

India's Affirmative Action Politics As Seen Through Tamil Nadu's Specious Quota Law

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10 February, 2012

Countercurrents.org

Partisan and misleading reports by duly appointed commissions entrusted with the task of fact-finding have dangerous implications for public policies, policy making, and people's faith in the judiciary and the commissions appointed by it. The report of the Tamil Nadu Backward Classes Commission submitted in July 2011 is in this dubious category.

The report 'Justification of Reservation under the Tamil Nadu Act 45 of 1994 on Quantifiable Data' by the Tamil Nadu Backward Classes Commission, headed by retired high court judge, M S Janarthanam is fraudulent and farcical. To place this report in perspective it is necessary to have some idea of the politics of reservation in Tamil Nadu.

I

The rise to power of the DMK in 1967 followed by the "Dravidian era" of politics marked the beginning of Tamil Nadu's aggressive quota politics. Following the untimely death in 1969 of the DMK founder and Tamil Nadu chief minister C N Annadurai, DMK president M Karunanidhi became chief minister and appointed the Tamil Nadu First Backward Classes Commission headed by A N Sattanathan.

The 1970 report of the Commission made several critical observations on reservation in the state. Of these the following are particularly relevant to note:

- There is a progressive section among the backward classes (BCs) in very many castes; in some castes it is so substantial by all yardsticks that it may as well be regarded as having crossed the borderline.
- Some castes have taken full advantage of the state's protective measures and made rapid strides, while many others are still in the lower stages of stagnancy.

- A group of nine castes (Agamudayan / Thuluva Vellalars; Devanga/ Sedan; Gavara; Illuvan / Ezhuvan/ Illathar; Kaikolan/ Sengunthar; Sadhu Chetty; Saurashtra; Vadugan; and Virakodi Vellala), of them seven accounting for about 11% of the BC population in the state, have cornered much of the benefits available to the entire BC population, namely, 37% of the non-gazetted and 48% of the gazetted posts, 44% of the engineering and 47% of the medical college seats.
- Such layers of developed segments can very well merge with the advanced sections of society, the so-called Forward Classes, and compete openly for careers and opportunities without taking cover under reservations.
- If the upper crust in each caste is not removed from competing with the less privileged the object of social justice, especially distributive justice, will not be achieved.
- As a result of the clubbing together of comparatively progressive castes with the most backward classes (MBCs) under one general category, representation of the latter as a group in government services and professional colleges is disproportionately low; without treating them as a separate entity for purposes of reservation there can be no chance of their reaching adequate representation in the foreseeable future, and they will continue to remain depressed.

In keeping with these observations the Commission recommended 16% reservation for the MBCs and 17% reservation for the BCs, taking into consideration its estimate of these categories in the state population as 22% and 29% respectively; and exclusion from reservation benefits families of salaried persons whose annual income exceeded Rs. 9,000, land owners owning more than ten standard acres, and business people with taxable income exceeding Rs. 9,000.

The DMK ministry enhanced reservation for the BCs from 25% to 31% and for the Scheduled Castes and Scheduled Tribes (SCs-STs) from 16% to 18% in 1971. However, it did not offer separate reservation for the MBCs; or implement the recommendation to prescribe an annual income of Rs. 9,000 on BC families, lest it should incur the displeasure of vested interests among the BCs.

As a belated attempt the M G Ramachandran-led AIADMK ministry issued a GO in July 1979 prescribing an annual income limit of Rs. 9,000 on BC families for eligibility to the reservation benefits.

Shortly after the announcement of the income criterion, MGR and his education minister, C Aranganayagam, defended it publicly: Social justice and fairness demand it, asserted MGR.

His argument was that even among the BCs there are affluent people who could afford spending on their children's education, whereas it is those with very meagre income, say, the rickshaw pullers, who ought to be given support and encouragement.

The purpose of the income limit is to render justice to a larger number of the economically backward, and to cut the vicious circle of the growth of “neo-Brahminical cult” among the affluent BCs, argued Aranganayagam. His reasoning was that although the state reserved 31% of seats in engineering and medical colleges, only about 25% of the beneficiaries belonged to the really backward, whereas the rest were from the affluent sections of the BCs, children of income tax assesseees, and so on, who took advantage of the reservation policy, merely because they belonged to the groups listed as BCs.

When the GO was issued there were protests against its enforcement, and agitations demanding its withdrawal. In the wake of these, and his party's defeat in the January 1980 Lok Sabha elections, MGR announced, on the eve of the dismissal of his ministry, the withdrawal of the GO, and outwitting his adversaries, also an increase in the reservation for the BCs from 31% to 50%.

These measures amply rewarded the AIADMK in terms of its return to power. They also brought cheer to the vested interests among the BCs and the political parties representing them. Among others, Karunanidhi hailed the announcement as a great success of the agitations launched by his party and the Dravida Kazhagam.

While disposing of writ petitions challenging the Constitutional validity of the two GOs of February 1, 1980 giving effect to the two MGR announcements of January 24, 1980, the Supreme Court on October 15, 1982 directed the state to appoint a Commission within two months, for reviewing the existing list of BCs after enumeration and a factual and scientific investigation of their conditions. In pursuance of this directive M G Ramachandran constituted, on December 13, 1982, the Tamil Nadu Second Backward Classes Commission, with J A Ambasankar as chairman.

The data collected by the Commission vindicated the findings of the Sattanathan Commission and clearly showed the lopsidedness of the state's reservation policy:

Of the total BC students admitted to professional courses, more than three-fourths were from a small number of the BCs (34 out of 222) accounting for only about two-fifths of the BC population in the state; of the total number of BC scholarships, the total amount of these scholarships, and candidates of all grades selected by the Public Service Commission (PSC), about two-thirds went to this relatively small number of BCs; even within this small number,

just about one-third, accounting for about one-third of the total BC population, cornered as much as two-thirds of the BC admissions to the professional courses and more than half of the scholarships, scholarship amounts, and BC candidates selected by the PSC. Top in this list of 34 major beneficiaries were seven of the nine major beneficiaries mentioned in the Sattanathan Commission report (see Table 1).

Table 1: BCs by population and access to reservation benefits, Tamil Nadu, 1981-82.

SN	Code	Caste/Community	Percent in total BCs				
			Popu- lation	Profe- ssional courses	Scholar- ships	Scholar- ship amount	Selected by the PSC
1	231	Kongu Vellalar	6.8	7.6	4.3	6.5	5.3
2	243	Nadar/Shanar/Gramani	6.6	10.2	10.7	10.1	5.1
3	201	Agamudaiyar	5.0	11.1	10.8	9.8	12.1
4	802	Labbai	4.0	4.5	5.6	6.1	4.2
5	210	Gavara	2.6	8.2	5.7	6.7	7.2
6	218	Kaikolar/Sengunthar	2.5	6.2	4.3	5.4	6.4
7	220	Kallar	2.3	3.7	3.9	3.4	2.8
8	239	Maravar	1.5	2.3	2.5	2.8	2.2
9	264	Sozha Vellalar	1.3	2.3	1.6	2.2	1.7
10	206	Devangar	1.2	4.1	2.5	3.0	2.0
11	258	Sadhu Chetty	1.0	2.2	1.5	1.7	1.7
12	277	Vokkaligar	0.8	0.9	1.0	1.2	0.7
13	801	Dekkini Muslims	0.7	1.2	0.6	0.9	1.3
14	276	Veerakodi Vellalar	0.7	1.5	1.3	1.6	1.5
15	909	CSI/SIUC	0.6	1.0	0.0	0.0	1.1
16	263	Sourashtra	0.5	2.2	1.8	1.8	1.8
17	257	Reddy (Ganjam)	0.5	1.0	0.8	1.1	0.6
18	260	Saliyar	0.4	1.3	0.8	0.8	0.9
19	262	Senaitalaivar	0.4	0.9	0.7	0.7	0.7
20	225	Karuneeagar	0.3	0.9	0.5	0.6	1.4
21	131	Sozhia Chetty	0.2	0.3	0.6	0.6	0.3
22	275	Vellan Chettiar	0.2	0.5	0.7	0.3	0.4
23	111	Jangam	0.2	0.3	0.5	0.3	0.4
24	224	Kannada Saineeagar	0.2	0.4	0.3	0.0	0.4
25	109	Isai Vellalar	0.2	0.4	2.7	0.4	0.7
26	305	Chettu	0.1	0.2	0.2	0.1	0.2
27	113	Kongu Chettiar	0.1	0.3	0.1	0.0	0.2
28	211	Gowda	0.1	0.2	0.4	0.5	0.1
29	127	Paravar	0.1	0.4	0.5	0.5	0.0
30	213	Idiga	0.1	0.2	0.1	0.1	0.2
31	245	Nangudi Vellalar	0.1	0.1	0.0	0.1	0.1
32	230	Khatri	0.1	0.3	0.0	0.0	0.0
33	112	Jogi	0.1	0.1	0.0	0.0	0.1
34	244	Nagaram	0.1	0.3	0.3	0.4	0.1
		Total	41.5	76.9	67.2	69.9	64.0
		Total of remaining 188 BCs	58.5	23.1	32.8	30.1	36.0

Source: Tabulated from Government of Tamil Nadu, Report of the Tamil Nadu Second Backward Classes Commission. Vols. 1-3: Pp. 100-123, 154-68, 179-97.

The dissenting views of 14 of the 21 members of the Commission made its report controversial right from the time of its submission in February 1985. Among other things, the dissenters questioned the rationale for inclusion in the chairman's recommendations of 17 forward communities as BCs and deletion of 34 communities from the existing BCs list. Their demands were, therefore, for retaining the existing list of BCs, with 67% reservation, against the much-reduced 32% recommended by the chairman with compartmental reservation by grouping the BCs according to the degree of their backwardness.

In the heat of the controversy, the MGR ministry did not make the report public, and despite repeated requests, did not table it in the Assembly. However, through a series of GOs issued on July 30, 1985, it made selective use of the report. These GOs contain the ministry's orders to continue the existing 50% reservation for the BCs (besides 18% for the SCs-STs), considering the Commission's estimate of the BC population at 67% and the majority members' recommendations for 67% reservation; to add 29 communities to the BCs list, without deleting any recommended for deletion; and the continuation of the existing list of MBCs within the BCs list without any separate reservation for the MBCs.

Such increasing politicization of reservation resulted in the exacerbation of the condition of the very backward castes because of the concentration of the reservation benefits in certain advanced castes. This was clearly brought out by the violent agitations of the Vanniyars during 1986-88 as outbursts of their deep-rooted frustration and bitterness over the way successive governments cheated them and included in the BCs list many undeserving communities, allowing them to grab all the benefits, leaving practically nothing to the really backward. Since Vanniyars are the largest caste in Tamil Nadu, accounting for about 12% of the state's population they could organize and agitate. Though several other castes have also been deprived of the reservation benefits they have not been able to organize and agitate because of their small size.

As a result of the Vanniyar agitations, the DMK which assumed office after the January 1989 elections, ordered compartmental reservation in March 1989. Out of 50% reservation for 201 communities, it set apart 20% for 39 MBCs and 68 Denotified Tribes, together accounting for about 31.1% of the BCs, and 30% for rest of the BCs accounting for about 68.9% of the total BC population in the state.

II

About three years after this new arrangement came the Supreme Court ruling in the Mandal case (Indra Sawhney), restricting overall reservation to 50% and eliminating the creamy layer

from the notified BCs. The vociferous campaign that followed the ruling by chief minister, J Jayalalithaa to protect the state's 69% quota (following a court order in 1990 the government gave the STs separate reservation of 1% making the overall reservation 69%) was crass opportunism when seen against her earlier social justice pedantry.

Thus, stating that the major reason for the violent antagonism to reservation in the north is that it has not been made clear that it is the really poor who will benefit, in an interview published in *Indian Express* on October 5, 1990, she asserted: Even among the so-called backward castes, there are many people who are well off, well placed in life, society. It makes a mockery of reservation if they are going to be cornering the benefits. So, it should be made clear that it is the economically weaker sections in the backward castes that will be given these concessions. Only then can one call it social justice. Defending the introduction of the income ceiling by her mentor, she added: 'What MGR actually meant was the benefit of reservation should be availed of by economically weaker sections among the BCs. We stand by that'.

Jayalalithaa's relentless campaign proclaimed that courts should not hamstring states in their efforts to render social justice, and in the process portrayed the judiciary as an interloper. In keeping with the views of the AIADMK cabinet, in April 1993 the state filed a petition in the Supreme Court seeking a review of its verdict in the Mandal case. The cabinet's views were the state's reservation scheme took into account the real backwardness among various castes and communities; its reservation scheme followed for a long time could not be disturbed without affecting the social fabric, particularly the rights and interests of the BCs; implementation of the ruling that reservation shall not exceed 50% would lead to social tension and agitations; and exclusion of the creamy layer would not be judicious as the adoption of any criteria would itself lead to unequal treatment.

Meanwhile, in response to writ petitions against the procedures followed in admissions to professional colleges, while upholding the reservation of 69% for 1993-94, the Madras High Court on July 27, 1993 ruled that the state had to take steps to implement the Supreme Court's orders in the right perspective and see that reservation was brought down to 50% at least before the next academic year. However, in response to a writ petition from the Voice (Consumer Care) Council, the Supreme Court on August 24, 1993 restrained the state from exceeding 50% even for 1993-94. Reacting to the Court order Jayalalithaa iterated her government's resolve to continue the existing level of reservation to endure the social progress of the BCs.

When the state made 69% reservation based on the High Court order, following a contempt petition from the Voice (Consumer Care) Council, the Supreme Court extracted on November 11, 1993 an unconditional apology from it for violating the Court order, and on November 22 an affidavit of compliance. This compliance forced the state to reduce the reservation in admissions from 50% to 31% (30% to 18.6% for the BCs, and 20% to 12.4% for the MBCs). The Court also directed the state on December 14 to admit forthwith to the MBBS course the 11 remaining candidates in the open merit list who were unlawfully deprived of admission by its failure to follow the 50% rule despite the Court order of August 24, 1993.

Offsetting this setback were, however, the efforts stepped up by Jayalalithaa to circumvent the judiciary politically. A resolution unanimously adopted by the Assembly at a special session convened on November 9, 1993, urged the Centre to amend the Constitution to protect the Tamil Nadu reservation policy. Moving the resolution Jayalalithaa called for a state-wide *bandh* on November 16, 'to voice the concern of the people over the threat to the 69% reservation being followed in the state.'

Following an all-party meeting on November 26, Jayalalithaa introduced in the Assembly on December 30 a Bill under Article 31(c) keyed to Articles 39(b) and (c) of the Constitution 'to give effect to the aspirations of the vast majority of the people of Tamil Nadu so as to achieve the goal of social justice'. The Bill with retrospective effect from November 16, 1992, reiterating the continuance of the 69% reservation, was unanimously passed on December 31, and dispatched to the Centre on January 19, 1994.

By this time, at a conference in Delhi on December 4, 1993, with characteristic candour Jayalalithaa gave a new twist to the Supreme Court rulings, and a new interpretation to the role of judiciary and to the rule of law: The Supreme Court verdict in the Mandal case has overruled the settled position and created uncertainty in the law, and a situation had been reached where the benefits given by a state government to the weaker sections under Article 46 had to be taken away to their detriment; the courts can only declare the laws and not assume the power of the legislatures which is purely in the domain of the legislatures or Parliament; to maintain the credibility of judicial forums and to create absolute confidence in the minds of the general public, justice acceptable to the majority of the public should be rendered by courts; and between the court's verdict and verdict of the people only the latter would have to prevail because that is final in a democracy, she asserted.

Thwarting the DMK's call for picketing government offices on June 17, 1994 protesting against Jayalalithaa's failure to secure President's assent to the Tamil Nadu Reservation Bill, at the eleventh hour Jayalalithaa abruptly called for a state-wide state-sponsored bandh the same day, demanding President's assent to the Bill.

When the Bill did not get the assent for nearly six months despite reminders to the Centre including Jayalalithaa's letter to the Prime Minister on June 3, reiterating that the state's reservation percentage cannot be anything less than 69%, Jayalalithaa sent letters to leaders of various political parties, led a 28 member multi-party delegation to Delhi and presented a memorandum to the Prime Minister on June 25. The memorandum pressed for President's assent to the Bill, inclusion of the Act in the Ninth Schedule, powers to the states to vary the reservation percentage with regard to population and other related factors; and reiterated the state's opposition to the elimination of the creamy layer.

Though the AIADMK was in the vanguard of the political campaign for protecting the 69% reservation, it was not alone. Political parties of all shades, besides extending support to the AIADMK within the Assembly, vied with one another in supporting the status quo, thus showing a certain unity of purpose though not of ideas and action.

Each party had its own political compulsion to vocally support the 69%. But as a net result of all these efforts the Tamil Nadu Reservation Bill obtained President's assent on July 19, and under further pressures, by the Constitution (85th) Amendment Bill passed unanimously by the Rajya Sabha on August 24 and Lok Sabha the next day, was included in the Ninth Schedule under Article 31B.

The validity of this Act was soon challenged by writ petitions filed before the Supreme Court which referred the matter to a Constitution Bench. The Court passed an interim order directing the government of Tamil Nadu to create additional seats in professional colleges to accommodate students who would have been selected under the 50% rule instead of the 69% rule. Similar orders were passed from year to year till 2010.

Even as the delay of about 17 years in deciding the validity of the Tamil Nadu Act enabled the Tamil Nadu government to persist with its specious quota law, on July 13, 2010 the Supreme Court disposed of the long pending writ petitions without expressing any opinion on the validity of Act, but with a direction to the state government to place quantifiable data before the Tamil Nadu State Backward Classes Commission and, on the basis of such data the Commission will decide the quantum of reservation in the light of the parameter laid down by the Court that if a state wants to exceed 50% reservation it is required to base its decision on

quantifiable data.

III

It is against the above background the Janarthanam Commission's report has to be seen. Though it was expected to be explicitly on the basis of quantifiable data it is a verbal jugglery, with frills and fabricated information.

Janarthanam's predilection as a staunch supporter of reservations has set the tone of the report as evident from the Foreword to it. In the first three paragraphs he states:

'1. Came the threat to distort and dismantle the massive inclusive growth – the State had attained – by pursuing the policy of reservation in pre and post Constitution eras – to the level of raising the eyebrows of other States in the shape of judgment in Indra Sawhney, emerging from the Apex Court.

2. The State of Tamil Nadu, in rather a bid not to get the inclusive growth affected, brought an enactment – Tamil Nadu Act 45 of 1994 – in the year 1993 to protect, preserve and maintain 69% reservation.

3. The vested-interest sections, unable to bear the brunt of such growth in the State, knocked at the doors of the Supreme Court by resorting to writ proceedings throwing a challenge to the Constitutional validity of the said Act, in 1994. Despite the stay of operation of the Act prayed for, fortunately, no stay was granted, and the 69% reservation was continued to be in operation for about seventeen years, developing and fostering inclusive growth to an astonishing level.'

The Foreword is followed by thirteen chapters in 188 pages. Their titles tell the story of their contents:

1. Punctilious Introduction
2. Reservation In Tamil Nadu – history of events;
3. Evolution of the Constitution and declaration of Independence;
4. March of law in the matter of reservation;
5. Qualitative exclusion of creamy layer – baseless;
6. Quantitative restriction, whether quintessential;
7. Backward classes without untouchability were kept in darkness by founding fathers of independent India;
8. Judicial intervention – stumbling block in capacity building of backward classes and weaker sections of the society;
9. Basic structure theory – a dangling sword above the heads of backward classes;

10. Neglect of backward classes in appointments to higher judiciary;
11. Political power dynamics of India – a case study;
12. Reservation under Tamil Nadu Act 45 of 1994 – existence of quantifiable data – justifiability or otherwise thereof;
13. Strategy and synergy for inclusive growth.

These chapters are mostly in the nature of mere page fillers and have hardly any bearing on the Commission's mandate. If any thing, the report questions the judiciary for its Mandal rulings, portrays it as an interloper in state policy; and overturns its mandate to the Commission.

A case in point is paragraph 5.9: 'The function of the judiciary is to adjudicate and not to legislate. The addition of the concept of creamy layer in either Article 15(4) or Article 16(4) by the Supreme Court can, by no stretch of imagination, be construed as an act of adjudication but that will tantamount to an act of legislation, that too not an ordinary legislation, but a constitutional amendment.'

The Commission ignored the fact that the concept of creamy layer was implicit in the Sattanathan Commission report.

The Janarthanam Commission's report refers to the enhancement of reservation for the BCs from 25% to 33% as the major recommendation in the Sattanathan Commission report; but ignores its important findings and recommendations mentioned earlier.

The Janarthanam Commission's report dwells on the Ambasankar Commission's estimate of 67% as the BC population of the state to justify the continuance of 69% reservation (notwithstanding the fact that Ambasankar himself recommended only 32% reservation for the BCs (a reduction of 18% from the existing 50%) for keeping the overall reservation within 50%):

'The reservation made to [the] BC under the Tamil Nadu Act 45 of 1994 is far below to their population which was estimated as 67%. As such, reservation made in favour of Backward Classes by the Tamil Nadu Act 45 of 1994 cannot at all be stated as not based on quantifiable data... The reservation made to SC and ST as 19% is [also] proportionate to their population. In such circumstances, the reservation made by the Tamil Nadu Act 45 of 1994 in favour of BC, MBC, SC and ST all put together is fully justified taking into consideration the percentage of population of those respective classes.' (Paragraphs 1.8, 1.9)

While the huge disparity in the estimate of the BC population as 51% by the Sattanathan Commission and 67% by the Ambasankar Commission, that too within ten years, itself calls

for explanation; and if any thing the former sounds proximate to the reality as the report contains robust data on each and every caste in Tamil Nadu, treating the latter as the same about three decades later is fallacious. That apart, an estimate of the BC population is not quantifiable data on the BCs.

The Janarthanam Commission had a rare opportunity of “revisiting the reservation site” by comparing the socio-economic, employment and educational status of the BCs in 1982 as available in the Ambasankar Commission report with corresponding data after about three decades to ascertain which castes have benefited from reservations, which are still lagging behind, and which should be excluded from the BCs list because of their advanced status. As these data are available with the government the only conclusion one can draw from the Commission’s failure to use the data is that it did not want to expose the reality which would have gone against the predilection of its chairman and hurt the government.

The report claims that the state government supplied quantifiable data and materials in abundance, but does not contain any such data and materials and any findings based on them.

The report has drawn attention to the Ambasankar Commission’s work, such as its survey, its tour of the districts for recording evidence, collection of population figures and preparation of output tables. The three lengthy annexures to the report are also from the Ambasankar Commission report. All these have no bearing on the Janarthanam Commission’s mandate; and even if they have any bearing it is not borne out by the report.

Stating that the Tamil Nadu Act 45 of 1994 has been in existence for seventeen years since 1994; and all these years, neither the BCs nor the MBCs availed of the entirety of benefits intended for them, the report claims that the need for the application of creamy layer exclusion in Tamil Nadu does not at all arise for consideration. But the table presented earlier clearly showed the continuing monopoly of the benefits by certain groups even about three decades ago. Whether such monopoly still continues would have been evident only by a caste-wise analysis of the current data and not by hollow assertions.

In July 2000 chief minister, M. Karunanidhi tabled in the Assembly the Tamil Nadu government's White Paper on job reservation. The Janarthanam commission report does not refer to this.

Going by this White Paper (and another source for 1992) of the state government employees the percentage of BCs, ranging from 61/55 to 55/46 in groups A+B and C+D in 1992/1999 was well above the 30% reservation fixed for them; whereas the corresponding figures for the MBCs, the lower strata of the BCs, eligible for 20% reservation, were 10/16 and 13/15. The

representation of the SCs and STs, eligible for 18% and 1% reservation, was broadly similar to that of the MBCs. That is, 9/13 and 20/18, and 1/0.4 and 1.5/1 respectively.

IV

Tamil Nadu chief minister Jayalalithaa to whom Janarthanam submitted the report on July 8, 2011 has not placed the report before the Assembly, made it public, or subjected it to judicial scrutiny. Instead, on July 11, 2011 Jayalalithaa issued a Government Order that the 69% reservation will continue without elimination of the creamy layer, though the Supreme Court gave only one year's time, till this July 13, 2011, for the status quo. Continuing the status quo without a thorough judicial scrutiny of the report and the Supreme Court's approval defies the court order, perpetrates a fraud on the Constitution, and sets a bad precedent.

Partisan and misleading reports by duly appointed commissions entrusted with the task of fact-finding have dangerous implications for policy making, and people's faith in the judiciary and the commissions appointed by it. The Janarthanam Commission's report is in this dubious category.

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