That Scheduled Caste Sikhs should have the same privileges as others Scheduled Castes, and 5. That there should be a statutory reservation of a certain proportion of places in the army. <sup>16</sup> The Advisory Committee was of the opinion that Sikhs were a minority from the point of view of population but did not suffer from handicaps from which depressed classes suffer. They were highly educated and enterprising and therefore, their demands of communal electorate or weightage in the legislature was disallowed. The consensus emerged and the Sikhs representatives proposed certain classes to be included in the list of the Scheduled Castes such as Mazhabis, Ramdasias, Kabirpanthis, Baurias, Sareras and Sikhligars of East Punjab who suffered the disabilities similar to the members of Scheduled

Castes. It was accepted by the Advisory Committee. <sup>17</sup>

The memoranda on behalf of the Anglo-Indians were submitted by Frank Anthony and S.H. Prater, claiming the special treatment for the community as was given to them under the British regime. The community claimed the retention and adequate provisions for the maintenance of its schools by the state as a fundamental right, the right of a minority to preserve its religion, its culture, its language and its way of life. <sup>18</sup> safeguarding the percentage of employment in the railways, posts and telegraphs and custom services was demanded. <sup>19</sup> increased representation in the centre and state legislature and a berth for an Anglo Indian in the central cabinet was also suggested. <sup>20</sup>

The members of the Advisory Committee took a very sympathetic view of the demands of the Anglo Indians. Owing to the complete dependence of the economy of this community on their position in certain services and their existing educational facilities, a subcommittee was appointed to submit a report. <sup>21</sup> The subcommittee submitted its report to the Advisory Committee which prepared its supplementary report and submitted it to the president of the constituent assembly with the remark that the existing basis of recruitment of Anglo Indians in the railways, the posts and telegraphs and the customs departments should continue unchanged for a period of two years after the commencement on the constitution. After that, at intervals of every two years the reserved vacancies were to be reduced each time by 10%. After a period of 10 years from the date of the coming into operation of the constitution all such reservations should be ceased. <sup>22</sup>

The findings of this report were greatly welcomed by the Anglo Indians for realizing their special needs. <sup>23</sup>

The Parsi community did not press for special treatment. Representative of the community Homi Modi following the tradition of the community which it had maintained in the past withdrew the claim for statutory reservation. But if the reservation

were provided for minority, similar provisions should be made for Parsis. He wished to maintain the minority character of the community. \*24

Indian Christian wanted reservation proportionate to their population in the central legislature and in the provincial legislatures of Madras and Bombay. In other provinces they sought liberty to contest elections from general seats. Rajkumari Amrit Kaur submitted a memorandum on behalf of the Indian Christians. She opposed both reservations of seats and weightage for any community, saying "Privileges and safeguards really weaken those that demand that. They are a definite bar to unity, without which there can be no peace as also to efficiency without which the standards of good governance are lowered." \*25

As the Muslim League was not participating, no memorandum was presented on behalf of the Muslim community. At the time of the third sitting of the committee from 21 to 27 July, 1947, the question of partition had been decided and the Muslim League was also represented in the sub-committee. The representatives of the Muslim community sent a letter for consideration of the minority's sub-committee. It contained certain peculiar points concerning social and religious life of the community. Their demands were that the cases of the community should be decided by the tenets of Islam, a permanent separate portfolio to administer the Muslim Waqfs be attached to Minister of State in each province and at the centre and that Minister be a Muslim as far as possible, the High Courts of the provinces and the Supreme Court of the Union should each have a Muslim Judge to judge the propriety of any cultural right coming under the purview of protective laws of the States. \*26 The Partition had a great effect on Muslim members and they gave up their claims of reservation. Tajamul Hussain criticised Nationalists Muslims for seeking reservation and appealed them to forget the past and help in creating a secular State. \*27 this led Sardar Patel to announce his gladness that Muslims were unanimously in favor of joint electorates without reservations.

The Sub-Committee on minorities submitted its report to the Advisory Committee with Patel as its Chairman. He showed strong opposition to any proposal for reservation in services for any minority community and emphasized the need to make recruitment in services on the basis of merit and stated that any departure from merit principle would necessarily impair the administrative efficiency. \*28

It was decided by the committee that all elections to the Central and Provincial legislatures would be held on the basis of joint electorates with reservation of seats for certain specified minorities on their population ratios. The reservation was proposed for a period of ten years, at the end of which the position was to be reviewed. No weightage was given. The members of the reserved category could contest the general seats. \*29 for the application of this principle the recognized minorities were classified into groups on the basis of population. Group 'A' was formed three of those whose population was less than 0.5 percent in the Indian dominion and it comprised of Anglo-Indians, Parsis and Plains' tribesmen in Assam. Group 'B' consisted of those whose population was more than 0.5 percent but not exceeding 1.5 percent and included in it Indian Christians and Sikhs. Group 'C' consisted of minorities having population exceeding 1.5 percent and consisted of Muslims and Scheduled Castes. \*30

For Anglo-Indians there was no reservation of seats, but the President of the Union and the Governors of the Provinces were given power to nominate their representatives in the Centre and the Provinces respectively if they fail to secure adequate representation in legislatures as the result of the general elections. No statutory reservation was proposed for Parsis. They continued to remain in the list of recognised minority. \*31

The Sub-Committee proposed that 'provision shall also be made for the setting up of a statutory commission to investigate into the conditions of socially and educationally backward classes, to study the difficulties under which they labour and to recommend to the union or the Unit-

Government, as the case may be, the steps that should be taken to eliminate the difficulties and the financial grants that should be given and the conditions that should be prescribed for such grants. \*32

The report of the Minority Rights was discussed in the Constituent Assembly. The Assembly accepted all the main recommendations without any modification. The representatives of different communities expressed their comments. Many Speakers from the minority community hailed the committee's recommendations and congratulated Patel for having produced the Magna Carta for the welfare of the Harijans and other minorities. \*33

The attitude of the Muslim League was not cooperative at this juncture, they pleaded for the continuation of a separate electorate as the only measure for safeguarding their interests.\*34 But there were some Muslim Organizations which preferred joint electorate. \*35 Several Muslim speakers demanded reservation in Legislatures and there was a little demand for reservation in services as Lari suggested reservation in legislature was meaningless -"Take away the reservations from legislature and for God sake give us reservation in services." \*36

Before partition the Constituent Assembly had adopted the resolution - "All elections to the Central and Provincial Legislatures will be held on the basis of joint electorates, provided that as a general rule, there shall be reservation of seats for the minorities." \*37 But after the partition of the Country, the minorities themselves gave notice for an amendment to the effect that in view of the conditions having vastly changed, since the Advisory Committee made its recommendations in 1947, it was appropriate that the reservation for minorities be do away with. Although the abolition of separate electorate had removed much of the poison from the body of the politic, the reservation of seats for religious communities, it was felt, did lead to a certain degree of separatism and was to that extent contrary to the conception of a secular democratic state. \*38

The report of Advisory Committee on Minorities Fundamental Rights, etc. came up for reconsideration on 30 December, 1948. Some of the members of the Committee were of the opinion that, since the position had greatly changed after 1947, it was of utmost importance to drop the reservations of religious minorities. \*39 Muniowary Pillai moved an amendment to continue the reservation for Scheduled Castes for a period of 10 years. It was considered that due to the peculiar position of the Scheduled Castes, the provision of reservation for them as was originally decided should remain unchanged. The Advisory Committee passed the resolution for abolition of reservation for minorities other than Scheduled Castes. \*40 another motion was adopted by the Constituent Assembly on 26 May, 1949 providing reservation of seats and nominations for a period of ten years from the commencement of the Constitution. \*41

The Draft constitution of India was formed by the Drafting Committee, headed by Dr. B.R. Ambedkar. In preparing the draft, the committee generally followed the decision taken by the Constituent Assembly, on the recommendations of the various committees appointed by it. The draft was introduced in the Assembly on 4 November, 1948 and was widely discussed and debated in subsequent seasons. At the time of the drafting Article 16(4) which was Article 10(3) of the Draft Constitution, there occurred a considerable discussion for the determination of the 'backward classes' for whom a special provision for reservation in jobs was to be made in the constitution. According to one group this term meant only the 'untouchables', while the other thought it covered a broader group of people who were educationally, economically and socially backward regardless of their religion, race or caste and some believed that it should include only the victims of historical wrongs.

The word 'backward' was not included in Article 10(3) as originally proposed by the Constituent Assembly which read "Nothing herein contained shall prevent the State from making provision for reservation in favour of classes, who in the opinion of the State are not adequately

represented in the public services." Ambedkar proposed a change that the phrase 'Classes not adequately represented in the public services' should be 'Classes as replaced may be prescribed by the State' because the words 'adequately represented' might give rise to controversies and a lot of litigations on the question of adequacy of representation and desired that the provision of reservation by an appropriate authority should continue. \*42 But it was opposed on the ground that the State could make provisions even for the majority community while the safeguards were meant for the minorities. \*43 Inclusion of the underrepresented members of the advanced communities were also within the purview of the clause.

The Drafting Committee finally decided to confine the policy of reservation only for the backward classes and not for any religious or linguistic minority. Article 10(C) of the Draft Constitution, which became Article 16(4) of the Constitution, provided.

"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 who in the opinion of the State are not adequately represented in the services under the State"

Draft Article 10 submitted in similar terms by K.M.Munshi and Ambedkar came up for consideration before the Assembly on 30 November, 1948, and various amendments were moved. Some members pointed out that the term 'backward' was not easy to define nor was it easy to find a suitable criterion for testing the backwardness of a community or class. \*44 It was feared that if accepted, it would give rise to casteism and favoritism which should not find place in a Secular State. While necessary concessions could be given to backward classes for improving educational qualifications, concessions not being allowed to any class on the ground of backwardness. \*45 the 'backward class' was a vague term which could be misused. \*46 Some other members favoured retention of the word 'backward' because it was

known in the North India that among Hindus, the classes of people engaged in agriculture and artisan works belonged to the backward class. In South India the scope of the 'backward classes' was very distinct. They were either socially or educationally backward economically forward. \*47

T.T. Krishnamachari referred to Article 10 as a piece of loose drafting which should not find place in the chapter on fundamental rights. Referring to clause 3 he inquired about the determination of the backward classes. It did not apply to a backward caste, Scheduled Caste or any other community. What would be the criteria? He suggested the basis of literacy and raised the question that "If the basis of division is literacy, 80 per cent of our people fall into the backward class citizens". Who is going to give the ultimate award? Perhaps the Supreme Court. It would have to find out the intention of the constitution makers as to who constitute the backward class. Was it a class based on economic grounds of status or on grounds of literacy or on grounds of birth? However, he was confident that it would be ultimately interpreted by the Supreme Court on some basis- Caste, community, religion, literacy or economic status. The Drafting Committee had thereby in his opinion, produced a paradise for lawyers. \*48

The Scheduled Castes members raised the apprehension whether they were included in the expression. \*49 some expressed apprehension of the judicial review of the term, which others equated backward classes with Scheduled Castes and Tribes. \*50 there were views that the term include a broad category of all backward castes and communities who were socially, economically and educationally backward. \*51

The problem of the minorities engaged considerable attention of the Drafting Committee because of its complicated character. It was wrong for the majority to deny the existence of the minorities and it was equally wrong for the minorities to perpetuate themselves. \*52

Article 292 to 301 of the Draft Constitution were related to provisions for minorities. Article 292



to 294 provided reservation of seats for minorities in the house of people and the legislative Assemblies of the States. The reservation was stipulated for the Muslims, Indian Christians, Anglo-Indians, Scheduled Castes and Scheduled Tribes. On the question of the claim of minorities to services and posts, Article 296 of the Draft Constitution provided that the claims could be considered consistent with the maintenance of efficiency of administration. Article 297 and 298 provided special provision for Anglo-Indians in certain services and with respect to educational grants for the benefit of the community.

But after the partition of the country, the provision for the minorities was abolished unanimously. K.M. Munshi assured the House that at the time when the Advisory Committee met on the last occasion there was no question of providing safeguards for any religious minority. The negotiations proceeded on the footing that except backward classes who are economically and socially backward and the Scheduled Castes and Tribes who have a special claim of their own. No other minority should be recognized in the Constitution. \*53 In his opinion the backward classes were the victims of historical discrimination to deny equality of opportunity in the socio-economic life of the society, therefore their social and economical needs should be satisfied. He clarified that the term 'backward classes' covered only the Scheduled Castes and Scheduled Tribes but also not other socially, educationally and economically backward classes if reading with Article 301 of the Draft Constitution (Which became Article 340 of the constitution). There is no discrimination between touchable and untouchables, or any community, but the backward classes are those classes who need special protection in services. \*54 This Article also clarified that - 'there will be a commission appointed for the purpose of investigating who are backward classes and it will submit the report to the President with suggestions for their uplift. \*55

Munshi used the term 'economically backward' with social and educational backwardness but neither the Article 16(4) nor Article 340 talk about economic backwardness. He indicated that

the word 'social' includes 'economic' also. Article 46 of our constitution speaks of the directive principles to promote the educational and economic interests of the weaker sections of the society, particularly the Scheduled Castes and Scheduled Tribes and to protect them from 'social justice' and all forms of the exploitation. The Constituent Assembly intended to include even economically backward classes of the society for the purpose of securing social justice to those people by making reservation of jobs for them. \*56

Dr. Ambedkar defended the inclusion of the word 'backward' - "Unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule together..... That I think..... is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word 'backward' which I admit did not originally find a place in the fundamental rights in the way in which it was passed by this Assembly. He observed that it was left to each local government to determine the definition of 'backwardness'. A backward community is community which is backward in the opinion of the government. \*57 He defended Article 10(3) describing it as a formula to reconcile the competing claims of absolute equality and equality in fact.

Some views were expressed against the reservation and in favour of merit as the principle of equality, but Dr. Ambedkar thought that there must at the same time be a provision made for the entry of certain communities which were outside the administration. \*57 There should be balance between merit and efficiency and the provisions of the social justice. The provisions for reservation must be so arranged that they should not go against rule of equality in reverse direction favouring the backward classes by giving them all posts. In his opinion reserved seats must be in minority in number, if only 30 seats out of 100 are left for general category, it is against the principle of equality. \*58

When it was put to vote the amendments relating to clause 3 of the Article 10 were negated by the Assembly, and it was adopted without any

amendment or alteration. Subsequently, it was incorporated in the Constitution as Article 16(4).

The developments since the inauguration of the constituent Assembly disclosed its objective of the adequate safeguards for minorities, backward and Tribal areas and depressed and other backward classes, subsequent formation of the Advisory Committee on minority's fundamental rights and its reports to the President. Constituent Assembly rejected separate electorates, reservation in Cabinets and reservation of seats for religious minorities and ultimately minimized the concessionary benefits to the Scheduled Castes and Anglo-Indians. This exhibits the peculiar statesmanship of the framers of the Constitution to wipe out the statutory basis of communalism. \*59 The abolition of reservation on communal grounds was welcomed by Nehru as a historic term in our destiny. \*60

Minorities realized the fact that the best interests of the country would be served by their self-denial of preferential treatment and the creation of a homogeneous society. The reservation of seats in Lok Sabha and Legislative Assemblies for Scheduled Castes and Scheduled Tribes was due to their unique position. Their social and educational position was low which needed immediate attention. The basis of special treatment was backwardness. The aim was to equalize them with the other classes of the people. The idea was never to perpetuate the dependence of the recipients of the benefits forever.

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