RIGHT TO EQUALITY AND PROTECTIVE DISCRIMINATION

[An Analytical Study with reference to Existing Reservation Policy and the Indian Constitution]

A

Thesis

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By

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Under the Supervision of

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CERTIFICATE

I feel great pleasure in certifying that the Thesis entitled "**Right to Equality and Protective Discrimination [An Analytical Study with reference to Existing Reservation Policy and the Indian Constitution]**" by Mr. **Ashok Kumar Meena** under my guidance. He has completed the following requirements as per the Ph.D. regulations of the University:

a) Course work as per the University rules.
b) Residential requirements of the University [*200 days*].
c) Regularly submitted annual progress report.
d) Presented his work in the Departmental Committee.
e) Published/accepted minimum of one research paper in a referred research journal.

I recommend the submission of the Thesis.

Prof. (Dr.) Arun Kumar Sharma
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Abstract

Sovereign India determinedly and unequivocally embarked the compensatory discrimination principle with a strong justification that it works as an effective mechanism to offset the historical cumulative deprivation experienced by lower castes. There are two concepts for equality where one is giving the notion of formal equality means everyone is equal before the law, and second one says about proportional equality in which the state has responsibility to take affirmative action in protection of equality. Article 14 to Article 18 of the Indian Constitution stands for the right to equality, by the lot many efforts of the Parliament, State Legislature and Judiciary, WE can realize that the right to equality is actual protective discrimination of the society.

The concept of "*protective discrimination*" for so called backward classes of people in India has assumed a new dimension because of the massive socio–economic changes after Independence and resultant change in the perception regarding "*equality*". Soon after independence, the social problem of caste inequality came to the fore though there are many kinds of inequalities in India, the main emphasis is on caste because of the potential of "*caste*" in the battle for ballots. Caste is considered peculiar and intrinsic to the Indian society but escapes strict definition, owing to its complexity. Yet it is used in so many contexts with this lack of precision. It is a term widely used to describe the hereditary, endogamous social classes and sub classes of traditional Hindu society. The issue of protective discrimination through reservations is steeped in questions of equality, merit and social justice. Understanding the interactions between these questions has long evoked judicial, political and academic debate.

In this research work the discussed about on affirmative action or protection discrimination tend to employ the language of rights, **particularly the rights of "*upper*" against the rights of "*lower*" castes**. The demands that the state should distribute benefits of education and employment between different castes and communities is a strong one as it echoes a social ideal that has prevailed in India for centuries. What is noticeable is a continued tendency to assert "*rights*" of one group as against another, as opposed to rights of an individual as an individual. The **Indian Constitution** guarantees fundamental rights of equality of opportunity and non–discrimination to individuals. While the justification for the reservation policy and the quota system has been accepted by all, debates are polarized on 3 main questions: the beneficiaries of the policy, its extent and its permanence. These have been thrashed out since the turn of the century, however debates intensified post *Mandal* and *Indra Sawhney* and their legacy continues till date. So, inspired by

all these logical situations of contemporary India, where from every state there is hue and cry for reservations and people get delighted to identify themselves belonging to a particular backward class or caste, the reservation has undertaken the issue of protective discrimination, to study it from socio–legal perspective into its existing reservation policy and the Indian Constitution. In the polemical debate on reservations, one often sees a bewildering array of terms employed, like affirmative action, positive discrimination, compensatory discrimination, protective discrimination *etc*. The proliferation of these terms was a post Mandalian phenomenon. Initially, the policy was nameless, with many content to describe it as "*special treatment*", "*preferential treatment*" or as "*concessions*". In India, they are popularly called as reservations. **Marc Galanter** proposed the use of the term compensatory description to refer to the array of policies, which are constitutionally permitted departures from the norm of formal equality for the purpose of favouring specified groups. These policies or preferences are of three basic types: the most important and contentious is reservations or quotas in academic institutions, government jobs and in legislatures. The second is the grant of scholarships, loans, land allotments, health care, and legal aid to a beneficiary group beyond comparable expenditure for others. The third is in the nature of protective devices *i.e*., provisions aimed to abolishing untouchability, forced labour, regulating money lending, protecting Scheduled Castes and Scheduled Tribes from oppression.

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CANDIDATE'S DECLARATION

I, hereby, certify that the work, which is being presented in the Thesis, entitled "**Right to Equality and Protective Discrimination [An Analytical Study with reference to Existing Reservation Policy and the Indian Constitution]**" in partial fulfillment of the requirement for the award of the Ph.D., carried under the supervision of Prof. (Dr.) **Arun Kumar Sharma** and submitted to the University Department of Law, University of Kota, Kota represents my ideas in my own words and where others ideas or words have been included. I have adequately cited and referenced the original sources. The work presented in this Thesis has not been submitted elsewhere for the award of any other degree or diploma from any Institutions. I also declare that I have adhered to all principles of academic honesty and integrity and have not misrepresented or fabricated or falsified any idea/data/fact/source in my submission. I understand that any violation of the above will cause for disciplinary action by the University and can also evoke penal action from the sources which have thus not been properly cited or from whom proper permission has not been taken when needed.

Date: ……

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This is to certify that the above statement made by Mr. **Ashok Kumar Meena**, Registration No. RS/2124/2013 is correct to the best of my knowledge.

Date: ……

Prof. (Dr.) Arun Kumar Sharma
(Research Supervisor)

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July……., 2018 **Ashok Kumar Meena**

LIST OF ABBREVIATIONS

`	:	Indian Rupee.
AC	:	Law Reports, Appeal Cases.
Agni	:	Agani Purana.
AIR	:	All India Reporters.
Akl	:	Avadanakalpalata.
ALJ	:	Allahabad Law Journal.
All	:	Allahabad.
ALR	:	Allahabad Law Reports.
AP	:	Andhra Pradesh.
Apararka	:	Apararaka's commentary on Yajn valkya Smrti.
Apast	:	Apastamba Dharmasutra.
Article	:	Article of the Constitution of India.
Atri	:	Atri Smrti.
Baud	:	Baudhayana Dharmasutra.
BHCR	:	Bombay High Court Reports.
BKM	:	Brhat Kathamanjari.
Bom	:	Bombay.
Brahas	:	Brahaspati Smrti.
CAD	:	Constituent Assembly Debate.
Cal	:	Calcutta.
Cl	:	Clause.
Cll	:	Clauses.
Cr.LJ	:	Criminal Law Journal.
Crop. Indic	:	Corpus Inscriptionum Indica.
Das. Av.	:	Dasavataracarita.
Del	:	Delhi.
Devala	:	Develasmrti.
DOP&T	:	Department of Personnel and Training.

e.g. [Exempli gratia]	:	For Instance.
ECHR	:	European Convention on Human Rights.
EG	:	Epigraphia Indica.
Gau	:	Gauhati.
Gaut	:	Gautama dharmasutra.
Guj	:	Gujarat.
HC	:	High Court.
HP	:	Himachal Pradesh.
HRJ	:	Human Rights Journal.
HRLJ	:	Human Rights Law Journal.
HRQ	:	Human Rights Quarterly.
HSC	:	Higher Secondary Course.
i.e.	:	That is.
IA	:	Indian Appeals.
IAS	:	Indian Administrative Service.
Ibid [Ibidem]	:	In the Same Case, Passage, Chapter, Book.
IC	:	Indian Cases.
IJPS	:	Indian Journal of Political Science.
ILR	:	Indian Law Reports.
IPS	:	Indian Police Service.
JT	:	Judgment Today.
Kant	:	Karnataka.
Ker	:	Kerala.
Lah	:	Lahore.
LB	:	Lower Burma.
LIC	:	Life Insurance Corporation
LRI	:	Law Reports of India.
LRI	:	Law Reports of India.
Mad	:	Madras.

MBBS	:	Medicinae Baccalaureus and Bachelor of Surgery [Bachelor of Medicine and Bachelor of Surgery].
MD	:	Doctor of Medicine.
MLA	:	Member of Legislative Assembly.
MLJ	:	Madras Law Journal.
MP	:	Member of Parliament.
Nag	:	Nagaland.
NCW	:	National Commission for Women.
OBC	:	Other Backward Class.
P&H	:	Punjab & Haryana.
Pat	:	Patna.
PC	:	Privy Council.
Pesh	:	Peshawar.
PG	:	Post Graduate.
PLT	:	Patna Law Times.
QB	:	Law Reports, Queen's Bench Division.
R	:	Rule.
R/w	:	Read with.
Raj	:	Rajasthan.
Rang	:	Rangoon.
RR	:	Rules.
S	:	Section of the Act.
SC	:	Scheduled Caste.
SC	:	Supreme Court.
SCA	:	Supreme Court Appeals.
SCC	:	Supreme Court Cases.
Sch	:	Schedule.
SCJ	:	Supreme Court Journal.
SCN	:	Supreme Court Notes.
SCOR	:	Security Council Official Records.
SCR	:	Supreme Court Reports.

SCWR	:	Supreme Court Weekly Reporter.
SEBCs	:	Socially and Educationally Backward Classes.
Ss	:	Sections of the Act.
Ss	:	Sections of the Act.
ST	:	Scheduled Tribe.
Sub-s	:	Sub–section.
Supra	:	Above.
T&C	:	Travancore–Cochin.
Tri	:	Tripura.
UNESCO	:	United Nations Educational, Scientific and Cultural Organization.
UNICEF	:	United Nations of International Children & Educational Fund.
UNO	:	United Nations of Organization
UOI	:	Union of India.
USA	:	United State of America.
Viz. [Videlicet]	:	Namely.
VP	:	Vindhya Pradesh.
w.e.f.	:	With effect from.
WHO	:	World Health Organization
WLR	:	Weekly Law Reports.

CONTENTS

Chapter 1

INTRODUCTION

I. General

"*We must begin by acknowledging that there is a complete absence of two things in Indian society. One of these is equality. On the social plane we have an India based on the principles of graded inequality, which means elevation for some and degradation for others. On the economic plane we have a society in which there are some who have immense wealth as against many who live in abject poverty.*"

Dr. B.R. Ambedkar

Sovereign India determinedly and unequivocally embarked the compensatory discrimination principle with a strong justification that it works as an effective mechanism to offset the historical cumulative deprivation experienced by lower castes. The truth is that Indian social system has, for centuries, committed social and economic injustices by the so–called higher castes on the lower castes that have been denied equality in the opportunity and the facilities of the society.[1]

In our democratic, socialist republic, every national, pariah to prince, has title to full personhood, which consists of social, economic and political

1. Jaswal S.S., **Reservation Policy and the Law**: **Myth and Reality of Constitutions Safeguards to Scheduled Castes**, Deep and Deep Publications, New Delhi, [2007], at p. 16.

status and opportunity. [2] So, the framers of the **Indian Constitution** incorporated into the Constitution itself provisions for compensatory discrimination programmes. The Preamble of the **Indian Constitution** speaks of "*We*, *the people of India*" resolving to secure *inter alia* "**Justice**: *social*, *economic* and *political*" to "*all its citizens*". The Indian Governments' policy of compensatory discrimination comprises of various preferential schemes. The policy of initiatives used in India to offset the inequalities of society is a policy of reservations.

To build up a just and fair society has been a dream of mankind since the beginning of civilization. A society based on in–equality can never be just and fair.[3] Equality as a value is specially preferred as a key to justice.[4] In the words of Justice **V**.**R**. **Krishna Iyer**:

"*Equality and quality are incongruous quantities, viewed from an elitist perspective*, *but must be so harmonized by social technology as to live in functional friendliness*, *not snarling fretfulness*, *if democracy in a developing country*, is *to be not* '*a teasing illusion*' *but humanism in action*."[5]

Formal equality merely requires the nonexistence of any discrimination in the terms of law. Justice demands equality of result which can be achieved just by the mitigation of in–equalities of men by positive State action. It has been understood that the claim of equality is in fact a dissent against unfair, un–deserved and unjustified in–equalities.

II. **Meaning of the term** "**Reservation**"

Reservation by definition entails some preference for the disadvantaged[6] who may otherwise lose in an open competition with those who are lucky to

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2. Iyer V.R. Krishna, "**Forward**" to Singh P., **Equality**, **Reservation and Discrimination in India**: **A Constitutional Study of Scheduled Castes**, **Scheduled Tribes and Other Backward Classes**, Deep and Deep Publications, New Delhi, [1985], at p. 5.
3. Mishra Jitendra, **Equality Versus Justice**: **The Problem of Reservations for Backward Classes**, Deep and Deep Publications, New Delhi, [1996], at p. 22.
4. Anand C.L., **Equality**, **Justice and Reverse Discrimination**, Mittal Publications, Delhi, [1987], at p. 33.
5. Iyer V.R. Krishna, "**Forward**" to Singh P., **Equality**, **Reservation and Discrimination in India**: **A Constitutional Study of Scheduled Castes**, **Scheduled Tribes and Other Backward Classes**, Deep and Deep Publications, New Delhi, [1985], at p. 5.
6. *State of Uttar Pradesh v. Dina Nath Shukla [Dr.]* AIR 1997 SC 1095; Also see, *National Legal Services Authority v. Union of India* [2014] 5 SCC 438.

have had a good education, training and upbringing. It is added in the **Indian Constitution** as a positive measure in order to provide the Backward Classes of the citizens an opportunity to improve excellence in the service.[7] However, while providing benefits of the policy of the "*reservation*", a stable equilibrium is needed to keep between justice towards the Backward Classes, equity for the forwards as well as efficiency for the entire system.

The concept of the "*reservation*" is very wide. For different people, the meaning of the term reservation is different. As a generic concept, one of the views about the reservation is that it is an anti–poverty measure. According to another view, reservation is just providing a right of access but it is not a right to redress. In the same way, affirmative action has a different connotation as a generic concept.[8] According to some persons, reservation is not part of affirmative action but according to the other people, it is part of that. The word "*reservation*" is not incorporated in Article 15[4] but it is provided under Article 16[4]. The meaning of the word "*reservation*" as a part of Article is different from the same word "*reservation*" as general concept.[9] But the guiding principle behind understanding the real meaning of this term is that the original intention and desires of the Constitution framers should be seen instead of the general concept or principles. So, the schematic interpretation of the Constitution is to be applied.[10] Inorder to understand the existing reservation policy, a study of the historical background relating to is necessary.

III. Historical Perspective of Discrimination

The Indian constitutional policy is based upon the notion that certain social groups in India are inherently unequal, are victims of societal

7. *State of Uttar Pradesh v. Dina Nath Shukla [Dr.]* AIR 1997 SC 1095. Also see, *National Legal Services Authority v. Union of India* [2014] 5 SCC 438.
8. Daniel Müller, ***Reservations and Time: Is There Only One Right Moment to Formulate and to React to Reservations?***, The European Journal of International Law, Vol. 24[4], [2013], at pp. 1113–1134.
9. *M. Nagaraj v. Union of India* AIR 2007 SC 71, at paras 39 and 40. See also, *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.
10. *M. Nagaraj v. Union of India* AIR 2007 SC 71, at para 41.

discrimination and thus require compensatory treatment.[11] The historical discrimination can be studied under the following heads:

[A] Ancient Period

In–equalities prevail in all societies. India, for centuries, has been a home of social systems which bred in–equality, exploitation and in–justice.[12] India was a country with highly rigid caste–based hierarchal structure. The traditional Indian society had witnessed the luxuriant growth of hierarchal movement embodied in the institutions of *Varna* and *Jati*.[13] Hindu society was divided into four *Varnas*, or classes, a convention which had its origins in the **Rig Veda**, the first and most important set of hymns in Hindu Scripture which dates back to 1500–1000 BC.[14] At the top of the hierarchy are the Brahmins and *Kshatriyas*. The *Vaishyas*, the farmers and artisan continue the third class. At the bottom are the *Shudras*, the class responsible for serving the three higher groups. Finally, the untouchables fall completely outside of this system. It is for this reason that the untouchables have also been termed *Avarna* [*no class*] or *Ati–Shudras*. The hierarchal social order was created over the centuries with a view to preserve the monopoly of social status, property and education by the higher caste Hindus.

Furthermore, in Vedic period, according to **Manu Smriti** philosophy, the four *Varnas* proceeded from the limbs of the creator.[15] The same theory also finds place in the Mahabharata which states that the *Brahmana* originated from the mouth of Brahma [*the creator*], the *Kshatriya* from His arms, the *Vaishya* from His two thighs, the *Shudras* from His feet. This theory is more or less based on the old Vedic concept enunciated in the "*Purusasukta*" of the Rig

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11. *State of Uttar Pradesh v. Dina Nath Shukla [Dr.]* AIR 1997 SC 1095; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.
12. Chitkara M.G. and Mehta P.L., **Law and the Poor**: **A Socio–Legal Study**, Ashish Publishing House, New Delhi, [1991], at p. 42.
13. Bhatia K.L., **Dr. B.R. Ambedkar**: **Social Justice and Indian Constitution**, Deep and Deep Publications, New Delhi, [1994], at p. 23.
14. Christopher John Fuller, **Camphor Flame**: **Popular Hinduism and Society in India**, Princeton University Press, Princeton, [1992], at p. 12.
15. Thakur H.D., **Ancient Culture of India**, Sandeep Prakashan, New Delhi, [1981], at p. 12.

Veda.[16] The main idea behind this theory is that the system of "*Varnas*" is creation of God.

In addition, the Post–Vedic period testifies to the rigid stratification and internal solidarity of the four *Varnas*. Each group was recognized as separate and distinct, quite complete in itself, for its social life. Elastic caste system got converted into rigid caste based hierarchal structure which operated for the period of over 3000 years in consequence of which *Shudras* or untouchables became socially, economically, educationally and politically backward and oppressed. They were forced to live a life afflicted by grinding poverty, diseases and ignorance and had to suffer lingering, adverse and oppressive effects of discrimination, oppression, exploitation and domination of the higher upper castes.[17]

The position of *Shudras* in Pre–Mauryan period as reflected in Buddhist and Jain texts shows that the *Shudras* were to serve the three higher *Varnas* and thus to maintain his dependants. *Shudras* did not enjoy the same standard of living as members of higher *Varnas*. There was no fundamental change in civil and political status of *Shudras* in the Mauryan and Post–Mauryan period.

However, the caste system grew more rigid and complex in Medieval period[18] not only because of the reason that it was in the nature of institutions to become stiff with age, but due to the instability of the political order and the over–running of India by alien people and creeds.[19] The social mobility in the caste system was totally absent.[20] The man's position in society was determined by birth not by his qualities. Whatever the reasons *Shudras* during this period were disliked, distrusted and despised and were subjected to social disabilities which along with the ensuring of system of *beggar* and forced

16. Rig Veda–X, 9012.
17. Oomen J.K., ***Scheduled Castes and Scheduled Tribes*** in Dube S.C., **India since Independence**: **Social Report on India**, **1947**–**1972**, Vikas Publishing House, [1977], at p. 155.
18. Luniya B.N., **Life and Culture in Medieval India**, Kamal Prakashan, Indore, [1971], at p. 132.
19. Ibid.
20. Chintins K.N., **Socio**–**Economic History of Medieval India**, Atlantic Publishers and Distributers, New Delhi, [1990], at p. 56.

labour led to their degenerated status in the society. Their plight was really deplorable.[21]

[B] Muslim Period

During this period, the rulers did not make any kind of efforts to make improvements in the age–old social order but protected the caste system as a defensive measure against the onslaught of the Muslim impact and continued the rigid and complicated traditional institution of castes and classes.[22] Further, the Muslim rulers patronized the caste system and they openly supported the feelings of low and high, touchables and untouchables.[23] However, the **Islamic culture indirectly benefited a vast majority of the economically backward people by providing them with suitable trades for their livelihood**. During this period, in the field of literature also, outstanding contributions were made by the low caste saints like **Kabir**, **Nanak**, **Raidas**, **Dadu** and **Namdeo**. They attacked the social evils which had crept into the Indian society by exposing the religious hypocrisies of both Hinduism and Islam. Their aim was to establish the righteousness of human values. Majority of these saints belonged to the lower castes groups like they were weavers, tanners, *dhanuks*, dhobis and tailors, *etc*.

Thus, a vast stratum of the populace was segregated socially and given inhuman and discriminatory treatment. This differentiation of society into different inscriptive groups [*castes*] had created a monopoly of the twice–born over–depressed classes. This monopoly became the main reason for the reservation to these depressed classes in later period.[24] Thus it is noted that prior to the British rule, most of Indian rulers abstained from bringing about harmony in different social groups and privileges and disabilities associated with membership of a particular group.[25]

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21. Chintins K.N., **Socio–Economic History of Medieval India**, Atlantic Publishers and Distributers, New Delhi, [1990], at p. 56.
22. Ibid, at p. 59.
23. Sagar S.L., **Hindu Culture and Caste System in India**, Uppal Book Store, Delhi, [1975], at p. 33.
24. Singh Gopal and Sharma H.L., **Reservation Politics in India**: **Mandalisation of the Society**, Deep and Deep Publications, New Delhi, [1995], at p. 7.
25. Bhatia K.L., **Dr**. **B**.**R**. **Ambedkar**: **Social Justice and Indian Constitution**, Deep and Deep Publications, New Delhi, [1994], at p. 106.

[C] British Period

When the European community's started encroaching upon the Indian soil, there was fall in the central authority that is the Muslim rule in the country and was also the surfacing of social, economic and political chaos. Because of that reason, there was political fragmentation, economic crisis and social disintegration in the Indian society. And it was easy for British rule to turn this country into a source of country for raw–materials and to destroy its basic economic structure. They began to export the raw–materials to the United Kingdom for converting it into the finished goods and to market them back to India. The age–old handicrafts and cottage industries of India got destroyed thereby bringing the greatest economic strain on the weaker sections of the country that mostly run these industries. It resulted into the poverty and unemployment in the country. The introduction of "*Zamindari*" and "*Rayatwari*" systems of the land revenue again gave a set back to the economic position of the *Shudras*, and they were compelled to lead a life of the bonded labourers.[26]

As may be noted, in **early British** [*or pre–Industrial*] period, the material development of the country, that is the contact with the outer world, socio–economic policies of the Government, and some legislative measures taken, brought a change in social practices, in the religious doctrines and also in the caste structure in the society. The Civil and Criminal Courts took over the judicial powers of the caste councils. It is of no doubt that the consummation of the British rule in the second half of the 18th century is an important historical phenomenon. Under the initial impact of the British rule, the triumph of the European capitalism over the Indian feudalism shook the aged old structure of the caste–ridden society of India. In addition, some social movements of social reformers also attacked the integrity of the caste system.

But this is in fact that the British rulers had shown no interest and anxiety to tackle the caste problem. Rather they adopted a policy of non–

26. Dhayal R.N., ***Dr. B.R. Ambedkar Ideas on Social Equality and Justice in Indian Perspectives***, Research Link—An International Journal, Vol. XVI[12], February, 2018, at pp. 108–109.

interference with native caste and religious matters. Due to this policy of British rulers, the vices of caste system were left intact. Britishers followed this policy because it was in their interest that Hindus should remain divided on the basis of caste. But even then the British rule produced structural disturbances in the traditional hierarchisation of Hindu society and opened new avenues of change through introduction of western education system. The western concept of equality, liberty and egalitarianism, provided powerful impetus to untouchables to challenge the validity of distinctions based on purity and pollution.[27] There were introduction of certain legislations during British rule to improve conditions of depressed classes or lower caste people. The **Caste Disabilities Removal Act**, 1850, the **Widow Remarriage Act**, 1856, and the **Special Marriage Act** of 1872 gave a blow to the caste system but they [*legislations*] did not prove of much avail towards lessening the rigour of the caste system.[28]

The Britishers had introduced special provisions and concessions for the educational advancement of the Backward Classes which were later on converted into caste reservation for job. **The policy of reservation in India was quite established during the decades of British rule but such policy was designed more to redress communal in–equality in the representation of weaker sections in public services rather than a social engineering device to redress the rooted socio–economic in–equalities of the disadvantaged section of the society because of the past societal discrimination**.[29]

The entry of scheduled castes into an educational institution in the country was recorded in the year 1856.[30] In June, 1856, a scheduled caste boy

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27. Singh P., ***The Scheduled Castes and the Law***, in **Law and Poverty**: **Critical Essay** by Baxi Upendra, N.M. Tripathi, Bombay, [1988], at p. 137.
28. Dhayal R.N., ***Right to Equality and Protective Discrimination***: ***A Socio–Legal Analysis***, JMSG–An International Multidisciplinary e–Journal, Vol. 3[3], January, 2018, at pp. 425–433.
29. Singh P., **Equality**, **Reservation and Discrimination in India**, Deep and Deep Publications, New Delhi, [1985], at p. 80; Dhayal R.N., ***Right to Equality and Protective Discrimination***: ***A Socio–Legal Analysis***, JMSG–An International Multidisciplinary e–Journal, Vol. 3[3], January, 2018, at pp. 425–433.
30. Divgi Pranav Jitendra, ***Reservations in India: A Constitutional Perspective***, World Journal on Juristic Polity, [2017], at pp. 1–18.

applied for admission into a Government School in Dharwal, **Bombay Presidency**. This incident had created furor in the administration, ultimately attracting the attention of the rulers.

As a result of the impact of Western education and British rule in India, there ushered an era of social and religious movements. The champions of these movements wanted a complete transformation of Indian society.[31] It was their intention to establish a society based on the concept of complete equality and justice to all, irrespective of caste, creed or colour. They wanted to cut the roots of in–equalities and annihilate the social disabilities prevailing in the Hindu society. But no concerted move was made on a large scale to eradicate the evil from our midst.[32]

Thus it is asserted that, the Britishers brought with them casteless culture and a literature full of thoughts on individual liberty. It was felt necessary to alter the habits of these people [*depressed class*] both through teaching and propaganda and make their economic position better in order to bring about real change in their social status.[33] Under these conditions, the **Mysore Government made** reservation in favour of **Backward Classes** as far back as 1874. Despite the scheme of communal reservation from 1874, the representation of other communities in the Government departments was far from being satisfactory.[34] Then in January 1895, Mysore Government issued a further circular reserving certain posts in favour of Backward Classes.[35]

On the basis of the representations received from the Depressed Communities, in 1918, the Mysore Government noted the high proportion of Brahmins in the State Services and desired that the other under–represented

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31. Kamble J.R., **Rise and Awakening of Depressed Class in India**, National Publications, New Delhi, [1979], at p. 29.
32. Malik Suneila, **Social Integration of Scheduled Castes**, Abhinav Publications, New Delhi, [1979], at p. 4.
33. Jaswal S.S., **Reservation Policy and the Law**: **Myth and Reality of Constitutional Safeguards to Scheduled Castes**, Deep and Deep Publications, New Delhi, [2007], at p. 32.
34. Singh P., ***Who are the*** "***Other Backward Classes?***": ***The Historical Background***, quoted in Indian Bar Review, Vol. 17[374]: or [394]: [1990] and Vol. 18[1]: 1991.
35. Mysore Government Circular No. 218–98, dated 19th/21st January, 1895: In 1914 a system of recruitment by nominations was introduced by which the posts of Assistant Commissioner were filled by members of Backward Classes.

communities should be adequately represented in the services. That year, the Government appointed a committee headed by **Miller**.[36] This committee started its working on the assumption that the expression Backward Classes included castes and communities together with Muslims who were not adequately represented in the services.

The committee defined the term "*Backward Classes*" to include all the communities except Brahmins.[37] The Government of Mysore on the basis of the report of above committee, extended special benefits in education and recruitment in the State services to these classes. Furthermore, the **Government of Travancore** and **Cochin**, **Andhra** and **Kerala** also pursued a policy of caste–quota for reservation in Government jobs.[38] However, the **Mentford Report** [1918] recognized only the claims of Sikhs in India. It was for the first time in the political history of India in 1917 that some associations like **Panchama**–**Kavli Abhinarthi Abhimana Sangh**, a Madras Presidency Untouchables Association initiated the move to give representation to Scheduled Castes in Indian Legislature. The result was that Franchise Committee [Southborough Committee], 1918–19 recommended for each provincial council the nomination from depressed classes.[39]

There was wide spread awakening in depressed classes and these classes started clamoring for adequate representation. In addition, the **Government of India Act**, 1919 recognized for the first time in India's history the existence of depressed classes and also recognized the claim of these classes for political representation. The **Government of India Act**, 1919 provided for the communal representations for Muslims, Sikhs, Anglo–Indians, Indian

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36. Government Order dated 23rd August, 1918 appointing the Committee.
37. Sir Leslie C. Miller Committee Report, 1919, at para 3and p. 11: This position continued till the Reorganization of State in 1956. *Also see*, Lelsh Dushkin, ***Backward Class Benefits and Social Class***, Economic and Political Weekly, Vol. 14, Nos. 7–8, April, 1979, at pp. 661–665.
38. Report of Backward Classes Commission, 1955, Vol. I, at pp. 128–130. In Travancor–Cochin [*before merger*] 35 percent of the job reservations were provided to various communities until 1952: 13 percent Ezhava Hindus, 5 percent Muslims, 3 percent Kammas, 3 percent Nadars, 1 percent Syrian Christians, 6 percent Latin Christians, 2 percent other Christians. In Andhra for every seven posts six went to Non–Brahmins. Bombay, Saurashtra also made communal reservations. *See*, report of Karnataka Backward Classes Commission, 1975 Vol. I, Part II, seminar proceedings, at p. 80. *See*, **Pursuit of Equality** by Srinivas M.N., Times Survey of India, 26th January, 1962.
39. **Indian Constitutional Reforms**, **Report of the Franchise Committee**, 1982, at para 28, and p. 15.

Christians, depressed classes, Ab–origins *etc*.[40] It is to be asserted here that Scheduled Tribes are also known as Ab–origins, and they belong to those backward sections of population of India who still observe their tribal ways and still follow their own peculiar customs and cultural norms. Scheduled Tribes live in inaccessible forests and hilly regions and they had been cut off from the main currents of national life. The stratagem adopt by the British administrators for solving the problems of the tribals included acquiring tribal land and forests and declaring certain tribal areas as debarred or partly debarred. However, a number of schools and hospitals had also been established by the British Government with the help of Christian missionaries by whom many tribes were converted to Christianity. So, by and large, the tribes continued to be the victims of colonial–feudal domination, ethnic prejudices, illiteracy, poverty and solitude during British period. It was after the **Government of India Act**, 1919 that the Scheduled Castes, popularly known as depressed classes became a "*political entity*" for consideration in future set–up of constitutional reforms.[41]

However, in 1920, the Congress made the issue of eradication of untouchability, an important item of the political programme. Furthermore, the **Swaraj Constitution** of 1927 provided that no community would be treated as untouchable and no distinction on the basis of the caste would be recognized in the free India. The all Parties' Committee under the headship of Motilal Nehru in 1923 also emphasized the removal of untouchability and other caste disabilities. In 1929, further, a committee was appointed by the Congress to arouse a bitter public opinion in favour of the removal of disabilities based upon the caste. In several resolutions, the Congress pledged to eradicate the curse of untouchability and caste vices.

In addition, in 1928, Government of Bombay set up a committee under the Chairmanship of **O**.**A**.**B**. **Starte** for identifying Backward Classes and it

40. Singh P., **Equality**, **Reservation and Discrimination in India**, Deep and Deep Pub., New Delhi, [1985], at p. 80. *Also See*, Dhayal R.N., ***Justice***, ***Equality and Liberty: Partners or Competitors?*****,** Online International Interdisciplinary Research Journal, Vol. I[V], April, 2018, at pp. 259–267.
41. Ibid.

recommended certain special provisions for their advancement. In its report submitted in 1930, this committee classified Backward Classes into three categories *i.e.*, "*Depressed Classes*, *Ab–originals and Hill Tribes and Other Backward Classes*".[42]

In keeping with the **Government of India Act**, 1919 the British Government in 1927 appointed a seven–member commission headed by **John Simon** MP and **Clement Atlee**. Dr. **B**.**R**. **Ambedkar** on behalf of *Bahiskrit Hitkarni Sabha* demanded joint electorates with reservation of seats for depressed classes.[43]

The **Simon Commission** [1930] as noted that "*our object* is *to make a beginning which* will *bring the depressed classes within the circle of elected representation*". The Simon Commission rejected separate electorates for the depressed classes.[44] Despite the pulls and pressure of the depressed classes' organizations, the recommendations of the Indian Statutory Commission revealed that the allocation of the seats to the depressed persons was not recommended on the basis of their full population ratio.

In 1931, six months after the publication of the **Simon Commission's Report**, a **Round Table Conference** was convened in London to review the Commission's proposals. **It was indeed magnificent event in the history of India**. Furthermore, a **Second Round Table Conference** was convened eight months later. It was indeed very historic. The congress agreed to participate in the conference and on the second hand, a long drawn controversy between **Mahatma Gandhi** and Dr. **B**.**R**. **Ambedkar** started over the position of the depressed classes in India. Dr. **Ambedkar** put forward the basic issue of the depressed classes before the committee once again. **Gandhiji** adamantly having taken up the causes of Harijans ["***Children of God***" *a term coined by the Congress leader*], opposed separate electorates particularly for the

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42. Padhy K.S. and Mahapatra Jayashree, **Reservation Policy in India**, Ashish Publishing House, New Delhi, [1988], at p. 19.
43. **Simon Commission's Report**, 1930, at p. 3.
44. Although the Commission denied separate electorates to the Depressed Classes, it "*felt compelled to continue*" separate electorates for the **Muslims**, **Sikhs and Simon Report**: **A Talk**, Coward–Me Cann, Inc., New York, 1930.

depressed classes.[45] The Second Round Table Conference was inconclusive and the minority issue remained unresolved.[46]

Given the failure of the Conference to settle minority representation and keeping in view the representation made by Dr. **Ambedkar**, Prime Minister **Ramsay Macdonald**, who had chaired the committee on minorities, offered to mediate on the condition so that the other members of the committee supported his decision. The product of this mediation was the Communal Award of 1932.[47] However, after the **Third Round Table Conference**, keeping in view the pressure from all corners, **Macdonald** announced the communal award on 16th August, 1932. Based on the findings of the Indian Franchise Committee, called the Lothian Committee,[48] the Communal Award established separate electorates and reserved seats for minorities, which also included depressed classes which were granted seventy–eight reserved seats. The Award provided for the depressed classes the right to vote in both special and general constituencies, especially granting a "*double vote*". The Award was a great shock to Mahatma Gandhi. But after the negotiations between **Gandhiji** and Dr. **B**.**R**. **Ambedkar**, a historic agreement known as **Poona Pact** was reached on 24th September, 1932.

Two basic concepts took birth out of the Poona Pact as under:

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45. Politically active *dalits* consider the term "*Harijan*" patronizing and condescending, its use was prohibited in all government business in 1990, at p. 33, **Nabhi's Brochure on Reservation and Concession**, Nabhi Publications, New Delhi, [2001].
46. Anthony and Fisher David, **The Proudest Day**: **India's Long Road to Independence**, W.W. Norton and Company, New York, [1997], at pp. 243–44.
47. **The Depressed Classes of India**, United States Office of Strategic Services, Washington, [1943], at p. 30.
48. The Lothian Committee, which included both British and Indian Representatives, was formed in 1932 to study extension of the franchise, women's suffrage, representation of the Depressed Classes and other related issues. Regarding representation of the Depressed Classes, the committee decided that, "*provision should be made in the new Constitution for better representation of the Depressed Classes and that the method of representation by nomination was no longer regarded as appropriate*". For the basis of its enquiry, the Lothian Committee submitted questionnaires to each of the provinces, asking for input on how best to secure representation for the Depressed Classes and advising that, "*the application of the group system of representation for the Depressed Classes*" and advising that, "*the application of the group system of representation to the Depressed Classes should be specially considered*". Report of the **Indian Franchise Committee**, 1932, **Indian Franchise Committee**, Government of India Central Publication Branch, [1932], at p. 4.

1) That depressed will remain within the Hindu fold.
2) That they will enjoy right to rule themselves jointly with others.

Like each of its antecedents, the system of representation of depressed classes through reservation outlined in the Poona Pact was intended to be temporarily continuing, until determined by mutual agreement between the communities concerned in the statement.[49]

The **Poona Pact** led to certain inevitable consequences, one was polarization of Scheduled Castes as political group with the purpose of exerting pressure on national leadership for total removal of untouchability on constitutional basis and protection of the interests of the Scheduled Castes through the introduction of a system of reservations. The other consequence was the firm re–dedication of Gandhi for the removal of untouchability. After the **Poona Pact**, Gandhi made the abolition of untouchability the central plank of the nationalist movement.

The **Poona Pact** was in fact of manifest material advantage to the depressed classes which formed the basis of their representation in the **Government of India Act**, 1935. This Act went into force in 1937. It was designed to give Indian provinces greater self–rule and to build–up a national federal structure to incorporate the princely states. The term, "*Scheduled Castes*" which was first coined by Simon Commission was introduced in this Act. The Act had defined the term "*Scheduled Castes*", as the group including "*such castes*, *races or tribes*, *parts of or groups within castes*, *races or tribes being castes*, *races*, *tribes*, *parts of groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as the* '*depressed classes*', *as His Majesty in council may specify*".[50] This vague classification was clarified later in the **Government of India** [*Scheduled Castes*] **Order**, 1936 which contained a list or "Schedule", of Scheduled Castes for various British

49. Sharma Kusum, **Ambedkar and Indian Constitution**, Ashish Publishing House, New Delhi, [1992], at pp. 224–25.
50. Anand C.L., **Constitutional Law and History of Government of India**, **Government of India Act**, **1935 and the Constitution of India**, revised by Seth H.N., Universal Law Publishing, Delhi, [2008], at p. 180.

provinces.

However in meantime on 4th July, 1934, in Indian Civil Services *i.e.*, Class I, Class II and subordinate level, under the control of Government of India with exception services requiring special technical qualifications, instructions were issued for reservation of posts for the depressed classes.[51] In the instructions issued on 4th July, 1934, it was stated that adequate steps should be taken to secure to the depressed classes a fair degree of representation in public services.[52]

By this time Dr. **B**.**R**. **Ambedkar** had formed the Independence Labour Party in 1936 for pressurizing the British Government to secure more resources for the depressed classes. Then, in July 1942, an All India Depressed Classes Conference in Nagpur was held during which he had established an All India Depressed Classes Federation. The demands were made by the groups for a new constitution with provisions in provincial budgets, particularly providing funds for education for the advancement of the Scheduled Castes; representation of Scheduled Castes by statute in all legislatures and local bodies; the establishment of separate villages for Scheduled Castes, "*away from and independent of the Hindu villages*", as well as a Government–sponsored "Settlement Commission" to oversee the new villages; and the creation of an All India Scheduled Castes Federation.[53]

Furthermore, Dr. **B**.**R**. **Ambedkar** on becoming a member of the **Viceroy's Executive Council** in 1942 submitted a memorandum demanding reservation for the Scheduled Castes in services, and scholarships and financial aid for the backing of their education. However, the Government accepted the demand for reservation in services in favour of the Scheduled Castes in 1943.[54] So, this was the first step whereby Dr. **B**.**R**. **Ambedkar** successfully enlarged

51. Maurie Gwyer and A. Appadorai, **Speeches and Documents on the Indian Constitution**, **1921**–**1947**, Oxford University Press, London, [1957], at pp. 116–117.
52. Ibid.
53. Report of the Proceedings of the 3rd Session of the All India Depressed Classes Conference held at Nagpur on 18th to 19th July, 1942.
54. Prahlad G. Jogdan, **Dalit Movement in Maharashtra**, Kanak Publications, New Delhi, [1991], at p. 57.

the scope of reservation in favour of depressed classes from legislative seats to Government jobs and education. It was only in 1942 that the Government of India decided to fix a certain percentage of jobs for the depressed classes in order to give them necessary motivation to acquire better qualifications in order to become eligible for posts and services.[55]

In August 1943, job–reservation to the tune of 8½ percent was provided for the depressed classes and it was assured to consider the question of raising this percentage in the event of availability of qualified candidates.[56] However, through the research study it is analyzed that the percentage of the Scheduled Castes population according to 1931 census was 12.75 percent and the percentage of job–reservation provided to these people was much below the percentage of their population on All India basis. For the basis of the study of reservation policy the period is divided into two: pre–Independence, and post–Independence.

[D] Pre–Independence Period

The British Government issued the Cabinet Mission Statement on 16th May, 1946, which was a set of proposals to guide the framing of a new Constitution of India. The Cabinet Mission, among other recommendations, laid down a comprehensive plan for the composition of the Constituent Assembly, such that the body should be "*as broad–based and accurate a representation of the whole population as possible*".[57] Recognition was given to the main divisions which were divided into Muslims, Sikhs and the General for the purpose of providing representation of this body.

At this stage, the British Government's attitude towards the Constituent Assembly of India was not friendly, rather it was deplorable. They played a double game due to their own political interests. On the one hand, when the Muslim League decided to boycott the proceedings of the Constituent

55. Report of the Commission of the Scheduled Castes and the Scheduled Tribes, 1951, at p. 23.
56. Ibid, at p. 124.
57. Maurie Gwyer and Appadorai A., **Speeches and Documents on the Indian Constitution**, **1921–1947**, Oxford University Press, London, [1957], at p. 582.

Assembly, the British Government could not, of course, contemplate–forcing such a Constitution upon any of the parts of India which was unwilling.[58] It was also remarked by the former Prime Minister of England when Muslim League was absent in the Constituent Assembly that it was like the absence of the bride when the marriage was going to take place in the church.[59] And on the other hand, it was pleaded by them that they could not allow minority to place a veto on the advance of the majority.[60] The first meeting of the Constituent Assembly took place according to the schedule inspite of the hostile attitudes. The only important absentees were the Muslim League members with some political motives in boycotting it. When the partition of the country took place, the representatives of certain areas ceased to be the members of the constituent Assembly as a result of their joining Pakistan. The Constituent Assembly was then re–organized and re–structured.

Dr. **H**.**C**. **Mukherjee**, an Indian Christian, was Vice–President of the Constituent Assembly and also was chairman of the Sub–Committee on minorities but the most important figure was Dr. **B**.**R**. **Ambedkar**, who was the chief spokesman of the Scheduled Castes. He was appointed as Chairman of the Drafting Committee of the Constituent Assembly. Dr. **B**.**R**. **Ambedkar** joined the Constituent Assembly just to safeguard the interests of the Scheduled Castes. He won the universal praise for the way he piloted the **Indian Constitution**. He convinced each and every person that failure to provide adequate and proper safeguards to Scheduled Castes will lead to serious social upheavals in India even after Independence.

[E] Post–Independence Period

When India got Independence, freedom was not an end in itself.

In the minds of the framers of the Indian Constitution the pledges of the pre–Independence era were uppermost. The framers of Indian Constitution

58. Maurie Gwyer and Appadorai A., **Speeches and Documents on the Indian Constitution**, **1921**–**1947**, Oxford University Press, London, [1957], at p. 661.
59. The Constituent Assembly Debates, Vol. I, at p. 96.
60. Bannerjee A.C., **The Making of the Indian Constitution**, Mukherjee and Co. Calcutta, [1948], at pp. 107–08.

were fully aware of caste ridden societal imbalance. Recognizing and acknowledging that the persons belonging to the Scheduled Castes have suffered intense and extensive social and economic discrimination because of the caste system and being victims of irrational prejudices, legislative measures were needed to overcome this discrimination. The Indian tribes had also remained backward. The need of the hour was to evolve ways and means to improve their socio–economic conditions in such a way without undue and hasty disruption of their way of living, without disturbing suddenly their social organization so as to integrate them slowly in general life of the country and also to create a caste–less society in India. **Therefore**, **after Independence**, **provisions were incorporated in the Indian Constitution in the shape of the** "***protective discrimination***" **by the Constitution–makers**, **for safeguarding the interests**, **promoting the development and welfare activities of the Scheduled Castes and Scheduled Tribes**.[61] The research study focuses on the various historical aspect of right to equality and reservation. In the Constituent Assembly, their first achievement was the adoption of the historical objectives resolution on 22nd January, 1947, which was moved by Pt. **J**.**L**. **Nehru**. In this resolution, their firm and solemn resolves were declared by them for framing a Constitution wherein to guarantee **social**, **economic** and **political justice**; and **equality of status and of opportunity** before the law, and also to provide the depressed and Backward Classes with adequate safeguards. The first step towards giving the shape to a nation's dream and aspiration was the adoption of the resolution.

From the outset, the Constituent Assembly laid down clearly its objectives and philosophy for the new Constitution. Several of the framers' main goals, articulated in the "Objectives Resolution" included guarantees of equality, basic freedoms of expression, as well as "*adequate safeguards……..for minorities*, *backward and tribal areas*, *and depressed and other Backward Classes*".

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61. Ahuja Ram, **Society in India**: **Concepts**, **Theories and Recent Trends**, Rawat Publications, Jaipur and New Delhi, [1999], at pp. 23–24.

The Constituent Assembly after adopting the Objective Resolution, constituted an Advisory Committee to tackle minority rights' issues. Moving the resolution for the setting up of Advisory Committee in the Constituent Assembly on 29th January, 1947, **Govind Ballabh Pant** laid special emphasis on the importance of the fundamental rights and pleaded for the special case of the Scheduled Castes.

An in–depth study of the Constituent Assembly Debates [62] further reveals that Dr. **B**.**R**. **Ambedkar** was having compromistic attitude. He strongly refuted the charge that the Scheduled Castes were not minority; rather he strongly asserted that:

"*The social*, *economic and educational conditions of the Scheduled Castes were so much worse than that of the citizens and other minorities that*, *in addition to protection*, *they would require special safeguards*."

He submitted a list of safeguards for Scheduled Castes and stressed that they should be continued for 25 years. The list included the following safeguards:[63]

1) Right to representation, in proportion to their population, in the Union and the State legislatures, ministries and in local bodies;
2) [a] Right to representation, in proportion to the population, in the various services under the Union, the States and all other local authorities; [b] the conditions to be prescribed from entry into the services not to abrogate any of the concessions given to the Scheduled Castes by the Government of India in their Resolution of 1942, 1945, 1946; and [c] on every Public Service Commission or a Committee constituted for filling vacancies, the Scheduled Castes to have at least one representative.
3) Special responsibility of the State to provide funds for higher education and for education abroad of the member of these communities.
4) Appointment of a special officer to keep a watch over the process of the Safeguards enumerated above.

Dr. **B**.**R**. **Ambedkar** agreed for the continuance of these safeguards for a period of ten years as decided by Advisory Committee, he also agreed that the safeguards must be extended at the end of the ten years if considered necessary. He stressed that it would not be beyond their capacity or their

62. The Constituent Assembly Debates, Vol. IX, at pp. 696–97.
63. "**State and Minorities**", **Dr**. **Ambedkar**, [1947], at pp. 17–26.

intelligence to invent new ways of getting protection which they were promised here.[64]

The Sub–Committee on minorities held three sittings. At its third sitting from 21st to 27th July, the major points arising out of the replies to the questionnaire and the notes and memoranda received from members of the Scheduled Castes and others were considered.[65] There were general discussions on various items of the agenda and the Sub–Committee decided by a majority of 28 to 30 that there should be no separate electorate for elections to the legislatures. [66] The following were the conclusions drawn by the Sub–Committee:

a) That there should be reservation of seats for different recognized minorities in the various legislatures, and
b) That the reservation should be for the period of ten years and the position to be reconsidered at the end of that period of ten years.[67]

The Sub–Committee on minorities recommended that [a] no statutory provisions should be made for reservation of seats for the minorities in the cabinet and that [b] the convention on the line of the paragraph VII of the Instrument of Instructions issued to Governor of Provinces under the **Government of India Act**, 1935 was provided in the Schedule in the Constitution.[68] It was also decided by the Sub–Committee that there would be reservation in public services for different communities.[69] Mr. **Ali Zaheer** moved, however, a resolution that in the Provincial as well as Central Services, the claims of all minorities should be kept in view in making appointments to such services consistently with the consideration of efficiency of administration.[70] The Sub–Committee decided by majority of votes that there should be reservation for Scheduled Castes in services to which recruitment was made by competitive examination.[71] It also recommended the setting up of

64. The Constituent Assembly Debates, Vol. IX, at pp. 696–97.
65. Rao B. Shiva, **The Framing of India's Constitution**: S**elect Documents**, Vol. II, [1967], at p. 387.
66. Ibid, at p. 392.
67. Ibid.
68. Ibid, at p. 398.
69. Ibid, at p. 399.
70. Ibid.
71. Rao B. Shiva, **The Framing of India's Constitution**: S**elect Documents**, Vol. II, [1967], at p. 399.

a statutory commission to investigate into **the conditions of socially and educationally Backward Classes** and to study the difficulties under which they laboured and to recommend necessary measures to uplift them.[72] The decisions reached at the meetings of the Sub–Committee on Minorities were embodied in the report which was drafted and approved by this committee. The Report was submitted to the Advisory Committee on 27th July, 1947.[73] **Ballabhbhai Patel**, Chairman of the Advisory Committee and the most powerful member of governing Congress Party after Nehru, submitted the Report on Minority Rights to President of the Constituent Assembly, Dr. **Rajendra Prasad** on 27th August, 1947. Assembly was then convened to discuss the Report. Patel opened the debate by presenting the Advisory Committee's main recommendations.

The Report of Minorities Sub–Committee came up for consideration before the Advisory Committee on 28th July, 1947. The committee endorsed almost all the conclusions reached by the Sub–Committee.[74] The speakers from the minority communities hailed the committee's recommendations and congratulated Patel for having produced the *Magna Carta* for the welfare of the *Harijans* and other minorities.[75] But the attitude of Muslim League was not cooperative and they still demanded a separate electorate.[76] The Advisory Committee and the reports of the Advisory Committee were discussed by the Constituent Assembly on 8th August, 1947.[77] The findings of the Sub–Committee were accepted by the Advisory Committee and the reports of the

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72. Article 300 of the **Draft Constitution**. The Committee also recommended the appointment of a special officer for minorities to investigate all matters relating to the safeguards provided for minorities and report the President upon working of the safeguard. *See*, draft Article 299[1] of the **Draft Constitution**.
73. Rao B. Shiva, **The Framing of India's Constitution**: **Select Documents,** Vol. II, Indian Institute of Public Administration, New Delhi, [1967], at p. 396.
74. Ibid, at p. 403.
75. The Constituent Assembly Debates, Vol. X, at p. 202; Pillai Munnisuami [Harijan], the Constituent Assembly Debates, Vol. X, at p. 208; Mookerjee H.C. [Christian]. The Sub–Committee on Minorities consisted of 26 members of various communities headed by Christian leader H.C. Mookerjee.
76. The Constituent Assembly Debates, Vol. X, at p. 213; Pocker B. [Muslim League], the Constituent Assembly Debates, Vol. X, at p. 221 Khaliquazzamman. Patel opposed such demand of Muslim League, The Constituent Assembly Debates, Vol. X, at p. 225.
77. Rao B. Shiva, **The Framing of India's Constitution**: **Select Documents,** Vol. II, Indian Institute of Public Administration, New Delhi, [1967], at p. 411.

Advisory Committee were discussed by the Constituent Assembly on 27th to 28th August. **The Advisory Committee and the Constituent Assembly decided subsequently in May 1949 to abolish all reservations for religious minorities and to retain reservation only for the Scheduled Castes and Scheduled Tribes**. [78] **It was recognized that the peculiar position of Scheduled Castes would make it necessary to give them reservation for a period of ten years**.[79] The recommendations as adopted by the Assembly were finally included in the Draft Constitution.[80] The Advisory Committee finalized the draft constitutional provisions. On 17th November, 1949, the third reading of the draft Constitution began.

By the end of February, 1948 the draft Constitution was completed. The draft Constitution underwent three readings by the Constituent Assembly but what emerged ultimately was an unequivocal constitutional policy providing for reservation of appointments and posts for the **Backward Classes including the Scheduled Castes and Tribes**.[81]

The Constitution framers were fully aware about the serious problems faced by the people belonging to the Scheduled Castes. They were not only willing to give special favours to the weaker sections of the society in order to redress the wrong done in the past to them by creating social disabilities but at the same time they wanted to good bye casteism.

After the partition of country in 1947, rules in respect of the communal reservation in services were revised and reservations for communities other than the Scheduled Castes were withdrawn in recruitments made by open competition. For the recruitment made otherwise than by open competition, but made on all India basis, 16½ percent of the vacancies were decided to be reserved for members of the **Scheduled Castes** and 13½ percent reservation for **Muslims** and 10 percent for **other minority communities** was decided to be

78. The Constituent Assembly Debates, Vol. IV, at pp. 585.
79. Ibid, at pp. 585.
80. *See*, text of the **Draft Constitution**, at Part XIV.
81. This policy was reflected in Article 10[3] of the Draft Constitution and present Constitution Article 16[4].

continued. For fixing percentage for the Scheduled Castes, the Government took into consideration the percentage of their population in the country as a whole [*e.g.*, *15½ percent according to 1941*]. In 1949, orders were issued for providing age relaxation and fee concessions to tribal communities.

Therefore, the **Indian Constitution** is framed in such a way as to bring societal balance between enhancing the social, economic and political status of the Backward Classes of people in the country and the general good of the General Category of people. So, a balancing tendency is indicated in the Constitution itself. The **Indian Constitution** embodies the philosophy of distributive justice with the strong determination to build a new and independent nation to ensure the triumph of justice, liberty, equality and fraternity.[82] Various provisions like Fundamental Rights, Directives Principles of State Policy, and other special Provisions relating to the weaker sections in the society aims at bringing peaceful socio–economic and political revolution in order to balance the conflicting interests in the Indian society to satisfy maximum of wants with minimum of fraction. **The research study lays focus on the various special provisions under the Indian Constitution in favour of Scheduled Castes**, **Scheduled Tribes and backward classes**. The **Indian Constitution** in respect of the minorities were appreciated by the representatives of the different minorities but to strengthen these provisions still further there were a number of suggestions.

The **Indian Constitution** has gone further than most modern Constitutions, including the American, in inscribing the commitment to equality into ours. Thus, in speaking of the guarantee of equality, **P**.**K**. **Tripathi** says:

"*But it must be appreciated that the scope of the guarantee in the* ***Indian Constitution*** *extends far beyond either*, *or both*, *the English and the United States guarantees taken together*."

It is evident here to go through the record of debates in the Constituent Assembly or to examine the notes and memorandum made by members of the

82. The Constituent Assembly Debates, Vol. X, at p. 682.

Constituent Assembly and by the Constitutional Adviser to see how strong the preoccupation with equality was among the makers of the **Indian Constitution**. This preoccupation was itself a part of the historical process that grew with the movement of freedom from colonial bondage. The Founding Fathers of the Constitution had drafted the Constitution with an aim to achieve the goal of the social revolution by rectifying past injustices through the inclusion of the downtrodden sections of the society into the democratic process.

At the time of drafting, in the Article 16[4] [Article 10[3] of the **Draft Constitution**], there occurred a considerable discussion about who were "*the Backward Classes for whom a special provision was made in the Constitution for reservation in jobs*". The word "*Backward*" however did not occur in Article 10[3] as it was originally proposed by the Constituent Assembly in April–May, 1947. The original Clause [Clause 5] 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...*"

Dr. **B.R. Ambedkar** made a proposal for a change in this clause which was as follows:

"*Nothing herein contained shall prevent the State from making provision for reservation in public services in favour of classes* ***as may be prescribed by the state***."

Dr. **B.R. Ambedkar** thought that the words "*adequately represented*" might give rise to a lot of litigations on the question of adequacy of representation and desired that once the appropriate authority made reservation of jobs, it should continue and should not be matter of litigation.[83] But **Rajagopalachari** opposed this suggestion saying that it would enable the State to make reservation even for majority community when the sole aim of Clause [5] is to protect minorities.[84] He thought that "*minorities*" could include even political minorities, so word "*class*" was preferable. This was in reply to a suggestion by some members that the word "*classes*" should be replaced by

83. Rao B. Shiva, ***The Framing of India's Constitution: Select Documents***, Vol. II, [1967], at p. 258.
84. Ibid.

"*minorities*". [85] Further, **Paniker** even gave stress for the inclusion of underrepresented members of the advanced communities within the purview of clause.[86]

But the Drafting Committee finally decided to confine the policy of reservation just for the Backward Classes and **not for any linguistic or religious minority**. The word "*Backward*" was added by the Drafting Committee before the word "*Classes*" in the Draft Constitution. Therefore Article 10[3] of the **Draft 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 adequate in the services under the State*."

This came to be as Article 16[4] of the **Indian Constitution**. By introducing the word "*Backward*" before the word "*Class*", the framers wanted to make it clear that except Backward Classes, who were **socially**, **educationally** and **economically backward**, no other minority could be made entitled to get the benefits of reservation. At this stage, in the Constituent Assembly divergent opinions were expressed by different members on the meaning of the term "Backward Class". According to majority of members of Constitutional Assembly, the term "Backward Class" was too vague. The Scheduled Castes members had apprehension whether they were included in the expression "*Backward*". Some members suggested omitting the "*Backward*" entirely allowing unrestricted communal reservations. Some members, on the other hand equated **Backward Classes with Scheduled Castes and Scheduled Tribes only**. Some members proposed that instead of the word "*Backward Class*", the expression "*Scheduled Castes*" or "*Depressed Class*" should be used for the sake of definiteness. Yet there were views that the term broader covered a category to include all backward castes and communities who were socially, economically and educationally backward.[87]

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85. Rao B. Shiva, ***The Framing of India's Constitution: Select Documents***, Vol. II, [1967], at p. 259.
86. Ibid.
87. Anuradha, **Reservation Law and Policy**: **An Analytical Study of its Criteria**, Unpublished Ph.D. Thesis, Department of Law, Guru Nanak Dev University, Punjab, [2011].

The delegate from Bombay, **K.M. Munshi**, referred to the Bombay practice of including a broader category of **socially**, **economically** and **educationally backward classes** besides the **Scheduled Castes and Scheduled Tribes**.[88] **K.M. Munshi** was of the opinion that:

"*The negotiations proceeded of 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***."[89]

When some Scheduled Castes members raised the question whether they were intended to be included, **Munshi** replied:

"*I cannot imagine for the life of me now after an experience of one and half–year of the Constituent Assembly that any honorable member of the Scheduled Caste should have a feeling that they will not be included in the Backward Classes so long as they are backward. I also cannot imagine a time when there is a Backward Class in India which does not include the Scheduled Castes*."[90]

He also said that when Draft Article 10[3] was read with Draft Article 301 [now Article 340], it became clear beyond doubt that the term "Backward" signified:

"*That class of people–does not matter whether you call them untouchable or untouchables, belonging to this community or that, a class of people who are so backward that special protection is required in the services and I can see no reason by any member should be apprehensive of regard to the word Backward*."[91]

It is specifically to be noted that **Munshi** repeatedly stressed that **socially**, **economically** and **educationally backward classes** were the legitimate recipients of the benefits of Article 16[4] read with Article 340. **Munshi** indicated that word "*social*" includes "*economic*" backwardness also. He also said that Article 46 directs the State 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 injustices*" and "*all forms of exploitation*". Further Article 46 of the **Indian**

88. Munshi K.M., The Constituent Assembly Debates, Vol. VII, at pp. 696–97.
89. The Constituent Assembly Debates, Vol. X, at p. 261.
90. Ibid, Vol. VII, at p. 696.
91. Ibid, Vol. VII, at p. 697.

Constitution used the word "*social injustice*" with the words "*economic interest*" implying that Constituent Assembly intended to include also the economically Backward Classes for the purpose of securing social justice to them by providing them with reservation jobs.

Despite these clarifications, there was doubt among the members of the Constituent Assembly about exact meaning and scope of the word "Backward Class". **T**.**T**. **Krishnamachari** described draft Article 10[3] using the "*Backward Class*" "*as a paradox for lawyers*, *leading to a lot of litigation*".[92] Dr. **B**.**R**. **Ambedkar** frequently used the word "*certain communities and collection of communities*" while defining draft Article 10[3].[93] The whole of the debate revolved round the question of which "*communities*" were intended to be included with the purview of the word "*Backward Classes*". Even **K**.**M**. **Munshi** at one place referred to backward community as being included in it.[94] Dr. **B**.**R**. **Ambedkar** clarified by exclaiming that, "*We have left it to be determined by each local Government*". A backward community is a community which is backward in the opinion of the Government.[95]

In the Constituent Assembly three divergent claims on equality were expressed on the principle of equality of opportunity. Dr. **B**.**R**. **Ambedkar** defending draft Article 10[3] [Clause (4) of Article 16] described it as a formula to reconcile the competing claims of absolute equality and equality in fact. These divergent opinions on the notion of equality may be stated as follows:

"*The first point of view was that there shall be equality of opportunity for all citizens and every individual who was qualified for particular post*

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92. The Constituent Assembly Debates, Vol. VII, at p. 699. He thought that the term was very vague and susceptible to varied interpretation as "*it does not apply to a* '*Backward Caste*'…… *It says* '*class*'. *Is it a class which is based on grounds of economic status or on grounds of illiteracy or grounds of birth. What is it?*"
93. The Constituent Assembly Debates, Vol. VII, at pp. 701 –702.
94. Ibid, at p. 697.
95. The Constituent Assembly Debates, Vol. VII, at p. 702. Even the recommendations of University Education Commission in 1948–49, proceeded on the assumption that the Constitution intended to provide protective discrimination for "*Backward Communities*". It stated that "*the needs of justice to the members of the Scheduled Castes and Communities declared to be backward by the Government……. Can be met by reserving a certain proportion of seats…… for qualified students from these communities*". Report of the University Education Commission, 1949, Vol. I, at p. 53.

should be free to apply for the post, to sit for the examination and to have his qualifications tested so as to determine whether he was fit for the post or not and that there ought to be no limitation and there ought to be no hindrance in the operation of the principle of equality of opportunity."[96]

Another view was that the principle of equality of opportunity was to operate to its fullest extent–there ought to be no reservation at all and all citizens if they are qualified should be placed on the same footing of equality so far as the public services were concerned.[97] The third view was expressed by Dr. **B**.**R**. **Ambedkar** thus:

"*Then we have quite a massive which insists that although theoretically it is good to have the principle that there should be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration*."[98]

He said that the Drafting Committee had to evolve a formula which could reconcile those three points of view and that no better formula would have been produced than the one embodied in Article 10[3].[99] Dr. **B**.**R**. **Ambedkar** also indicated that a balance had to be kept between claims of merit and efficiency and claims based on social justice *i.e*., making reservations for weaker sections.

For keeping such a balance care had to be taken that the State should not try to reserve all posts in favour of backward groups in the guise of providing them social justice so as to completely destroy the equality claims of others.

The debates of Assembly reflects multiplicity of the views in respect of

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96. All these competing views were summarized by Dr. **B**.**R**. **Ambedkar** in the Constituent Assembly Debates, Vol. VII, at pp. 701–702.
97. For instance **Lok Nath Mishra** thought that Article 10[3] was un–necessary because it would put a premium on backwardness and in–efficiency that it could not be a fundamental right of any citizen to claim a portion of state employment which ought to go by merit alone. *See*, The Constituent Assembly Debates, Vol. VII, at p. 673. **Damador Swaroop Seth**, believed that reservation in services meant the very negation of efficiency and good Government and that if Clause [3] of Article 10 was accepted it would give rise to casteism and favouritism which should have nothing to do in a secular State. He suggested that necessary facilities and concessions should be given to the Backward Classes to improve their educational qualifications and to raise their general level of living but no concession should be given in the selection of Government servants. *See*, The Constituent Assembly Debates, Vol. VII, at p. 679. **H**.**N**. **Kunzru** suggested that reservation should be only for a temporary period. The Constituent Assembly Debates, Vol. VII, at pp. 680–81. **Aziz Ahmed Khan** wanted the deletion of Article 10[3] as there was an inconsistency between Article 10[3] which related to Backward Classes and Article 296 which related to minorities' claim in services. The Constituent Assembly Debates, Vol. VII, at p. 682.
98. The Constituent Assembly Debates, Vol. VII, at p. 701.
99. Ibid.

the meaning of the term "*Backward Classes*" including a view that for the term backward was meant, economic backwardness or educational backwardness, of the people irrespective of one's caste, religion or race.

In this regard in the Constituent Assembly, **K**.**T**. **Shah** also had proposed to make amendment in Clause [2] of draft Article 9 [now Clause (3) of Article 15] for adding the word "*or Scheduled Castes*, *or Backward Tribes*, *for their advantage*, *safeguard and betterment*". The object stated by him was:

"*In regard to the Scheduled Castes and Backward Tribes*, *it is an open secret that they have been neglected in the past*; *and their rights and claims to enjoy and have the capacity to enjoy as equal citizens happen to be denied to them because of their backwardness*. *I seek therefore by this motion to include them also within the scope of this Sub–clause [2]*, *so that any special discrimination in favour of them may not be regarded as violating the basic principles of equality for all classes of citizens in the country*. *They need and must be given for some time at any rate*, *special treatment in regard to education*, *in regard to opportunity for employment*, *and in many other cases where their present in–equality*, *their present backwardness is only a hindrance to the rapid development of the country*."[100]

Dr. **B**.**R**. **Ambedkar** opposed Shah's amendment on the apprehension that if a clause like Article 16[4] was introduced in Article 15 also, the State could open separate educational and other facilities exclusively for the Scheduled Castes and the Scheduled Tribes without offending the equality guarantee contained in Articles 14, 15 or 29.[101] **It is here relevant to note that Dr**. **B**.**R**. **Ambedkar was not unaware of the prevalence of the practice in America of segregation of Negroes from educational and other public facilities with the tacit approval of the US Supreme Court**.[102] When Shah's amendment was rejected, presumably the Assembly felt that Article 46 was broad enough to cover all compensatory preferences in educational sphere

100. The Constituent Assembly Debates, Vol. VII, at pp. 655.
101. Ibid, at p. 661.
102. In *Plessy v. Fergusan* [1896] 163 US 537, the US Supreme Court upheld a Louisiana law that required railway companies to provide "*equal but separate*" accommodation for Whites and Negros and the Court held that the fourteen Amendment was not intended "*to abolish distinction based on color or enforce social, as distinguished from political equality*, *or a communion of two races upon terms unsatisfactory to either*". *Plessy v. Fergusan* [1896] 163 US 537, at p. 544. It was only in 1954 in *Broon v. Board of Education* [1954] 347 US 483, that the "*equal but separate*" doctrine of *Plessy* was struck down as violative of equal protection guarantee. Dr. Ambedkar had perhaps *Plessy* in his mind in opposing Shah's amendment.

without violating Articles 14 or 15.

Dr. **Ambedkar's** statement clarifies that the purpose of Article 16[4] is to provide adequate representation to the underrepresented backward communities and also to see that a wholesale reservation does not completely destroy the guarantee of equality of opportunity contained in Article 16[1] of the **Indian Constitution**, so the reservation should be of a minority of posts. From the reference made by Dr. **B.R. Ambedkar** to "*castes and communities*" it shows that by backward communities he meant nothing but backward castes and communities, who had suffered centuries of oppressions and various other types of socio–economic disabilities precisely on the ground of being belonging to a particular caste, community or religion. He further stated that backward community is a community which is backward in the opinion of the local Government provides due recognition of the variations in the local conditions and suggests the difficulties in formulating an universal test for determining backwardness on an All–India basis.

The entire debates on Articles 15[3] and 16[4] revolved around the only question as to which communities were intended to be included for protective discrimination. The Chief Draftsman, Dr. **B.R. Ambedkar** always equated Backward Classes with Castes and Communities. **Munshi** stressed always the relevance of the factors of social, economic and educational backwardness in determining Backward Classes. Some members pressed for including economic backwardness as the only consideration for these benefits. But some were of the opinion that only the Scheduled Castes were Backward Classes; others viewed it as broad enough to include other castes and communities as well. One member [**T.T. Krishnamachari**] echoed the doubt that Article 16[4] would be a paradise for lawyers.[103] **A close look at the debates of the Constituent Assembly on Article 16[4] gives the impression that the Backward Classes were not merely economic groups but the historical social categories but historical social categories whose backwardness was**

103. The Constituent Assembly Debates, Vol. VII, at p. 701.

associated with discriminatory social structure of the Indian society.[104]

So, this discussion throws light that the makers of the Indian Constitution themselves were worried about inclusion of these special provisions of reservation in favour of Scheduled Castes, Scheduled Tribes and backward persons. Even they were fully aware about the fact that these people [*Scheduled Castes*, *Scheduled Tribes and backward persons*] were the victims of exploitation due to the caste system in ancient India; the proportion of these people was much more in comparison to the percent of benefits or incentives in the shape of policy of reservation. So they were worried about the fact that this exception might eat up the rule altogether. Dr. **Ambedkar** had given stress upon fundamental rights of the individuals in comparison to this policy of reservation which was made just an enabling provision. All these people were aware about the various problems which could have come across due to this policy in the long run, therefore, Dr. **B**.**R**. **Ambedkar** and others decided to make this policy a time bound policy, so that with regular check up or review, the government could decide about inclusion or exclusion of this policy in favour of **Scheduled Castes**, **Scheduled Tribes** and **backward persons**. The research study through the judicial decisions of the Supreme Court and various High Courts throws light as to the exact meaning and scope of the term "*Backward*".

Finally, on 26th January, 1950, India ended its "*Dominion*" **status**, **and became a Republic**, **and real constitutional provisions on the emancipation of the depressed castes came on this day**, **with special justice as the fundamental constitutional end**. The Constitution makers resolved to constitute India into a **Sovereign**, **Socialist**, **Secular**, **Republic**, **Democratic** and *inter–alia* to secure **justice**, **social**, **economic** and **political** as enshrined in the Preamble.

The **Indian Constitution** is always described as one of the most rights

104. The Constituent Assembly Debates, Vol. VII, at pp. 701–02.

based Constitutions in the world.[105] Interestingly, it was drafted around the same time as the **Universal Declaration of Human Rights** of 1948. The Constitution of India, therefore, seeks to capture the essence of human rights in the Preamble, in the articles on Fundamental Rights as well as in the Directive Principles of the State Policy. The Universal Declaration of Human Rights by the United Nations to which India was a party has its impact in the framing of our Constitution. Many provisions of the **Indian Constitution** are based upon the provisions that can be found in the **Universal Declaration of Human Rights** of 1948. Article 7 of the **Universal Declaration of Human Rights**, 1948 declares that:

"*All are equal before the law and are entitled without any discrimination to equal protection of the law*."

IV. Constitutional Provisions regarding Reservation

Equality has been and is the single greatest craving of all human beings at all points of time.[106] The doctrine of equality has been referred to in the Preamble and the Articles under the sub–heading "**Right to Equality**".[107] Article 14 enjoins upon the State not to deny to any person "*equality before the law*" or the "*equal protection of the laws*" within the territory of India. Ofcourse, Article 7 of the **Universal Declaration of Human Rights** had also declared both of the concepts. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions "*equality before the law*" and "*equal protection of the laws*" in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18.[108] It was necessary to adopt positive measures to abolish in–equality. **The positive preferential treatment**

105. The 395 Articles and ten appendices schedule in the Constitution of India, make it one of the largest and most detailed Constitutions in the world. The ten schedules in force cover the designations of the States and Union Territories; the emoluments for high level officials; forms of oaths; allocation of the number of seats in the Rajya Sabha [Council of States—the Upper House of Parliament] per State or Territory; provisions for the administration of tribal areas in Assam; the Union meaning Central Government], State and concurrent tests of responsibilities; the official languages; land and tenure reforms; and association of Sikkim with India.
106. *Indra Sawhney v. Union of India* AIR 1993 SC 502.
107. Articles 14 to 18 of the **Indian Constitution**.
108. *Indra Sawhney v. Union of India* AIR 1993 SC 502

of the depressed classes or weaker sections of the society is called reservation.

The general provision is provided under Article 15[4] forbidding discrimination by State which also contains the provision that the State may make any special provision for the advancement of any socially and educationally Backward Classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Similarly, Article 16 also forbids discrimination with respect to the Government employment and Article 16[4] and Article 16[4–A] permit the State to make any special provision for the reservation of appointment or posts and reservation in matters of promotion to any class or classes of posts in the services in favour of any Backward Class of the citizens respectively which, in the opinion of the State, is not adequately represented in the services under the State.

Further, in the **Indian Constitution**, directions are given empowering the Government to undertake special measures for the advancement of backward groups. Article 46 directs that the State is empowered and shouldered with the responsibility to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all forms of exploitation.[109] It is with this end in view that Articles 15[4], 16[4], 330, 332, 334, 335, 338, 339 and 340 were added in our National Charter. It was truly felt by the founding fathers to be extremely essential to provide these weaker sections of the society with certain special treatment at least in the matter in which their inequality and backwardness proved to be hindrance to the development and progress of the country. Thus, this provision is envisaged in the Constitution as an exceptional and temporary measure just to be used for purpose of creation of a caste–less society in India by mitigating the inequalities between different communities so that all these inequalities might disappear among all these communities.

109. Article 46 of the **Indian Constitution**.

However, for the research study it is necessary to relate to the special provisions regarding women. The framers of the Constitution wanted to correct the injustices done to the women by being put in disadvantaged position. The Constitution provides for both negative and positive measures. Equality on the basis of sex and individuality of women has been recognized by the **Indian Constitution**.[110] The **Indian Constitution** has provided the explicit guarantee to women's right of equality in the country. So, the special provision for benefiting generally women has been provided in Article 15[3]. What Article 15[3] contemplates is the making of special provision for as a class itself. So, protective discrimination in favour or women in matters of employment is permissible within the Indian Constitutional scheme.[111] The framers proved themselves for the "*betterment*" and "*upliftment*" of those who had hitherto remained un–equals.[112] The research study focuses in detail the provisions as contained under the Indian Constitution regarding the policy of reservation.

V. Policy of Reservation

There are three main kinds of benefits for these beneficiaries which are discussed here as follows:

[A] Political Reservation

Of all the preferential policies, the most prominent is the reservation of seats in elective legislative bodies. Under political reservation, a certain number of seats in Parliament and in the State legislatures are reserved for members of the Scheduled Castes and the Scheduled Tribes **but not for the Other Backward Classes**. Political reservations are specified under the **Indian Constitution** and the provisions reveal the ambivalence of the makers of the Constitution as well as of policy makers in contemporary India. The constitutional provisions for political reservations for the Scheduled Castes and the Scheduled Tribes are mandatory.

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110. Articles 14, 15 and 16 are particularly important in so far as they enshrine the principle of equality and absence of discrimination. In fact, women are treated as exceptional class requiring special protection. Hence State can make special provision for them under Article 15[3].
111. *Shamsher Singh v. State* AIR 1970 P&H 372 [FB]; *Charan Singh v. Union of India* [1979] ILR 422 [Del]: [1979] LabIC 633: [1979] IILLJ 123 [Del].
112. Articles 15[3] and [4] and 16[4] and [5] of the **Indian Constitution**.

The **Indian Constitution** provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Lower House of Parliament and in the State Legislatures [Article 330 and Article 332 respectively]. The reservation of seats is specifically provided in the **Indian Constitution** in proportion to their number for Scheduled Castes in the Lok Sabha [Lower House of Parliament][113] and the Vidhan Sabha [Lower House of the State Legislature][114] **reserving no seats in the Upper Houses**, **Central or State**. The reason behind providing

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113. Article 330: Reservation of Seats for SCs and STs in the House of the People:
    i) Seats shall be reserved in the House of the People for,—
        a) The Scheduled Castes;
        b) The STs except the Scheduled Tribes in the Autonomous District of Assam; and
            1) The Scheduled Tribes in the autonomous district of Assam.
            2) The number of seats reserved in any state or union territory for the Scheduled Castes or the Scheduled Tribes under Clause [i] shall as nearly as may be, the same proportion to the total number of seats allotted to the State or Union Territory in the House of People as the population of the Scheduled Castes in the State or Union Territory of the Scheduled Tribes in the State or Union Territory or part of the State or Union Territory, as the case may be, in respect of which seats are reserved, bears to the total population of the State or Union Territory.
            3) Notwithstanding anything contained in Clause [2], the number of seats reserved in the House of People for the Scheduled Tribes in autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous district bears to the total population of the State.

114. Article 332: Representation of seats for SCs and STs in the Legislative Assemblies of the State:
    1) Seats shall be reserved for the Scheduled Castes and Scheduled Tribes except the Scheduled Tribes in the autonomous district Assam in the Legislative Assembly of every State.
    2) Seats shall be reserved also for the autonomous district in the Legislative Assembly of the State of Assam.
    3) The number of seats reserved for the Scheduled Castes or Scheduled Tribes in the Legislative Assembly of the any State under Clause [i] shall bear as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are all reserved, bears to the total population of the State.
        A) Notwithstanding anything contained in Clause [3] until the taking effect under Article 170. Of the re–adjustment, on the basis of the first consensus after the year 2000 of the number of seats in the Legislative Assemblies of the State of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland, the seats which shall be reserved for the Scheduled Tribes in the Legislative Assembly of any such State shall be:
            a) if all the seats in the Legislative Assembly of such State in existence on the date of coming into force of the **Constitution** [*47th Amendment*] **Act**, 1987 [*hereafter in this clause referred to as the existing Assembly*] are held by members of the Scheduled Tribes, all the seats except one;
            b) in any other case, such number of seats as bears to the total number of seats, a proportion to the Scheduled Tribes in the existing Assembly.
    4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.
    5) The Constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.....
    6) No person who is not a member of a Scheduled Tribe of any autonomous District of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district.

reservation of seats in the Legislature was that they [*Weaker Sections of the society*] had neither the resources nor the experience for entering into an open competition for the purpose of the participation in the political process.[115] The Scheduled Castes because of their disadvantageous position could not have competition with the advanced section of the society on the footing of the equality. So, **they have been guaranteed representation in order to assure social justice**. In order to enhance political participation by Scheduled Castes, the constitutional provision of reserved seats is complemented by statutory provisions.[116]

The demarcation of constituency and designation of those who were reserved as Scheduled Castes was entrusted to a **Delimitation Commission**. Two standards were applied by the **Delimitation Commission**:

1) Concentration of Scheduled Castes population, and
2) Dispersal of reservation.

The directions were given to the Commission by the Delimitation Act to locate the seats reserved for Scheduled Castes "*in different parts of the State and……as far as practicable in those areas where the proportion of their population is comparatively large*."[117]

However it is asserted that the Scheduled Castes may also stand for non–reserved seats; there shall not be repugnancy to the provisions of securing additional seats if the members of said categories are able to secure them. It is an additional claim which is obtainable through merit and work. It means that the claim of eligibility for reserved seats does not exclude the claim for the general seat. But there is no reservation of seats provided in the indirectly elected Upper Houses at both Centre and State. In the same way, within the legislature or the Government, **there is no constitutional requirement or statutory provision for reservation of political appointments**, **like Cabinet**

115. Sathe S.P., ***Reservation of Seats in Legislature for Scheduled Castes and Scheduled Tribes***, in Indian Law Institute's Mohammed Imam, [ed.], **Minorities and the Law Congress under the Auspices of the Indian Law Institute**, N.M. Tripathi, Bombay, [1972], at p. 197.
116. For detail see, the **Representation of People's Act**, 1951.
117. Section 9[1][c] of the **Delimitation Act**, 1972.

Ministers[118] **or membership of Standing Committees**. But in practice, the number of Scheduled Caste Ministers both at the Centre and the State has slowly arisen because of the practical convention to have at least one Scheduled Caste Minister at the Centre and in each of the State. There is no separate electorate. To the reserved seats, elections are held based upon the single electoral roll and in the reserved constituency; each voter is entitled to vote. It means in the constituency, all the voters have a right to vote in order to elect a person belonging to such castes and tribes to a reserved seat. To discourage the differentiation of the Scheduled Castes or Scheduled Tribes from other people and to gradually integrate them in the mainstream of the national life, this method of no separate electorate has been adopted. In a State or Union Territory, the number of seats reserved for such castes and tribes is to bear the same proportion to the total number of seats allotted to that State or Union Territory in the Lok Sabha as the population of the Scheduled Castes and Scheduled Tribes in the concerned State or Union Territory bears as nearly as possible, to the total population of the State or the Union Territory.

[B] Job Reservation

The second type of reservation which is even more controversial than the first is known as reservation in public employment. The Constitution makers were of strong belief that unless down–trodden and depressed people of the country actually participate in the administration and governing process, the constitutional safeguards and the developmental schemes will be of no use for them in the country. The Constitution makers strongly asserted[119] that the unfortunate legacy of the past suffered from the disabilities and handicaps. Therefore, according to them, it was now the main object to provide depressed classes of persons with special treatment, **at least as a temporary measure**, with the purpose of removing the hindrance to the development of the country and to bring them [Scheduled Castes and Scheduled Tribes] at par with the rest

118. Article 164[i] provides that the States of Bihar, Madhya Pradesh and Orissa shall have a Minister in charge of Tribal Welfare who may in addition be in charge of Scheduled Castes and Backward Classes or any other work.
119. Baig M.A.A., ***Reservation in Public Employment and Judicial Process***, Supreme Court Journal, Vol. 3, Part I, September, 1989, at p. 6.

of the section of the society in order to create an egalitarian society wherein **justice**, **social**, **economic** and **political prevail**. So, in order to achieve this object, the Indian Constitution has provided the reservation of seats in public employment.[120] The provisions for reservation in public employment apply not only to the Scheduled Castes and Scheduled Tribes but also to the Other Backward Classes as well. Over the years, there has been an extension of reservation in public employment for the benefit of the Other Backward Classes. **This has now become the most contentious issue of positive measure in India**. The question is whether or not the wholesale extension of reservation in public employment for the Other Backward Classes accords with the spirit of the **Indian Constitution**. **For reservation in public employment**, **unlike political reservations**, **the provisions are not mandatory**, **they are enabling provisions**. The Constitution says that the State may take such measures as are necessary for the special benefit for the Other Backward Classes also. But the mandate of Articles 14 and 16 is not just the negative injunction that the State shall not treat equally situated people unequally, **rather there is positive content included in the these Articles that requires that State should bring about equality in place of the existing inequality**.[121] It is specifically held by Justice **Krishna Iyer** in *State of Kerala v. N.M. Thomas*[122] that the preferential treatment through the technique of classification could be accorded only to those sections of people in whose case backwardness was such a high degree that they deserved benign discrimination and also he says that:

"*If we search for Backward Class, we just find Scheduled Castes and Scheduled Tribes as the large segment but not any other section of the society. No class other than Harijans can jump the gauntlet of equal opportunity guarantee. Their only hope is in Article 16[4].*"

The philosophy behind providing reservation of posts in favour of the Scheduled Castes and Scheduled Tribes was based upon the factual

120. Article 16[4] states: "*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 citizen which in the opinion of the State, is not adequately represented in the service under the State*."
121. *State of Kerala v. N.M. Thomas* AIR 1976 SC 490, at p. 497.
122. AIR 1976 SC 490, at p. 497.

circumstances in which they were not properly rather much less represented in the services than ratio of the population would warrant. The object of the Constitution drafters to include the provision of Article 16[4] in the Constitution is to ensure equality of opportunity in cases of public employments and also to provide adequate representation to the weaker sections of the society who have been placed in a very discontent position on account of sociological reason from a time immemorial. It means the main purpose of this provision was that change should be ushered in as expeditiously as possible but with the least friction and dislocation in the national life.[123] So, the reservation for Backward Classes should be in consistence with requirement of the efficiency of administration.[124]

[C] Educational Reservation

Finally, **there is what may be called reservation in education**. The provisions for reservations in educational institutions to depressed and deprived sections of the Scheduled Castes and Scheduled Tribes have been provided in Article 15[4]. According to Article 15, the State is specifically barred from making any kind of discrimination towards its citizens on the bases of race, caste, citizenship, sex, place of birth or any of them. But Clause [4] of the same article lays down that the State is empowered to make any special provision for the advancement of any socially and educationally Backward Classes. These, again, are matters of contention, for reservation exists not only **in general arts and science courses but also in medical and engineering streams as well**. The determination of the status of socially and educationally Backward Class **is not a simple matter because sociological and economic considerations come into play while evolving proper criteria for its determination**. The provisions of this Article leave to the State the matter to determine and to specify the Backward Classes. According to the Article 340, a Commission can be appointed to investigate the conditions of the socially and educationally backward classes and also all the other matters referred to the Commission.

123. *Indra Sawhney v. Union of India* 1992 SC 477, at p. 497.
124. Ibid, at p. 482.

The wide expression "*special provisions*" under Article 15[4] includes every type of assistance which can be provided to the Scheduled Castes, Scheduled Tribes and Backward Classes to improve their status and to bring them into the main stream of Indian life. In relation to education, the State is empowered, under Article 15[4], to provide free education, free text books, free uniforms and subsistence allowance, merit scholarships and the like, beginning from the primary education and going and reaching up to University and Post–Graduate education. So, it is noted that vast and varied powers are vested in the State by this Article to improve the lot of the Scheduled Castes, Scheduled Tribes and Backward Classes.

However it is pertinent to note that when the Constitution was enacted in 1950, the reservations were to cease after 10 years. However, having regard to the socio–economic conditions of Scheduled Castes and Scheduled Tribes, the Constitution has been amended from time to time, and the period of 10 years has been extended to 20 years,[125] then to 30 years,[126] then to 40 years,[127] then to 50 years[128] and then to 60 years.[129] At present, it provides that the reservation will cease after 70 years[130] *i.e*., after 2020 keeping in view the unsatisfactory progress of the Scheduled Castes and Scheduled Tribes in every facets of their life and also keeping in view their handicaps and disabilities under which they live and which have not yet been removed. So, these categories of people need this reservation for some time more to ameliorate their condition in order to catch up with the rest of the nation.

VI. Statement of Problem

The institution of casteless and classless society was very labouriously, prudently and accomodatively sighted by the framers of the Constitution. The

125. The **Constitution** [*80th Amendment*] **Act**, 1959.
126. The **Constitution** [*23rd Amendment*] **Act**, 1969.
127. The **Constitution** [*45th Amendment*] **Act**, 1980.
128. The **Constitution** [*62nd Amendment*] **Act**, 1989.
129. The **Constitution** [*79th Amendment*] **Act**, 1999.
130. The **Constitution** [*109th Amendment*] **Act**, 2009: Through this amendment, Article 334 of the **Indian Constitution**, for the words "*sixty years*", the words "*seventy years*" has been substituted. Now this amendment has extended the reservation beyond 25th January, 2010. Also See, Kumar R., ***Constitutional Amendments: An Instrument for Social Transformation***, Research Inspiration–An International Multidisciplinary e–Journal, Vol. 3[1], December, 2017, at pp. 440–446.

Indian Constitution seems to propagate the principle of caste blindness but reservational benefit is bound to yield caste consciousness. Though the Indian Constitution does not give rise to casteism and favouritism, it speaks of Backward Classes; still caste consciousness is bound to crawl into the reservational benefits. The current reservation policy has been unsuccessful to realize the desired ambition of building a caste less society. Rather it has divided the whole motherland on caste lines. The political leaders have used this policy as a device for producing just vote banks.

Inter–caste rivalry and tension has been accentuated by the policy of reservation. The social distance between castes has been widened by it instead of reducing the same. It has sown the seeds of division between the privileged and the under–privileged among the under–privileged classes.

The policy of reservation has also resulted into a new problem of political mobilization. The policy of reservation has not offered equal opportunities to all the recipients within each group/community. Among the Scheduled Castes, Scheduled Tribes or Other Backward Classes and minorities, almost in all categories of beneficiaries, there is an intensifying sense of deprivation amongst different categories, which is leading to internal discord. Thus, this discontentment amongst different categories has turned out to be the stand for political mobilization. The mobilizing different groups [*i.e.*, *the demand made by the people of one category/group for including in the other category/group*] has become the basis for the politics of many parties and organizations throughout the 1990's, 2000's and in the present decade like "*Gurjars*" in Rajasthan claimed for the Scheduled Tribes rank, like the "*Meena*" community, "*Gowari*" community from Maharashtra also made a similar plea for inclusion in the Scheduled Tribes category, even the *Lingatyas Jats* frequently insisted for inclusion in the Scheduled Castes category, the long–lasting demand in Maharashtra for inclusion of entire Maratha community [*as against the inclusion of the only Kunbi Marahthas as at present*] in the Other Backward Classes category is another example of the interweaving of politics

at State level and social justice program.

The problem of policy of reservation is that it has to make compromise with merit and efficiency. The efficiency and competence of the Government are determined by the professional competency of the personnel employed in it. In fact, no Government can expect to travel much beyond what its public services authorize it to do. This implies that acceptance of merit is the basis of public recruitment. Reservation of posts or appointments in services for Scheduled Castes, Scheduled Tribes and Other Backward Classes means the very denial of efficiency and good governance. Such a provision would put a premium on backwardness and in–efficiency by giving relaxation in the minimum marks requirement and the upper age limit in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.

In the age of liberalization, privatization and globalization, the main characteristic of the policy of liberalization comprise reduction of the Government role in the economic governance, privatization and more reliance on market forces. Globalization means nothing but cross border trade, again here, the dependence is on market forces resulting in depletion in the Government jobs and services. There is growing apprehension that the employment opportunities in private sector for Scheduled Castes, Scheduled Tribes and Other Weaker Sections would also reduce in size because of the panic that the policy of reservation fetches in–efficiency. Thus, this policy of reservation is going to loose its relevance owing to globalization, privatization and liberalization.

Consequently, in order to bring to light some of the important inadequacies in the law and policy of reservation, to evaluate the various aspects responsible for lacunas and inadequacy in the policy and also to accentuate future challenges for the policy of reservation, the research has become very important.

VII. Importance of the Study

On the foundation of the conclusions drawn from the study, an attempt

has been made to eliminate the loopholes in the existing laws, rules and regulations as well as its implementation for making the policy of reservation more effectual and result–oriented and to bring this policy onto the lines of the aspirations of the Constitution makers. Requisite and appropriate amendments have been proposed in the existing laws so that it could not only prove valuable for the actual beneficiaries but also not to be prejudiced towards the other classes *i.e.*, general category people, thereby carrying proper equilibrium among different caste segments, upper and lower. Suggestions have been given for making this policy more adaptable, effective and useful.

However, in spite of different judgments of the Supreme Court and amendments to the Constitution by the Parliament, the policy of reservation has not succeeded to achieve its objectives. The present policy of reservation is in–adequate as it has failed to uplift the weaker sections of society. This policy also has not achieved the success to make a casteless society.

An endeavor has been made through this study to detect the serious flaws in the present policy of reservation and to suggest the remedial measures to plug those loopholes. An attempt has also been made to find the impact of globalization, liberalization and privatization on the policy of reservation.

VIII. Hypothesis/Objectives of the Study

[A] Hypothesis

A hypothesis is an assertion, assumption or proposition that the investigator seeks to investigate The study is made in view of the following hypothesis:

a) The existing provisions of law and policy relating to reservation benefits as provided in favour of SCs, STs, OBCs and women under the Indian Constitution and the various Acts are not adequate and sufficient for the purpose of improving their lot.
b) The policy of reservation has not been successful in creating a classless and casteless society under the Indian perspectives.
c) The policy of reservation as adopted for women seems to be insufficient

regarding right to equality.

[B] Objectives

Viewed in this perspective, following are some of the objectives for the present research work:

a) To analyze and review both existing constitutional and statutory provisions, relating to reservation.
b) To study and analyze the impact of the law and policy of reservation on the improvement and development of weaker segments of the society including SC and ST and women.
c) To find out the main lacunas and defects prevailing in the existing provisions.
d) To study the role of judiciary at the Apex and High Courts level in reviewing the important landmark judgments concerning reservation from time to time.
e) To make thorough investigation about the rising trend of communal and caste tensions due to existing law and policy of reservation and to suggest some sound measures to contain it as these causes are detrimental to unity and integrity of our nation.
f) To examine the role of various Central and States Commission in bringing the change in the law and policy of reservation.
g) To examine as to how the enforcement and implementation of statutory provisions concerning reservation have been made to ascertain gap between theory and practice.
h) To accentuate and recommend whether any alternative to the present system of reservation is accessible or not.

IX. Research Methodology

The study of each problem demands its own appropriate technique, but there is always inter–dependence of various tools used in a research design.[131]

131. Lundberg G.A., **Social Research**: **A Study in Methods of Gathering Data**, Longmans Green, London, [1942], at p. 119.

The types of steps to be applied depend essentially upon the end that is sought to be achieved. Studies relating to existing provisions of the **Indian Constitution** regarding preferential discrimination in favour of weaker and backward sections of India are necessarily complicated and involve an in–depth understanding of the nature and scope of the law relating to reservation and the effect of the implementation of said law on the people belonging to different sections of our society.

The nature and scope of a research study greatly affects the choice of method to be adopted for the collection of a research data.[132] For the current study, data has been collected both through primary and secondary sources.

The primary data have been collected through direct contact with the respondents at different places of the area. The tools employed for the collection of the primary data are interview schedule and observational study.

However, the secondary data required for the study has been collected from books, newspapers, journals, articles, magazines, websites *etc*. This data consists of provisions of the **Indian Constitution** regarding the law of quota reservation, statutes passed by legislatures, decisions of judiciary, decrees and orders of executives, rules and regulations of various administrative agencies.

X. Scheme of the Study

The research work comprises of seven chapters. There are as follows:

1) **Chapter one** provides the detailed introduction and evolution and genesis of the discriminatory practices based on the caste–system prevalent in India. It also deals with the importance of the present study. It is highlighted that the doctrine of equality is the foundation of social justice on which the palace of democracy can be built.
2) **Chapter two** deals with the historical perspective of right to equality and reservation.

132. Gangrade K.D., ***Sampling Methods of Data Collection: Questionnaire and Schedule***, in Jain S.K. and Wani M. Afzal [Eds.], **Legal Research and Methodology**, Indian Law Institute, New Delhi, [2006], at p. 354.

3) **Chapter three** includes various provisions of reservation policy and various other measures adopted in favour of Scheduled Castes, Scheduled Tribes and women under the **Indian Constitution**. The framers of the **Indian Constitution** have given a special place to the erstwhile untouchables under the Constitution. The Scheduled Castes and the Scheduled Tribes are characterized by the poor economic condition as well as by the lowest social or ritual status in the caste hierarchy. The poor and the oppressed people, who are now called as the Scheduled Castes, were shrouded in the darkness of the repression, exploitation and the perplexity and were also the victims of an inferiority complex, deep–rooted poverty, backwardness, illiteracy, exploitation and the social subjugation before the dawn of the liberty. So, they had remained socially, educationally and economically more backward than any of the higher castes in the country. Numerous steps had been taken from time to time in the pre–Independence India, for improving the status of these strata or sections of the society but they touched only the border or the problem. The noticeable progress has been registered only after the emergence of India as a Sovereign Independent Republic. The **Indian Constitution** as a social document envisions a conversion of Indian society from medieval hierarchical and clogged society into modern, secular and democratic society through the extension of the improved amenities to the oppressed in order to enable them for achieving upward mobility by acquiring social, economic, educational and political authority. The constitutional policy of compensatory discrimination was formulated and implemented to facilitate the lower–status castes to change their social and economic position.

4) **Chapter four** reveals the existing reservation policies. In India, affirmative action policies have facilitated a very small section or strata of the society of India among under–privileged categories to progress towards a semblance of economic and social equal opportunity. Unlike any other country, the caste identities have been made more prominent by India's affirmative action policies when the target was to lessen the stratification by caste. This is all indicative of the fact that the laws and policies were not well

planned, inadequately formulated and badly implemented. The time has come when the laws and policies of reservation should be made need based. The poverty is the root cause of all the ills and is a world phenomenon now. Now–a–day's world is a materialistic one therefore, all the laws and policies of reservation arc needed to be based upon the economic criteria only.

5) **Chapter five** analyses the judicial approach towards the policy of preferential discrimination. The judiciary has done laudable job by pronouncing extraordinarily sound judgments in relation to problems of preferential and protective discrimination. Judiciary has successfully preserved and safeguarded the fundamental rights of the citizens and helpless groups which were at risk because of the policy of reservation executed by the Government from time to time. In reality, it has been required by the court that reservation policies should be so formulated as to "*strike a reasonable balance*" among "*several relevant considerations*". To interpret the rule of law in action and to provide justice at the door of poorest of poor, the judiciary in India has made an adequate attempt. The judiciary has also been vigilant to create classless society and gradual abolition of caste consciousness.
6) **Chapter six** emphasizes on the reservation and its impact on Indian society. The social responses to issues relating to composition, inter–group mobility and inter–group tension have resulted in conflicts, sensitive struggles and evolution of compromise policies. Overall direction towards social integration of different communities and building up of harmonious society is visible in these policies. The present chapter focuses on reservation and its impact on Indian society and the views of the various sociologists regarding the various factors for reservation.
7) **Chapter seven** includes overall conclusion of the study, including observation, finding and suggestions.

In this research study the researcher has tried to cover the whole gamut of protective discrimination related issues and concern in India with an

emphasis on legal rights of weaker segments of the society including SC's, ST's and women. It can be an important compendium for the discriminatory practices based on the caste system prevalent in India. Additionally, the thesis can be an important guide for researchers in identifying various research questions for further research on related issues regarding reservation policy in India. Views expressed in the study, not specifically attributed to others, are mine and do not reflect the views of the Government.

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Chapter 2

HISTORICAL PERSPECTIVE OF RIGHT TO EQUALITY AND RESERVATION

I. General

For nearly sixty nine years, India, through a policy called "*reservations*", has attempted to put an end to its ancient caste system by using quotas and other benefits to ensure that historically disadvantaged groups have political voice, access to education, and opportunities for state employment. The legal doctrine developed alongside this policy traces the national memory of the caste system and its consequences, and reflects an understanding that the caste system has left a pervasive mark on nearly every aspect of Indian society.

The doctrines developed by courts in response to these policies, however, have a peculiar relationship to the political authority of castes and other communities subordinate to the state. To a surprising extent, Indian courts have shown deference to the authority of the caste system in ways that underscore the political authority of the caste hierarchy and undermine the constitution's aspiration to greater equality. This feature of Indian equality law reflects a tension between the constitutional aspiration to social reform on the one hand,

and deference to the authority of the caste or tribe to define its own boundaries on the other.

Indian law has sought to include these communities in its project of far–reaching social reform. When constitutional law attempts to dismantle a status hierarchy and articulate a normative framework for doing so, it must contemplate this process of reform as involving not only the enactment of legal rules to protect these groups, but also the important role these groups will play in the evolution of the normative commitments that structure law's relationship to that hierarchy. The castes themselves have a view of Indian history that has been shaped by their history of social subordination. Indian constitutional law has sought to break with that history and to articulate new constitutional values that mark the beginning of a new social order.[1]

II. Growth and Evolution of Policy of Reservation

Although scholars continue to debate the precise origin of the caste system, there is general agreement among historians and anthropologists that it has existed in India for as long as two thousand years.[2] The ancient Hindu scriptures, the *Veda*, describe a strict social hierarchy that bears some resemblance to the modern Indian caste system.[3] According to the *Veda*, the universe is organized into a strict classification scheme and a set of hierarchical relationships that are reflected in the organization of society.[4]

The relationship between the caste system and the structure of the universe provided a deep religious justification for the stratification of society

1. Scott Grinsell, ***Caste and the Problem of Social Reform in Indian Equality Law***, Vol. 35[1], Article 6, Yale Journal of International Law, [2010], At pp. 199–200.
2. Mendelsohn Oliver and Vicziany Marika, **The Untouchables**: **Subordination**, **Poverty and the State in Modern India**, Cambridge University Press, [1998], at p. 7: Why the Varna system or untouchability developed in India is far from clear, but perhaps it had something to do with the incursion of "*Aryans*" who migrated from Europe and established themselves in India; Thapar Romila, **A History of India**, Penguin Books, [1990], at pp. 48–49.
3. Smith Brian K., **Classifying the Universe**: **Ancient Indian Varna System and the Origins of Caste**, Oxford University Press, [1994], at pp. 46–47. Also see, Dumont Louis, **Homo Hierarchicus**: **Caste System and its Implications**, University of Chicago Press, [1970], at pp. 65–89.
4. Smith Brian K., **Classifying the Universe**: **Ancient Indian Varna System and the Origins of Caste**, Oxford University Press, [1994], at p. 49.

according to caste, and its compartmentalization into sovereign communities with the power to govern their own affairs.[5]

The caste system divides society into discrete groups that are traditionally associated with a certain profession and that strongly prohibit marriage outside of the caste.[6] These groups exist in a hierarchical relationship to one another, and a person born into a caste remains within it unless he or she is expelled from it.[7] By tradition, moving from one caste to another was extremely difficult if not impossible; the caste identity that one received at birth could not typically be altered by any means.[8] The caste groups commonly known as "*untouchables*" are at the very bottom of the caste system and have traditionally been subject to discrimination and severe forms of oppression by the higher castes.[9] The relationships among the castes, especially between higher castes and the untouchables, frequently take the form of physical distance.[10] The caste hierarchy is founded on the belief that the lower castes can pollute the higher castes, and the fear that members of the higher castes who have contact with the lower castes will be spiritually damaged.[11]

Thus it is submitted that India was a country with highly rigid caste–based hierarchal structure, with ascending order of privileges and descending order of disabilities. For the research study a historical perspective is necessary. Therefore how the concept of reservation evolved is studied before. In 185 BC, Samavedhi Sunga Brahmin called **Pushymitra** who was serving under the Magada Empire as a commander killed the Buddhist king Brihadratha Maurya in a bloody coup and usurped the throne and a bloodiest chapter in the history of mankind started opening. He established the Sunga Dynasty based on

5. Smith Brian K., **Classifying the Universe**: **Ancient Indian Varna System and the Origins of Caste**, Oxford University Press, [1994], at p. 49.
6. Dumont Louis, **Homo Hierarchicus**: **Caste System and its Implications**, University of Chicago Press, [1970], at pp. 92–112.
7. Galanter Marc, **Competing Equalities**: **Law and the Backward Classes in India**, University of California Press, [1984], at p. 8.
8. Divgi Pranav Jitendra, ***Reservations in India: A Constitutional Perspective***, World Journal on Juristic Polity, [2017], at pp. 1–18.
9. Mendelsohn Oliver and Vicziany Marika, **The Untouchables**, [1998], at pp. 5–20.
10. Ibid, at pp. 12–13.
11. Galanter Marc, **Competing Equalities**: **Law and the Backward Classes in India**, University of California Press, [1984], at p. 14.

Braminical religion which gave birth to series of tyrants. It was during this period that the dreaded Manusmriti was codified. Buddhist Memorials, Sthoopa's, Vihara's and Chithya Bhoomis were raised to ground. Buddhist Universities were set on fire. Buddhist monks were murdered mercilessly. **Pushymitra** set a price of 100 gold pieces on the head of every Buddhist monk. New–born babies were crushed to ground and their brains were dashed out in front of the very eyes of their mothers. They did not even spare Buddhist widows who were pregnant. They were captured, dragged, in streets and burnt alive enmass like heap of wooden logs. It was the most in human persecution unparalleled anywhere in the world. About these events Dr. **B**.**R**. **Ambedkar** said:

"***Pushymitra's*** *revolution was a political counter revolution engineered by the Brahmins to overthrow Buddhism*, *the Brihadratha Maurya killed by Pushyamitra Sunga*. *Such a revolution is great revolution than French revolution*."

After destroying Maurya dynasty, **Pushyamitra** started the Brahminal regime. In his regime he enforced the Manusmriti and it was the rule of law, afterwards he divided the society into four classes, **Brahmins** [*priestly class*] **Kshatriya** [*warrior class*], **Vaisya** [*trading class*] and **Sudra** [*service class*]. **Pusyamitra** sunga who is acclaimed as the greatest law giver for Hindus. The **Code of Manusmriti** gave legal sanction and strength for compartmentalization of the Hindu society into various castes and gave the Brahmins a most prestigious place in Hindu society. Gross discrimination, pampered and favored treatment for Brahmins formed the basis and foundation of the Manu Code. According to Manusmriti, king must enquire into the caste and settle the law according to the caste. It is to be asserted here that equality before law and equal protection of law, equal application of law was never recognized by the ancient Hindu law. The Hindu law was mainly based on Manusmriti. The Hindu law varied according to caste. The Manusmriti mandated the king never to tax a Brahmin even when all other sources of revenue have failed. According to that:

"*The Brahmin by a divine right is the head of all living creatures all that exists in this universe is the Brahmins property*."

Even if a Brahmin commits any heinous crime he was not to be killed. The king might exile but allow him to keep his property. The Manu code curtailed the rights of *Sudra's* and imposed severe disabilities on them. If a *Sudra* listened to the reading to the *Vedas*, his ears were to be filled with molten lead. If he recited them, his tongue should be cut off. If he committed them to memory, he should be cut into pieces. According to **Manusmriti**, there was complete prohibition of education for the *Sudras* and untouchables. There was complete **ban on the *Sudras* and untouchables in occupying places of power and authority**. **Thus it was found that in India**, **that education**, **power**, **properties were monopolized by the Brahmins**; **these were reserved for only Brahmins**. This kind of system existed up to 1848 and for more than 2000 years the Brahmins enjoyed the privileges and immunities. They were beneficiary by the caste system, but Scheduled Caste and Scheduled Tribes were victimized by the caste system, they were subjected to many hardship, exploitation, injustice and unequal treatment for many centuries. Scheduled Castes were the lower castes in the caste hierarchy of the Hindu social system. The Scheduled Tribes were the tribes that had not been confirmed as Hindu in the historical perspective and lived animistic lifestyles. Therefore the framers of the **Indian Constitution** decided to give special benefits to the Scheduled Caste and Scheduled Tribes by forming a reservation policy. Especially the impulse of the people belonging to weaker section was very much felt by Dr. **B**.**R**. **Ambedkar**, who also came from the lower strata of the society. As a result he fought for **Equality**, **Liberty** and **Justice** in various committees constituted by the Constituent Assembly. The result of his endeavour to secure justice to weaker sections ultimately found place in the **Indian Constitution** in the form of reservation.

[A] History of Reservation in Various State Provinces

The concept of reservation is one of the crucial factors in the **Indian Constitution** to secure socio–economic justice to the weaker sections and bring them to the mainstream of the national life. The **political**, **social** and **economic**

inequalities, which existed in India prior to the **Indian Constitution**, came into being made many revolutionary and social thinkers to agitate for securing socio, economic and political justice. Consequently, when the **Indian Constitution** was being drafted, the Constitution makers inserted the concept of equality, so that no individual shall be treated inequality. Based upon individual achievement was too hypocritical in the Indian caste ridden society where group identification had been historically used for the purpose of discrimination and separateness. Therefore, the makers of the **Indian Constitution** adopted a policy of "*preferential treatment*" in favour of certain weaker sections of the society to offset of the effects of inherited inequalities and remedy historic injustice. The policy of reservation under the **Indian Constitution** operates in three fields, which are legislature [*political reservation*], services under the State [*job reservation*] and educational reservation. However, to understand and appreciate the policy of reservation, there is need to look into the history of reservation, this policy of reservation has got its own history.

[1] Reservation in Bombay Province

In India the process of reservation was initiated on 26th July, 1902 by Chatrapati Shahu Maharaj of Kolhapur. He extended the educational facilities and job reservation to the depressed classes in his kingdom. In his administration he started giving 50 percent reservation to the depressed classes in the Indian history. For the first time in India the process of reservation started in the regime of Chatrapati Shahu Maharaj. In his State, before taking the administration in his hands, untouchables were made to live outside the village in an out of the way corner, which was the dirtiest and filthiest part of the village. They were not allowed to draw water from the public wells of village. They were also allowed not to enjoy the benefits of the public rest houses. Even if they were dying of thirst, they could not touch the tank or pond of the village. Even for service of the lowest kind, they were not allowed to enter the Hindu household, their very touch was a sin to be avoided at all costs.

Their chief duty was with the dead beasts of the villages to bear the carcasses of animals out of the village, feed themselves on the rotten flesh of dead animals and at the best, work in their primitive ways on the skins of those animals. In the Kolhapur State the shadow of an untouchable was sufficient, if it falls on a member of a higher caste, it would pollute him as was presumed.[12]

Dr. **Govind Sadashiv Ghurye** evaluates the work initiated by **Jyotirao Phule** and **Chatrapati Shahu Maharaj** in following words:

"*Phule's was a revolt against caste in so for as caste denied ordinary human rights to all the members of Hindu society and not merely a non–brahmin movement to cast off the diminution of Brahmins. The movement did not receive any support from the Brahmins in general. Even among the non–brahmins the progresses of Phule's ideas slow. It was Shahu Maharaj who infused new life into the agitation so much so that Mantego and Chelmsford, in their Indian political reforms had to grant the demands.*[13]

The untouchables in India remained under the thralldom since the time immemorial. **Jyotirao Phule** probably was the first in India to carry on a forceful crusade against the practice of untouchablity in modern time. **Jyotirao Phule** was rightly regarded as a pioneer of untouchablity movement in India in general and Maharashtra in particular. The movement started by Mahatma **Jyotirao Phule** was further carried on by **Chatrapati Shahu** with full strength, vigour and earnestness. Hence, **Chatrapati Shahu Maharaj** earned the position of an apostle of the coming movement of the untouchables after him.[14] When Shahu Maharaj took the administration in his hand in 1894, majority of the state officials were Brahmins. Other Backward Classes remained aloof from education and consequently from state services. Thus, from the beginning **Chatrapati Shahu Maharaj** realized the necessity of setting on the right track the whole social machine which for ages had strayed along lines harmful to national growth. To do this he had to embark on a strenuous campaign against the evils of the traditional hierarchy of castes. He set about his work

12. **Chatrapati Shahu**, **the Pillar of Social Democracy**, editor P.B. Shalunkhe, Education Department Government of Maharashtra Publication, Bombay, [1994], at p. 143.
13. Ghurye G.S., **Caste and Race in India**, Popular Prakashan, [1969], at p. 287.
14. **Chatrapati Shahu**, **the Pillar of Social Democracy**, editor P.B. Shalunkhe, Education Department, Government of Maharashtra Publication, Bombay, [1994], at p. 144.

systematically his first step, to this effect was the reservation of **50 percent of posts for backward classes including untouchables**.

In the year 1902, his highness was invited to England to attend the coronation of his majesty **King Edward–VII**. During this sojourn in England, he issued the order from England, to the effect that **50 percent posts for the state services should be reserved for the backward class candidates**. This was indeed a landmark in his carrier as social reformer. The original order dated 26th July, 1902 stated:

"*Endeavours have been made in recent years in the Kolhapur state to faster and encourage the education of all castes of the subjects. So far, but Highness regrets to have to recorded that those endeavours have not in the case of more backward classes met with the success that was hoped for. His Highness, has the matter under very careful consideration, has come to the conclusion that this want of success in due to the fact that the rewards for the higher education are not sufficiently widely distributed. To remedy this to a certain extent and to establish within the state an incentive to the backward classes of his Highness has decided that it is desirable to reserve for those classes a larger share of employment in the State services than has hither to been the case.*"

He immediately ordered from the date of this order 50 percent of the vacancies that may occur shall be filled by recruits from among the backward classes. In all offices in which the proportion of officers of the backward at present is less than 50 percent, the next appointment shall be given to a member of those classes.[15]

Chatrapati Shahu Maharaj was keen on extending all facilities for education of the lower classes. Further by the order of 1911, he exempted them completely from the school fees. Furthermore he granted in 1919, scholarship to students who were admitted to the school. To encourage untouchables to education he also deposited promissory notes of 10,000 in the state treasury in memory of late **Shivaji Maharaj**.

Chatrapati Shahu Maharaj was a champion of social justice and equal opportunities for all. He believed in protecting the weak against strong. The

15. **Chatrapati Shahu**, **the Pillar of Social Democracy**, editor P.B. Shalunkhe, Education Department, Government of Maharashtra Publication, Bombay, [1994], at p. 146.

aim of his measures was to raise the lower castes from their object position in society by employing them and fitting them for hither to closed avenues of life. For lack of educated men among them he had to content himself by employing them in his household services. He appointed untouchable coach men. The coach men, placed on the coach boxes of state carriages on all occasions, even during his daughter's marriage, came publicly in association with the upper caste men who had to tolerate their presence and touch on all occasions. In India, since past, it was considered a privilege to serve as an elephant driver. His Highness employed some untouchables in this popularly exalted position. The right to have swords in their belts on public ceremonial occasions was a badge of Kshatriyaship. His Highness gave some of them these swords of honour and allowed them to appear in state functions, like the soldiers and sardars of warrior classes.

Chatrapati Shahu Maharaj took various administrative measures with the object of removing the bar of untouchability. The first step was the appointment of the untouchables as *Talathis* [*village accountant*], the new stipendiary village ministers, who were hither to member of the heaven born, Brahmin community. The untouchable *Talathis*, thus appointed became important officers of village. Preference was given to fit men of the depressed classes over everybody else. They were allowed then to be promoted according the merits to every departments of the state.[16]

His highness extended to them special representation in the Kolhapur municipality, which was now reconstituted on a communal basis in 1920–21 and a young man of the *Chamar* caste soon became the chairman of the board. The chief among other measures adopted were:

1) The abolition of untouchability on water pipes, tanks, wells, in Dharmashalas, hospitals, schools and other public places.
2) Free boarding houses for them at the station Bungalow.
3) Abolition of separate schools for the untouchables.

16. **Chatrapati Shahu**, **the Pillar of Social Democracy**, editor P.B. Shalunkhe, Education Department, Government of Maharashtra Publication, Bombay, [1994], at p. 150.

4) The enrolment of several untouchable members as pleaders in the State.

To end the discriminative treatment to the untouchables in the state departments, Maharaja issued prompt orders to all the authorities directing them to follow his instructions in this respect rigorously. His order of 15th January, 1919 was thus:

"*All officers in the state, revenue, judicial or general department must treat the untouchables who have entered the state services with kindness and equality. If any state officers have any objection to treat the untouchable according to the above order, he will have to give notice of registration within six weeks from the receipt of this order and resign his post. He will be entitled to no Pension. His Highness expects every subject of his, should be treated like a human being and not like a beast.*"[17]

[2] Reservation in Mysore Province

Regarding reservation policy, Karnataka State has got a long history of protective discrimination policy for uplifting the socially and educationally backward sections of the population of the State. In order to understand and appreciate the significance of the role played by the State Government in improving the socio–economic and educational conditions of Scheduled Caste and Scheduled Tribes, Other Backward Classes and minorities in the State it is necessary to review the history of reservation policy in Karnataka.

The present Karnataka was created in 1956 by integrating Kannada speaking areas of former Hyderabad State and the former Bombay and Madras provinces with the then princely State of Mysore. Though the reservation policy of the Government of the princely State of Mysore was influenced by the social reform movement in the former Madras province, particularly the social revolt sponsored by the justice party, the princely State of Mysore had developed its own rudimentary policy of reservation as far back as 1874. During the period between 1874 and 1895, the Government of Mysore reserved 20 percent of middle and lower level jobs in police department for Brahmins and 80 percent for **Muslims**, **Hindus** and **Indian Christians**. However, again from 1914, the Government of Mysore introduced a system of nomination of

17. **Chatrapati Shahu**, **the Pillar of Social Democracy**, editor P.B. Shalunkhe, Education Department, Government of Maharashtra Publication, Bombay, [1994], at p. 151.

qualified backward class candidates to the post of Assistant commissioners. Even so it was realized that the backward classes including SCs and STs could not break the monopoly of the Brahmins in the State Government service.

It may be interesting to know that between 1881 and 1910 the demand for the jobs for locals, inspired by a sort of "*sons of soil*" theory was going on within the group of Brahmins. At this time, the Mysore Maharaj was advised to appoint Diwans, from outside the State who came mostly from former Madras province. These Diwans used help their *kiths* and *kins* belonging to their own sub–caste to get employment in the state Government jobs. This was resisted by the local Brahmins who raised hue and cry against Tamil Brahmins domination of Government jobs in the princely State of Mysore. This would appear as though the Mysore Brahmins themselves behaved like backward classes asking for reservation. However, it was more like agitation of the "*sons of soil*" and this controversy came to an end with the appointment of Sir **Mokshagundam Visvesvaraya** as Diwan of the Mysore State in 1910. But, **Visvesvaraya** himself resigned in 1918 on the issue of reservation for Backward Classes in Government service.[18]

This social reform movement and the resultant communal order in the Madras province and the monopoly of the Brahmins in Mysore Government jobs created a lot of discontent among the backward classes. No Government could ignore the demands of a vast majority of the people for a share in the Government service. As a positive response to this demand, the first backward classes committee held on under the Chairmanship of the Chief Judge of Mysore High Court, **Leslie C**. **Miller** was appointed and this committee which submitted its report within a record time about 11 months laid the basic foundation for **the future formulation of the reservation policy for the backward classes in the State of Karnataka**. In fact the report which runs over 31 pages adds on original ideas about the criteria to be adopted for identifying backward classes, measures needed for promoting their education

18. **Reservation Crisis in India**, editor, Vinay Chandra Mishra, Bar Council of India Trust, AB/21, Lal Bahadur Shastri Marg, New Delhi, [1991], at p. 275.

and the reasons for compromising merit with equality of representation in Government service.[19]

The Miller Committee was the result of the political awakening of the OBC's in the princely State of Mysore. The economic strength of two dominant communities' *Vokkaliga's* and *Lingayat's* was prominent, but their educational level was low. Therefore, they could not compete with Brahmins for Government service though Brahmins constituted only 3.4 percent of the population. Hence, they took the lead in demanding reservation in the state Government jobs. They were supported by Other Backward Castes, Muslims, Indian Christians, SCs and STs. They got a semi democratic political forum to articulate their demand. Afterwards, Sh. **Nalwadi Krishnaraj Wodeyer**, constituted the representative Assembly. It was a forum for consulting different sections of the society on the State Government policy matters. Most of these members were nominated on the basis of their economic and social background. This representative Assembly gave rise to political awakening among the backward classes though economically better of among them took the lead.[20]

It was this coalition of self interest group which compelled the Maharaja of Mysore to break the monopoly of Brahmins in Government service and throw it open through reservation to non–Brahmins. Even then the fortunes of the backward classes fluctuated. Their interests came to depend upon the social background of the Diwans who succeeded Sir **Mokshagundam Visvesvaraya** as also their political whims and fancies. Even so, the Maharaja could not reverse the policy of reservation as it was demanded by a vast chunk of influential section of the people of princely State of Mysore. After independence up to the time of reorganization of the State [1947–1956], the Miller Committee recommendations were implemented. Thus, the **Nalwadi**

19. **Reservation Crisis in India**, editor, Vinay Chandra Mishra, Bar Council of India Trust, AB/21, Lal Bahadur Shastri Marg, New Delhi, [1991], at p. 276.
20. Ibid, at p. 277.

Ktrishnaraja Wodeyer extended the reservation to non Brahmins up to 75 percent in his State.[21]

By that time India achieved independence and princely state was integrated into the Indian union. The Brahmins had accepted willy–nilly the growing power of the backward classes, because of their numerically minority position as the new political system came to depend significantly upon the numerical strength of the castes. During this period the numerically dominant communities along with the SCs/ STs and also Muslims resorted to yet another interesting strategy of driving Brahmins out of the rural areas. The dominant communities which controlled elected Government after independence introduced tenancy abolition legislation and made the Brahmins to lose their *inam* lands to the tenants. It may be mentioned in this context, that in south India, the Brahmins never cultivated the land though they owned vast land under the *inamdari* system. It so happened that their tenants belonged to the dominant communities though in some places there were Scheduled Castes also so the political strength was effectively and intelligently used by the dominant communities to weaken the economic base of the Brahmins moved in the rural areas.[22] As a result, after losing their lands the Brahmins moved to urban areas in search of white collar jobs. Though they suffered during that transition period, they had the ingenuity of using their limited resources for rehabilitating themselves comfortably in the urban areas.

After the integration of the state in 1956, it became necessary to the exercise of reservation in view of the merger of the areas from other states which did not have any consistent reservation policies. The attempts of the Government of Karnataka to prepare a uniform list to be applied to the people of all the integrated areas were frustrated by the high court. Therefore, the second backward classes committee was appointed under the chairmanship of backward classes' political leader Dr. **Nagannagowda** in 1960. To determine

21. **Reservation Crisis in India**, Editor, Vinay Chandra Mishra, Bar Council of India Trust, AB/21, Lal Bahadur Shastri Marg, New Delhi, [1991], at p. 278.
22. Ibid, at p. 279.

the backward classes and recommend the extent of reservations, the committee identified the backward classes basically on the basis of caste though it was educational test and proportion of people of each caste in Government service as additional declared one of the dominant communities *Lingayats*. As a result, this led to legal battle which ended in the Supreme Court striking down the state Government order on reservations.

This period [1956–1972] was also marked by the role of *Lingayats* in Karnataka under the chief Minstership of Sh. **S**. **Nijalingappa** and Sh. **Veerendra Patil** and they did not want their own community to be excluded from the list of backward classes and lose the benefit of reservation. At the same time it was alleged that the two dominant communities cornered all the benefits under reservation policy and also a new set of guidelines was required for determining the backward classes.[23] At this juncture, the backward class's movement took a different turn under the political leadership of Sh. **Devaraj Urs**. Until that time all the non–Brahmins castes and communities were considered as backward classes. But a general feeling that *Lingayats* and *Vokkaligas* dominated the political, economic, educational and even administrative spheres. By that time Sh. **Devaraj Urs** used the new political strategy as after 1969 split, the Congress party wrest political power from the two dominant communities in the state. He tried to unite the non dominant minority backward castes, Muslims and Scheduled Castes and Scheduled Tribes. Though he was compelled not to ignore *Vokkaligas* totally. He wanted to formulate a new reservation policy consistent with his new political strategy. For this purpose he found in Sh. **L.G**. **Havanur**, who was already an active proponent of new backward classes' ideology, an able policy adviser. While the earlier backward classes', inquiry bodies enjoyed the status of only committee, elevated its status to that of the Commission.

Accordingly Sh. **Devaraj Urs** appointed the first Backward Classes Commission in 1972 under the Chairmanship of Sh. **Havanur**. This

23. Singh S.K. and Singh A.K., **OBC Women**: **Status and Educational Empowerment**, New Royal Book Co., Lucknow, [2004], at p. 96.

Commission submitted its report after prolonged deliberations in November, 1975. But the state Government modified its recommendations and implemented them.[24] This Commission also left out certain sections of the *Lingayat* community forcing them to seek justice in the Court. When the Government order of reservation was implemented, rational emergency was in operation and therefore *Lingayat's* could not take to streets against the recommendations of the **Havanur Commission**. Therefore, they had to wait for a more appropriate time, after the emergency, they decided to seek judicial remedy. The Karnataka high court upheld the recommendations of **Havanur Commission** but partially struck down the modifications introduced in the Government order. Even then *Lingayats* went in appeal to Supreme Court which directed both the Government of Karnataka and Tamilnadu to review the list of backward classes in the light of fresh data. The judicial decision forced the Government of Karnataka to appoint the second backward class's commission in 1982 and the Second Backward Classes Commission which submitted its report in 1986 excluded not only *Lingayats* and *Vokkaligas*; the two major communities which dominated for long the backward classes movement and allegedly cornered the benefits under reservation policy, but also thirteen other communities which were still educationally in a majority positions.[25] These recommendations sparked–off a state–wide agitation and ultimately forced the Janata Government to reject the recommendations of the commission. The fresh Government order which was issued in 1986 brought back most of the communities [*the former non–Brahmins*] to the backward classes list for the purpose of reservation. This in brief is history of reservation movement in Karnataka.

[B] Reservation under the British Period

The era of emancipation of untouchables began with the advent of the British rule, as the advent of the British rule with the consolidation of political regime and introduction of the western oriented education system, produced

24. Singh S.K. and Singh A.K., **OBC Women**: **Status and Educational Empowerment**, New Royal Book Co., Lucknow, [2004], at p. 97.
25. Ibid, at p. 101.

many structural disturbances in Indian caste structure also. Brahmins, being the literate caste, responded promptly to the western liberal education and entered in big numbers to Governmental services and the professions. The emphasis of British rule upon the egalitarian system of justice with new ideas of equality of opportunity in the beginning came in handy of Brahmins, as they monopolized all the Government jobs and professions only in the name of full and free competition.[26]

It is thus seen that really effective measures began to be taken only after the reforms of 1910. For the first time, the census report of 1910 divided the Hindu into three categories:

a) Hindus,
b) Animists or Tribles, and
c) the depressed classes or untouchables.

As a result the census report of 1910 giving separate importance to untouchables acquired a new political dimension. In 1910, the basis adopted by the census commissioner for separating the different classes of Hindus into:

a) those who were hundred percent Hindus, and
b) those who were not hundred percent Hindus.

Those who were not hundred percent were, denied the supremacy of Brahmin, did not receive the Mantra from a Brahmin, denied the authority of the Vedas, did not worship the Hindu Gods, were not served by good Brahmins as family priests. These tests were enough as to divide the Hindus from untouchables.[27]

The systematic attempt for the welfare depressed classes was made with the introduction of the **Mantego Chelmsford Reform**, 1919. But under this reform a very few could qualify for the restricted franchise.

At this time Dr. **B**.**R**. **Ambedkar** started for the social emancipation and political mobilization of the people of the oppressed state. He was effective in

26. Padhy K.S. and Mahapatra Jayashree, **Reservation Policy in India**, Ashish Publishing House, New Delhi, [1988], at p. 15.
27. Ibid, at p. 16.

highlighting the inhuman treatment to which they were subjected by Hindu philosophy. He divided Hindu civilization into touchable Hindus and untouchable Hindus and pleaded for their representation only on the ground of separate interests which require protection.[28]

According to Dr. **B**.**R**. **Ambedkar**, the untouchable classes must have their own men in the council hall to fight for the redress of their grievances. The non-Brahmins as a class are subjected to the social and intellectual domination of the Brahmin priesthood and may rightly, advocate separate representation. On the basis of this he applied two principles such as the standing of a community and principle of minority to determine their quota of representation. The **Mantego Chelmsford Reforms** thus recognized the differentials and divisions for depressed classes to the legislative council.[29]

On 29th May, 1928, when Dr. **B**.**R**. **Ambedkar** submitted before the **Simon Commission**, his statement demanding protection of the interests depressed classes through adequate representation. Dr. **Ambedkar** made it clear that the depressed classes and untouchables were synonymous and they must be treated as distinct minority separate from the Hindu community.[30]

Furthermore, the **Round Table Conference** held in 1930 marked:

"*The beginning of the claims of the untouchables in the arena of the devolution of the political power from the British rulers to the Indian natives*."

In this conference Dr. **B**.**R**. **Ambedkar** shifted his position arguing for separate electorates for the depressed classes.

However, as per the Dr. **B**.**R**. **Ambedkar** proposal put before the **Round Table Conference** in 1931–1932, **Separate Electorate** means a territorial constituency comprising exclusively of untouchables only in which they alone will vote for their handpicked candidates.[31]

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28. Padhy K.S. and Mahapatra Jayashree, **Reservation Policy in India**, Ashish Publishing House, New Delhi, [1988], at p. 18.
29. Ibid, at p. 17.
30. **Ambedkar and Nation Building**, edited by Shyamlal and Saxena K.S., Rawat Publications, New Delhi, [2009], at p. 66.
31. Shetty V.T. Rajshekar, **Separate Electorate and Separate Settlement**: **For Untouchables and Every other Oppressed Nationality in India**, Dalit Sahitya Academy, Bangalore, [1996], at p. 5.

This is the meaning of separate electorate and this was the demand of all "*minorities*" at the **First Round Table Conference** in which the Congress party of **M.K. Gandhi** refused to take part. However, in the **Second Round Table Conference** in which the Congress was also present under the leadership of **Gandhi**. Hindu representatives opposed the demand saying that the "*minority*" representatives at the conference were not genuine representatives of the untouchables, Muslims, Sikhs, *etc*., and Congress party alone represented all the people of India including its minorities so there was dead lock at the Round Table Conference and the only hope lay in arbitration to which everybody including Gandhi agreed except Dr. **B.R. Ambedkar**. So at the Second Round Table Conference the delegates did not agree upon a solution to the communal problem.[32]

After wards the British Prime Minister, **James Ramsay MacDonald**, accepting the demand of Dr. **Ambedkar** announced the famous "*communal award*" on 17th August in 1932, where separate electorates for depressed classes were to be created sanctioning them distinct status. As per this award, the untouchable will have two votes in general constituency and another in a special communal constituency comprising exclusively of untouchables to be carved out in areas where they were in abundant.[33]

Gandhi took objection to this award after having given his consent to abide by the decision [*communal award*] of the Prime Minster. His main objection was that the award would take untouchables away from Hindus and Hinduism and that the interest Hinduism would suffer. **Gandhi** was aware of the danger of allowing untouchables to vote in an exclusively communal constituency. **Gandhi** wanted to avert this danger and save his Hindu people. Gandhi was more interested in protecting his Hinduism. He wrote a letter to **Samuel Hoare**, the **Secretary of State for India**:[34]

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32. Singh S.K. and Singh A.K., **OBC Women**: **Status and Educational Empowerment**, New Royal Book Co., Lucknow, [2004], at p. 19.
33. Ibid, at p. 20.
34. Vakil A.K., **Gandhi–Ambedkar Dispute**: **An Analytical Study**, Ashish Publishing House, New Delhi, [2010], at p. 19.

Gandhi said, "*I do not mind the untouchables being converted to Islam or Christianity. I should tolerate that, but I cannot possibly tolerate what is in for Hinduism for there are these two divisions set up in every village. Those who speak of political rights of untouchables do not know India and do not know how Indian society is today constructed. Therefore, I want to emphasis that I cannot command that if I was the only person to resist this thing I will resist it with my life.*"[35]

But the British Government, refused to his threat. Prime Minster, **James Ramsay MacDonald** in a letter tried his best to assure Gandhi and through him the Hindus that this award would not take away the untouchables from Hindus and Hinduism. In all general constituencies, he said, the untouchables will vote with Hindu electorate on equal footing. Only in limited special constituencies, they will vote separately. He said such a step was necessary to safeguard their rights and interests that we are convinced, is necessary under present conditions.[36] The untouchables were given two votes only to see that they voted with the rest of the Hindus and remained in Hinduism, the Prime Minster pleaded.

Gandhi and his Hindu leaders did not agree to the communal award and Gandhi went on "*fast unto death*" in Poona Yarawada Jail and the Hindu press came out with wide propaganda that Dr. **B**.**R**. **Ambedkar** was bent upon killing the father of nation. This wily Gandhi went on his well advertised fast against separate electorate and the entire Hindus of India joined in the mad frenzy against Dr. **B**.**R**. **Ambedkar** and entire untouchables of India. They are not only threatened Dr. **B**.**R**. **Ambedkar** life but also said that:

"*If Gandhi were to be die, they would burn the houses of all the untouchables in the whole India.*"

The entire fascist forces of the country joined hands to blackmail Dr. **B**.**R**. **Ambedkar** who was finally forced to surrender. Dr. **B**.**R**. **Ambedkar** ultimately agreed to amend the award in accordance to the wishes of Gandhi.[37]

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35. Padhy K.S. and Mahapatra Jayashree, **Reservation Policy in India**, Ashish Publishing House, New Delhi, [1988], at p. 19.
36. **Babasaheb Ambedkar**: **Writings and Speeches**, Vol. 5, 1st edition by Education Department, Government of Maharashtra, [1990], re–printed by Dr. B.R Ambedkar Foundation, [2014], at p. 337.
37. Shetty V.T. Rajshekar, **Separate Electorate and Separate Settlement**: **For Untouchables and Every other Oppressed Nationality in India**, Dalit Sahitya Academy, Bangalore, [1996], at p. 18.

Then after this incident the famous "**Poona Pact**" was signed by Dr. **B**.**R**. **Ambedkar** and **Gandhi** on 24th September, 1932. Dr. **B**.**R**. **Ambedkar** was quite unhappy with this Pact and blamed it squarely for depriving the SC's and ST's of their genuine rights. After signing the **Poona Pact** the right to separate electorate, the right to elect the true representatives was gone. As the result of **Poona Pact** whatever Dr. **Ambedkar** brought from London, he lost it at Poona.[38]

Thereafter some press people asked Dr. **Ambedkar**, as to how was he feeling after signing the **Poona Pact**. At that time Dr. **Ambedkar** said:

"*People call Mr. Gandhi as Mahatma. But I cannot call him Mahatma, I cannot even call him a human being. I brought a fruit from London for my people. I was thinking to hand it over to my people. Hoping to see they are enjoying it. But meanwhile Mr. Gandhi snatched the fruit from my hand. He squeezed the fruit and gave the juice to his people and threw the rind on the face of my people. Today, I am facing as a person on whose face rind of the fruit has been thrown.*" [39]

As a result, the **Poona Pact** came to act as a compromise between the depressed classes and the Hindu community. It declared the scheme of reservation of seats for the depressed classes out of general electorates in the provincial as well as in central legislature through election by joint electorates. It also declared about the representation to these classes in the public services. The number of seats reserved for the depressed classes was increased to equal to the proportion of population, with representatives being chosen in general from both communities.[40]

Similarly the policy of reservation was provided by the **Government of India Act**, 1935 with the effort of Dr. **B**.**R**. **Ambedkar**. The expression Scheduled Caste, which was first coined by the **Simon Commission** was introduced in the **Government of India Act**, 1935. Under it the "*Scheduled Castes*" replaced "*Depressed Classes*" and separate list of "*Scheduled Castes*"

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38. Jatava D.R., **Ambedkar**: **The Prime Mover**, ABD Publication, [2004], at p. 32.
39. Gopinath M., **Let us take the Caravan of Babasaheb Ambedkar to its Logical End**: **A Message from Dadasaheb Kanshi Ram**, Bahujan Samaja Publication, Bangalore. [2000], at p. 10.
40. **Ambedkar and Nation Building**, edited by Shyamlal and Saxena K.S., Rawat Publications, New Delhi, [2009], at p. 66.

were notified for various provinces in 1936. In this for the protection of SC's and ST's, abolition of untouchability, the special safeguards and reservation for SC's and ST's introduction of universal adult franchise were adopted.[41]

However, on January, 1947 however after taking into consideration the serious implications of reservation of seats for the minorities at the meeting of advisory committee a resolution was moved at the initiation of **Sardar Patel** to abolish reservations of seats to the SC's and ST's. At this stage, in the Constituent Assembly there were 28 SC/STs MPs including Dr. **B**.**R**. **Ambedkar**. The Congress leaders did everything to prevent Dr. **B**.**R**. **Ambedkar** entering the Constituent Assembly through Muslim league from Khulna and Jaishore of undivided Bengal. However, out of 28 SC/ST members there were only two non–Congress members. The minority committee of Constituent Assembly decided to abolish the reservation for all minorities but Dr. **B**.**R**. **Ambedkar** sternly opposed it and his voice was alone. So his voice was not heard by the Congress body. Thereafter Dr. **B**.**R**. **Ambedkar** thought of seeking the support of the SC/ST members of parliament to continue the reservation.[42]

He went to the Wellington Hospital to see **Jagjivanram**, and told him that both were financially well off and capable of maintaining their children for one or two generations. But he was much worried about the 10 crores of SC/ST who were orphans, what would happen to them if the reservation was abolished. Therefore, he came there to seek his and others support in the Constituent Assembly to continue the reservation for some years to come. At this, **Jagjivanram** said he had a great faith in the sincerity of **Gandhi** and Congress. So he was not infavour of continuation of the reservation as he was afraid of the iron rod of the Congress. Nobody had the courage to oppose **Sardar Patel**. So he expressed his inability to extend his support in the matter. There were 28 MP's in the Constituent Assembly including Dr. **Ambedkar** but all other 27 MP's did not co–operate with Dr. **Ambedkar** in his efforts. This was an evil

41. Padhy K.S. and Mahapatra Jayashree, **Reservation Policy in India**, Ashish Publishing House, New Delhi, [1988], at p. 21.
42. **Times of Bahujan**, Monthly Magazine, Vol. 2, Editor M. Gopinath, Bangalore, [2002], at p. 8.

role played by the SC MPs. The upper Castes used SC MPs to stab their own people. There was of course the lone voice of **Nagappa** from Andhra Pradesh who opposed the resolution in the Constituent Assembly. He was punished for his support, **Sardar Patel** warned him saying that Dr. **Ambedkar** would not give him anything, if he supported him but **Nagappa** did not care for the warning and he had to suffer for it; he came and told Dr. **Ambedkar** the full details as to how the congress action would only lead the country's independence into a dangerous spot after some years.[43] All minorities would certainly raise their voice and achieve what they wanted. It depended on their unity and how they put–up a united front against the Congress. He assured **Nagappa** that he was hopeful that he would find some solution. It was sorry to say that:

"*The Congress had gagged all the MPs not to open their mouths to save their own community rights*."[44]

It was in January, **1947 that the reservations for all the communities were abolished**. This decision to scrap reservation was approved by the Constituent Assembly however, Dr. **B**.**R**. **Ambedkar** absented himself from the proceedings of the Constituent Assembly, because he was totally opposed to this move. Furthermore, when the Constituent Assembly voted for the abolition of reservation the newspapers particularly "*Hindustan Times*" and "*Statesman*" hailed the move as a "*red letter day*" in the history of India. However, this clip of news was read before Dr. **B**.**R**. **Ambedkar**, he shot back saying, "***This would not be a Red letter day but would be a dead letter day***". He had been persistently pleading that reservations were the human rights for all SC/ST/minorities and therefore it should not be abolished. Because the educated young men of the minority communities have been looking towards the reservation, the educated young men of these communities would now go underground. Dr. **B**.**R**. **Ambedkar** was almost a lonely man in the Constituent Assembly. Yet the Manuvadis were afraid of him. They decided to drop him

43. Ambedkar B.R., **What Congress and Gandhi have done to the Untouchables**, [1945], at p. 32.
44. **Times of Bahujan**, Monthly Magazine, Vol. 2, editor M. Gopinath, Bangalore, [January, 2002], at p. 9.

from the Constituent Assembly through giving away the place from where he was nominated to the East Pakistan at the time of partition of India.[45]

The British forced the congress to get Ambedkar elected to the Constituent Assembly and make him the custodian of rights of SC and STs. For this Mr. **Jayakar** was forced to resign from Poona constituency vacating it in favour of Dr. **B**.**R**. **Ambedkar**. On 9th July, 1947 Dr. **B**.**R**. **Ambedkar** was elected to the Constituent Assembly and on 10th July, 1947 the British announced that they would quit India on 15th August, 1947. But in this battle, Dr. **B**.**R**. **Ambedkar** ultimately succeeded in installing himself as the Chairman of the Drafting Committee. Furthermore, 29th August, 1947 was a memorable day in the Constitutional history of India. Because as chairman he incorporated the very reservation in services in the form of the fundamental rights, as present under the **Indian Constitution**.[46] In this way, the tools of the Constitutional provisions regarding protective discrimination in favour of the backward classes goes back to the decade of freedom struggle.

III. **Growth and Evolution of Policy of Reservation for Women**

In general, the Indian society is totally male dominated and biased against the female gender. This results in all sorts of exploitation and discriminatory practices. Obviously the status of Indian women is unjust and inhuman. Women on their part have been struggling through various organization and movements to liberate themselves from the clutches of the male dominated social order. For the research study it is necessary to study the historical background of the status of women.

[A] Status of Women in Vedic Period

In Vedic period women enjoyed all sorts of necessary rights which are essential for a human being.[47] The women had access to all branches of learning, the women enjoyed a position at par with men. Women played an important role in religious ceremonies. The girls were free to choose their own

45. **Times of Bahujan**, Monthly Magazine, Vol. 2, editor M. Gopinath, Bangalore, [January, 2002], at p. 10.
46. Ibid, at p. 11.
47. **Dr**. **B**.**R**. **Ambedkar on Federalism**, **Ethnicity and Gender Justice**, edited by Prof. Nazeer H. Khan, Zafar Ahmad Khan, Deep & Deep Publications, [2001], at p. 173.

life partners by *swayamvara* system and they got married, after attaining puberty. They had all the opportunities to pursue education, including study of Vedas and were even eligible for Upanayana. They could end a marriage and remarry. In this period, women lived with dignity.

The Vedic hymn informs that both husband and wife were joint owners of family property and **a daughter whether married or unmarried retained her right of inheritance in the property of her deceased father**. Women were actively involved and associated with men in every socio–religious ritual and ceremony. The examples of **polygamy** were rare and mainly confined to ruling class. **Dowry system** was prevalent but only in rich and royal families. **A wife was regarded as indispensable member of husband's family and a centre of domestic world**. She proved herself as a sincere friend, partner and a guide of her husband. She could move freely out of her house and enjoyed freedom of movement by attending fairs and festivals, Sabhas and Assemblies of learned persons. Marriage was regarded as indissoluble holy union and divorce was unknown, **Sati system was not prevalent**. A woman had an absolute ownership over the property and it was regarded as her "*Stridhan*".[48] Thus, a woman was regarded as equal partner, friend and equal share in joys and sufferings of her husband's life in Vedic period. In social, cultural and educational activities she enjoyed considerable freedom and more or less possessed equal rights in matters of religion. She was considered as human being and enjoyed a status and prestige in the society.

[B] Status of Women in Post Vedic Period

In the post Vedic period, women were treated as bonded labourers like slaves, the honorable position and status of woman enjoyed in Vedic period gradually declined. She was regarded subservient to man and confined to household chores and child bearing. In this respect, **Manu** stated that:

"*There is a vital structural difference between men and women and a woman could not possess an independent status*."

48. Kanth Anjani, **Women and Law**, Jain Book Agency, [2008], at p. 22.

During the post Vedic period it was noted that throughout her whole life a woman would be an appendage to male. Father protects her during the period of maidenhood, husband protects her during the period of covertures and sons protect her during the period of widowhood and thus a woman was never free.[49]

Manu expected too much from virtuous wife by merging her personality of her husband. He emphatically stated that:

"*Even if the husband is immoral, and has lack of good qualities, the wife must still worship and she thought he was god to herself. Manu imposed manifold duties on a woman. She should be virtuous and loyal to her husband also even after his death.*"[50]

The social status of women was undermined, many restrictions were imposed on them and they were deprived of many basic human rights. Even though women were in majority in the society they were discriminated and ill treated by men.[51]

A woman shall not perform the daily sacrifices prescribed by the Vedas if she does it, she will go to hell. **Manu** clearly enunciated that a widow should never even dream of remarriage and divorce. **Child marriages for girls and sati system were in practice**.[52]

This clearly indicates how women were totally discarded in the society without having any privilege, they were treated with contempt and had no opportunity either go for remarriage or to live with dignity in society. The condition of women in Manusmriti was so deplorable and inhuman.

In addition, the golden age of Guptas had been dark–age for women. The Gupta kings strictly practiced the Brahmincal law by upholding certain rules for women like sati and celibacy of widows. Further, in the medieval period, Muslims invaded India and introduced the *purdah* system.

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49. **Dr**. **B**.**R**. **Ambedkar on Federalism**, **Ethnicity and Gender Justice**, edited by Prof. Nazeer H. Khan, Zafar Ahmad Khan, Deep & Deep Publications, [2001], at p. 191.
50. Bhatia K.L., **Social Justice of Dr**. **B**.**R**. **Ambedkar**, Deep and Deep Publications, [1996], at p. 179.
51. Ibid, at p. 191.
52. Ibid, at p. 193.

[C] Status of Women in British Period

After ages of suffering suppression and enslavement, the new hope dawned in the lives of women with the introduction of British period in India.[53] The introduction of western education enlightened many Indians and many social workers started to purify the Hindu society from its evils. Father of social revolution **Mahatma Jyotirao Phule** worked hard for the abolition of sati system. He sacrificed his life for the education of girls, with all the hindrances of Brahmins, he gave the education to women in his life time, and Britishers encouraged him in this task.

In this respect, the British Government for the purpose to eradicate the social evils like, child marriage, *sati* system, *pardha* system, dowry prohibition, female infanticide, enacted various legislations. The various enactments of this kind were the **Sati Abolition Act**, 1829, the **Caste Disability Removal Act**, 1850, the **Hindu Widow Re–marriage Act**, 1856, the **Female Infanticide Prevention Act**, 1870 and the **Child Marriage Restraint Act**, 1929, for the protection and enlightment of position and status of women.[54]

[D] Women and Ambedkar Movement

Dr. **B**.**R**. **Ambedkar** made an in depth study of Hindu scriptures *i.e*., *smiritis* and *shastras*, the fundamentals of Hindu scriptures faith that ordained graded socio–religious, economic and cultural status to the *chaturvarnas* and threw the women in the irrationality, inhumanity and hollowness of Manusmirti.[55] In the light of these laws Dr. **B**.**R**. **Ambedkar** observed that Manu was basically responsible for the fall of Hindu woman. Dr. **B**.**R**. **Ambedkar** criticizing **Manu** said that:

"*A woman in the eyes of Manu was a thing of no value in India*".

According to Dr. **B**.**R**. **Ambedkar** even Muslim woman were influenced by the Indian environment created by many laws contrary to the laws of

53. Kanth Anjani, **Women and Law**, Jain Book Agency, [2008], at p. 70.
54. Kuppuswami A., **Indian Women's Rights**: **Myth and Reality**, S. Gogia Pub., Hyderabad, [2011], at p. 120.
55. Ahir D.C., **The Legacy of Dr**. **Ambedkar**, B.R. Pub. Corp., New Delhi, [1990], at p. 119.

Islamic sharaiah. Lamenting to the sad plight of Muslim women, Dr. **B**.**R**. **Ambedkar** observed, no Muslim girl has the courage to repudiate her marriage although it may be open to her on the ground that she was a child and that it was brought about by persons other than her parents. The Muslim wife cannot repudiate the marriage, the husband can always do it without having to show any cause. Dr. **B**.**R**. **Ambedkar** even opposed the Indian Muslim *purdah* system of Islam.[56]

In this respect, the **Hindu Code Bill** was drafted and introduced in the Constituent Assembly.[57] Being India's first law minister and chairman of the Drafting Committee of the Constituent Assembly, he thought it appropriate to liberate woman from the age old enslavement, exploitation, harassment by reforming the Hindu social laws created by Manu. Besides providing Constitutional guarantees to women Dr. **Ambedkar** introduced and passed four Acts relating to Hindu law such as:

1) The **Hindu Marriage Act**, 1955;
2) The **Hindu Succession Act**, 1956;
3) The **Hindu Minority and Guardianship Act**, 1956; and
4) The **Hindu Adoptions and Maintenance Act**, 1956.

Dr. **B**.**R**. **Ambedkar** took the care of woman as a member of the family and also of society. His aim was to reconstruct and reorganize the Hindu society from the grass–root level. He endeavoured to solve the problems relating marriage of girl child, re–marriage of widows, *sati* convention among Hindus.

Thus to conclude, the real contribution of Dr. **B**.**R**. **Ambedkar** is reflected in the protective discrimination scheme of reservation policy of the government envisaged under some provisions of Part III [Fundamental Rights], and many of Part IV provisions dealing with the constitutional mandate to

56. **Dr**. **B**.**R**. **Ambedkar on Federalism**, **Ethnicity and Gender Justice**, edited by Prof. Nazeer H. Khan, Zafar Ahmad Khan, Deep & Deep Publications, [2001], at p. 202.
57. **Babasaheb Ambedkar**: **Writings and Speeches**, Vol. 3, 1st edition by Education Department, Government of Maharashtra, [1990], re–printed by Dr. Ambedkar Foundation, [January, 2014], at p. 308.

ameliorate the conditions of the so–called Scheduled Castes, Scheduled Tribes and Other Backward Classes. Provisions like Article 17 prohibiting untouchability, Article 30 dealing with the protection of minorities, Article 32 guaranteeing the citizens constitutional right to enforce the fundamental rights in courts of law *etc*., are some of the notable examples. Articles 15[4] and 16[4] of Part III and Part XI, and Schedules V and VI of the **Indian Constitution** dealing with the upliftment of Scheduled Castes and Scheduled Tribes speaks clearly about the substantial and significant contribution of Dr. **BR Ambedkar** for the development of the unfortunate untouchables who continue to suffer under the clutches of caste imperialists and religious fundamentalists of modern India.

To conclude, the, Hindu social system is liable for the growth and evolution of the policy of reservation. Hindu Social System divided into various classes and castes, *i.e*., the upper castes and the lower castes. As a matter of fact, the Hindu social system denied the education to the women, Scheduled Castes and Scheduled Tribes. Justice was given to the women and Scheduled Castes and Scheduled Tribes only during the British period with the efforts of Dr. **B**.**R**. **Ambedkar**.

The policy of reservation is special preferential treatment, it is very much necessary to bring equality among unequals. Unless special provisions are made for the upliftment of women, SCs and STs, who are in no position to compete with the more advanced section of the society they will not be able to get any place.

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RIGHT TO EQUALITY UNDER THE INDIAN CONSTITUTION

I. General

Even before the Stoics, **Aristotle** expounded the concept of equality. He advocated *justitia distributiva*, according to which equal treatment should be accorded to those who were equal before the law.[1] But this equality of treatment was confined to citizens, from which category artisans and slaves were excluded. He excluded artisans and slaves from citizenship on the group that "*virtue is impossible for men whose time is consumed in manual labour*".[2] His concept of equality was, therefore, a limited concept and applied only to a designated section of the population. This lack of universal application of the concept of equality was not due to the fact that by nature slaves and artisans were less human in character, endowments and aspirations than the citizens of the city state, **but mainly due to the then prevailing social values which assigned inferior status to them**. It is submitted through the study that **Aristotle**, who imbibed the spirit and social values of the period, could not think in terms of extending the concept of equality to artisans and slaves.

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1 . Friedman W., **Legal Theory**, Stevens and Sons Ltd., London, [1960], at p. 385.
2 . Sabine G.H., **A History of Political Theory**, Dryden Press, [1973], at p. 95.

It is to be noted here that, the Roman jurists received the doctrine of equality from the Stoics, but they made a distinction between the law of nature, which postulated absolute equality, and the law of nations [*jus gentium*], which recognized slavery.[3] Even though the Christian doctrine was pledged to the fundamental equality of men, in the scholastic and catholic legal system this fundamental equality, as pointed out by Prof. **Friedman**, was "*subordinated to the acceptance of the existing social order as one ordained and to be borne– subject to certain principles of justice and charity*".

Thus, the evolution of the concept of equality shows that it has never been conceived as a static and eternal doctrine with an unchangeable meaning, and, on the other hand, it has been given, in consonance with the changing values of the society, different meaning at different times.

However under the Indian context, the spirit of equality pervades the provisions of the **Indian Constitution**, as the main aim of the founders of the Constitution was to create an egalitarian society where in social, economic and political justice prevailed and equality of status and opportunity are made available to all. Thus, the types and nature of rights enumerated in Part–III of the **Constitution** and the tenor of certain provisions included there in hardly support the proposition that the Fundamental Rights listed in the **Indian Constitution** are rooted in the enigmatic, abstract and Divine–willed doctrine of law of nature.

It is here to be noted that the inclusion of Fundamental Rights in the **Indian Constitution** seems to have been intended to serve two purposes. **The first purpose** is to secure the life and liberty of the people against arbitrary acts of the Government and not to keep the rights beyond State regulations and reasonable restrictions. Reasonableness of restriction is often determined with reference to social thinking on a particular matter. Stipulation of restrictions in Part–III under the **Indian Constitution**, which can be imposed on the rights by the State, bears out this purpose that lies behind the inclusion of Fundamental

3 . Friedman W., **Legal Theory**, Stevens and Sons Ltd., London, [1960], at p. 385.

Rights. Even the Supreme Court admitted in *A.K. Gopalan v. State of Madras*[4] that the most striking feature of the provisions of Part–III of the **Indian Constitution** is that they expressly seek to strike a balance between a written guarantee of individual rights and the collective interests of the community.[5] If the Constitution–makers had intended to render the rights sacrosanct such a balance would not have been struck by them. Further, the **second purpose** is to remove suspicion from the minds of members of minority communities and offer them sufficient safeguards.

The rights enumerated in Part–III of the **Indian Constitution** are based on social values of the present generation and not on the doctrine of natural law. Since the social values are not static and likely to change with the progress of time, the rights are liable to change or modifications to square with the changing values. No right can remain sacred in an organic instrument if it is not supported and sustained by the active opinion and social values of the society in which it is intended to be exercised. When such is the case it is difficult to say that rights should remain in the same form as they were introduced by the framers of the **Constitution** without any alteration even if there is change in social thinking and values. Attribution of immutability to these rights on the ground that **they are rooted in the doctrine of natural law would not only put these rights in constitutional straitjacket**, **but stultify future progress as well**. That might not be the intention of the Fathers of the Constitution is evident from the fact that they explicitly envisaged in the Constitution creation of a welfare state through gradual economic reconstruction and social reforms, which can be achieved by re–adjusting the rights if need be.

However, it is difficult to derive support from the scheme and provisions of the Constitution to the concept of immutable and transcendental rights. The theory of "*reserved rights*", which connotes paramountcy of rights cannot be attributed to the mere fact that "*the people*" are ordains of the Constitution. The fact that in Part–III certain rights are guaranteed against the State and certain other rights against individuals, and also the State and certain other rights against individuals and also the fact that Article 13[2] uses the expression "*the rights conferred by this Part*" make it clear that the Constitution gives no quarters to the theory of "*reserved rights*".

4 . [1950] SCR 74: AIR 1950 SC 27.
5 . Ibid, at pp. 85 and 108.

Therefore, the immutability of Fundamental Rights cannot be established on the non–existing theory of "*reserved rights*". Besides, the un–amenability of Fundamental Rights cannot be established under the Constitution except by strenuous and farfetched construction of the provisions of the Constitution, which construction, if accepted, would lead, to dangerous implications and absurd conclusions. The truth of the matter is that there is nothing in the Constitution to support the concept of immutable Fundamental Rights. Infact, even the majority view in *Golaknath* case[6] admits that the fundamental rights can be amended by **Constituent Assembly**, which may be summoned by Parliament acting under its residuary power. This very admission of amenability of Fundamental Rights disproves the earlier assertion that they are transcendental in character.

It seems, therefore, reasonable to think that the fundamental rights have been based on the values, which the society considers very dear. That being the position, it is difficult to subscribe to the view that the fundamental rights are unalterable, and they remain in the same form in which they were adopted and radiate the same meaning which they did at the time of their inclusion in the Constitution, for all time of come.

II. **Nature of the Right to Equality in the Draft Constitution**

The inclusion of a list of Fundamental Rights in a written Constitution was not a new idea to the freedom fighters and Constitution–makers of India. The idea of incorporation of a bill of rights had been conceived by the Founding Fathers of the **Constitution** of the **United States**, and it gained so much currency after the First World War that the Constitutions of many European States invariably included a bill of rights. But the Indian leaders felt the need of a bill of rights not because it was the fashion of the era but because it was necessary to restrain the government from acting arbitrarily.

As a matter of fact, there were two schools of thought in India, which subscribed to two divergent views on the inclusion of a list of fundamental rights in a written Constitution. **One school of thought**, which represented the strong protagonists of British constitutional system, spurned the idea of

6 . *Golaknath v. State Of Punjab* AIR 1967 SC 1643: [1967] 2 SCR 762.

including a list of Fundamental Rights in the **Constitution**. This school held the view that the inclusion of a bill of rights in a written Constitution was unnecessary, unscientific and more often harmful. This view later reflected in the report of the **Simon Commission** submitted prior to the formulation of the **Government of India Act** of 1935. It was observed that though bill of rights had been inserted in many **European Constitutions** but, after the war experience had not shown them to be of any great practical value. Abstract declarations, it opined, were useless unless there existed the will and means to make them effective.[7] This statement obviously had reference to the constitutions wherein declaration of Fundamental Rights remained as a platitudinous statement and pious wish without sufficient means to enforce them, but not to the constitutions which rendered the declaration of Fundamental Rights effective by enforcement measures stipulated in the Constitution itself.

Another school of thought, which represented the views of the majority of the Indian leaders, strongly favoured the inclusion of a list of fundamental rights in the **Constitution**. Eminent men, who belonged to this school of thought, had ample experience of arbitrary and ruthless measures taken by the British Executive in India against the national leaders during the freedom struggle and also of the steps taken by the government to suppress with impunity such important right as *freedom of speech*, *freedom of association*, *freedom of the press* and *personal liberty*. Naturally, therefore, they strongly felt that only a written guarantee of individual rights could deter any government from acting arbitrarily.

Besides this, there was another factor which influenced these men, and that was the existence of minority communities in India which were nursing a feeling of helplessness against any possible arbitrary rule of the majority community and a fear of insecurity. The protection of *cultural*, *religious* and *other interests* of the minority communities was rightly considered *sine qua*

7 . For quotations from the report of the **Simon Commission**, *See*, Basu D.D., **Commentary on the Constitution of India**, LexisNexis Butterworths Wadhwa, Nagpur, [2013], Vol. I, at p. 114.

non for a free democracy and just rule, and that could be ensured, they thought, only by written guarantee of individual rights. Many a leader of India, therefore, strongly felt the need of including a list of Fundamental Rights in the Constitution. Their determination reflected in the ***Nehru Committee Report*** of 1928 and later in the **Karachi Resolution on Fundamental Rights**. Finally, the ***Cabinet Mission***, which was solely manned by Englishmen, unequivocally subscribed to this view and in its statement of 1946 it strongly recommended the formation of an **Advisory Committee** to go into the question of formulation of a list of Fundamental Rights.[8] Thus, in 1947 when the leaders of India settled down in the Constituent Assembly to frame a Constitution for India it was decidedly settled that a list of Fundamental Rights should be included in the **Constitution**. Accordingly, the framers addressed themselves, *inter alia*, to the task of formulating a list of Fundamental Rights, and the result was Part III of the **Constitution**, which guaranteed to persons and citizens several Fundamental Rights.

Thus it is observed that, the incorporation of fundamental rights is, therefore, intended to serve two purposes, namely, [i] to prevent the executive from acting arbitrarily, and [ii] to ensure some amount of security and protection to the minorities of various types in India.

III. **Right to Equality under the Present Constitution**

The Preamble of the **Indian Constitution** was carved out of the "*Objectives Resolution*" adopted by the **Constituent Assembly** in January 1947, on the basis of which the entire Constitution was subsequently drafted. The great importance attached by the framers of the Constitution to the basic document, "*Objectives Resolution*", indicates the pre–eminent position given to the Preamble of the Constitution. The Objectives Resolution was variously described by the framers as "*something that breathes life in human minds*",[9] "*a pledge which is enshrined in the heart of every man*".[10] "*An expression of the*

8 . For the statement of the **Cabinet Mission**, See, Rau B.N., **India**'**s Constitution in the Making**, Orient Longmans, [1960], edited by Rao B. Shiva, at Appendix–A.

9 . Speech of Pt. J.L. Nehru, **Constituent Assembly Debates**, Vol. I, at p. 57.

10 . Speech of Anthony F.R., **Constituent Assembly Debates**, Vol. I, at p. 92.

surging aspirations of people",[11] "*a sort of a spiritual Preamble which will pervade every section, every clause and every schedule of the Constitution*",[12] and "*a sort of dynamic, a driving power*."[13]

It is however also, clear that the Preamble to the **Indian Constitution** is not merely a preface to the Constitution, but the very basis of it. Besides, the various descriptions of the perambulary declaration given expression to by the Constitution–makers, it also indicates the importance of and place of the pride given to, the Preamble in the constitutional scheme. Since it "*pervades every section, every clause and every schedule of the Constitution*", it is, unlike the Preambles in many other Constitutions, a sort of telescope through which, probably only through which, one can perceive clearly the intentions of the framers engraved on various parts of the Constitution. In view of these facts, it is difficult to minimize the value of the Preamble to the **Indian Constitution** as an aid to construe the provisions of the Constitution. As a matter of fact, the Judiciary in India, although hesitant earlier in taking the help of the Preamble,[14] has been now seeking increasingly the aid of the Preamble in interpreting specific provisions of the Constitution.[15]

The Preamble of the **Indian Constitution** states that the people of India have solemnly resolved "***to secure to all its citizens***: ***Justice***, *social*, *economic* and *political*.....; ***Equality*** *of status and of opportunity*". The Objectives Resolution from which the above phrase has been carved out states:

"The Constituent Assembly declares its firm and solemn resolve.... to draw up for her future governance a Constitution—

i) 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....; and
ii) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes."

Thus, the concept of **socio–economic justice** has been incorporated in the Preamble, but its actual connotations and intentions of the framers of the

11 . Speech of Alladi Krishnaswami Ayyar, **Constituent Assembly Debates**, Vol. I, at p. 138.
12 . Speech of Gadgil N.V., **Constituent Assembly Debates**, Vols. II–III, at p. 259.
13 . Ibid.
14 . *A.K. Gopalan v. State of Madras* AIR 1950 SC 50: [1950] SCR 88. See also, *In–re Berubari Union and Exchange of Enclaves* [1960] SCJ 933.
15 . *Golaknath v. State of Punjab* [1967] 2 SCJ 486.

Constitution incorporating it may be gathered from the opinions expressed by the members of the Constituent Assembly.

At this stage for the research study it is necessary to lay emphasis on the historical aspect of relating to socio–economic justice in the Objectives Resolution on which two different opinions were expressed by some members in the Constituent Assembly. According to **one opinion**, the phrase should have been so framed as to express in clear terms the acceptance of the doctrine of socialism. Putting forward this view, Dr. **B**.**R**. **Ambedkar** stated that if this Resolution:

"*……has a reality behind it and a sincerity…, I should have expected some provision whereby it would have been possible for the State to make economic, social and political justice a reality and I should have from that point of view expected the Resolution to state in most explicit terms that in order that there may be social and economic justice in this country, there would be nationalization of industry and nationalization of land. I do not understand how it could be possible for any future Government which believes in doing justice, socially, economically and politically, unless its economy is a socialistic economy*."[16]

The above view was not shared by others who opined that the Constituent Assembly had no socialistic mandate to incorporate in the **Constitution** such an economic policy of doctrinaire character.[17] It was also felt by some that incorporation of a particular economic doctrine might not be very conducive to the smooth working of the democratic apparatus. **Alladi Krishnaswami Ayyar**, therefore, pointed out that the **Constitution** should not be rendered rigid by incorporating explicitly a particular economic doctrine, and that it should "*contain the necessary elements of growth and adjustment needed for a progressive society*."[18] Speaking in support of the phrase, Pt. **J**.**L**. **Nehru**, who was the sole architect of the Objectives Resolution, said:

"*If, in accordance with my own desire, I had put in that we want a socialist state, we would have put in something which may be agreeable to many and may not be agreeable to some and we wanted this Resolution not to*

16 . **Constituent Assembly Debates**, Vol. I, at pp. 97–98.
17 . See the speech of Masani M.R., **Constituent Assembly Debates**, Vol. I, at p. 91.
18 . **Constituent Assembly Debates**, Vol. I, at p. 138.

be controversial in regard to such matters. *Therefore, we have laid down, not theoretical words and formulae, but rather the content of the thing we desire*."[19]

In view of the explanatory statement of Pt. **J**.**L**. **Nehru**, the phrase dealing with socio–economic justice was accepted without any change.

The various views of the members of the Constituent Assembly and final acceptance of the phrase without any change clearly indicates that the framers unequivocally laid down socio–economic justice as a goal to be achieved by the future governments in India, and rejected the idea of incorporating in the Constitution particular means to achieve it. Thus, every government which purports to function within the constitutional framework is duty–bound to strive to secure socio–economic justice for the citizen, but what means it should adopt to achieve the goal is left to each government to decide in accordance with particular mandate it received from the people in each election. If a particular government is of the opinion that *laissez–faire* economy is the best means to achieve the socio–economic justice and if the opinion of the government is in consonance with the mandate received from the people in the general election, there is nothing in the Constitution to prevent government from pursuing the chosen path to achieve the goal. But no government can ignore to try to circumvent the constitutional mandate, namely, the socio–economic justice, with impunity.

At this stage, it is therefore, necessary to know the meaning of the concept of socio–economic justice. Statements made by certain members in the Constituent Assembly explaining the concept help us to discern its meaning. The phrase in the Objectives Resolution pertaining to socio–economic justice, in **M**.**R**. **Marsani**'**s** view, clearly rejects the present social structure and the social *status quo*. "*It also means*," according to him, "*that the people of this country, so far as any Constitution can endow them, will get social security–the right to work or maintenance by the community*."[20] Proceeding further he said that the Resolution also "*envisages far–reaching social change–social*

19 . **Constituent Assembly Debates**, Vol. I, at p. 60.
20 . Ibid, at p. 90.

justice in the fullest sense of the term–but it works for those social changes through the mechanism of political democracy and individual liberty."[21]

On the other hand, **Seth Govind Das** said:

"*Keeping in view the condition of the world and the plight of India, we can say that our Republic will be both democratic and socialist…if true peace is to be realized, it can only be realized through socialism. No other system can give us true peace*."[22]

As to the economic justice, **N.V. Gadgil** said that:

"*It could only be secured if the means of production in the country ultimately came to be socially owned. Private enterprises might be there, but in a limited manner*."[23]

Furthermore, referring to socio–economic justice contemplated in the Resolution, Dr. **S. Radhakrishnan** said that it intended to effect a smooth and rapid transition from a state of *serfdom* to one of freedom.[24] Then, emphasizing the need for such a change, he said:

"*It is therefore necessary that we must remake the material conditions; but apart from remaking the material conditions, we have to safeguard the liberty of the human spirit*."[25]

Thus, this perambulary concept of socio–economic justice has been translated by the framers into specific provision in Part–III and Part–IV in the present **Indian Constitution**. However, this constitutional goal of socio–economic justice can be achieved only if the courts adopt a pragmatic and sociological approach without making much ado about the rights in interpreting socio–economic legislations, which contemplate change in the social structure, effect a transition from *serfdom* to freedom or attempt to remake material conditions of the society. The fact that such a goal has been embodied in the Preamble itself testifies its value–signifying predominant position in the Constitution.

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21 . **Constituent Assembly Debates**, Vol. I, at p. 92.
22 . Ibid, at pp. 105–106.
23 . **Constituent Assembly Debates**, Vols. II–III, at p. 259.
24 . Ibid, at p. 253.
25 . Ibid, at p. 257.

However, there had been also a few good reasons, which made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing, the main political party, the Congress, had for long been demanding these rights against the British rule. During the British rule in India, the rulers on a very wide scale violated human rights. Therefore, the framers of the Constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights.

Secondly, the Indian society is fragmented into many religions, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some rights, which may be enforced against the government, which may become arbitrary at times. Though democracy was being introduced in India, yet democratic traditions were lacking, and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimized by having a Bill of Rights in the Constitution.

The need to have the Fundamental Rights was to very well accepted on all hands that in the Constituent Assembly, the point was not even considered whether or not to incorporate such rights in the Constitution. In fact, the fight all along was against the restrictions being imposed on them and the effort all along was to have the Fundamental Rights on as broad and pervasive a basis as possible.[26]

It is to be asserted here that the Fundamental Rights are a necessary consequence of the declaration in the Preamble to the **Constitution** that the people of India have solemnly resolved to constitute India into a *sovereign*, *democratic*, *republic*, and to secure to all its citizens *justice*, *social*, *economic*, and *political*; ***liberty of thought***, *expression*, *belief*, *faith* and *worship*; ***equality of status*** and ***opportunity***.

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26 . For an analysis of discussion on ***Fundamental Rights in the Constituent Assembly***; *see*, Granvile Austin, **The Indian Constitution**: **Cornerstone of a Nation**, Clarendon Press, Oxford, [1966], at pp. 50–113.

The Fundamental Rights in India, apart from guaranteeing certain basic civil Rights and freedoms to all, also fulfil the important function of giving few safeguards to minorities, outlawing discrimination and protecting religious freedom and cultural rights. During emergency, however, some curtailment of the Fundamental Rights does takes place. But all these curtailments of the Fundamental Rights are of a temporary nature.

The framers of the **Indian Constitution**, learning from the experiences of the **USA**, visualized a great many difficulties in enunciating the Fundamental Rights in general terms and in leaving it to the courts to enforce them, *viz*., the Legislature not being in a position to know what view the courts would take of a particular enactment, the process of legislation becomes difficult; there arises a vast mass of litigation about the validity of the laws and the judicial opinion is often changing so that law becomes uncertain; the judges are irremovable and are not elected; they are, therefore, not so sensitive to public needs in the social or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in judicial hands.[27] Even then, certain rights especially economic rights have had to be amended from time to time to save some economic programmes.

The Fundamental Rights in the **Indian Constitution** have been grouped under seven heads as follows:

a) **Right to equality** comprising Articles 14 to 18, of which Article 14 is the most important.
b) **Right to freedom** comprising Articles 19 to 22, which guarantee several freedoms, the most important of which is the freedom of speech.
c) **Right against exploitation** consists of Articles 23 and 24.
d) **Right to freedom of religion** is guaranteed by Articles 25 to 28.
e) **Cultural and educational rights** are guaranteed by Articles 29 and 31.
f) **Right to property** is now very much diluted and is secured to some extent by Articles 30–A, 31–A, 31–B and 31–C.
g) **Right to constitutional remedies** is secured by Articles 32 to 35.

In this series of constitutional provisions **Article 14** is the most significant relating to the research study. It has been given a highly activist

27 . Rau B.N., **India's Constitution in the Making**, Orient Longmans, [1960], p. 245.

magnitude in the recent years by the courts, and thus, it generates a large number of court cases. In recent days, Article 14 is the genus while Articles 15 and 16 are the species. Articles 14, 15 and 16 are constituents of a single code of constitutional guarantees supplementing each other.

In situations not covered by Articles 15 to 18, the general principle of equality embodied in Article 14 is attracted whenever discrimination is alleged. The goal set out in the Preamble to Constitution regarding status and opportunity is embodied and concretized in Articles 14 to 18.

It may be worthwhile to note that Article 17 of the **Universal Declaration of Human Rights**, 1948 declares that all are *equal before the law* and are entitled without any discrimination to the *equal protection of laws*. By and large the same concept of equality inheres in Article 14 of the **Indian Constitution**.

It may be noted that the right to equality has been declared by the Supreme Court as the basic feature of the Constitution. The Constitution is wedded to the concept of equality. The Preamble to the Constitution emphasizes upon the principle of equality as basic feature to the Constitution. This means that even a constitutional amendment offending the right to equality will be declared invalid. Neither Parliament nor any State Legislature can transgress the principle of equality.[28] This principle has been recently reiterated by the Supreme Court in *M.G. Badappanvar v. State of Karnataka*[29] in the following words:

"*Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic structure of the Constitution of India*."

Accordingly, Article 14 runs as follows:

"*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*."

28 . *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461: [1973] 4 SCC 225; *Indra Sawhney v. Union of India [II]* AIR 2000 SC 498: [2000] 1 SCC 168.

29 . [2001] 2 SCC 666: AIR 2001 SC 260. Also see, *T.M.A. Pai Foundation v. State of Karnataka* [2002] 8 SCC 481; *NTR University of Health Science Vijaywada v. G. Babu Rajendra Prasad* [2003] 5 SCC 350; *Islamic Academy of Education and Anr v. State of Karnataka and Ors* [2003] 6 SCC 697; *Saurabh Chaudri and Ors v. Union of India & Ors* [2003] 11 SCC 146; *P.A. Inamdar v. State of Maharashtra* AIR 2005 SC 3226.

This provision corresponds to the equal protection clause of the 14th *Amendment* of the **US Constitution**, which declares:

"*No State shall deny to any person within its jurisdiction the equal protection of the laws*."

Two concepts are involved in Article 14, *viz*., "***equality before law***" and "***equal protection of laws***".

The **first** is a negative concept which ensures that there is no special privilege in favour of any one, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the **Dicean** concept of the "*rule of law*" in Britain.[30] This, however, is not an absolute rule and there are a number of exceptions to it, *e*.*g*., foreign diplomats enjoy immunity from the country's judicial process; Article 361 extends immunity to the **President of India** and the **State Governors**; **public officers** and **judges** also enjoy some protection, and some special groups and interests, like the trade unions, have been accorded special privileges by law.

The **second** concept, "*equal protection of laws*", is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences of circumstances. Equal protection of the laws does not postulate equal treatment of all persons without distinction. What it postulates is the application of the same laws alike and without discrimination to all person similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of *race*, *religion*, *wealth*, *social status* or *political influence*.[31]

Article 14 thus means that "*equals should be treated alike*"; it does not mean that "*unequals ought to be treated equally*". Persons who are in the like circumstances should be treated equally. On the other hand, where persons or

30 . Wade E.C.S. and Phillips G.G., **Constitutional and Administrative Law**, English Language Book Society and Longman Group, [1978], at p. 87.

31 . *Jagannath Prasad Sharma v*. *State of Uttar Pradesh* AIR 1961 SC 1245: [1962] 1 SCR 151; *Mohd*. *Shaheb Mahboob v*. *Dy*. *Custodian* AIR 1961 SC 1657: [1962] 2 SCR 371.

groups of persons are not situated equally to treat them as equals would itself be violative of Article 14 as this would itself result in inequality. Accordingly, to apply the principle of equality in a practical manner, **the courts have evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory**.[32]

A Legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on an equal footing. The Supreme Court has underlined this principle thus:

"*Article 14 of the **Indian Constitution** ensures equality among equals*: *its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification*. *A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstance, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law*."[33]

Article 14 forbids class legislation; it does not forbid reasonable classification of persons, objects and transactions by the Legislature for the purpose of achieving specific ends. Classification to be reasonable should fulfil the following two tests:

a) It should not be arbitrary, artificial or evasive. It should be based on an *intelligible differentia*, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.
b) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.[34]

What is however necessary is that there must be a substantial basis for making the classification and that there should be a *nexus* between the basis of classification and the object of the statute under consideration. In other words, there must be some rational *nexus* between the basis of classification and the object intended to be achieved. Therefore, mere differentiation or inequality of

32 . *Ashutosh Gupta v. State of Rajasthan* [2002] 4 SCC 34: AIR 2002 SC 1533.
33 . *Western Uttar Pradesh Electric Power and Supply Co. Ltd. v. State of Uttar Pradesh* AIR 1970 SC 21–24: [1969] 1 SCC 817. Also see, *R.K. Garg v. Union of India* AIR 1981 SC 2138: [1981] 4 SCC 675; *In Re: Special Courts Bill* AIR 1979 SC 478: [1979] 1 SCC 380; *State of Uttar Pradesh v. Kamla Palace* AIR 2000 SC 633.
34 . *Laxmi Khandsari v. State of Uttar Pradesh* AIR 1981 SC 873, 891: [1981] 2 SCC 600.

treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract Article 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object, which the Legislature has in view in making the law in question.[35] As the Supreme Court has explained:

"*The differentia which is the basis of the classification and the Act are distinct things and what is necessary is that there must be a nexus between them*".[36]

As the Supreme Court has observed recently in *Thimmappa* case:

"*When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not* ***per se*** *amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view*."[37]

The Supreme Court has however warned against over–emphasis on classification. The Court has explained that the doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality, over–emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Article 14 of the **Indian Constitution**. The over–emphasis on classification would inevitably result in substitution of the doctrine of classification for the doctrine of equality... Lest, the classification would deny equality to the larger segments of the society.[38]

It is here to be submitted that whether a classification adopted by a law is reasonable or not is a matter for the courts to decide.[39] The question of reasonableness of classification has arisen in innumerable cases. The twin tests

35 . *Jaila Singh v. State of Rajasthan* AIR 1975 SC 1436: [1976] 1 SCC 682.
36 . *In Re*: *Special Courts Bill, 1978* AIR 1979 SC 478: [1979] 1 SCC 380.
37 . *K. Thimmappa v. Chairman, Central Board of Directors* AIR 2001 SC 467: [2001] 2 SCC 259.
38 . *LIC of India v. Consumer Education and Research Centre* AIR 1995 SC 1811, 1822: [1995] 5 SCC 482. See also, *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394.
39 . *Caterpillar India Pvt. Limited v. Western Coalfield Limited and Ors* [2007] 11 SCC 32.

applied for the purpose is, however, quite flexible. The courts, however, show a good deal of deference to legislative judgment and do not lightly hold a classification unreasonable. A study of the cases will show that many different classifications have been upheld as constitutional.[40] There is no closed category of classification; the extent, range and kind of classification depend on the subject matter of the legislation, the conditions of the country, the economic, social and political factors work at a particular time.

The Supreme Court has recently explained the principle of initial presumption of validity as follows in *Ashutosh Gupta v. State of Rajasthan*:[41]

"*There is always a presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The presumption of constitutionality stems from the wide power of classification, which the legislature must, of necessity possess in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people.*"

The Supreme Court has explained the rationale underlying this rule as follows:

"*Many a time, the challenge is based on the allegation that the impugned provision is discriminatory as it singles out the petitioner for hostile treatment, from amongst persons who, being situated similarly, belong to the same class as the petitioner. Whether there are other persons who are situated similarly as the petitioner is a question of fact. And whether the petitioner is subjected to hostile discrimination is also a question of fact. That is why the burden to establish the existence of these facts rests on the petitioner. To cast the burden of proof in such cases on the state is really to ask it to prove the negative that no other persons are situated similarly as the petitioner and that the treatment meted out to the petitioner is not hostile.*"[42]

However, it is to be lay emphasis here that Article 14 can apply only when discrimination results from laws emanating from one single source and not when one law enacted by one legislature is different from another law

40 . *Swaroop Vegetables Products Industries v. State of Uttar Pradesh* AIR 1984 SC 20: [1983] 4 SCC 24.

41 . [2002] 4 SCC 34: AIR 2002 SC 1533.

42 . *Deena v. Union of India* AIR 1983 SC 1154: [1984] 1 SCC 29.

enacted by another legislature. Article 14 does not authorize the striking down of the law of one State on the ground that, in contrast with the law of another State on the same subject, its provisions are discriminatory; nor does Article 14 contemplate the law of the Centre or of a State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two. The sources of authority for the two being different, Article 14 can have no application.

When a statute is impugned under Article 14, it is the function of the court to decide whether the statute is so arbitrary or unreasonable that it has to be struck down. At best, a statute upon a similar subject deriving its authority from another source can be referred to, if its provisions have been held to be unreasonable, or have stood the test of time, only for the purpose of indicating what may be said to be reasonable in the context.[43]

The benefit of "*equality before law*" and "*equal protection of law*" accrues to every person in India whether a citizen or not. As the Supreme Court has observed on this point:

> "*We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and the equal protection of the laws*".[44]

The question of reasonableness of classification *vis–à–vis* Article 14 in the principles stated above has arisen before the courts in a large number of cases. Some of these cases are noted below.

Special provisions can be made by a Legislature to protect and preserve the **economic interests** of persons belonging to the Scheduled Castes and Scheduled Tribes and to prevent their exploitation.[45]

43 . *State of Madhya Pradesh v. Mandavar* AIR 1954 SC 493: [1955] 1 SCR 599; *Bar Council, Uttar Pradesh v. State of Uttar Pradesh* AIR 1973 SC 231: [1973] 1 SCC 261; *Sant Lal Bharti v. State of Punjab* AIR 1988 SC 485: [1988] 1 SCC 366; *State of Tamil Nadu v. Ananthi Ammal* AIR 1995 SC 2114: [1995] 1 SCC 519.

44 . *Faridabad Ct–Scan Centre v. D.G. Health Services and Ors* AIR 1997 SC 3801: [1997] 7 SCC 752. Also see, *Chairman, Railway Board v. Chandrima Das* AIR 2000 SC 988, 997: [2000] 2 SCC 465.

45 . *Manchegowda v. State of Karnataka* AIR 1984 SC 1151: [1984] 3 SCC 301.

In *Mohan Kumar Singhania v. Union of India*,[46] the Supreme Court has ruled that each of the various civil services, namely, IAS, IFS, IPS, Group A Services and Group B Services, is a "*separate and determinate*" service forming a distinct cadre and that each of the services is founded on intelligible differentia which on rational grounds distinguishes persons grouped together from those left out and that the differences are "*real and substantial*" having a "*rational and reasonable nexus*" to the "*objects sought to be achieved*."

Further, the Supreme Court has stated in *Gursharan Singh* case,[47] that the guarantee of "*equality before law*" is a positive concept. A person cannot enforce it in a negative manner. Therefore, if an illegality or irregularity is committed by the state in favour of a person or a group of persons, others cannot claim that the same irregularity or illegality be also committed in their favour on the principle of equality before law.

The Supreme Court has decided a case relating to mentally retarded pregnant women's consent for abortion. Chief Justice **K.G. Balakrishnan** has held that:

"*There is no doubt that a woman's right to make reproductive choices is also a dimension of '**personal liberty**' as understood under Article 21 of the **Constitution of India**. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a '**compelling state interest**' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the **Medical***

46 . AIR 1992 SC 1: [1992] Supp 1 SCC 594.

47 . *Gursharan Singh v. New Delhi Municipal Commissioner* AIR 1996 SC 1174–1179: [1996] 2 SCC 459. Also see, *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain* [1997] 1 SCC 35, 45; *State of Haryana v. Ram Kumar Mann* [1997] 3 SCC 321; *Jalandhar Improvement Trust v. Sampuran Singh* AIR 1999 SC 1347: [1999] 3 SCC 494; *C.S.I.R. v. Ajay Kumar Jain [Dr.]* AIR 2000 SC 2710.

***Termination of Pregnancy Act**, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices*."[48]

Hence, under the *equal protection of the laws*, forcible sterilization or abortion of mentally persons [*eugenics theory*] it was held that such measures is anti–democratic and violative of Article 14 of the **Constitution**.[49]

Therefore, it must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hops or fleeting promises and so long as they find a place in the **Constitution**.

However, the Supreme Court has even enunciated the doctrine of implied Fundamental Rights. The Court has asserted that in order to treat a right as Fundamental Right it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes occurring in the country may entail the recognition of new rights and the law in its eternal youth grows to meet social demands.[50]

IV. **No Discrimination on Grounds of Religion *etc***.

Article 15[1] specifically bars the state from discriminating against any citizen of Indian on grounds only of *religion*, *race*, *caste*, *sex*, *place of birth*, or any of them.

Further Article 15[2] prohibits subjection of a citizen to any disability, liability, restriction or condition on grounds only of *religion*, *race*, *caste*, *sex*, *place of birth* with regard to:

a) access to shops, public restaurants, hotels and places of public entertainment; or
b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

48 . *Suchita Srivastava v. Chandigarh Administration* [2009] 9 SCC 1.
49 . Ibid, at para 24.
50 . *Unni Krishnan J.P. v. State of Andhra Pradesh* AIR 1993 SC 2178: [1993] 1 SCC 645l.

Furthermore, under Article 15[3], the state is not prevented from making any **special provision for women and children**.

In addition, Article 15[4] or Article 29[2] does not prevent the state from making any **special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes**.

Article 15[5] added by the **Constitution** [*93rd Amendment*] **Act**, 2005 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 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 referred to in Article 30[1]**.[51]

No citizen of India can claim reservation as a matter of right and accordingly no writ *mandamus* can be issued.[52]

[A] Article 15[1]

Article 15[1] prohibits differentiation on certain grounds mentioned above. Commenting Article 15[1] the Supreme Court observed:

"*Article 15[1] prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it*."[53]

The word "*discrimination*" in Article 15[1] involves an element of unfavourable bias. The use of the word "*only*" in the Article 15[1] and 15[2] connotes that what is discountenanced is discrimination purely and solely on account of any of the ground mentioned. A discrimination based on any of these

51 . *Ashok Kumar Thakur v. Union of India* [2008] 6 SCC 1, at pp. 717, 718: [2008] 3 MLJ 1105. The **Constitution** [*93rd 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*". See also, *Indian Medical Association v. Union of India* AIR 2011 SC 2365, at p. 2417: [2011] 7 SCC 179.

52 . *Andhra Pradesh Public Service Commission v. Baloji Badhavath* [2009] 5 SCC 1: [2009] 5 JT 563. See also, *Gulshan Prakash v. State of Haryana* AIR 2010 SC 288: [2010] 1 SCC 477; *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14.

53 . *Valsamma Paul v. Cochin University* AIR 1996 SC 1011, at p. 1019: [1996] 3 SCC 545.

grounds and also on other grounds is not hit by Article 15[1] and 15[2] though it may be hit by Article 14.[54] If religion, sex, caste, race or place of birth is merely one of the factors which the Legislature has taken into consideration, then it would not be discrimination only on the ground of that fact. But if the Legislature has discriminated only on one of these grounds and no other factor could possibly have been present, then, undoubtedly, the law would offend against Article 15[1].

Further, to adjudge the validity of an Act under these Articles, a distinction is to be drawn between the object underlying the impugned Act and the mode and manner adopted therein to achieve that object. The object underlying the Act may be good or laudable but its validity has to be judged by the method of its operation and its effect on the fundamental right involved. The crucial question to ask therefore is whether the operation of impugned Act results in a prohibition only on any of the grounds mentioned in Article 15[1] and 15[2]. It is the effect of the impugned Act that is to be considered and if its effect is to discriminate on any of the prohibited grounds, it is bad.

[B] Article 15[2]

Article 15[2], mentioned above, contains a prohibition of general nature and is not confined to the state only. On the basis of this provision, it has been held that if a section of the public puts forward a claim for an exclusive use of public well, it must establish that the well was dedicated to the exclusive use of that particular section of the public and not to the use of general public.[55] A custom to that effect cannot be held to be reasonable, or in accordance with enlightened modern nation of utility of public wells because of the force of Article 15.

[C] Article 15[3]

Article 15[3] and 15[4] constitute exceptions to Article 15[1] and 15[2].

According to Article 15[3], the State is not prevented from making any "*special provision*" for women and children.

What does the expression "*special provision*" for women mean? The "*special provision*" which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. Thus, Article 15[3]

54 . *Narasappa v. Shaik Hazrat* AIR 1960 Mys 59.
55 . *Arumugha v. Narayana* AIR 1958 Mad 282.

includes the power to make reservation for women. Talking about the provision giving preference to women, the Court has said that this provision does not make any reservation for women. It amounts to affirmative action. It operates at the initial stage of appointment and when men and women candidates are equally meritorious. Under Article 15[3], both reservation and affirmative action are permissible in connection with employment or posts under the State. Article 15 is designed to create an egalitarian society.

Article 15[1] and 15[2] prevent the State from making any discriminatory law on the ground of gender alone. The Constitution is thus characterized by gender equality. The Constitution insists on equality of status and it negates gender bias. Nevertheless, by virtue of Article 15[3], the State is permitted, despite Article 15[1], to make any special provision for women, thus carving out a permissible departure from the rigours of Article 15[1]. Articles 15 and 16 do not prohibit special treatment of women. The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex. In English law "*but–for–sex*" test has been developed to mean that no less favourable treatment is to be given to women on gender based criterion which would favour the opposite sex and women will not be deliberately selected for less favourable treatment because of their sex. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally charted affirmative action plan.[56]

Article 15[3] recognizes the fact that the women in India have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio–economic activities of the nation on a footing of equality. The purpose of Article 15[3] is to eliminate this socio–economic backwardness of women and to empower them in such a manner as to bring about effective equality between men and women. The object of Article 15[3] is to strengthen and improve the status of women. Article 15[3]

56 . *Air India Cabin Crew Assn. v. Yeshaswinee Merchant* [2003] 6 SCC 277: AIR 2004 SC 187.

thus relieves the state from the bondage of Article 15[1] and enables it to make special provisions to accord socio–economic equality to women.

The scope of Article 15[3] is wide enough to cover the entire range of State activity including that of employment. Article 15[3] is a special provision in the nature of a proviso qualifying the general guarantees contained in Articles 14, 15[1], 15[2], 16[1] and 16[2].

A doubt has been raised whether Article 15[3] saves any provision concerning women, or saves only such a provision as is in their favour.[57] The better view would appear to be that while the State can make laws containing special provisions for women and children, it should not discriminate against them on the basis of their gender only. This appears to be the cumulative effect of Article 15[1] and 15[3]. Although there can be no discrimination in general on the basis of sex, the Constitution itself provides for special provisions being made for women and children by virtue of Article 15[3]. Reading Article 15[3] and 15[1] together, it seems to be clear that while the state may discriminate in favour of women against men, it may not discriminate in favour of men against women. However, only such provisions can be made in favour of women under Article 15[3] as are reasonable and which not altogether obliterate or render illusory the constitutional guarantee mentioned in Article 15[2].

The operation of Article 15[3] can be illustrated by the following few cases:

a) Under Section 497 of the **Indian Penal Code**, the offence of adultery can be committed only by a male and not by female who cannot even be punished as an abettor. As this provision makes a special provision for women, it is saved by Article 15[3].[58]

57 . Justice Mukharji, in *Mahadeb v. [Dr.] Sen* AIR 1951 Cal 563. Also see, *Anjali v. State of West Bengal* AIR 1952 Cal 825.

58 . *Yusuf Abdul Aziz v. State of Maharashtra* AIR 1954 SC 321: [1954] SCR 930. Also see, *Sowmithri Vishnu v. Union of India* AIR 1985 SC 1618: [1985] Supp SCC 137; *Revathi v. Union of India* AIR 1988 SC 835: [1988] 2 SCC 72.

b) The discretionary nature of the power of judicial review is illustrated when the Supreme Court even after finding that the reservation policy of the State Government in force was contrary to Articles 14, 15 and 16 took into consideration the fact that a large number of young girls below the age of 10 years were taught in primary schools and that it would be preferable that such young girls are taught by women and held that reservation of 50 percent in favour of female candidates was justified.[59]

c) Where a female employee's grievance was the writing of a sensuous letter expressing love to her, admiring her qualities and beauty, and extending unsolicited help, it was held that the female employee's grievance ought to have been looked into according to the directions given in *Vishaka* case.[60]

d) Section 497of the **Criminal Procedure Code**, 1973, prohibited release of a person accused of capital offence on bail except a woman or a child under 16 or a sick man. The provision has been held valid as it metes out a special treatment to women which is consistent with Article 15[3].[61]

e) In *Walter Alfred Baid*, *Sister Tutor [Nursing] Irwin Hospital v*. *Union of India*,[62] a rule making male candidates ineligible for the post of Senior Tutor in the School of Nursing was held to be violative of Article 16[2] and was not saved by Article 15[3].

f) A rule granting a special allowance to the women principals working in a wing of the Punjab Educational Services was challenged on the ground that their male counterparts were not given the same benefit although both performed identical duties and were part of the same service. The constitutional validity of the rule was challenged under Article 16[2].[63]

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59 . *Rajesh Kumar Gupta v*. *State of Uttar Pradesh* [2005] 5 SCC 172: AIR 2005 Bom 470.

60 . *Vishaka v. State of Rajasthan* [1997] 6 SCC 241: AIR 1997 SC 3011; *D.S. Grewal v*. *Vimmi Joshi* [2009] 2 SCC 210: [2009] 1 JT 400.

61 . *Mt*. *Choki v*. *State of Rajasthan* AIR 1957 Raj 10. This provision now is Section 437 of the **Criminal Procedure Code**, 1973. Also see, *Nirmal Kumar v*. *State of Rajasthan* [1992] Cri.LJ 1582; *Shehat Ali v*. *State of Rajasthan* [1992] Cri.LJ 1335.

62 . AIR 1976 Del 302.

63 . *Shamsher Singh v. State of Punjab* AIR 1970 P&H 372.

The Court stated that if a particular provision squarely falls within the ambit of Article 15[3], it cannot be struck down merely because it may also amount to discrimination solely on the basis of sex. "*Articles 14, 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, Clause [3] of Article 15 can be invoked for construing and determining the scope of Article 16[2]*."

The Court however ruled that "only such special provisions in favour of women can be made under Article 15[3], which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16[2].

g) There existed a common cadre of Probation Officers for males and females. However, for the post of the Head of the Institute for destitute women, only females were regarded as eligible. This was challenged as being discriminatory.

   Keeping in view the nature of duties to be performed, the State Government may decide that only a woman will head a women's institution. Article 15[3] enables the State to make any special provision for women and children and so the impugned rule could not be held to be unconstitutional.[64]

h) The Bombay Government enacted a statutory provision reserving a few seats for women in the municipalities. The provision was challenged as discriminatory. Rejecting the challenge in *Dattatraya v. Motiram More*,[65] and the Court went to state:

   "*Even if in making special provision for women for giving them reserved seats the State has discriminated against men, by reason of Article 15[3] the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex*."

i) The most significant pronouncement on Article 15[3] the recent Supreme Court case *Government of Andhra Pradesh v. P.B. Vijay Kumar*.[66]

64 . *B.R. Acharya v. State of Gujarat* [1988] Lab IC 1465.
65 . AIR 1953 Bom 311.
66 . AIR 1995 SC 1648: [1995] 4 SCC 520.

The Supreme Court has ruled in the instant case that under Article 15[3], the State may fix a quota for appointment of women in government services. Also, a rule saying that all other things being equal, preference would be given to women to the extent of 30 percent of the posts was held valid with reference to Article 15[3].

It was argued that reservation of posts or appointments for any backward class is permissible under Article 16[2] but not for women and so no reservation can be made in favour of women as it would amount to discrimination on the ground of sex in public employment which would be violative of Article 16[2]. **Rejecting this argument**, **the Supreme Court has ruled that posts can be reserved for women under Article 15[3] as it is much wider in scope and covers all State activities**. While Article 15[1] prohibits the State from making any discrimination *inter alia* on the ground of sex alone, virtue of Article 15[3], **the State may make special provisions for women**. Thus, Article 15[3] clearly carves out a permissible departure from the rigours of Article 15[1].

The Court has emphasized that an important limb of the concept of gender equality is creating job opportunities for women. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15[3]. "*To say that under Article 15[3], job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article*. *Making special provision for women in respect of employment or posts under the State is an integral part of Article 15[3]*." This power conferred by Article 15[3] is not whittled down in any manner by Article 16.

j) If separate colleges or schools for girls are justifiable, rules providing appointment of a lady principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. Hence, rules empowering the authority to appoint only a lady principal or a lady teacher or a lady

doctor or a woman Superintendent are not violative of Articles 14, 15 or 16.[67]

[D] Article 15[4]

Article 15[4] confers a discretion and does not create any constitutional duty or obligation. Hence no *mandamus* can be issued either to provide for reservation or for relaxation.[68]

Reservations are possible under Article 15[4] for the advancement of any backward class of citizens or for Scheduled Castes and Scheduled Tribes. Rejecting the argument that Article 15[4] envisages "*positive action*" while Article 16[4] is a provision warranting programmes of "*positive discrimination*", the Supreme Court has observed in *Indra Sawhney v. Union of India*:[69]

"*We are afraid we may not be able to fit these provisions into this kind of compartmentalization in the context and scheme of our constitutional provisions. By now, it is well settled that reservation in educational institutions and other walks of life can be provided under Article 15[4] just as reservations can be provided in services under Article 16[4]. If so, it would not be correct to confine Article 15[4] to programmes of positive action alone. Article 15[4] is wider than Article 16[4] is as much as several kinds of positive action programmes can also be evolved and implemented thereunder [in addition to reservations] to improve the conditions of Socially and Educationally Backward Classes [SEBCs], Scheduled Castes and Scheduled Tribes, whereas Article 16[4] speaks only of one type of remedial measure, namely, reservation of appointments/posts.*"

Reservation for a backward class is not a constitutional mandate. The provisions of Article 330[1][b] and [c] show that the Constitution has treated Scheduled Tribes in the autonomous districts of Assam as a separate category distinct from all other Scheduled Tribes. This clearly indicates that when the Constitution makers wanted to make a sub–classification of Scheduled Tribes, they have themselves made it in the text of the Constitution itself and have not

67 . *Vijay Lakshmi v. Punjab University* [2003] 8 SCC 440: AIR 2003 SC 3331.

68 . *Union of India v. R. Rajeshwaran* [2003] 9 SCC 294: [2001] 10 JT 135. See also, *Gulshan Prakash v. State of Haryana* AIR 2010 SC 288: [2010] 1 SCC 477; *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438.

69 . AIR 1993 SC 477: [1992] Supp 3 SCC 217.

empowered any Legislature or Government to make such a sub–classification.[70]

In *E.V. Chinnaiah v. State of Andhra Pradesh*[71] as referred above the Court also said that Article 341 indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any sub–classification or division in the said list except, may be, for the limited purpose of Article 330. Therefore, it is clear that the Constitution intended all the castes including the sub–castes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group cannot be subdivided for any purpose. The constitution intended that all the castes included in the Schedule under Article 341 would be deemed to be one class of persons.

The principles laid down in *Indra Sawhney v. Union of India*,[72] for sub–classification of other Backward Classes cannot be applied as a precedent for sub–classification or sub–grouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of other backward classes is not applicable to scheduled castes and scheduled tribes. This is for the obvious reason *i.e.*, the Constitution itself has kept the Scheduled Castes and Scheduled Tribes list out of interference by the State Government.[73]

A woman who by birth did not belong to a backward class or community, would not be entitled to contest a seat reserved for a backward class community merely on the basis of her marriage to a male of that community.[74]

The validity of the **Scheduled Castes and Scheduled Tribes**

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70 . *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394: AIR 2005 SC 162; *P.A. Inamdar v. State of Maharashtra* AIR 2005 SC 3226; *I.R. Coelho [Dead] by LRS v. State of Tamil Nadu* [2007] 2 SCC 1: AIR 2007 SC 861.

71 . Ibid.

72 . AIR 1993 SC 477: [1992] Supp 3 SCC 217.

73 . *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394: AIR 2005 SC 162.

74 . *Sandhya Thakur v. Vimla Devi Kushwah* [2005] 2 SCC 731: AIR 2005 SC 909.

[*Prohibition of Transfer of Certain Land*] **Act**, 1978 which restricted the transfer by SC or ST of any land granted to them for particular period of time [*e.g., 3 years*] has been upheld because of their poverty, lack of education and backwardness which was exploited by the stronger section of the society was not unreasonable and hence not violative of Article 19[1][f] of the Constitution. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the state's jurisdiction while exercising its executive or legislative power is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. Having already fulfilled this part of its constitutional obligation, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class. It is not open to the State to sub –classify a class already recognized by the Constitution and allot a portion of the already reserved quota among the State created subclass within the list of scheduled casts. Furthermore, the emphasis on efficient administration placed by Article 335 of the **Indian Constitution** must also be considered when the claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered. Since the State had already allotted 15 percent of the total quota of the reservation available for backward classes to the Scheduled Castes the question of allotting any reservation under the impugned Act to the backward classes did not arise. The very fact that a legal fiction has been created is itself suggestive of the fact that the Legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or sub–classified further. An uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. For the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more

backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalizing the reservation to the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated. **Reservation must be considered from the social objective angle**, **having regard to the constitutional scheme and not as a political issue and thus**, **adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes**.[75]

As regards the identification of the "***Scheduled Castes***" and "***Scheduled Tribes***", reference is to be made to Articles 341 and 342.

[1] Socially and Educationally Backward Classes

A major difficulty raised by Article 15[4] is regarding the determination of who are "*socially and educationally backward classes*". This is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determination. Article 15[4] lays down no criteria to designate "*backward classes*"; it leaves the matter to the state to specify backward classes, but the courts can go into the question whether the criteria used by the state for the purpose are relevant or not.

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the Supreme Court's approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and 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.

75 . *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394: AIR 2005 SC 162.

From the several judicial pronouncements concerning the definition of backward classes, several propositions emerge. **First**, **the backwardness envisaged by Article 15[4] is both social and educational and not either social or educational**. This means that a class to be identified as backward should be both socially and educationally backward.[76] In *M.R. Balaji v. State of Mysore*,[77] the Court equated the "*social and educational backwardness*" to that of the "***Scheduled Castes** and **Scheduled Tribes***". The Court observed:

"*It was realized that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Scheduled Tribe and it was thought that some special provision ought to be made even for them*."

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 and thus the whole object of reservation would be frustrated.[78]

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 classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society. Also this test would break down in relation to those sections of society which do not recognize caste in the conventional sense as known to the Hindu society.

Fifthly, poverty, occupations, place of habitation, all contributes to backwardness and such factors cannot be ignored.

Sixthly, backwardness may be defined without any reference to caste. As the Supreme Court has emphasized, Article 15[4] "*does not speak of castes, but only speaks of classes*", and that "*caste*" and "*class*" are not synonymous. Therefore, exclusion of caste to ascertain backwardness does not vitiate

76 . *M.R. Balaji v. State of Mysore* AIR 1963 SC 649: [1963] Supp 1 SCR 439.
77 . AIR 1963 SC 649: [1963] Supp 1 SCR 439.
78 . *Janki Prasad Parimoo v. State of Jammu & Kashmir* AIR 1973 SC 930: [1973] 1 SCC 420.

classification if it satisfies other tests.

After the enactment of the above mentioned **First Constitutional Amendment** in 1951, *Balaji* was the first case which came up before the Supreme Court.[79]

An order of the Mysore Government issued under Article 15[4] reserved seats for admission to the State medical and engineering colleges for backward classes and "*more*" backward classes. This was in addition to the reservation of seats for the Scheduled Castes [*15 percent*] and for the Scheduled Tribes [*3 percent*]. Backward and more backward classes were designated on the basis of "*castes*" and "*communities*".

The Court declared the order bad on several grounds in *Balaji v. State of Mysora*.[80] The **first** defect in the Mysore order was that it was based solely on caste without regard to other relevant factors and this was not permissible under Article 15[4]. Though caste in relation to Hindus could be a relevant factor to consider in determining the social backwardness of a class of citizens, it must not be made the sole and dominant test in that behalf. Christians, Jains and Muslims do not believe in the caste system and, therefore, the test of caste could not be applied to them. In as much as identification of all backward classes under the impugned order had been made solely on the basis of caste, the order was bad. "*Social backwardness is in the ultimate analysis the result of poverty to a very large extent*".

Secondly, the test adopted by the State to measure educational backwardness was the basis of the average of student–population in the last three high school classes of all high schools in the State in relation to a thousand citizens of that community. This average for the whole State was 6.9 per thousand. The Court stated that assuming that the test applied was rational and permissible to judge educational backwardness, it was not validly applied. Only a community well below the State average could properly be regarded as

79 . *Jagwant Kaur v. State of Maharashtra* AIR 1952 Bom 461.
80 . AIR 1963 SC 649: [1963] Supp 1 SCR 439.

backward, but not a community which came near the average. The vice of the Mysore order was that it included in the list of backward classes, caste or communities whose average was slightly above, or very near, or just below the State average *e.g*., *Lingayats* with an average of 7.1 percent were mentioned in the list of backward communities.

Thirdly, the Court declared that Article 15[4] does not envisage classification between "*backward*" and "*more backward classes*" as was made by the Mysore order. 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. By adopting the technique of classifying communities into backward and more backward classes, 90 percent of the total State population had been treated as backward. The order, in effect, sought to divide the State population into the most advanced and the rest, and put the latter into two categories—backward and more backward—and the classification of the two categories was not envisaged by Article 15[4]. "*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 community as a whole*. *The adjustment of these competing claims is undoubtedly a difficult matter*, *but if under the guise of making a special provision*, *a State reserve practically all the seats available in all the colleges*, *that clearly would be subverting the object of Article 15[4]*." The State has "*to approach its task objectively and in a rational manner*".

In *Balaji*, the Supreme Court could sense the danger in treating "*caste*" as the sole criterion for determining social and educational backwardness. The importance of the judgment lies in realistically appraising the situation when the Court said that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome of social backwardness. The Court drew distinction between "*caste*" and "*class*". An attempt at finding a new basis for ascertaining social and educational backwardness in place of caste as

reflected in the *Balaji* decision.

The Court also ruled that reservation under Article 15[4] should be reasonable. It should not be such as to defeat or nullify the main rule of equality enshrined in Article 15[1]. While it would not be possible to predicate the exact permissible percentage of reservation it can be stated in a general and broad way that it ought to be less than 50 percent: "*how much less than 50 percent would depend upon the relevant prevailing circumstances in each case*". Also a provision under Article 15[4] need not be in the form of a law, it could as well be made by an executive order.

An order saying that a family whose income was less than `1200 per year, and which followed such occupations as agriculture, petty business, inferior services, crafts *etc*., would be treated "*backward*", was declared to be valid in *Chitralekha v. State of Mysore*.[81] Here two factors—economic condition and profession—were taken into account to define backwardness, but caste was for the purpose.

In *Balaji*, the Supreme Court had mentioned caste as one of the relevant factors for determining social backwardness. The order in the instant case was challenged on the ground that caste had been completely ignored for the purpose. The Supreme Court ruled that though caste is a relevant circumstance in ascertaining backwardness of a class, there is nothing to preclude the authority concerned from determining social backwardness of a group of citizens if it could do so without reference to caste. Identification or classification of backward classes on the basis of occupation–cum–income, without reference to caste is not bad and would not offend Article 15[4]. Justice **Subba Rao**, speaking for the majority of the Constitution Bench stated:

"*….What we intend to emphasize is that under no circumstances a 'class' can be equated to a 'caste', though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15[4] of the Indian Constitution, it does not vitiate the classification if it*

81 . AIR 1964 SC 1823: [1964] 6 SCR 368.

satisfied other tests."

In course of time, the judicial view has undergone some change in this respect and "*caste*" as a factor to assess backwardness has been given somewhat more importance than in *Balaji*. The Supreme Court has taken note of the fact that there are numerous castes in the country which are backward socially and educationally and the state has to protect their interests. A caste is also a "*class*" of citizens and, therefore, if an entire caste is found to be socially and educationally backward as a fact, on the basis of relevant data and material, then inclusion of the caste as such would not violate Article 15[1]. When backwardness is defined with reference to castes, the Court wants to be satisfied that not "*caste*" alone, but other factors have also been considered for the purpose.

In a number of cases,[82] it has been held that a lady marrying a Scheduled Caste/Scheduled Tribe/other Backward Citizen, or one transplanted by adoption or any other voluntary act, does not *ipso facto* become entitled to claim reservation under either Article 15[4] or Article 16[4]. In *Valsamma Paul v. Cochin University*,[83] the Supreme Court has explained the rationale behind this ruling as follow:

"*It is seen that Dalits and Tribes suffered social and economic disabilities recognized by Articles 17 and 15[2]. Consequently, they became socially, culturally and educationally backward; the OBC also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities... Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also undergo same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation*."

The Court went on to say that a person who has had an advantageous start in life having been born forward caste is transplanted into a backward

82 . *Kumari Madhuri Patil v. Addl. Commissioner, Tribal Development* [1994] 6 SCC 241: [1994] 199 SCC 1349: AIR 1995 SC 94; *A.S. Sailja v. Kurnool Medical College, Kurnool* AIR 1986 AP 209; *N.B. Rai v. Principal Osmania Medical College* AIR 1986 AP 196; *Smt. D. Neelima v. Dean of P.G. Studies, A.P. Agricultural Universities, Hyderabad* AIR 1993 AP 299.

83 . AIR 1996 SC 1010: [1996] 3 SCC 345.

caste by adoption/marriage/conversion does not become eligible to the benefit of reservation either under Articles 15[4] or 16[4]. "*Acquisition of the status of SC, etc*., *by voluntary mobility into these categories would play fraud on the Constitution, would frustrate the foreign constitutional policy under Articles 15[4] and 16[4] of the Constitution*."

Furthermore, the Supreme Court has clarified in *Jagdish Negi v. State of Uttar Pradesh*,[84] that no class of citizens can be perpetually treated as socially and educationa.lly backward. Backwardness cannot continue indefinitely. Every citizen has a right to develop socially and educationally. The State is entitled to review the situation from time to time. There is no rule that once a "*backward class of citizens, always such a backward class*". Once a class of citizens has been held to be socially and educationally backward class of citizens, it cannot be predicted that in future it may not cease to be so. 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 the category or has ceased to fall in that category.

The Supreme Court has observed in *Indra Sawhney*[85] that the policy of reservation has to be operated year–wise and there cannot be any such policy in perpetuity. The State can review from year to year the eligibility of the class of socially and educationally backward class of citizens. Further, it has been held that 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**.

[2] Quantum of Reservation

Another question which arises is what is the extent of reservation that can be made under Article 15[4]?

84 . AIR 1997 SC 3505: [1997] 7 SCC 203.
85 . *Indra Sawhney v. Union of India* AIR 1993 SC 447.

The Supreme Court has set its face, generally speaking, against excessive reservation, for it is bound to affect efficiency and quality by eliminating general competition.

For the first time, in *Balaji*,[86] the question was raised before the Supreme Court relating to the extent of special provisions which the States can make under Article 15[4]. In this case, reservation up to 68 percent was made by the State of Mysore for backward classes for admission to the State medical and engineering colleges. The break–up of the reservation was as follows: 50 percent seats for backward and more backward classes; 15 percent seats for Scheduled Castes; 3 percent seats for the Scheduled Tribes. In effect, 68 percent seats were reserved in medical, engineering and other technical colleges for the weaker sections of the society, leaving only 32 percent seats for the merit pool.

The State even argued that since Article 15[4] does not contain any limitation on the State's power to make reservation, cent percent reservation could be made in favour of backward classes in the higher educational institution if the problem of backwardness in a State so demanded. **The Supreme Court rejected this extreme argument**. **The Court also rejected the rule of 68 percent reservation**.

The Court agreed, on the one hand, that Article 15[4] must be read with Article 46, a directive principle, and steps ought to be taken to redress backwardness and inequality from which the backward classes, Scheduled Castes and Scheduled Tribes suffer otherwise for them political freedom and Fundamental Rights would have little meaning. On the other hand, the Court insisted that Article 15[4] being a special provision cannot denude Article 15[1] of all its significance. Article 15[4] is not a provision which is exclusive in character, so that in looking after the advancement of those classes the State would be justified in ignoring altogether the advancement of the rest of the society. The Court observed:

86 . *M.R. Balaji v. State of Mysore* AIR 1963 SC 649: [1963] Supp 1 SCR 439.

"*It is because the interests of the society at large would be served by promoting advancement of the weaker elements in the society that Article 15[4] authorizes special provision to be made*. *But if a provision which is in the nature of an exception completely excludes the rest of the society that clearly is outside the scope of Article 15[4]*. *It would be extremely unreasonable to assume that in enacting Article 15[4] Parliament intended to provide that where the advancement of the backward classes or the Scheduled Castes and Tribes was concerned, the Fundamental Rights of the citizens consisting of the rest of the society were to be completely ignored*."

The Court emphasized that a special provision contemplated by Article 15[4] must be within reasonable limits. The Supreme Court set its face against excessive reservation under Article 15[4], for it may affect efficiency by eliminating general competition. The general principle laid down by the Court is that the maximum limit of reservation should not be more than 50 percent for all classes under Article 15[4], *viz*., backward classes, Scheduled Castes and Scheduled Tribes. Thus, reservation of 68 percent was declared void in *Balaji*. The Court observed that the interest of the weaker section, of the society needs to be adjusted with interests of the society as a whole.

[3] Reservation in Admissions

Questions arise frequently regarding reservation of seats for admission in educational institution for categories of persons other than those falling under Article 15[3], 15[4] and 15[5]. This can be done under Article 15[1] itself but the main question to consider is whether the classification is reasonable. Thus, reservation of seats for children of defence personnel, ex–defence personnel and political sufferers has been upheld.[87]

The Indian Constitution being a living organ, rights are to be determined in terms of judgments interpreting the Constitution. Right of a meritorious student to get admission in a postgraduate course is a fundamental and human right which is required to be protected. Such a valuable right cannot be permitted to be whittled down at the instance of less meritorious students.[88]

Fixation of a district–wise quota on the basis of the district population to

87 . *D.N. Chanchala v. State of Mysore* AIR 1971 SC 1762: [1971] 2 SCC 293.
88 . *Saurabn Chaudri [Dr.] v. Union of India* [2004] 5 SCC 618: AIR 2004 SC 2212.

the total State population for admission to the State medical colleges has been held to be discriminatory.

Since SCs and STs Form a separate class by themselves and outside the creamy layer area and having regard to Article 46, these socially backward categories are to be taken care of at every stage and even in specialized institutions like IITs. The argument of maintenance of high standards made on behalf of Delhi IIT was rejected although the Court accepted the position that "*the petitioners were not able to secure the required credits as against the stipulated minimum requirement for continuation*" of their studies.[89] This is close to Arun Shourie's "*bending over backwards*" and discourages merit and excellence.

It may be noted that such reservation falls under Article 15[1] and not under Article 15[4] and this can be valid only if it fulfils the tests of reasonable classification as laid down under Article 14.

The Supreme Court has emphasized that the primary consideration for selecting candidates for admission to medical colleges is merit. But departure from the merit principle is permissible where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals. Merit principle may thus be departed from either in State interest,[90] or on the consideration of a region's claim for backwardness.[91]

While "*residence*" may be the basis of reservation, according to the Supreme Court in *Pradeep Jain v. Union of India*,[92] it may be tested on the touch stone of Article 14. Accordingly, the Court has condemned as unconstitutional and void under Article 14 "*wholesale reservation*" on the basis of the "*domicile*" or "residence" requirement within the State,[93] or on the basis

89 . *Avinash Singh Bagri v. Registrar, IIT Delhi* [2009] 8 SCC 220: [2009] 11 SCALE 535.

90 . *D.P. Joshi v. State of Madhya Pradesh* AIR 1955 SC 334; *P. Rajendran v. State of Madras* AIR 1968 SC 1012.

91 . *State of Uttar Pradesh v. Pradip Tandon* AIR 1975 SC 563: [1975] 1 SCC 267.

92 . AIR 1984 SC 1420: [1984] 3 SCC 654.

93 . On this point, Justice **Bhagwati**, speaking for the Court made the following pithy remark: "*The entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one nation and there is only one citizenship, namely citizenship of India,*

of "*institutional*" preferential for students passing the qualifying examination for admission so as to exclude all students not satisfying the requirement regardless of merit.

The Court pointed out that the principle of selection can be diluted on the ground of regional backwardness. If the State Government starts a medical college in a backward region, and reserves most of the seats therein to the students from the region, then such reservation or preference treatment cannot be regarded as discriminatory. Students from backward region can hardly compete with the students from advanced region. Reservation or preference in such a case may be of a high percentage but it cannot be total.

So far as the undergraduate courses are concerned, the reservations based on domicile, universities or institutions are permissible provided that the said reservations are not wholesale.[94] As regards admission to the post–graduate and super–specialty courses, no reservations are possible.[95]

On the whole, the impact of judicial pronouncements in the area has been wholesome. The growing tendency to make reservations in technical institutions for all and sundry has been curbed to some extent. In the absence of judicial control, reservation would have run riot, excluding all merit. Had this tendency not been controlled, it would have led to the inevitable result of falling standards which would have been a national loss. Many deserving and

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and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of the law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognize the essential unity and integrity of the country by treating it as if it were a mere conglomeration of independent States." *Pradeep Jain v. Union of India* AIR 1984 SC 1420 at pp. 1424, 1425: [1984] 3 SCC 654.

94 . *Dinesh Kumar v. Motilal Nehru Medical College [II]* AIR 1986 SC 1877: [1986] 3 SCC 727.

95 . *Ahmedabad Municipal Corporation v. Nilaybhai R. Thakore* AIR 2000 SC 114, at p. 117: [1999] 8 SCC 139. Also see, *D.P. Joshi v. State of Madhya Pradesh* AIR 1955 SC 334: [1955] 1 SCR 1215; *D.N. Chanchala v. State of Mysore* AIR 1971 SC 1762: [1971] 2 SCC 293; *Pradeep Jain [Dr.] v. Union of India* AIR 1984 SC 1420: [1984] 3 SCC 654; *Jagdish Saran v. Union of India* AIR 1980 SC 820: [1980] 2 SCC 768.

better qualified candidates from the so called advanced sections of society would have been forced to go without education and this would have been unjust to them. The Supreme Court's pronouncements put the whole problem posed by Article 15[4] within a reasonable mould. It was also necessary to play down the importance of caste lest the caste system instead of being obliterated should be perpetuated.[96] A very important achievement of the Court is that 15 percent seats in medical colleges are to be filled in on an all India basis.

[3.1] Post Graduate Courses

While the Supreme Court has shown some flexibility of approach in the matter of fixation of criteria/reservation/preference for admission to graduate courses like MBBS, as discussed above, it has adopted somewhat stringent approach towards admissions to Post–Graduate courses and still more stringent attitude to admissions to super–specialties. The basic proposition laid down by the Supreme Court is that admission to Post–Graduate courses should be based strictly on merit and that there should be no dilution of standards in such courses.[97] This judicial approach is illustrated by the following judicial pronouncements.

In a number of cases, the Supreme Court has expressed doubt whether there can be any reservation at the Post–Graduate level for backward classes. For example, in a post–graduate medical course, only MBBS candidates can be admitted. Can a MBBS be regarded as backward even though he may belong to a backward class. Reservation in the higher courses would perpetuate the pernicious theory "*once backward always backward*". The Court has advocated the principle that the higher you go in the ladder of education, the lesser should be the reservation.

Generally speaking, at the post–graduate level, it is merit that ought to count. Thus, the Supreme Court has observed in *Jagdish Saran [Dr.] v. Union*

96 . Marc Galantar, ***Protective Discrimination for Backward Classes in India***, 3 JILI, [1961], at p. 39; Sharma G.S., ***Educational Planning: Its Legal and Constitutional Implications in India***, N.M. Tripathi, [1967], at pp. 56–113.

97 . *Narayan Sharma v. Pankaj Kr. Lehkar* AIR 2000 SC 72: [2000] 1 SCC 44.

of India,[98] that to encourage SC/ST/OBC students, the State may reserve seats for them at the under graduate level, but at the level of PhD, MD, or levels of higher proficiency, "*equality*", measured by matching excellence, has more meaning and cannot be diluted much without grave risk. At the highest scales of proficiency or specialty, "*the best skill or talent, must be hand–picked by selecting according to capability*". At that level, "*where international measure of talent is made, where losing one great scientist or technologist in the making is a national loss, the considerations we have expanded upon as important lose their potency*".

In *Pradeep Jain [Dr.] v. Union of India*,[99] the Supreme Court expressed great reluctance in accepting any reservation for admissions to post–graduate courses where ordinarily merit should prevail. The case dealt with reservation of seats for the residents of the State or the students of the same University for admission to the medical colleges.[100] The Court said in the instant case, that considerations for admission to the post–graduate courses such as MD and the like for reservation based residence requirements within the State or institutional preference were different from those for admission to the MBBS course. The Court emphatically stated that excellence cannot be allowed to be compromised by any other considerations because that would be detrimental to national interests. The Court thus opined that in case of admissions to the post–graduate courses, such as MS, MD and the like, "*it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference*". The Court observed further:

> "*This proposition has greater importance when we reach the higher levels of education like post–graduate courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines of social consequence, but more at the higher levels of sophisticated skills and strategic employment. To devalue merit at the summit is to temporize with the country's development in the vital areas of professional expertise*."

98 . AIR 1980 SC 820: [1980] 2 SCC 768.
99 . AIR 1984 SC 1420: [1984] 3 SCC 654.
100 . *Pradeep Jain [Dr.] v. Union of India* AIR 1984 SC 1420: [1984] 3 SCC 654.

However, the Court directed in *Pradeep Jain* that while residence within the State would not be a ground for reservation in admissions to post–graduate courses, a certain percentage of the seats could be reserved on the basis of "*institutional preference*" in the sense that a student who has passed the MBBS course from a medical college or University, may be given preference for admission to the post–graduate course in the same medical college or University. But such reservation on the basis of institutional preference should not in any event exceed 50 percent of the total number of open seats available for admission to the post–graduate course.

But the Court directed that even in regard to admissions to the post–graduate courses, so far as super–specialties such as neurosurgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on an all India basis.

But, **the Supreme Court has now changed its stance on this question and has ruled that there may be reservation of seats for backward classes in admission to post–graduate**, **specialty or super–specialty courses in medicine**. The Court has argued that after admission, every student has to undergo the same courses and the same examination even though at the admission stage the cut–off point may be lower for backward candidates than for general candidates.[101]

The Supreme Court emphasized that the primary imperative of Articles 14 and 15 is equal opportunity for all across the nation to attain excellence. The philosophy and pragmatism of excellence through universal equal opportunity is part of the Indian culture and constitutional creed. This norm of non–discrimination, however, admits of just exceptions geared to equality, and does not forbid such basic measures as are needed to abolish the gaping realities of current inequalities afflicting social and educationally backward classes' and the Scheduled Castes and the Scheduled Tribes. But reservation by a university

101 . *P.G. Institute of Medical Education and Research v. K.L. Narasimham* AIR 1997 SC 3687: [1997] 6 SCC 283.

for its own graduates creates a new kind of discrimination which is sanctioned by Articles 14 and 15. Delhi University students do not form an educationally backward class. But the Court also emphasized that at the post–graduate level "*equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk*". Further, "*it is difficult to denounce or renounce the merit criterion when the selection is for post–graduate or post–doctoral courses in specialized subjects.... To sympathize mawkishly with the weaker sections by selecting sub–standard candidates, is to punish society as a whole by denying the prospect of excellence say in hospital service... So it is that relaxation on merit, by overruling equality and quality altogether, is a social risk where the stage is post–graduate or post–doctoral*".[102]

Institution–wise reservation has no place in the scheme of Article 15, although social and educational destitution may be endemic in some parts of the country where a college or university may be started to remedy this glaring imbalance and reservation for those alumni for higher studies may be permitted. Thus, reservation is to be linked to backwardness. However, the Court stressed that reservation should not run not otherwise that will bring about a fall in medical competence. The very best should not be rejected from admission because that will be a national loss. The Court consequently laid down the following principles for this purpose:

i) Reservation must be kept in check by the demands of competence. A certain percentage must be available for meritorious students. Shelter of reservation should not be extended where minimum qualifications are absent.
ii) Reservation on the ground of backwardness cannot prevail in the same measure at the highest scale of specialty where the best skill or talent must be picked up.

The Supreme Court has rendered a momentous decision in *Preeti Sagar Srivastva [Dr.] v. State of Madhya Pradesh*.[103]

The factual context in this case was as follows: For admission to Post–Graduate degree/diploma course in medicine, candidates were required to

102 . *Jagdish Saran [Dr.] v. Union of India* AIR 1980 SC 820, at p. 829.
103 . AIR 1999 SC 2894: [1999] 7 SCC 120.

appear at an entrance examination. The State Government fixed a cut–off percentage of 45 percent marks in this examination for admission of the general category students while no cut–off percentage of marks was fixed for SC/ST candidates. This meant that there was no minimum qualifying marks in the entrance examination prescribed for the reserved category candidates for admission to the post–graduate medical courses. This was challenged and the Supreme Court quashed the same in *Sadhna Devi [Dr.] v. State of Uttar Pradesh*,[104] with the remark that if this was done, merit would be sacrificed altogether.

The Supreme Court was of the opinion that even for the reserved category candidates, there should be some minimum qualifying marks if not the same as prescribed as bench marks for general category students. Thus, there cannot be zero qualifying marks for reserved category candidates in the entrance test for admission to the post–graduate courses. The government having installed the system of holding an admission test, would not be entitled to do away with the requirement of obtaining minimum qualifying marks for the special category candidates.

In sum, in *Sadhna*, the Supreme Court insisted that for admission to post–graduate medical course, there ought to be prescribed a minimum cut off percentage of marks at the entrance examination for Scheduled Castes, Scheduled Tribes and other Backward Classes. **It would be unconstitutional as being violative of the right to equality to keep this cut off point at zero percent**.

As a sequel to the *Sadhna* ruling, the State of Uttar Pradesh prescribed a Post–Graduate Medical Entrance Examination for admission to Post–Graduate Degree/Diploma Course in medicine and fixed a cut–off percentage of 45 at the entrance examination for the general category candidates for admission to the post–graduate medical course. But for admission of reserved category candidates, the cut–off percentage was fixed at 20 percent. In addition, 50 percent of the seats in the post–graduate course were reserved for

104 . AIR 1997 SC 1120: [1997] 3 SCC 90.

Scheduled Castes, Scheduled Tribes and Backward Classes candidates. A similar scheme was laid down in Madhya Pradesh. The Supreme Court was called upon to adjudge the validity of these schemes *vis–à–vis* Article 15[4]. However, in *Preeti Sagar* the Supreme Court did not express any opinion on the question whether reservation of seats is permissible at the post–graduate level in medicine as this question was not debated before it. The Court only examined the question whether lower qualifying marks could be prescribed for admission of reserved category candidates.

The Court has pointed out in *Preeti Sagar* that Article 15[3] and 15[4] permit compensatory or protective discrimination in favour of certain classes. Every policy pursued under Article 15[4] makes a departure from the equality norm for the benefit of the backward. Therefore, it has to be designed and worked in a manner conducive to the ultimate building up of an egalitarian non–discriminatory society. That is its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Article 15[4] have to be designed and pursued to achieve this ultimate national interest. At the same time, these programmes cannot be unreasonable or arbitrary, nor can they be executed in a manner which undermines other vital public interest of the general good of all. "*All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good.... Article 15[4] also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests*."[105]

The Court has emphasized:

"*Consideration of national interest and the interests of the community or society as a whole cannot be ignored in determining the reasonableness of a special provision under Article 15[4]*."[106]

Any special provision under Article 15[4] has to balance the importance of having, at the higher levels of education, students who are meritorious and who have secured admission on their merit as against the social equity of

105 . *Preeti Sagar Srivastva [Dr.] v. State of Madhya Pradesh* AIR 1999 SC 2894, at p. 2904: [1999] 7 SCC 12.

106 . *Preeti Sagar Srivastva [Dr.] v. State of Madhya Pradesh* AIR 1999 SC 2894, at p. 2905: [1999] 7 SCC 12.

giving compensatory benefit of admissions to the SC/ST candidates who are in a disadvantaged position. Selection of the right calibre of students is essential in the public interest at the level of specialized post–graduate education. Special provisions for SC/ST candidates at the specialty level have to be minimal.

In the interest of selecting suitable candidates for specialized education, it is necessary that the common entrance examination be of a standard and qualifying marks are prescribed for passing that examination. Accordingly, the Supreme Court has refused to accept the argument that there need not be any qualifying marks prescribed for the qualifying examination for admission to the post–graduate medical courses as the candidates have already passed the MBBS examination which is the essential pre–requisite to post–graduate medical courses.

The Court has not itself laid down how much relaxation can be given to the reserved category candidates in the matter of minimum qualifying marks as compared to the general candidates. The Court has left the matter for decision to the Medical Council of India "*since it affects standards of post–graduate medical education*".[107]

The Supreme Court has changed its opinion as appears from *Preeti Sagar*. The Court has specifically disagreed with the view expressed by it in several earlier cases that the process of selection of candidates for admission to medical colleges has no real impact on the standard of medical education.[108] The Court has observed in *Preeti Sagar*:

"*...the criteria for the selection of candidates have an important bearing on the standard of education which can be effectively imparted in the medical colleges. We cannot agree with the proposition that prescribing no minimum qualifying marks for admission for Scheduled Castes and the Scheduled Tribes would not have an impact on the standard of education in the medical colleges*."

107 . Ibid, at p. 2909.

108 . *Nivedita Jain v. State of Madhya Pradesh* AIR 1981 SC 2045; *Ajay Kumar Singh v. State of Bihar* [1994] 4 SCC 401; *Post–Graduate Institute of Medical Education & Research v. K.L. Narasimham* [1997] 6 SCC 283: AIR 1997 SC 3687.

The Court has now disagreed with the view expressed in earlier cases that since all students passed the same examination, standards of education are maintained and it does not matter even if student of lower merit are admitted. The Supreme Court has clearly spelt out that the criteria for selection has to be merit alone. Infact, merit, fairness and transparency are the ethos of the process for admission to such courses. There cannot be any circumstance where the rule of merit can be compromised.[109]

This approach of the Supreme Court is most welcome as it is a very important step toward maintenance of a semblance of standard in medical education. Weak students are bound to pull down the level of teaching as the teacher has to tone down his teaching to the level of weak candidates in the class. If the teacher talks at a higher level then it will pass over the heads of weak students. Accordingly, the better students will be the sufferer as the weaker students always act as a drag on the entire class.

[E] Article 15[5]

Article 15[5] of the Indian 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 referred to in Article 30[1].

Clause [5] in the Article was added by the **Constitution** [*93rd Amendment*] **Act**, 2005. The **Constitution** [*93rd Amendment*] **Act** was in response to the Supreme Court's explanation in *P.A. Inamdar*[110] of the ratio *T.M.A. Pai*[111] that imposition of reservations on the non–minority added educational institutions, covered by Sub–clause [g] of Clause [1] of Article 19,

109 . *Asha v. B.D. Sharma University of Health Science* AIR 2012 SC 3396: [2012] 7 SCC 389; *AIIMS Students' Union v. AIIMS* AIR 2001 SC 3262: [2002] 1 SCC 428.

110 . *P.A. Inamdar and Ors v. State of Maharashtra* AIR 2005 SC 3226: [2005] 6 SCC 537.

111 . *T.M.A. Pai Foundation and Ors v. State of Karnataka and Ors* AIR 2003 SC 355: [2002] 8 SCC 481.

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**.[112]

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.[113] Further, the **Constitution** [*93rd 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*".[114]

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 Articles 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 unaided educational institutions, a power that was most certainly granted under Clause [6] of Article 19, which had been inserted by the 1st Constitutional Amendment in 1951. Article 15[5] does not abridge the basic structure of the Constitution.[115]

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. This article is capable of very wide interpretation and vests the

112 . *Indian Medical Assn. v. Union of India* [2011] 7 SCC 179, at p. 236: AIR 2011 SC 2365: AIR 2011 SCW 3469: [2011] 6 SCALE 86.

113 . *Ashoka Kumar Thakur v. Union of India* [2008] 6 SCC 1, at p. 486: [2008] 3 MLJ 1105.

114 . *Ashoka Kumar Thakur v. Union of India* [2008] 6 SCC 1, at p. 486: [2008] 3 MLJ 1105. See also, *Indian Medical Association v. Union of India* AIR 2011 SC 2365, at p. 2417: [2011] 7 SCC 179: The placement of Clause [5] of Article 15 of the Constitution in the equality code by the 93rd Constitutional Amendment is of great significance. They are not a violation of the basic structure but in fact strengthen the basic structure of our Constitution.

115 . *Indian Medical Assn. v. Union of India* [2011] 7 SCC 179, at p. 236: AIR 2011 SC 2365: AIR 2011 SCW 3469: [2011] 6 SCALE 86; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.

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**.[116]

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.[117] 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.[118]

V. **Equality of Opportunity in Public Employment**

Article 16[l] guarantees equality of opportunity to all citizens "*in matters relating to employment*" or "*appointment to any office*" under the state. According to Article 16[2], no citizen can be discriminated against, or be ineligible for any employment or office under the state, on the grounds only of *religion*, *race*, *caste*, *sex*, *descent*, *place of birth* or *residence* or any of them.

Adherence to the rule of equality in public employment is a being feature of Indian Constitution and the rules of law is its core, the Court cannot disable itself from making an order inconsistent with Articles 14 and 16 of the Constitution.[119]

Article 16[2] is also an elaboration of a facet of Article 16[1]. These two clauses thus postulate the universality of Indian citizenship. As there is common citizenship, residence qualification is not required for service in any State.

Public employment is a facet of right to equality envisaged under Article 16 of the Indian Constitution. The State although is a model employer, its right

116 . *Sindhi Educational Society v. Government [NCT of Delhi]* [2010] 8 SCC 49, at p. 83: AIR 2010 SCW 5393: [2010] 6 SCALE 578.

117 . *Ashoka Kumar Thakur v. Union of India* [2008] 6 SCC 1: [2008] 5 JT 1.

118 . *Naz Foundation v. Government of NCT of Delhi* [2009] 160 DLT 277 [Dl–DB]: [2009] 5 AD Del 429: [2009] 111 DRJ 1: [2009] 3 JCC 1787: [2010] Cri.LJ 94; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.

119 . *Reserve Bank of India v. Gopinath Sharma* [2006] 6 SCC 221: AIR 2006 SC 2614.

to create posts and recruit people therefore emanates from the statutes or statutory rules and/or rules framed under the proviso appended to Article 309 of the Indian Constitution. The recruitment rules are to be framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.[120]

On a comparative basis, Article 16 deals with a very limited subject, *viz*., public employment. On the other hand, the scope of Article 15[1] is much wider as it covers the entire range of state activities. The ambit of Article 16[2] is restrictive in scope than that of Article 15[1] because Article 16[2] is confined to employment or office under the State, meaning services under the central and State Governments and their instrumentalities. However, Article 15 being more general in nature covers many varied situations of discrimination. Further, the prohibited grounds of discrimination under Article 16[2] are somewhat wider than those under Article 15[2] because Article 16[2] prohibits discrimination on the additional grounds of descent and residence apart from religion, race, caste, sex and place of birth.

Article 15 does not mention "*descent*" and "*residence*" as the prohibited grounds of discrimination, whereas Article 16 does. Thus, with regard to the grounds of discrimination, Article 15 is somewhat narrower than Article 16. What Article 16 guarantees is that all citizens in matters of state service shall be treated alike under like circumstances both in privileges and obligations. There should be no discrimination between one employee and another on the basis of any prejudice, bias or any extraneous ground.

The word "*discrimination*" in Article 16[2] involves an element of unfavourable vice. As already noted, Article 14 guarantees right of equality generally; Articles 15 and 16 are instances of the same right equality in specific situations. Article 14 is the genus while Article 16 is a species. Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words, Article 16 is only an instance of the application of the

120 . *Principal, Mehar Chand Polytechnic v. Anu Lamba* [2006] 7 SCC 161: AIR 2006 SC 3074.

general rule of equality laid down in Article 14 and it should be construed as such. Accordingly, "*equality*" in Article 16[1] means equality as between member of the same class of employees, and not equality between members of separate, independent, classes.

Equal protection of the laws does not postulate equal treatment of all persons without distinction, it merely guarantees the application of the same laws alike without discrimination to all persons similarly situated.[121] Therefore, Article 16 does not bar a reasonable classification of employees or reasonable tests for selection. Equality of opportunity of employment means selection. Equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent, classes. There can be no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Those who are similarly circumstance are entitled to equal treatment.

The equality guaranteed by Article 16[1] takes within its fold all stages of service. The expression "*matters relating to employment*" in Article 16[1] is not restricted only to the initial stage of appointment; the expression "*appointment to an office*" in Article l6[1] does not mean merely the initial Appointment. Article 16[1] includes all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment or which form part of the terms and conditions of such employment, such as, salary, periodical increments, leave, promotion, fixation of seniority, gratuity, pension, superannuation and even termination of employment. The guarantee of Article 16[1] could become illusory if narrowly construed, for then the state could comply with formal requirement by affording equality at the initial stage but defeat its object by making

121 . *All India Station Masters' and Assistant Station Masters' Association Delhi v. Gen. Man. Central Railway* AIR 1960 SC 384; *Jagannath Prasad Sharma v. State of Uttar Pradesh* AIR 1961 SC 1245; *Indian Rly. SAS Staff Association v. Union of India* [1998] 2 SCC 651: AIR 1998 SC 805.

discriminatory provisions as regards other matters subsequently.[122]

[A] Matters of Employment

[1] Services Conditions

Under Article 309, rules regulating service conditions of government servants can be made by the government, but such rules have to stand the tests of Articles 14 and 16 and, thus, have to be reasonable and fair and not grossly unjust.[123] In the absence of a rule or regulation, service conditions may be prescribed by executive instructions.

The legal position of a government servant is more one of status rather than that of contract and his rights and duties are no longer determined by contract or consent of parties but by statutes or statutory rules, which may be unilaterally altered without the consent of the employees.[124] But these rules have to be consistent with the fundamental rights.[125]

Reading Articles 14 and 16 together, the Supreme Court has laid down several propositions regulating various aspects of service—from appointment to dismissal—of public servants. The endeavour of the Court has been to eliminate administrative discrimination, favouritism, arbitrariness and misuse of power from this area.

Seniority is not a fundamental right. It is merely a civil right. Article 16 is applicable in the case of an appointment. It does not speak of fixation of seniority.[126] Unilateral change of status of its employee by an instrumentality of the State is arbitrary violating Articles 14 and 16.[127]

[2] Appointment

The Supreme Court ruled that, in the absence of the rules, a trust could

122 . *Gen. Manager, S. Rly. v. Rangachari* AIR 1962 SC 36: [1962] 2 SCR 586; *Ganga Ram v. Union of India* AIR 1970 SC 2178: [1970] 1SCC 377; *State of Kerala v. Thomas* AIR 1976 SC 490: [1976] 2 SCC 310; *ABSK Sangh [Rly.] v. Union of India* AIR 1981 SC 298: [1981] 1 SCC 246.

123 . *State of Uttar Pradesh v. Ramgopal* AIR 1981 SC 1041: [1981] 3 SCC 1.

124 . *Calcutta Dock Labour Board v. Jaffur Imam* AIR 1966 SC 282: [1965] 3 SCR 453; *Roshanlal Tandon v. Union of India* AIR 1967 SC 1889: [1968] 1 SCR 185; *Sirsi Municipality v. Cecelia Francis Tellis* AIR 1973 SC 855: [1973] 1 SCC 409; *D.T.C. v. D.T.C. Mazdoor Congress* AIR 1991 SC 101, 186.

125 . *Chairman, Railway Board v. C.R. Rangadhamaiali* AIR 1997 SC 3828: [1997] 6 SCC 623.

126 . *Bimlesh Tanwar v. State of Haryana* [2003] 5 SCC 604: AIR 2003 SC 2000.

127 . *BALCO Captive Power Plant Mazdoor Sangh v. National Thermal Power Corpn*. [2007] 14 SCC 234: AIR 2008 SC 336.

make appointments under its administrative power. The Court enunciated the following proposition:

"*In the absence of any statutory rules governing the service conditions of the employees*, *the executive instructions and/or decisions taken administratively would operate in the field*; *appointments/promotions can be made in accordance with such executive instructions*, *administrative direction*."

But if statutory rules are made, then the executive power to make appointments has to exercised in accordance with them. The executive power can supplement the rules by filling gaps therein, but cannot supplant the same.[128] Appointments ought to be made strictly according to the rules. All appointment to public office have to be made in conformity with Article 14 of the **Indian Constitution**, there must be no arbitrariness resulting from any undue favour being show to any candidate.[129] Appointments made in violation of the rules infringe Articles 14 and 16 and, as such, the government cannot later regularize then.[130]

In addition, appointment of candidate by "*pick and choose*" without preparing any merit list amounts to an arbitrary exercise of power.[131]

Generally speaking, the judicial approach is that appointments ought to be made on the basis of a written test plus a *viva voce* test and not *solely* on the basis of a *viva voce* test. While *viva voce* is an important factor, it ought not to be the sale factor in the process of selection. The reason is that reliance thereon may lead to "*sabotage of the purity of the proceedings*". There is always room for suspicion if common appointments are made through oral interview only. However, there may be posts requiring persons of mature personality and such posts may be filled solely on the basis of a *viva voce* test. The Supreme Court has ruled in *Praveen Singh v. State of Punjab*[132] that the posts of block development officers at the *panchayat* level in the State do not require persons

128 . *J&K Public Service Commission v. Narinder Mohan* AIR 1994 SC 1808: [1994] 2 SCC 630.
129 . *Bedanga Talukdar v. Saifudaullah Khan* AIR 2012 SC 1803, at p. 1810: [2011] 12 SCC 85.
130 . *State of Orissa v. S. Mohapatra* [1993] 2 SCC 486: AIR 1993 SC 1650; *M.A. Haque v. Union of India* [1993] 2 SCC 213; *J&K Public Service Commission v. Narinder Mohan* [1994] 2 SCC 630: AIR 1994 SC 1808.
131 . *State of Bihar v. Kaushal Kishore Singh* AIR 1997 SC 2643.
132 . AIR 2001 SC 152: [2000] 8 SCC 633.

of mature personality and, therefore, appointment to these posts ought to be made on the basis of a written test and *viva voce* and not solely through *viva voce*.[133]

Article 16 and 14 do not forbid the government from creating different cadres or categories of posts carrying different emolument. Also, there is no bar in the way of the State integrating different cadres into one cadre. It is entirely a matter for the state to decide whether to have several different cadre or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of the equality clause.[134]

In *Janki v. State of Jammu & Kashmir*,[135] the Supreme Court aside the selection found the interview process to be thoroughly unsatisfactory. The interview committee did not take into account the service records of the candidates and the candidates who had secured even less than 30 percent marks at the interview were selected. The Court ruled that selection made on such a poor basis cannot be regarded as a real selection at all.

Where selection was made without interview or fake or ghost interviews, final record were tampered with and documents were fabricated, an inference can be drawn that the whole selection process was motivated by extraneous considerations. The entire selection process was set aside as being arbitrary. The selectees had no right to assume office.[136] The Supreme Court commented on the whole episode as follows:

"*The whole examination and the interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shacks our conscience to come across such a systematic fraud*."[137]

It is further to be added that, under Article 16[2], residential requirement will be unconstitutional as a condition of eligibility for employment or

133 . *Union of India v. Tarun K. Singh* AIR 2001 SC 2196.

134 . *Kishori Mohanlal Bakshi v. Union of India* AIR 1962 SC 1139; *Reserve Bank of India v. N.C. Paliwal* AIR 1976 SC 2345, at p. 2357: [1976] 4 SCC 838.

135 . AIR 1973 SC 930: [1973] 1 SCC 420.

136 . *Krishan Yadav v. State of Haryana* AIR 1994 SC 2166: [1994] 4 SCC 165.

137 . *Krishan Yadav v. State of Haryana* AIR 1994 SC 2166, at p. 2172: [1994] 4 SCC 165. Also see, *Union of India v. Tarun K. Singh* AIR 2001 SC 2196.

appointment to an office under the State or its instrumentality.[138]

[3] Compassionate Appointment

Appointment on compassionate grounds of a son, daughter or widow to assist the family to relieve economic distress because of the sudden demise in harness of a government servant has been held to be valid *vis–à–vis* Article 16[1] and 16[2]. The rationale underlying provision of compassionate appointments to the heirs of the deceased employee is that he was the bread winner for the family and his exit has left the family in the lurch and in precarious and vulnerable economic position.[139]

Appointment in public services on compassionate ground has been carved out, as an exception, in the interests of justice, to the general rule that appointments in the public services should be made strictly on the basis of open invitation of applications and merit and no other mode of appointment nor any other consideration is permissible.[140] Appointment on compassionate ground cannot be claimed as a matter of right under Article 16 of the **Indian Constitution**. Therefore, the High Courts or Administrative Tribunals cannot direct the State to make appointments on compassionate ground when the regulations in respect thereof do not cover and contemplate such appointments.[141]

The Supreme Court has ruled that compassionate appointment is not to be made as a matter of course but only after examining the financial condition of the family. It is only if the concerned authority is satisfied that, but for the provision of employment, the family of the deceased employee will not be able to meet the crisis that a job is to be offered to an eligible member of the family. Such an appointment can be made only against the lowest post in non–manual and manual categories.[142]

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138 . *Pradeep Jain v. Union of India* AIR 1984 SC 1420: [1984] 3 SCC 654; *V.N. Sunanda Reddy v. State of Andhra Pradesh* AIR 1995 SC 914: [1995] Supp 2 SCC 235.

139 . *Balbir Kaur v. Steel Authority of India Ltd*. AIR 2000 SC 1596: [2000] 6 SCC 493.

140 . *Indian Bank v. Usha* AIR 1998 SC 866, at p. 874: [1998] 2 SCC 663.

141 . *Commissioner of Public Instructions v. K.R. Viswanath* [2005] 7 SCC 206: AIR 2005 SC 3275; followed in *Indian Drugs and Pharmaceuticals Ltd. v. Devki Devi* [2006] 5 SCC 523: AIR 2006 SC 2691.

142 . *Umesh Kumar Nagpal v. State of Haryana* [1994] 4 SCC 138: [1994] 4 JT 525. Also, *Smt. Sushma Gosain v. Union of India* AIR 1989 SC 1976: [1989] 4 SCC 468; *Director of Education*

[4] Probation

As regards probation, the employer has the prerogative to put an employee on probation and watch his performance.[143] A probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general suitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice ground.[144]

[5] Promotion

No employee has a vested right to promotion but he certainly has the right to be considered for promotion according to the rules. Chances of promotion are not conditions of service and are defensible by law. A rule which merely affects the chances of promotion does not amount to a change in the conditions of service. But if a rule confers a right of actual promotion, or a right to be considered for promotion, is a service rule.[145] As the Supreme Court has observed in *State of Maharashtra v. Chandrakant Anant Kulkarni*:[146]

"*Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not.*"

Difficult questions have at times arisen in matters of promotion from

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[Secondary] v. Pushpendra Kumar AIR 1998 SC 2230: [1998] 5 SCC 192.

143 . *Ajit Singh v. State of Punjab* AIR 1983 SC 494: [1983] 2 SCC 217.

144 . *State Bank of India v. Palak Modi* [2013] 3 SCC 607: [2012] 11 SCALE 542; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.

145 . *High Court of Calcutta v. Amol Kumar Roy* AIR 1962 SC 1704; *Mohd. Shujat Ali v. Union of India* AIR 1974 SC 1631: [1975] 3 SCC 76; *Mohd. Bhakar v. Y. Krishna Reddy* [1970] SLR 768 [SC]; *Ramachandra Shankar Deodhar v. State of Maharashtra* [1974] 1 SCC 317; *Syed Khalid Rizvi v. Union of India* [1993] Supp 3 SCC 575; *State of Mysore v. G.N. Purohit* [1967] SLR 753 [SC].

146 . AIR 1981 SC 1990: [1981] 4 SCC 130. Also, *K. Jagadeesan v. Union of India* AIR 1990 SC 1072: [1990] 2 SCC 228.

lower to a higher grade within the same category. How far distinctions are permissible within the same class for promotion purposes? The general rule is that inequality of opportunity of promotion among members of a single class, which is based on no rational criteria, is not valid under Article 16.

The Supreme Court, generally speaking, does not countenance non–egalitarian "*micro–distinctions*" in the area of promotions. The Supreme Court has warned that the doctrine of classification should not be taken to a point where instead of being a useful servant, it becomes a dangerous master. However, conditions designed to promote efficiency and best service have been accepted as valid, *e.g*., the basis of seniority–cum–merit.[147] In a State, mamlatdars were recruited partly directly and partly by promotion from a lower grade. But after appointment, all mamlatdars were integrated into one cadre as they had the same designation, pay scale, functions, *etc*. It was held that as all mamlatdars formed one class, it would not be valid to accord a favoured treatment to the appointed mamlatdars *qua* the mamlatdars, and thus to discriminate them, for purposes of promotion to the posts of deputy collectors.[148]

Usually, the Supreme Court has upheld classification, for the purposes of promotion, based on educational qualifications. However one has always to bear in mind the facts and circumstances of the case in order to Judge the validity of a classification.[149]

In *Food Corporation of India v. Om Prakash Sharma*,[150] for purposes of promotion, the eligibility criterion was fixed at three years of service for graduates and five years of service for matriculates. This differentiation was quashed by the Supreme Court on the ground that the nature of work performed

147 . *Union of India v. V.J. Karnik* AIR 1970 SC 2092: [1970] 3 SCC 658. Also, *State of Jammu & Kashmir v. T.N. Khosa* AIR 1974 SC 1: [1974] 1 SCC 19.

148 . *S.M. Pandit v. State of Gujarat* AIR 1972 SC 252: [1972] 4 SCC 778.

149 . *State of Jammu & Kashmir v. T.N. Khosa* AIR 1974 SC 1: [1974] 1 SCC 1989; *Roop Chand Adlakha v. Delhi Development Authority* AIR 1989 SC 307: 1989 Supp 1 SCC 116; *P. Murugesan v. State of Tamil Nadu* [1993] 2 SCC 340; *Rajasthan State Electricity Board Accountants Association v. Rajasthan State Electricity Board* [1997] 3 SCC 103: AIR 1997 SC 882: [1994] 6 JT 157.

150 . AIR 1998 SC 2682: [1998] 7 SCC 676.

by the promotees was not such as to make differentiation between graduates and non–graduates. All promotes performed the same type of work. The corporation had placed no material before the Court to justify the classification between graduates and non–graduates. The differentiation was thus held unconstitutional as offending the equality clause.

For purposes of promotion, two tests are generally applied, *viz*., "*merit–cum–seniority*" or "*seniority–cum–merit*". The **second test** involves consideration of *inter se* seniority of the employees who are eligible for consideration for promotion. The test means that "*given the minimum necessary merit requisite for efficiency of administration*, *the senior*, *even though less meritorious*, *shall have priority and a comparative assessment of merit is not required to be made*".[151] On the other hand, if the test of "*merit–cum–seniority*" is adopted then a comparative assessment of merit of the candidates is required to be made. This test lays greater emphasis on merit and not on length of service which plays a less significant role. Seniority is to be given weight if merit and ability are approximately equal.

In addition, the Supreme Court has suggested to the Union and State Governments a complete change in the system of maintaining confidential rolls of their employees because a solution has to be found to the long delays in communicating the adverse entries against the employees and also against the misuse of the powers by officials who write the confidential reports. Under the prevailing system, entries are first made in the confidential report of an officer behind his back and **then he is given an opportunity to make a representation against the entry by communicating the same to him after considerable time**. Any representation made by him is considered by a higher authority some years later by which time any evidence that may be there to show that the entries made were baseless may have vanished. Suspensions, adverse remarks and frequent transfers from one place to another are ordered many a time without justification and without giving a reasonable opportunity

151 . *State of Mysore v. C.R. Sheshadri* AIR 1974 SC 460: [1974] 4 SCC 308; *State of Kerala v. N.M. Thomas* AIR 1976 SC 490: [1976] 2 SCC 310.

to the employee concerned. Such actions surely result in the demoralization of the services. The Courts could give very little relief in such cases. Hence the government itself should devise effective means to mitigate the hardship caused to the employees who are subjected to such treatment.

The Court has made these observations while disposing of the case of **Amar Kant Choudhary**, a 1964 directly–recruited Deputy Superintendent of Police in Bihar, who was wrongly left out of the list by the selection committee for promotion on the basis of adverse entries in his confidential rolls which were not communicated to him for several years, and which were later expunged by the government. The Court directed that within four months, the selection committee must consider Mr. **Choudhary**'**s** case for promotion, and if he is selected, he would be entitled to the seniority and all other consequential benefits flowing therefrom.[152]

[6] Seniority

Difficult questions arise from time to time regarding fixation of *inter se* seniority in a cadre. Seniority is governed by service rules. No one has a vested right to seniority but an employee has an interest seniority acquired by working out the rules. It can be taken away only by operation of a valid law.[153]

Where the appointment is illegal, the appointee would not be entitled to any consequential seniority.[154] Temporary, *ad hoc* or fortuitous appointment, not being appointed according to the rules, cannot be counted towards seniority.[155] The date of promotion to a particular grade or category determines the seniority in that grade or category.[156] However, if the circumstance so require, a group of persons can be treated as a class separate from the rest, for

152 . *Amar Kant Choudhary v. State of Bihar* AIR 1984 SC 531: [1984] 1 SCC 694. Also, *Gurdial Singh Fiji v. State of Punjab* AIR 1979 SC 1622: [1981] 4 SCC 419.

153 . *A.K. Bhatnagar v. Union of India* [1991] 1 SCC 544; *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India* AIR 1981 SC 298: [1981] 1 SCC 246.

154 . *Bhupendra Nath Hazarika v. State of Assam* [2013] 2 SCC 516: AIR 2013 SC 234.

155 . *D.N. Agrawal v. State of Madhya Pradesh* AIR 1990 SC 1311; *K.C. Joshi v. Union of India* AIR 1991 SC 284: [1992] Supp 1 SCC 272; *V. Sreenivasa Reddy v. Government of Andhra Pradesh* AIR 1995 SC 586: [1995] Supp 1 SCC 572; *Jammu & Kashmir Public Service Comm. v. Narinder Mohan [Dr.]* [1994] 2 SCC 630.

156 . *Karam Chand v. Haryana State Electricity Board* AIR 1989 SC 261: [1995] Supp 1 SCC 572.

any preferential or beneficial treatment while fixing their seniority.[157]

Furthermore, the Supreme Court has said in *R.S. Makashi and Ors v. I.M. Menon and Ors*[158] that there is no invariable normal rule that seniority is to be determined only on the basis of the respective dates of appointment to the post and that any departure from such a rule will be *prima facie* unreasonable and illegal. The rule–making authority can formulate rules of seniority. However, such rules must be "*reasonable, just and equitable*".[159]

[7] Transfer

An order of transfer of an employee is a part of the service conditions. The Court does not interfere with such an order unless it is *mala fide*, or that the service rules prohibit such an order, or that the authority issuing the order was not competent to do so.[160] It has been held that where the pay, position and seniority of the respondent were not affected, the transfer order would not be punitive merely because his promotional chances got affected.[161]

[8] Compulsory Retirement

Provision for compulsory retirement of government servants in public interest does not infringe Articles 14 and 16. These Articles do not prohibit the prescription of reasonable rules for compulsory retirement[162] which neither involves any civil consequences,[163] nor any stigma.

It is valid to put a ban on re–appointment of persons compulsorily retired as it has a reasonable basis and has some relation to the suitability for employment or appointment to an office.[164]

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157 . *Ram Janam Singh v. State of Uttar Pradesh* AIR 1994 SC 1722: [1994] 6 SCC 622.

158. AIR 1982 SC 101: [1982] 2 SCR 69.

159 . Fixation of seniority was held reasonable in *K.B. Shukla v. Union of India* AIR 1979 SC 1136: [1979] 4 SCC 673, but unreasonable and legally erroneous in *G.R. Luthra v. Lt. Gov. of Delhi* AIR 1979 SC 1900, and *B.L. Goal v. State of Uttar Pradesh* AIR 1979 SC 228.

160 . *State Bank of India v. Anjan Sanyal* AIR 2001 SC 1748: [2001] 5 SCC 508.

161 . *Registrar General, High Court of Judicature at Madras v. R. Perachi* AIR 2012 SC 232, at p. 241: [2011] 12 SCC 137.

162 . *Shiv Charana Singh v. State of Mysore* AIR 1965 SC 280; *P. Radhakrishna Naidu v. State of Andhra Pradesh* AIR 1977 SC 854: [1977] 1 SCC 56l. See also, *R.C. Chandel v. High Court of Madhya Pradesh* AIR 2012 SC 2962, at p. 2969: [2012] 8 SCC 58.

163 . *Union of India v. J.N. Sinha* AIR 1971 SC 40: [1970] 2 SCC 458; *Tara Singh v. State of Rajasthan* AIR 1975 SC 1487: [1975] 4 SCC 86.

164 . *P. Radhakrishna Naidu v. State of Andhra Pradesh* AIR 1977 SC 854: [1977] 1 SCC 56l.

[9] Retirement

The expression "*conditions of service*" would take within its fold, fixation of the age of superannuation. Therefore, service rules made under Article 309 may revise and reduce the age of retirement. In *Nagaraj*,[165] the age of superannuation was reduced from 58 to 55 years by amending the service rules. The Supreme Court ruled that service rules can be amended under Article 309.

[10] Termination

There should be no discrimination in the matter of termination of service. In one of the cases, out of the 2000 officiating sub–inspectors of police, only the respondent was reverted while persons junior to him were allowed to officiate. This was held to be discriminatory and so bad under Article 16.[166] Dismissal of a person on the sole ground that he is a "*non–Andhra*" was held void as amounting to discrimination only on the ground of place of birth which is prohibited by Article 16[2].[167] **The constitutional provision draws no distinction between temporary and permanent posts and applies to all posts with equal rigour**.

[B] Equal Pay for Equal Work

The Supreme Court has deduced the principle of "*equal pay for equal work*" from Articles 14, 16 and 19[d] and the Preamble to the **Indian Constitution**. As the Supreme Court has explained in *State of Madhya Pradesh v. Pramod Bhartiya*,[168] the doctrine of "*equal pay for equal work*" is implicit in the doctrine of equality enshrined in Article 14, and flows from it. The rule is as much a part of Article 14 as it is of Article 16[1]. **The doctrine is also stated in Article 39[d]**, **a directive principle**, **which ordains the State to direct its policy towards securing equal pay for equal work for both men and women**.

165 . *K. Nagaraj v. State of Andhra Pradesh* AIR 1985 SC 551: [1985] 1 SCC 523; *State of Andhra Pradesh v. S.K. Mohinuddin* AIR 1994 SC 1474.
166 . *State of Uttar Pradesh v. Sughar Singh* AIR 1974 SC 423: [1974] 1 SCC 218.
167 . *Jankiraman v. State of Andhra Pradesh* AIR 1959 AP 185.
168 . AIR 1993 SC 286: [1993] 1 SCC 539.

The Court has enunciated the doctrine as follows:

"*The doctrine of equal work for equal pay would apply on the premise of similar work but it does not mean that there should be complete identity in all respects. If the two classes of persons do some work under the same employer, with similar responsibility, under similar working conditions, the doctrine of 'equal work equal pay', would apply and it would not be open to the State to discriminate one class with the other in paying salary*."

But it cannot be said that being a directive principle, it is not enforceable in a Court of law because it is also a part of Article 14. **The fundamental rights and directive principles are not supposed to be exclusionary of each other**; **they are complimentary to each other**.

The parameters for invoking the principle of equal pay for equal work include, *inter–alia*, the nature of the work and common employer.[169] The principle may properly be applied to the cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.[170] Thus, where all relevant considerations are the same persons holding identical posts and discharging similar duties should not be treated differentially.

Article 14, as already sated, permits reasonable classification which means that the classification is to be based on an intelligible basis which distinguishes persons or things grouped together from those that are left out of the group and that differentia must have a rational nexus with the object to be achieved by the differentia made. In other words, there ought to be causal connection between the basis of classification and the object of classification. The doctrine of equal pay for equal work applies in case of unequal scales of pay based on no classification or irrational classification, though those drawing the different scales of pay do identical work under the same employer.

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169 . *Alvaro Noronha Ferriera v. Union of India* AIR 1999 SC 1356: [1999] 4 SCC 408. Also see, *Avtar Singh v. State of Punjab & Ors* CWP No. 14796 of 2003; *State of Punjab and Ors v. Rajinder Singh and Ors* LPA No. 337 of 2003, decided on 7th January, 2009; *State of Punjab and Ors v. Rajinder Kumar* LPA No. 1024 of 2009, decided on 30th August, 2010.

170 . *P.K. Ramachandra Iyer v. Union of India* AIR 1984 SC 541: [1984] 2 SCC 141.

Accordingly, the Court has found it difficult to envisage a situation in research institutes where persons holding doctorate qualification and enjoying the status of professor are governed by two different scales even though their duties, functions and responsibilities are identical.

Classification on the basis of educational qualifications has always been upheld by the Supreme Court as reasonable and permissible under Article 14. In the instant case,[171] the Government of Karnataka had prescribed two different scales of pay for the tracers—a higher scale for matriculate tracers and a lower pay scale for non–matriculate tracers. The Court negatived the plea of discrimination by the non–matriculate tracers. The Court ruled that prescribing two different scales for matriculates and non–matriculates is not violative of Articles 14 and 16 and that distinction made on the basis of technical qualifications or for that matter even on the basis of general educational qualifications relevant to the suitability of the candidate for public service is permissible. The Court proceeded on the assumption that both matriculates and non–matriculates "*were doing the same kind of work*" and yet the classification made was upheld as permissible under Articles 14 and 16.

A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of equal pay for equal work requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. Thus normally the applicability of this

171 . *State of Mysore v. P. Narasingha Rao* AIR 1968 SC 349: [1968] 1 SCR 407. Also see, *Mohd. Shujat Ali v. Union of India* AIR 1974 SC 1631: [1975] 3 SCC 76.

principle must be left to be evaluated and determined by an expert body. These are not matters where a writ Court can lightly interfere.[172]

The Court also clarified another significant point. Since the plea of equal pay for equal work has to be examined with reference to Article 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be.[173] In the instant case, the petitioners [*respondents before the Supreme Court*] failed to discharge this onus.

The principle of "*equal pay for equal work*" does not apply to two sets of employees working in different organizations and when there is qualitative difference in the duties and functions discharged by them.[174]

At times, it may prove very difficult for the Court to apply the principle of equal pay for equal work as there are inherent difficulties in comparing and evaluating work done by different persons in different organizations, or even in the same organization.[175] Often the difference is a matter of degree and there is an element of value judgment. The Supreme Court has observed in this connection:

"*So long as such value judgment is made* ***bona fide*** *reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. It is important to emphasize that equal pay for equal work is a concomitant of Article 14 of the Constitution. But it follows naturally that equal pay for unequal work will be a negation of that right.*"[176]

Like in some other areas the Court has adopted a restrictive approach perhaps because of realizing that it had opened the doors wider than what was

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172 . *State of Haryana v. Charanjit Singh* [2006] 9 SCC 321: AIR 2006 SC 161; *State of Punjab and Ors v. Rajinder Singh and Ors* LPA No. 337 of 2003, decided on 7th January, 2009; *State of Punjab and Ors v. Jagjit Singh and Ors* decided on 26th October, 2016.

173 . Also see, *State of Haryana v. Charanjit Singh* [2006] 9 SCC 321: AIR 2006 SC 161; *State Bank of India v. M.R. Ganesh* [2002] 4 JT SC 129, 136: [2002] 4 SCC 556: AIR 2002 SC 1955.

174 . *Garhwal Jal Sammelan Karmachari v. State of Uttar Pradesh* AIR 1997 SC 2143: [1997] 4 SCC 24.

175 . *State of Haryana v. Jasmer Singh* [1997] 1 Supp 137: [1996] 11 SCC 77: AIR 1997 SC 1788.

176. *Federation of All India Customs and Central Excise Stenographers [Recognized] v. Union of India* AIR 1988 SC 1291: [1988] 3 SCC 91. Also see, *State of Uttar Pradesh v. Ministerial Karmachari Sangh* AIR 1998 SC 303: [1988] 1 SCC 422; *State Bank of India v. M.R. Ganesh* [2002] 4 JT SC 129, 136: [2002] 4 SCC 556: AIR 2002 SC 1955; *Jeet Ram Sharma v. Union of India* WP [C] 86/2015.

required. On the authority of *Charanjit Singh*,[177] it has been held that Article 39[d] could be of no assistance for application of the rule of equal pay for equal work unless the Court is satisfied that the incumbents are performing equal and identical work as discharged by the employees vis–à–vis whom the claim is made.[178] The Court could have avoided the "*identity*" criterion since the claim in the case involved obviously different classes of teachers on the one hand and clerical staff on the other.

The above discussion reveals that the initial zeal to do justice got tempered by too many claims for equality requiring the Court to take up intensive factual enquiry beyond its competence. However in *Dineshan*, after noticing the restrictive approach of the Supreme Court in relation to the principle of "*equal pay for equal work*" it was held that it would not be correct to lay down as an absolute rule that merely because determination and granting of pay scale is the prerogative of the executive, the Court had no jurisdiction to examine any pay structure and an aggrieved employee has no remedy if he is unjustly treated by arbitrary State action or inaction. It was pointed out that when there is no dispute with regard to the duties and responsibilities of the persons who held identical posts or ranks but they are treated differently merely because they belonged to different departments or the basis of classification of posts which is *ex facie* irrational, arbitrary or unjust, the Court had power to intervene.[179] The case, however, is important because of the virtual resurrection of the principle as to the reviewability of an issue relating to equal pay for equal work and Article 14 in that context.

[C] Exceptions to Article 16[1] and 16[2]

The right of equality guaranteed by Article 16[1] and 16[2] are subject to a few exceptions.

[1] Article 16[3]

177 . *State of Haryana v. Charanjit Singh* [2006] 9 SCC 321: AIR 2006 SC 161; *State of Punjab and Ors v. Rajinder Singh and Ors* LPA No. 337 of 2003, decided on 7th January, 2009.

178 . *S.C. Chandra v. State of Jharkhand* [2007] 8 SCC 279, 288: AIR 2007 SC 3021.

179 . *Union of India v. Dineshan K.K.* [2008] 1 SCC 586: AIR 2008 SC 1026, here, the Union of India's affidavit, however, admitted the disparity in the pay scales.

First, under Article 16[3], **Parliament** may make a law to prescribe a requirement as to residence within a State or Union Territory for eligibility to be appointed with respect to specified classes of appointments or posts. Thus, Article 16[2] which bans discrimination of citizens on the ground of "*residence*" only in respect of any office or employment under the State can be qualified as regards residence, and a "*residential qualification*" imposed on the right of appointment in the State for specified appointments. This provision, therefore, introduces some flexibility, and takes cognizance of the fact that there may be some very good reasons for restricting certain posts in a State for its residents.

Article 16[3], however, incorporates a safeguard to ensure that it is not abused. **Power has been given to Parliament and not to the State Legislatures to relax the principle of non–discrimination on the ground of residence so that only a minimum relaxation is made in this regard**. **The State Legislatures being subjected to greater local pressures might have been tempted to create all kinds of barriers in the matter of public services**.

Under Article 16[3], Parliament has enacted the **Public Employment** [*Requirement as to Residence*] **Act**, 1957. The Act repeals all laws in force prescribing a requirement as to residence within a State or Union Territory except **Himachal Pradesh**, **Manipur**, **Tripura** and **Telengana**—the area transferred to Andhra Pradesh from the erstwhile State of Hyderabad. Due to the backwardness of these areas, the Act permits prescription of a residential qualification for a period up to 21st March, 1974, in regard to non–gazetted services.

In *A.V.S. Narasimha Rao v. State of Andhra Pradesh*,[180] the Supreme Court declared that part of the Act unconstitutional which prescribed a residence qualification for government services in Telegana—a part of the State of Andhra Pradesh. The Court took the view that under Article 16[3], Parliament

180 . AIR 1970 SC 422: [1969] 1 SCC 839. Further, on the Telegana issue see, *Director of Industries and Commerce v. V. Venkata Reddy* AIR 1973 SC 827: [1973] 1 SCC 99.

can impose a residential qualification for services in the whole State, but not in a part of the State, for Article 16[3] uses the word "*State*" which signifies "*State*" as a unit and not parts of a State as districts, taluqs, cities, *etc*. Article 16[3] speaks of the whole state as the venue for residential qualification. Thus, while Parliament can reserve certain posts in the State of Andhra Pradesh for the residents of the State, it cannot reserve posts in Telengana [*which is a part of the State*] for the residents of Telengana. The life of this Act came to an end in 1974. For Andhra Pradesh, however, some special provisions have been made under Article 371–D.

[2] Article 16[4]

Under Article 16[4], the State may make 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 public services under the State. The term "*State*" **denotes both the Central and the State Governments and their instrumentalities**. State as an employer is entitled to fix separate quotas of promotion for degree holders, diploma holders and certificate holders in exercise of its rule making power under Article 309.[181]

Explaining the nature of Article 16[4], the Supreme Court has stated in *Mohan Kumar Singhania v. Union of India*,[182] that it is "*an enabling provision*" conferring a discretionary power on the State for making any provision or 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 service of the State. Article 16[4] neither imposes any constitutional duty nor confers any fundamental right on any one for claiming reservation.[183]

Under Article 16[4], it is incumbent on a State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the State services. Different States may have different methods of reservation and it is not for the Court to look into the

181 . *Chandravathi P.K. v. C.K. Saji* [2004] 5 SCC 618: AIR 2004 SC 2212.
182 . AIR 1992 SC 1, at p. 26: [1992] Supp 1 SCC 594.
183 . *Indra Sawhney v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217. Also see; *Ajit Singh v. State of Punjab* [2000] 1 SCC 430.

wisdom of the method adopted.[184] While doing so, the State Government may take the total population of a particular backward class and representation in the State services, When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class, then the percentage has to be followed lowed strictly. If some SC or backward class candidates are appointed or promoted against the general posts, they are not to be counted against the reserved posts. The number of reserved posts cannot be reduced on this account. The State may, however, on an overall view of the situation review the matter and re–fix the percentages of reservation.[185]

Reservation does not rule out merits. Judging of merit may be at several tiers. It may undergo several filtrations. **Ultimately**, **tile constitutional scheme is to have the candidates who would be able to serve the society and discharge the functions attached to the office**. **Vacancies are not filled up by way of charity**. Emphasis has all along been made, times without number, to select candidates and/or students based upon their merit in each category:

"*The disadvantaged group or the socially backward people may not be able to compete with the open category people but that would not mean that they would not be able to pass the basic minimum criteria laid down therefore*."[186]

One of the tests to be applied when a statutory provision for reservation is challenged is whether the width of the power has given rise to excessive reservation and that as to whether this wide extent would make an inroad into the principles of equality under Article 16[1] and it is for the State concerned to show in each case the extent of the existence of compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. Since, however, the constitutional amendments which were under challenge were enabling provisions, it was open to the State to exercise their discretion to make such

184 . *Nair Service Society v. T. Beermasthan [Dr.]* [2009] 5 SCC 545: [2009] 4 JT 614.
185 . *R.K. Sabharwal v. State of Punjab* AIR 1995 SC 1371, at p. 1375: [1995] 2 SCC 745.
186 . *Andhra Pradesh Public Service Commission v. Baloji Badhavath* [2009] 5 SCC 1: [2009] 5 JT 563.

provisions after collecting quantifiable date showing backwardness of the class and inadequacy representation of that class in public employment in addition to compliance With Article 355 of the **Indian Constitution** subject to the clarification that the reservation provision does not exceed the ceiling limit of 50 percent or obliterate the creamy layer or extend the reservation indefinitely.[187]

Further Article 16[4] has to be interpreted in the background of Article 335.

The equality of opportunity guaranteed by Article 16[1] is to each individual citizen of the country while Article l6[4] contemplates special provision being made in favour of the socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. Accordingly, the rule of 50 percent reservation in a year should be taken as a unit and not the entire strength of the cadre, service or the unit as the case may be.[188]

The term, "*backward class*", as used in Article 16[4], takes within its fold Scheduled Castes and Scheduled Tribes. Article 15[4] speak about "*socially and educationally backward classes of citizens*". Article 16[4] speak of "*any backward class of citizens*". However, it has been settled by a series of judicial pronouncements that the expression "*backward class of citizens*" in Article 16[4] means the same thing as the expression "*any socially and educationally backward classes of citizens*" in Article 15[4]. Thus, to equality for being called a "*backward class citizen*" under Article 16[4], one must be a member of a "*socially and educationally backward class*".[189]

It has been emphasized that the expression "*backward class*" is not synonymous with "*backward caste*" or "*backward community*". In determining whether a section of population forms a backward class for purposes of Article 16[4], a test *solely* based on caste, community, race, religion, sex, descent,

187 . *M. Nagaraj v. Union of India* [2006] 8 SCC 212: AIR 2006 SC 71.
188 . *Indra Sawhney v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217.
189 . *Janki Prasad Parimoo v. State of Jammu & Kashmir* AIR 1973 SC 930: [1973] 1 SCC 420.

place of birth or residence cannot be adopted because it would directly be violative of Article 16[2].[190]

Article 16[4] does not, however, cover the entire ground covered by Article 16[1] and 16[2]. Some of the matters relating to employment in respect of which equality of opportunity has been predicated by Article 16[1] and 16[2] do not fall within the scope of the *non–obstante* clause in Article 16[4]. For instance, as regards conditions of service relating to employment, such as, salary increment, gratuity, pension and age of superannuation are matters relating to employment and, as such, they do not form the subject matter of Article 16[4]. It means that, in these matters, there can be no exception even in regard to the backward classes of citizens. In other words, these matters relating to employment are absolutely protected by the doctrine of equality and do not forms the subject matter of Article 16[4].

Article 16[4] neither confers a right on anyone to claim, nor imposes a constitutional duty on the government to make, any reservation for anyone in public services. It is merely an enabling provision and confers a discretionary power on the state to reserve posts in favour of backward classes of citizens, which, in its opinion, are not adequately represented in the state services. A balance needs to be struck between individual rights under Articles 14 and 16[1], on the one hand, and the affirmative action taken by the State under Article 16[4]. Therefore, reservation under Article 16[4] has to be within reasonable and legitimate limits. In making reservation under Article 16[4], the State cannot ignore the fundamental rights of the rest of the citizens.[191]

The amalgamation of two classes of people for reservation would be unreasonable as two different classes are treated similarly which is in violation of the mandate of Article 14 which mandates to treat similar similarly and "*to*

190 . *Triloki Nath v. State of Jammu and Kashmir* AIR 1969 SC 1: [1969] 1 SCR 103. Also see, *State of Uttar Pradesh v. Pradip Tandon* AIR 1975 SC 563: [1975] 1 SCC 267.

191 . *C.A. Rajendran v. Union of India* AIR 1968 SC 507: [1968] 1 SCR 721. Also see, *P&T Scheduled Caste/Tribe Employees Welfare Ass. [Regd.] v. Union of India* AIR 1989 SC 139: [1988] 4 SCC 147; *S.B.I. SC/ST Employees Welfare Ass. v. State Bank of India* AIR 1996 SC 1838, at p. 1841; *Ajit Singh v. State of Punjab* [1999] 7 SCC, at p. 229.

treat different differently". It is well settled that to treat different unequal's as equals violates Article 14 of the **Indian Constitution**.[192]

Article 16[4] does not envisage any reservation in services independent of backwardness. Reservation of posts was made in a State on the basis of various castes and communities like Harijans, backward Hindus, Muslims, Hindu Brahmins, non–Brahmins and Christians. The Supreme Court noted in *Venkataraman*,[193] that Article 16[4] expressly permits reservation of posts in favour of backward classes but not with regard to those not regarded as backward. While reservation of posts in favour of any backward class of citizens cannot be avoided, reservation of posts between Hindus, Muslims and Christians infringes Article 16[1] and 16[2].[194] This is not reservation for backward classes but distribution of posts on the basis of community, a ground prohibited by Article 16[2]. The expression "*backward class*" used in Article 16[4] is not synonymous with "*backward caste*" or "*backward community*". To determine whether a section of the population forms a "*class*" for purposes of Article 16[4], a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted.

Further, in *Rangachari*,[195] the validity of the circulars issued by the Railway Administration, providing for reservation in favour of the Scheduled Castes/Scheduled Tribes to promotions [*by selection*] was questioned. The argument was that Article 16[4] was confined to direct recruitment only and did not comprehend reservation in the matter of promotions as well. The Supreme Court ruled by a majority of 3:2 that under Article 16[4], reservation in government services can be made not only at the initial stage of recruitment, but even in the matter of promotion from a lower to a higher post or cadre. Thus, selection posts can also be reserved for backward classes.

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192 . *Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation* [2006] 6 SCC 718: AIR 2006 SC 2814.

193 . *Venkataraman v. State of Madras* AIR 1951 SC 229.

194 . *Triloki Nath v. State of Jammu & Kashmir* AIR 1969 SC 1: [1969] 1 SCR 103; *Makhan Lal v. State of Jammu & Kashmir* AIR 1971 SC 2206.

195 . *General Manager, Southern Rly. v. Rangachari* AIR 1962 SC 36: [1962] 2 SCR 586, for a comment on the case see, 3 JILI 367 [1961]. Also see, *State of Punjab v. Hira Lal* AIR 1971 SC 1777: [1970] 3 SCC 567.

The Court went on to explain that the expression "*adequately represented*" in Article 16[4] imports considerations of "*size*" as well as "*values*", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. Adequacy of representations of backward classes in any service has to be judged by reference to numerical as well as qualitative tests. The advancement of the socially and educationally backward classes require not only that they should have adequate representation in the lowest rung of services but that they should secure adequate representation in selection posts as well. Inadequacy of representation of backward classes can be cured by applying reservation to senior posts as well.

The Courts have interpreted Article 16[4] liberally because the Constitution attaches great importance to advancement of backward classes. However, reservation should not be excessive for two reasons. One, Article 335 enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments in connection with the affairs of the Union or a State, the policy of the State should be consistent with "*the maintenance of efficiency of administration*". Insisted the Court:

"*It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration*."

Therefore, the Court observed:

"*There can be no doubt that the Constitution–makers assumed that while making adequate reservation under Article 16[4] care would be taken not to provide for unreasonable, excessive or extravagant reservation.... Therefore, like the special provision improperly made under Article 15[4], reservation made under Article 16[4] beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution*."

Secondly, because Article 16[4] forms an exception to Article 16[1] and 16[2], Article 16[4] could not be given such an operation as to destroy the main Articles. Reservation for backward classes could not be so excessive which would in effect efface the guarantee under Article 16[1] of equal opportunity in

the matter of public employment, or at best make it illusory.

In this respect *Indra Sawhney v. Union of India*,[196] known as the *Mandal Commission* case, is a very significant pronouncement of the Supreme Court on the question of reservation of posts for backward classes. The Court has dealt with this question in a very exhaustive manner.

The Mandal Commission was appointed by the Government of India in terms of Article 340 of the Constitution in 1979 to investigate the conditions of socially and educationally backward classes. One of the major recommendations made by the Commission was that, besides the Scheduled Castes and Scheduled Tribes, for Other Backward Classes which constitute nearly 52 percent component of the population, 27 percent government jobs be reserved so that the total reservation for all, SCs, STs and OBCs, amounts to 50 percent.

No action was taken on the basis of the Mandal Report for long after it was submitted, except that it was discussed in the Houses of Parliament twice, once in 1982 and again in 1983. On 13th August, 1990 the **V.P. Singh Government** at the centre issued an office memorandum accepting the Mandal Commission recommendation and announcing 27 percent reservation for the socially and educational backward classes in vacancies in civil posts and services under the Government of India.

This memorandum led to widespread disturbances in the country. In 1991, the **Narasimha Rao Government** modified the above memorandum in two respects: **one**, the poorer sections among the backward classes would get preference over the other sections; **two**, 10 percent vacancies would be reserved for other "*economically backward sections*" of the people who were not covered by any existing reservation scheme.

Ultimately, the constitutional validity of the memorandum came to be questioned in the Supreme Court through several writ petitions. The question of constitutional validity of the memorandum was considered by a Bench of 9

196 . AIR 1993 SC 477: [1992] Supp 3 SCC 217.

Judges. Six opinions were delivered. The leading opinion was delivered by Justice **Jeevan Reddy**, on behalf of himself, Chief Justice **Kania**, Justice **Venkatachaliah** and **Ahmadi**. Two judges, Justice **Pandian** and Justice **Sawant**, in separate opinions concurred with Justice **Reddy**. Three judges, Justice **Thommen**, Justice **Kuldip Singh** and Justice **Sahai**, in separate opinions dissented from Justice Reddy on several points.

In *Indra Sawhney*, the Supreme Court has taken cognizance of many complex but very momentous questions having a bearing on the future welfare and stability of the Indian society. The Supreme Court has delivered a very thoughtful, creative and exhaustive opinion dealing with various aspects of the reservation problem. Basically reservation in government services, is anti–meritocracy, because when a candidate is appointed to a reserved post, it inevitably excludes a more meritorious candidate. But reservation is now a fact of life and it will be the ruling norm for years to come. The society may find it very difficult to shed the reservation rule in the near future. But the Court's opinion has checked the system of reservation from running not and has also mitigated some of its evils.

Three positive aspects of the Supreme Court's opinion may be highlighted.

One, the over–all reservation in a year is now limited to a maximum of 50 percent.

Two, amongst the classes granted reservation, those who have been benefited from reservation and have thus improved their social status [*called the "creamy layer" by the Court*], should not be allowed to benefit from reservation over and over again. This means that the benefit of reservation should not be misappropriated by the upper crust but that the benefit of reservation should be allowed to filter down to the lowliest so that they may benefit from reservation to improve their position.

This proposition raises the ticklish question of finding suitable socio–economic tests to identify the creamy layer among the backward classes. The

Court admits that identifying the elite classes may not be an easy exercise. Accordingly, the Court has left the task of chalking out the criteria for the purpose to the government concerned. However, the Court has given one clear indication of its thinking on this issue. The Court has said that if a member of a backward family becomes a member of IAS, IPS or any other All–India Service, his social status rises; he is no longer socially disadvantaged. **This means that**, **in effect**, **a family can avail of the reservation only once**.

Three, an element of merit has now been introduced into the scheme of reservation. This has been done in several ways, *e.g.*:

a) promotions are to be merit–based and are to be excluded from the reservation rule;

b) certain posts are to be excluded from the reservation rule and recruitment to such posts is to be merit–based;

c) minimum standards have to be laid down for recruitment to the reserved posts. In fact, the Court has insisted that some minimum standards must be laid down even though the same may be lower than the standards laid down for the non–reserved posts.

In the *Mandal* case, the Supreme Court has clearly and authoritatively laid down that the "*socially*" advanced members of a backward class, the "*creamy layer*", has to be excluded from the backward class and the benefit of reservation under Article 16[4] can only be given to the "*class*" which remains after the exclusion of the "*creamy layer*". This would more appropriately serve the purpose and object of Article 16[4].

The reason underlying this approach is that an effort be made so that the most deserving section of the backward class is benefited by reservations under Article 16[4]. At present, the benefits of job reservations are mostly chewed up by the more effluent sections of the backward class and the poorer and the really backward sections among them keep on getting poorer and more backward. The jobs are few in comparison to the population of the backward classes and it is not possible to give them adequate representation in state

services. Therefore, it is necessary that the benefit of reservation should reach the poorest and the weakest section of the backward class.

In *Indra Sawhney*, it is emphasized that upon the member of a backward class reaching an advanced social level or status, he would no longer belong to the backward class and would have to be weeded out. The Court has opined that exclusion of creamy layer, *i.e*., socially advanced members, will make the class a truly backward class and would more appropriately serve the purpose and object of Article 16[4]. Justice **Jeevan Reddy**, has stated that there are sections among the backward classes who are highly advanced socially and educationally, and they constitute the forward section of the community. These advanced sections do not belong to the true backward class. "*After excluding them alone, would the class be a compact class*. *In fact, such exclusion benefits the truly backward*".

A line has to be drawn between the forward in the backward class and the rest of the backward. If the creamy layer is not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. If the creamy layer among backward classes were given same benefits as backward classes, it will amount to treating un–equals equally which amounts to the violation of the equality clause.

According to Justice **Jeevan Reddy**, the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. It is difficult to draw a line where a person belonging to the backward class ceases to be so and becomes part of the "*creamy layer*". It is not possible to lay down the criteria exhaustively.

Article 16[4] is an enabling provision and confers a discretionary power on the State to make reservation in the matter of appointments in favour of backward classes of citizens which in its opinion are not adequately represented either numerically or qualitatively in services of the State. But it confers no Constitutional right upon the members of the backward classes to claim reservation. This article does not say that only such Scheduled Castes and

Scheduled Tribes which are mentioned in the Presidential Order issued under Articles 341[1] or 342[1] for a particular State alone would be recognized as backward classes of citizens and none else. If a State or Union Territory makes a provision whereunder the benefit of reservation is extended only to such Scheduled Castes or Scheduled Tribes which are recognized as such in relation to that State or Union Territory then such a provision would be perfectly valid. The **Union Territory of Pondicherry** having adopted a policy of the Central Government whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State are eligible for posts which are reserved for SC/ST candidates, no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.[197]

In *Preeti Sagar [Dr.] v. State of Madhya Pradesh*,[198] it was held that the Constitution permits preferential treatment for historically disadvantaged groups in the context of entrenched and clearly perceived social inequalities. That is why Article 16[4] permits reservation of appointments or posts in favour of any backward class which is not adequately represented in the services under the State. Reservation is linked with adequate representation in the services. Reservation is thus a dynamic and flexible concept. The departure from the principle of equality of opportunity has to be constantly watched. So long as the backward group is not adequately represented in the services under the State, reservations should be made.

From the above it is clear that the mechanism of reservation has been considered as a transitory measure that will enable the backward to enter and be adequately represented in the state services against the backdrop of prejudice and social discrimination. But, finally, as the social backdrop changes —and a change in the social backdrop is one of the constitutional imperatives, as the backward are able to secure adequate representation in the services, the reservations will not be required. Article 335 enters a further caveat on reservations, *viz.*, while considering the claims of the Scheduled Castes and

197 . *S. Pushpa v. Sivachanmugavelu* [2005] 3 SCC 1: AIR 2005 SC 1038.
198 . [1997] 7 SCC 120, at pp. 142, 143: AIR 1999 SC 2894.

Scheduled Tribes as well as backward classes, for appointments, the maintenance of efficiency of administration is to be kept in sight.

[D] Constitutional Amendments

After *Indra Sawhney*, two constitutional amendments have been incorporated in Article 16[4] to somewhat tone down the impact of the Supreme Court pronouncements.

[1] Article 16 [4–A]

In *Indra Sawhney*, as stated above, eight out of nine Judges opined that Article 16[4] was confined to ritual appointments only and it did not permit or warrant reservations m the matter of promotion as such, as this gave rise to several untoward and inequitous results. The Court however permitted the existing rules in that behalf to operate for a period of five years from the date of the judgment. Thus, *Rangachari* decision was overruled.

Since then, however, the **77th Constitutional Amendment Act** has been brought into effect permitting reservation in promotion to the Scheduled Castes and Scheduled Tribes. The following Clause [4–A] has been added to Article 16 in 1995:

"*Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State*."

The Constitutional Amendment was brought into effect before the expiry of the time–limit set by the Supreme Court, *viz*., five years from the date of the judgment for the rule permitting reservation in promotion to end. Article 16[4–A] came into force from 17th June, 1995.

Thus, by amending the Constitution, Parliament has removed the base as interpreted by the Supreme Court in *Indra Sawhney* that "*appointment*" does not include "*promotion*". Article 16[4–A] thus revives the interpretation put on Article 16 in *Rangachari*. Rule of reservation can now apply not only to initial recruitment but also to promotions as well where the state is of the opinion that

the Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in services under the State.[199]

In may however be noted that Article 16[4–A] **permits reservation in promotion posts only for the members of the Scheduled Castes and Scheduled Tribes but not for other Backward Classes**. This means that the position taken by the Supreme Court in *Indra Sawhney* still prevails as regards OBCs in respect of promotion posts. **No reservation can be made in promotion posts for the OBCs**.

The Supreme Court has emphasized that Article 16[4–A] ought to be applied in such a manner that a balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes as well as for other members of the society.[200]

It has also been held that Article 16[4–A] is an enabling provision. If the State makes no reservation the High Court has no jurisdiction under Article 226 of the Constitution to issue any direction therefor.[201]

[1.1] Promotion and Seniority

Promotion of SC and ST employees out of turn because of the scheme of reservation gives rise to several problems, especially, pertaining to seniority of such persons over the employees belonging to the general category. The Supreme Court has sought to grapple with such problems keeping in view considerations of equity and fairness.

In *Union of India v. Virpal Singh Chauhan*,[202] a two–Judge Bench of the Supreme Court reiterated what the Court had said in *Indra Sawhney* that providing reservation in promotion was not warranted by Article 16[4]. The rule of reservation in promotion factually created a very poignant and objectionable situation in *Virpal*.

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199 . *Commissioner of Commercial Taxes, Andhra Pradesh v. G. Sethumadhava Rao* AIR 1996 SC 1915: [1996] 7 SCC 512; *G.S.I.C. Karmachari Union v. Gujarat Small Scale Industries Corpn*. [1997] 2 SCC 339.

200 . *P.G. Institute of Medical Education and Research v. Faculty Association* AIR 1998 SC 1767: [1998] 4 SCC 1.

201 . *A.P. Sarpanch Association v. Government of Andhra Pradesh* AIR 2001 AP 474.

202 . AIR 1996 SC 448: [1995] 6 SCC 684.

Of the 33 candidates being considered for promotion to 11 vacancies, all were SC/ST candidates. Not a single candidate among them belonged to the general category. The Court described the resultant situation arising out of reservation in promotion posts as follows:

"*Not only the juniors are stealing a march over the seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Castes/Scheduled Tribes candidates in the service have also been left behind. Such a configuration could not certainly have been intended by the framers of the Constitution or the framers of the rules of reservation*."[203]

The Court stated in *Virpal* that there is no uniform or prescribed method of providing reservation. The extent and nature of reservation is a matter for the state to decide having regard to the facts and requirements of each case. It is open to a state to say that while the reservation is to be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of the rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate would regain his seniority over the reserved candidate notwithstanding that he has been promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the state to so provide.

Further in *Ajit Singh Januja v. State of Punjab*,[204] a three–Judge Bench of the Supreme Court has gone a step ahead than *Virpal*. Reading Articles 14, 16 and 335, the Supreme Court has now categorically laid down that when there arises a question to fill up a post reserved for a SC/ST candidate in a still higher grade, then a SC/ST candidate is to be promoted first, but when the question is in respect of promotion to a general category post, then the general category candidate who has been promoted later would be considered first for promotion applying either the principle of seniority cum merit or merit cum seniority.

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203 . *Union of India v. Virpal Singh Chauhan* AIR 1996 SC 448: [1995] 6 SCC 684.
204 . AIR 1996 SC 1188: [1996] 2 SCC 715.

The Court has agreed with the *Virpal* ruling that seniority between the reserved category candidates and the general candidates in the promoted category shall continue to be governed by their panel position, *i.e*., with reference to their *inter se* seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated "*consequential seniority*". Explaining the rationale underlying this ruling, the Court has observed:

"*If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions*. *This will not consistent be with the requirement or spirit of Articles 16[4] or Article 335 of the Constitution*."[205]

But then, in *Jagdish Lal v*. *State of Haryana*,[206] a three–Judge Bench differed from the above ruling. The Court now argued that the normal rule of seniority ought to prevail in this area as well, *viz*., that the seniority rule ought to apply meaning thereby that the seniority is to be counted from the date of promotion.

Ultimately, the Court reconsidered the whole matter in *Ajit Singh II*.[207] A Constitution Bench has now overruled *Jagdish Lal* and has restored the view as expressed in *Ajit Singh I*.

The Court has now stated that the primary purpose of Article 16[4] is due representation of certain classes in certain posts. But, along with Article 16[4], there are Articles 14, 16[1] and 335 as well. Articles 14 and 16 lay down the permissible limits of the affirmative action by way of reservation which may be taken under Article 16[4] and 16[4–A]. While permitting reservations, Articles 14 and 16[1] also lay down certain limitations at the same time. Article 335 ensures that the efficiency of administration is not jeopardized.

The right to equal opportunity in the matter of promotion in the sense of a right to be "*considered*" for promotion is a Fundamental Right guaranteed by

205 . *Ajit Singh Januja v*. *State of Punjab* AIR 1996 SC 1188: [1996] 2 SCC 715.
206 . *Jagdish Lal v*. *State of Haryana* AIR 1997 SC 2366: [1997] 6 SCC 538.
207 . AIR 1999 SC 3471: [1999] 7 SCC 209.

Article 16[1]. Article 16[1] provides to every employee otherwise eligible for promotion, or who comes within the zone of consideration, a fundamental right to be "*considered*" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "*considered*" for promotion, which is his personal right.

Article 16[4] or 16[4–A] contains no directive or command; it is only an enabling provision;[208] it imposes no constitutional duty on the state and confers no fundamental right on anyone. It is necessary to balance Article 16[1] and Article 16[4] and 16[4–A]. The interests of the reserved classes must be balanced against the interests of other segments of society.[209]

The doctrine of equality of opportunity in Article 16[1] is to be reconciled in favour of backward classes under Article 16[4] in such a manner that Article 16[4], while serving the cause of backward classes shall not unreasonably encroach upon the field of equality. It is necessary to strike such a balance so as to attract meritorious and talented persons to the public services. It is also necessary to ensure that the rule of adequate representation in Article 16[4] for the backward classes and the rule of adequate representation in promotion for SC/ST under Article 16[4–A] do not adversely affect the efficiency in administration as warranted by Article 335.

When a reserved candidate is recruited at the initial level he does not go through the same normal process of selection which is applied to a general candidate. A reserved candidate gets appointment to a post reserved for his group. He is promoted to a higher post without competing with general candidates. The normal seniority rule, *viz*., from the date of "*continuous officiation*" from the date of promotion applies when a candidate is promoted in the normal manner and not to the promotion of a reserved candidate.

208 . *C.A. Rajendran v. Union of India* AIR 1968 SC 507: [1968] 1 SCR 721; *P&T Scheduled Caste/Tribe Employees' Welfare Assn. v. Union of India* [1988] 4 SCC 147: AIR 1989 SC 139.

209 . *M.R. Balaji v. State of Mysore* AIR 1963 SC 649: [1963] Supp 1 SCR 439; *Indra Sawhney v. Union of India* AIR 1993 SC 447; *Post Graduate Institute of Medical Education and Research v. Faculty Assn.* [1998] 4 SCC 1: AIR 1998 SC 1767; see also, *Mangat Ram v. State of Punjab* [2005] 9 SCC 323.

Accordingly, in *Ajit Singh II*, the Court has laid down the following principle to regulate the seniority of the promoted reserved candidates:

"……*the roster–point promotees [reserved category] cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post—vis–à–vis the general candidates who were senior to them in the lower category and who were later promoted*. *On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate—he will have to be treated as senior, at the promotion level, to the reserved candidate even if the reserved candidate was earlier promoted to that level*."[210]

The Court has ruled that *Virpal* and *Ajit Singh I* have been correctly decided but not *Jagdish Lal*.

In *M.G. Badappanavar v. State of Karnataka*,[211] the Supreme Court has again confirmed its earlier ruling in *Ajit Singh II* and directed that the seniority lists as between the general and reserved promotees, and promotions, be reviewed in the light of the ruling in that case. The Court directed that the seniority of the general candidates be restored accordingly.

[2] Article 16[4–B]

The **Constitution** [*81st Amendment*] **Act**, 2000, has added Article l6[4–B] to the Constitution. Article 16[4–B] runs as follows:

"*Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause [4] or Clause [4–A] as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year*."

The Amendment envisages that the unfilled reserved vacancies in a year are to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year. The rule of 50 percent reservation laid down by the Supreme Court is to be applied only to the normal vacancies and not to the posts of backlog of reserved

210 . *Ajit Singh v. State of Punjab II* AIR 1999 SC 3471, at p. 3491: [l999] 7 SCC 209. This ruling has been followed in *Jatindra Pal Singh v. State of Punjab* AIR 2000 SC 609: [1999] 7 SCC 257; *Ram Prasad v. D.K. Vijay* AIR 1999 SC 3563: [1999] 7 SCC 251.

211 . [2000] JT Suppl 3 SC 408: AIR 2001 SC 260: [2001] 2 SCC 666. Also see, *Sube Singh Bahanani v. State of Haryana* [1999] 8 SCC 213: [1999] SCC [L&S] 1453.

vacancies. This means that the unfilled reserved vacancies are to be carried forward from year to year without any limit, and are to be filled separately from the normal vacancies.

This Amendment also modifies the proposition laid down by the Supreme Court in *Indra Sawhney*.

The Amendment does increase the employment opportunities for the *SC*, *ST* and OBC candidates.

VI. **Abolition of Untouchability**

Article 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of "*untouchability*" is to be an offence punishable in accordance with law.

Abolition of untouchability in itself is complete and its effect is all pervading applicable to State action as well as acts or omissions by individuals, institutions or juristic body of persons.[212]

The main object of Article 17 is to ban the practice of untouchability in any form. To give effect to Article 17, Parliament enacted the **Untouchability** [*Offences*] **Act**, 1955, prescribing punishments for practising untouchability in various forms. In 1976, the Act was renamed as the **Protection of Civil Rights Act**, 1955.

The word "*untouchability*" has not been defined either in the Constitution or in the Act, because it is not capable of any precise definition.

It has however been held that the subject–matter of Article 17 is not untouchability in its literal or grammatical sense but the "*practice as it had developed historically in this country*". Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, *e.g.*, suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do not come within the purview of Article 17.

212 . *State of Karnataka v. Appa Balu Ingale* AIR 1993 SC 1126: [1995] Supp 4 SCC 469.

Article 17 is concerned with those regarded untouchables in the course of historic development.[213] Thus, instigation of a social boycott of a few individuals, or their exclusion from worship, religious services or food, *etc*., it is not within the contemplation of Article 17.[214] It is not clear whether Article 17 would prohibit outcasting or ex–communication of a person of a higher caste from his caste.[215]

The State Legislature passed a law to improve the conditions of living of untouchables. Accordingly, the Act provided for acquisition of land for constructing a colony for them. It was argued against the validity of the law that the construction of a colony would not be in conformity with Article 17. The Madras High Court rejected the argument.[216] The Court stated that what Article 17 prohibits is singling out the Harijan community for hostile treatment as a socially backward community. By no process of reasoning, could Article 17 be held **to prohibit the State from introducing a scheme for improving the condition of living of such persons**. The Court also referred to Article 15[4] in this connection.

Parliament has also enacted the **Scheduled Castes and Scheduled Tribes** [*Prevention of Atrocities*] **Act**, 1989, in order:

i) to prevent the commission of atrocities against the members of the Scheduled Castes and Scheduled Tribes;
ii) to provide for setting up of special courts for the trial of offences under the Act; and
iii) also to provide for the relief and rehabilitation of victims of such offences.

The statement of Objects and Reasons accompanying the corresponding Bill stated as follows:

"*Despite various measures to improve the socio–economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They*

213 . Denial of access to a Jain temple to a person on the ground of his being a non–Jain, but not on the ground of his being a *harijan*, does not constitute an offence under the Act; *State of Madhya Pradesh v. Puranchand* AIR 1958 MP 352. Also see, Marc Gala, ***Caste Disabilities and Indian Federalism***, 3 JILI, [1961], at p. 205.

214 . *Devarajiah v. Padmanna* AIR 1961 Mad 35, at p. 39. Also see, ***Minorities and the Law***, ILJ, [1972], at pp. 143–170.

215 . *Hadibandhu Behera v. Banamali Sahu* AIR 1961 Ori 33.

216 . *Pavadai v. State of Madras* AIR 1973 Mad 458.

are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons....."[217]

Article 15[2] also helps in the eradication of untouchability, as no person shall, on the grounds only of "*religion, race, caste, sex, place of birth or any of them*" , be denied access to shops, *etc*., as mentioned therein.

An interesting point to note is that while the fundamental rights, generally speaking, are resonations mainly on government activities, Articles 17 and 15[2] protect an individual from discriminatory conduct not only on the part of the state but even on the part of private persons in certain situations.

The Supreme Court has stated that whenever any fundamental right like Article 17 is violated by a private individual, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. The State is under a constitutional obligation to see that there is no violation of the fundamental right of such person. Reference may also be made in this connection to Articles 14, 21, 23, 25 and 29.

The directive principles, especially Articles 38 and 46, obligate the State to render socio–economic and political justice to *dalits* and improve the quality of their life. "*The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the* ***dalits*** *in the national mainstream*".[218]

VII. Safeguards for Scheduled Castes, Scheduled Tribes, Backward Classes and Women

[A] Identification of SCs and STs

217 . For comments on this Act, see, *Jai Singh v. Union of India* AIR 1993 Raj 177; *State of Madhya Pradesh v. Ram Krishna Balothia* AIR 1995 SC 1198: [1995] 3 SCC 221.

218 . Justice Ramaswamy K., in *State of Karnataka v. Appa Balu Ingale* AIR 1993 SC 1126: [1995] Supp 4 SCC 469, at p. 1134.

The Constitution does not specify the castes or the tribes which are to be called as the Scheduled Castes or the Scheduled Tribes. It leaves the power to list these castes and tribes to the President, *i.e*., the Central Executive.

Scheduled Castes, according to Article 366[24] read with Article 341, are those castes, races or tribes, or parts thereof, as the President may notify. According to Article 341[1], the President may by public notification specify what castes, races or tribes, or groups thereof in each State and Union Territory would be regarded as the Scheduled Castes for the purposes of the Constitution in relation to that State or Union Territory. Thus, the lists of the Scheduled Castes may vary from State to State and one Union Territory to another.

As regards the States, the President issues the notification after consultation with the Governor of the State concerned.

The purpose of this provision is to avoid disputes as to whether a particular caste, race or tribe should be specified as a Scheduled Caste or not. Only those castes, races or tribes can be characterized as Scheduled Castes which are notified in the Presidential Order under Article 341. To determine whether or not a particular caste, race or tribe is a Scheduled Caste or not in a State, one has to look only at the notification issued by the President under Article 341.[219]

The Supreme Court has expressed in *State of Maharashtra v. Milind*,[220] that the words "*castes*" or "*tribes*" in the expression "Scheduled Castes" and "Scheduled Tribes" have not been used in the ordinary sense of the terms but are used in the sense of the definitions contained in Article 366[24] and 366[25]. In this view, a caste is a "Scheduled Caste" or a tribe is a "Scheduled Tribe" only if they are included in the President's Orders issued under Articles 341 and 342.

It has been held that a person belong to SC in one State cannot be

219 . *K. Adhikanda Patra v. Gandua* AIR 1983 Ori 89; *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394, at p. 409; *State of Maharashtra v. Mana Adim Jamat Mandal* [2006] 4 SCC 98.

220 . AIR 2001 SC 393: [2001] 1 SCC 4.

deemed to be so in relation to any other State to which he migrates for the purpose of employment or education. Lists of SCs are declared in relation to each State separately.[221]

Under Article 341[2], however, once the notification is issued by the President under Article 341[1] any modifications therein, by way either of including or excluding from the list any caste, race or tribe or a part or a group thereof, can be made by Parliament by law and not by a Presidential notification. This means that the entries in the Presidential notification issued under Article 341[1] have to be taken as final unless altered by Parliament by law.[222] The Constitutional mandate thus is that it is the President who is empowered, in consultation with the Governor of the State, to specify by a public notification the castes, races or tribes or parts or groups within castes, races and tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes in relation to that State.

It is not open to anyone to include any caste as coming within the notification on the basis of evidence—oral or documentary—if the case in question is not specifically mentioned in the notification. It is therefore not possible to give evidence that a particular caste is a Scheduled Caste even though not mentioned in the Presidential Order.[223]

Even the Court cannot modify, add or subtract any entry in the Presidential Order. The function of the Court is to interpret what an entry in the Presidential Order is intended to mean.[224] In *Pankaj Kumar Saha v. Sub–*

221 . *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College* [1990] 3 SCC 130: [1990] 2 SCR 843: *MCD v. Veena* AIR 2001 SC 2749: [200 1] 6 SCC 571, at p. 574; *Uttar Pradesh Public Service Commission v. Sanjay Kumar Singh* [2003] 7 SCC 657, at p. 658: AIR 2003 SC 3626.

222 . *B. Basavalingappa v. D. Munichinappa* AIR 1965 SC 1269: [1965] 1 SCR 316. Also, *Parsram v. Shivchand* AIR 1969 SC 597: [1969] 1 SCC 20; *Kumari Madhuri Patil v. Addl. Commr. Tribal Development* AIR 1995 SC 94: [1994] 6 SCC 241; *K.S. Vijaylakshmi v. Tahsildar, Palakkad* AIR 2000 Ker 262; *S. Swvigaradoss v. Zonal Manager, FCI* AIR 1996 SC 1182: [1996] 3 SCC 100.

223 . *Srish Kumar Choudhury v. State of Tripura* AIR 1990 SC 991: [1990] Supp SCC 220. Also see, *Vimal Ghosh v. State of Kerala* AIR 1997 Ker 237; *State of Maharashtra v. Mana Adim Jamat Mandal* [2006] 4 SCC 98, at p. 102: AIR 2006 SC 3446.

224 . *Srish Kumar Choudhury v. State of Tripura* AIR 1990 SC 991: [1990] Supp SCC 220. Also see, *Vimal Ghosh v. State of Kerala* AIR 1997 Ker 237; *State of Maharashtra v. Mana Adim Jamat Mandal* [2006] 4 SCC 98, at p. 102: AIR 2006 SC 3446.

Divisional Officer, Islampur,[225] the Supreme Court has observed:

"*It is now settled law that.... the Court is devoid of power to include or exclude from or substitute or declare synonyms to be a Scheduled Caste or Scheduled Tribe*."

It is for Parliament to amend the list and include therein, or exclude therefrom any caste, race or tribe.

The purpose of Article 341[1] is to avoid all disputes as to whether a particular caste is a Scheduled Caste or not for purposes of the Constitution. It is the President's notification issued under Article 341[1], which determines whether a particular caste is a Scheduled Caste or not.[226] If a particular caste is not mentioned in the Presidential Order, it cannot be characterized as a Scheduled Caste.[227] Only those castes can be regarded as Scheduled Castes which are notified in the PO made und Article 341. The Supreme Court has observed as regards the President's power under Article 34l:

"*It is obvious that in specifying castes, races or tribes, the President has been expressly authorized to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe, but parts of or groups within them would be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and educational backwardness of the race, caste or tribe justifies such specification. In fact, it is well known that before a notification is issued under Article 341[1], an elaborate enquiry is made and it is as a result of this inquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness in regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and may justify the division of the Sate into convenient and suitable areas for the purpose of issuing the public notification in question.*"[228]

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225 . AIR 1996 SCW 1943: [1996] 8 SCC 264. Also, *Nityanand Sharma v. State of Bihar* AIR 1996 SCW 782: [1996] 3 SCC 576; *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar* [2008] 9 SCC 54.

226 . *Bhaiyalal v. Harikishan* AIR 1965 SC 1557, at p. 1560: [1965] 2 SCR 1557.

227 . *Parsram v. Shivchand* AIR 1969 SC 597: [1969] 1 SCC 20.

228 . *Bhaiyalal v. Harikishan* AIR 1965 SC 1557, at p. 1560: [1965] 2 SCR 1557.

Similarly, **Scheduled Tribes**, according to Article 366[25] read with Article 342, are those tribe or tribal communities, or parts or groups thereof, as the President by notify. The President may specify under Article 342[1] by public notification what tribes or tribal communities are to be treated as the Scheduled Tribes with respect to each State and Union Territory. A person belonging to a Scheduled Tribe in one State cannot *ipso facto* claim the same status in another State unless his tribe is declared to be a Scheduled Tribe in relation to that State.[229]

In case of the States, the President issues the notification after consulting the Governor of the State concerned. There is no uniform test for classifying the tribes as the Scheduled Tribes and, therefore, there exist difficulties in determining which tribe can rightly be included in, or excluded from, the schedule of tribes.

Once these lists have been issued by the President, any later additions or subtractions can be made therein only by a law of Parliament and not by a Presidential notification.[230] Clarifying the position in this regard, the Supreme Court has observed in *State of Maharashtra v. Milind*[231] that the Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub–tribe, part or group of any tribe or tribal community is synonymous to the one mentioned in the order if they are not so specifically mentioned in it. It is also not at all permissible to hold any enquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned entry in the said order.[232]

Under the above–mentioned provisions, the President promulgated a number of orders listing the Scheduled Castes and the Scheduled Tribes, *i.e.*,

229 . *Action Committee v. Union of India* [1994] 5 SCC 244; *U.P. Public Service Commission v. Sanjay Kumar Singh* [2003] 7 SCC 657: AIR 2003 SC 3626; *S. Pushpa v. Sivachanmugavelu* [2005] 3 SCC 1: AIR 2005 SC 1038.

230 . Article 342[2] of the Indian Constitution.

231 . AIR 2001 SC 393: [2001] 1 SCC 1038.

232 . *B. Basavalingappa v. D. Munichinnappa* AIR 1965 SC 1269: [1965] 1 SCR 316; *Sirsh Kumar Choudhury v. State of Tripura* AIR 1990 SC 991: [1990] Supp SCC 220; *Nityanand Sharma v. State of Bihar* AIR 1996 SC 2306: [1996] 35 SCC 576.

the **Constitution** [*Scheduled Castes*] **Order**, 1950;[233] the **Constitution** [*Scheduled Tribes*] **Order**, 1950;[234] the **Constitution** [*Scheduled Castes—Part C States*] **Order**, 1951, and the **Constitution** [*Scheduled Tribes—Part C States*] **Order**, 1951.

As stated above, once these orders have been issued by the President, no other authority except Parliament, that too by passing a law, can amend these orders.

These orders did not give entire satisfaction to the people and the Central Government received a number of requests for revision and modification of the lists contained in these orders. The Central Government referred all these requests to the Backward Classes Commission. On the recommendation of the Commission, Parliament modified the Presidential Orders by enacting the **Scheduled Castes and Scheduled Tribes Order** [*Amendment*] **Act**, 1956.

After the re–organization of the States on a linguistic basis in 1957, a new Presidential Order was issued under the **States' Re–organization Act**. Besides, various other orders have been issued mainly for the Union Territories. The **Scheduled Castes and Tribes Orders**, 1950 have been further modified by the **Scheduled Castes and Scheduled Tribes Orders** [*Amendment*] **Act**, 1976.

In this regard, the Supreme Court has stated in *Ganesh v. State of Maharashtra*:[235]

"*The notification of the President under Article 342 of the Indian Constitution, subject to the* ***Scheduled Castes and Scheduled Tribes Act****, 1976, is conclusive and final*." Similarly "*by virtue of Article 341, the Presidential Orders made under Clause [1] thereof acquire an overriding status. But for Articles 341 and 342 of the Constitution, it would have been possible for both the Union and the States, to legislate upon, or frame policies, concerning the subject of reservation, vis–à–vis inclusion of Castes/Tribes. The presence of*

233 . *Bhaiya Ram v. Anirudh* AIR 1971 SC 2533: [1970] 2 SCC 825; *Dadaji v. Sukdeobabu* AIR 1980 SC 150: [1980] 1 SCC 621; *K. Adikanda Patra v. Gandua* AIR 1983 Ori 89; *Principal, Guntur Medical College v. Y. Panduranga Rao* AIR 1983 AP 339.

234 . *Bhaiyalal v. Harikishan* AIR 1965 SC 1557, at p. 1560: [1965] 2 SCR 1557.

235 . AIR 1997 SC 2333: [1997] 4 SCC 340.

Articles 338, 338–A, 341, 342 in the Constitution clearly preclude that."[236]

However the **Andhra Pradesh Scheduled Castes** [*Rationalization of Reservations*] **Act**, 2000 regrouped the 59 castes found in the Presidential List into 4 separate groups and allotted them different percentage out of the total reservation made for Scheduled Castes as a class. Striking down the Act as unconstitutional,[237] the Supreme Court said that the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41of List II or Entry 25 of List III nor could the principles laid down in *Indra Sawhney v. Union of India*,[238] for sub–classification of OBCs be applied as a precedent for sub–classification or sub–grouping Scheduled Castes in the Presidential List. If they are one class under the Constitution, any division of these classes of persons based of any consideration would, apart from being violative of Article 14 of the Constitution, amount to tinkering with the Presidential List and therefore unconstitutional.[239]

In *Subhash Chandra v. Delhi Subordinate Services Selection Board*[240] the Supreme Court held that there exists a distinction between State service and State run institutions including Union Territory Services and Union Territory run institutions on the one hand, and the Central Civil Services and the institutions run by the Central Government on the other. In the case of the former, the reservation whether for admission or appointment in an institution and employment or appointment in the services or posts in a State or Union Territory must be confined to the members of the Scheduled Castes and Scheduled Tribes as notified in the Presidential Orders. But in respect of All–India Services, Central Civil Services or admission to an institution run and founded by the Central Government, the members of Scheduled Castes and

236 . *Subhash Chandra v. Delhi Subordinate Services Selection Board* [2009] 10 SC 615: [2009] 11 SCALE 278; *Union of India v. Shantiranjan Sarkar* [2009] 3 SCC 90.
237 . *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394: AIR 2005 SC 162.
238 . [1992] Supp 3 SCC 217.
239 . *E.V. Chinnaiah v. State of Andhra Pradesh* [2005] 1 SCC 394, at pp. 414, 418: [2006] 10 SCALE 472.
240 . [2009] 10 SC 615: [2009] 11 SCALE 278; *Kavita Khorwal v. Delhi University* [2008] 154 DLT 755.

Scheduled Tribes and other reserved category candidates irrespective of their State for which they have been notified are entitled to the benefits thereof.

Clause [3] of the **Scheduled Castes Order**, 1950, originally declared that: "....*no person who professes a religion different from Hinduism*" would be deemed to be a member of a Scheduled Caste. This para was substituted by the following para of the **Scheduled Castes and Scheduled Tribes Orders** [*Amendment*] **Act**, 1956:

"....*no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste*".

This provision has created some difficulty as is illustrated by *Punjabrao v. Meshram*,[241] the Supreme Court held in the instant case that under Clause [3] of the **Order**, only a person professing the Hindu or Sikh religion could belong to a Scheduled Caste, and a person who became a Buddhist and declared that he had ceased to be a Hindu could not derive any benefit from the Order. He could not thus contest election from a constituency reserved for members of the Scheduled Castes.

To undo the effect of this ruling, the **Scheduled Castes Order**, 1950, has been amended by the **Constitution** [*Scheduled Castes*] **Orders** [*Amendment*] **Act**, 1990 which adds the word "Buddhist" after the "Sikh" in Clause [3]. This means that a scheduled caste person professing the Buddhist religion does not cease to be a scheduled caste.[242] This Amendment shows that change of religion does not alter the social and economic conditions of the Scheduled Castes.

In *Soosai v. Union of India*,[243] the Supreme Court has posed the following important question:

"*Whether a Hindu belonging to a Scheduled Caste retains his caste on conversion to Christianity?*"

The question becomes relevant to decide whether certain facilities

241 . AIR 1965 SC 1179: [1965] 1 SCR 849. Also see, *S. Rajagopal v. C.M. Armugam* AIR 1969 SC 101; *Soosai v. Union of India* AIR 1986 SC 733: [1985] Supp SCC 590.

242 . *Sandipan Bhagwant Thorat v. Ramdas Bandu Athavale* AIR 2002 Bom 110.

243 . AIR 1986 SC 733.

granted to the Scheduled Castes can be denied to a scheduled caste person on changing his religion from Hinduism to another religion. Will this denial amount to discrimination on the ground of "*religion*" only and thus be violative of Articles 14 and 15[1] of the Indian Constitution?

In *Soosai* the constitutional validity of para 3, mentioned above, was challenged under Article 14 and Article 15[1] as being discriminatory on the basis of religion.

In its judgment [delivered by Justice **Pathak**], the Court has accepted that "*caste was retained on conversion from one religion to another*",[244] but the Court has also observed that such an oppressed group of people was part of the Hindu society alone. The Court insisted that to sustain discrimination the petitioner must prove that the disabilities and handicaps suffered from such caste membership in the social order of its origin—Hinduism—continue in their oppressive severity in the new environment of a different religious community as well. In the words of the Court:

"*To establish that paragraph 3 of the* ***Constitution*** *[Scheduled Castes]* ***Order****, 1950 discriminates against Christian members of the enumerated castes it must be shown that they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of the Constitution. It is not sufficient to show that the same caste continues after conversion. It is necessary to establish further that the disabilities and handicaps suffered from such caste membership in the social order of its origin–Hinduism continue in their oppressive severity in the new environment of a different religion community*."

In the instant case, no authoritative and detailed dealing with the present conditions of Christian society had been placed before the Court. Accordingly, the Court refused to hold that the President acted arbitrarily in the exercise of his judgment in enacting paragraph 3 of the **Constitution** [*Scheduled Castes*] **Order**, 1950.

The Court asserted that it is well established that when violation of

244 . AIR 1986 SC 733, at p. 735.

Article 14 or any of its related provisions, is alleged, the burden rests on the petitioner to establish by clear and cogent evidence that the State has been guilty of arbitrary discrimination. In the instant case, the petitioner had failed to establish his case.[245]

The Supreme Court has also considered another interesting question: when a member of a Scheduled Caste is converted to Christianity and, thereafter, is reconverted to Hinduism, what is his status? The Court has held that reconversion would not entitle him to be automatically treated as belonging to his original caste, before conversion; he would belong to his original caste if the members of the caste accept him as a member. The caste is a "*social combination of persons governed by its rules and regulations*", and it may admit a new member just as it can expel an existing member.[246] The Constitution Bench of the Supreme Court has observed on this point in *Guntur Medical College v. Mohan Rao*:[247]

> "*….on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but would become such member if the other members of the caste accept him as a member and admit him within the fold*."

The Supreme Court has held that a woman when married to a member of a tribe, after due observance of all formalities and after getting the approval of the elders of the tribe, would be regarded as a member of the tribe to which her husband belongs on the analogy of the wife taking the husband's domicile. In the instant case,[248] the husband belonged to the Munda Tribe. His wife sought to contest for a seat in the Lok Sabha from a reserved tribal constituency. It was argued against her that as she was not a member of the Scheduled Tribe, she was not eligible to contest from the reserved seat. The Supreme Court however ruled that as she was duly married to a person from

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245 . See also, *State of Kerala v. Chandramohanan* [2004] 3 SCC 429, at p. 435: AIR 2004 SC 1672; *Anjan Kumar v. Union of India* [2006] 3 SCC 257, at p. 265: AIR 2006 SC 1177.

246 . *C.M. Arumugam v. S. Rajagopal* AIR 1976 SC 939: [1976] 1 SCC 863.

247 . AIR 1976 SC 1904: [1976] 3 SCC 411. Also see, *W.S.V. Satyanarayana v. Director of Tribal Welfare* AIR 1997 AP 137.

248 . *N.E. Horo v. Jahanara Jaipal Singh* AIR 1972 SC 1840: [1972] 1 SCC 771.

the Munda Tribe, she acquired membership of that tribe.

However, more recently the Supreme Court has held that[249] a woman belonging to a Forward Class marrying a tribal cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practised by the tribals from time immemorial and accepted by the community of the village as a member of tribal society. Such acceptance must be by a resolution of the village community which must be entered in the Village Register kept for the purpose. In any event the off–spring of such a marriage would be tribal. On the other hand if a non–tribal man marries a tribal woman, their off–spring would not be tribal.[250] Further, conversion of the parents does not automatically affect the tribal status of the child.[251]

A member of a Scheduled Tribe in one State, on migration to another State, does not carry with him the tribal status if his Tribe is not recognized as such in the other State. Each State has its own list of Tribes.[252] In the instant case,[253] the petitioner belonged to a Scheduled Tribe in Andhra Pradesh. He migrated to Maharashtra where his Tribe was not listed as a Scheduled Tribe as a Scheduled Tribe. The Supreme Court ruled that he could not be treated as a member of the Scheduled Tribe in Maharashtra though he would be one in Andhra Pradesh. The Court ruled that under Article 342, the Scheduled Tribes are specified in relation to each State and Union Territory and, therefore, a member of a Scheduled Tribe in one State does not carry that status to another State. But when an area dominated by members of the same tribe belonging to the same region has been bifurcated between two States, the members would continue to get the same benefit when the said tribe is recognized in both the States.[254] This interpretation of Article 342 is in line with the interpretation of

249 . *Anjan Kumar v. Union of India* [2006] 3 SCC 257, at p. 261: AIR 2006 SC 1177.
250 . Ibid, at p. 261. Ed: The observations appear to be too generalized and requires reconsideration
251 . *Lillykutty v. Scrutiny Committee, SC & ST* [2005] 8 SCC 283: AIR 2005 SC 4.
252 . Article 342 of the **Indian Constitution**; *Lillykutty v. Scrutiny Committee, SC & ST* [2005] 8 SCC 283: AIR 2005 SC 4. See also, *Sau Kusum v. State of Maharashtra* [2009] 2 SCC 109.
253 . *Marri Chandra v. Dean, S.G.S. Medical College* [1990] 3 SCC 130: [1990] 2 SCR 843.
254 . *Sudhakar Vithal Kumbhare v. State of Maharashtra* [2004] 9 SCC 481, at p. 483: AIR 2004 SC 1036.

Article 341 as mentioned above.[255]

A person belonging to a forward c1ass cannot claim the status of a ST by obtaining a false certificate to that effect for purposes of admission to an educational institution.[256]

[B] Constitutional Safeguards

Under Article 330, seats are to be reserved for the Scheduled Castes and the Scheduled Tribe in Lok Sabha. Originally, this reservation was to operate for ten years from the commencement of the Constitution. But this duration has been extended continuously since then by 10 years each time. Now, under the Amendment of the Constitution, enacted in 1999, this reservation is to last until 25th January, 2010.[257] It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation.

The reservation for Lok Sabha seats for the Scheduled Castes and Scheduled Tribes has to be made in each State and Union Territory on population basis. The number of Lok Sabha seats reserved in a State or Union Territory for such Castes and Tribes is to bear, as nearly as possible, the same proportion to the total number of seats allotted to that State or Union Territory in the Lok Sabha as the population of the Scheduled Castes and the Scheduled Tribes [*excluding the Scheduled Tribes in the autonomous districts of Assam*][258] in the concerned State or the Union Territory bears to the total population of the State or the Union Territory.[259]

Similarly, under Article 332[1], seats are to be reserved for the

255 . Also see, *Kumari Madhuri Patil v. Addl. Commr. Tribal Development* [1994] 6 SCC 241: [1994] 125 SCC 1349; *Dudh Nath Prasad v. Union of India* AIR 2000 SC 525: [2000] 2 SCC 20; *State of Uttaranchal v. Sidharth Srivastava* [2003] 9 SCC336, at p. 352: AIR 2003 SC 4062.

256 . *Kumari Madhuri Patil v. Addl. Commr. Tribal Development* [1994] 6 SCC 241: [1994] 125 SCC 1349.

257 . Article 334[a]. The **Constitution** [*109th Amendment*] **Bill**, 2009, to amend Article 334 of the Constitution by substituting the words "*seventy years*" for the words "*sixty years*".

258 . These Tribal Districts of Assam [Schedule VI] are not under regular administration and the tribes therein are excluded from such representation.

259 . Article 330[2].

Scheduled Castes and the Scheduled Tribes [*excluding the tribes in the autonomous districts of Assam*][260] in the State Legislative Assemblies. Under Article 334[a], this reservation is to operate until 25th January, 2010.[261] The seats reserved for such Castes and Tribes in a State Legislative Assembly are to bear, as nearly as possible, the same proportion to the total number of seats in the Assembly as the population of such Castes and Tribes in the State bears to the total State population.[262]

By the 42nd Amendment of the Constitution, the number of seats for the Scheduled Castes and Scheduled Tribes in Lok Sabha and the State Legislative Assemblies were frozen at the level of the 1971 census population figures and this number will not be varied until the first census held after the year 2000.[263] A new Constitutional Amendment has now been passed to freeze the seats in the Lok Sabha and State Legislature, at the 2001 census level until the year 2026.

Article 243[T] of the Constitution provides for **reservation of seats for the Scheduled Castes**, **Scheduled Tribes and women in every municipality and further enables the legislature of a State to make provision for reservation of seats in any municipality or offices of the Chairpersons in the municipalities in favour of Backward Class of citizens**. It also mandates that the offices of Chairpersons in the municipalities shall be reserved for the Scheduled Castes, Scheduled Tribes and women as the legislature of a State may, by law, provide.

Elections to the reserved seats are held on the basis of a single electoral

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260 . These Tribal Districts of Assam [Schedule VI] are not under regular administration and the tribes therein are excluded from such representation.

261 . The **Constitution** [*79th Amendment*] **Act**, 1999.

262 . Special provisions have been made through Article 332[4], [5] and [6] for representation of Autonomous Tribal Districts in the Assam Legislature. Each district has seats in the Legislature in proportion to its population with respect to the total State population; Constituencies in an autonomous district do not comprise any area outside the district; none other than a member of a Scheduled Tribe of an autonomous district is eligible for election to the Assembly from that district. *See*, *Subrata Acharjee v. Union of India* [2002] 2 SCC 725 for reservation of seats for Scheduled Tribes in the Tripura Legislative Assembly on a basis other than the proportion of population.

263 . In 1980, there were 78 *Harijan* and 39 *Adivasi* members in the Lok Sabha and 546 *Harijan* and 291 *Adivasi* members in the Assemblies.

roll, and each voter in the reserved constituency is entitled to vote. There is no separate electorate. It is not for the Scheduled Castes and the Scheduled Tribes alone to elect their representatives. Thus, to elect a person belonging to such Castes and Tribes to a reserved seat, all the voters in the constituency have a right to vote. This method has been adopted with a view to discourage the differentiation of the Scheduled Castes and the Scheduled Tribes from other people and to gradually integrate them in the main stream of national life. Also, a member of the Scheduled Castes or the Scheduled Tribes is not debarred from contesting a general non–reserved seat.[264]

The fact that reservation of seats in the Legislatures is not on a permanent basis, but is at present provided for a 10 year period at a time, shows that it is envisaged that the Scheduled Castes and the Scheduled Tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and that there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel that their interest secure without any kind of reservation.

[C] Consideration of Efficiency

The general principle adopted as regards government service is merit, but in case of the Scheduled Castes and the Scheduled Tribes, some relaxation is needed because of their backwardness. Article 335, therefore, provides that the claims of the members of the Scheduled Castes and the Scheduled Tribes are to be taken into consideration, consistently with the maintenance of efficiency of administration, in making appointments to services and posts in connection with the affairs of the Union or of a State. This provision thus imposes a constitutional obligation on the various governments to take steps to ensure that the claims of members of the Scheduled Castes and Scheduled Tribes are duly considered in making appointments to government services.

In this connection, reference may be made to the discussion under

264 . *V.V. Giri v. D.S. Dora* AIR 1959 SC 1318: [1960] 1 SCR 426. See also, *Bihari Lal Rada v. Anil Jain [Tinu]* [2009] 4 SCC 1.

Articles 16[1] and 16[4]. Article 335 is an enabling provision conferring power on the State to make reservation of posts in favour of any backward class of citizens who, in the opinion of the State Government, are not adequately represented in the State services. In this connection, reference may also be made to Article 46, a Directive Principle.

Article 335 runs follows:

"*The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State*."

Article 335 insists on drawing a balance between reservation of posts for the Scheduled Castes and Scheduled Tribes in government posts and maintenance of efficiency in the administration. Article 335 makes efficiency in administration of paramount importance. Article 335 makes efficiency in administration an express constitutional limitation upon the discretion vested in the State while making provisions for adequate representation for the Scheduled Castes and Scheduled Tribes.[265]

As the Supreme Court has stated in *Indra Sawhney v. Union of India*,[266] the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, in including the reserved category.

The Supreme Court has observed in this connection:

"*Article 335 stipulates that the claims of the members of the Scheduled Castes and Tribes shall be taken into consideration, consistent with the maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the affairs of the Union or of the State. It is thus, apparent that even in the matter of reservation in favour of Scheduled Castes and Scheduled Tribes the founding fathers of the Constitution did make a provision relating to the maintenance of efficiency of administration. In this view of the matter if any statutory provision provides for recruitment of a candidate without bearing in mind the maintenance of efficiency of*

265 . *Ajit Singh II v. State of Punjab* AIR 1999 SC 3471: [1999] 7 SCC 209. See also, *Andhra Pradesh Public Service Commission v. Baloji Badhavath* [2009] 5 SCC1.

266 . *Indra Sawhney I v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217; *Indra Sawhney II v. Union of India* AIR 2000 SC 498.

administration such a provision cannot be sustained, being against the constitutional mandate."[267]

Whether a particular class is adequately represented in the State services or not is a matter which lies within the subjective satisfaction of the concerned government. Although not stated specifically in the Constitution, the same principle of efficiency of administration[268] is to apply to reservation of posts for Other Backward Classes as well.

[D] Additional Provisions for Scheduled Tribes

The Constitution provides for the appointment of a Minister for Tribal Welfare in each of the **States of Bihar**, **Madhya Pradesh** and **Orissa**. This Minister can also be put additionally in charge of the welfare of the Scheduled Castes and Backward Classes, or any other work.

Under Article 339[1], the President may appoint a Commission at any time, and must appoint it after ten years of the commencement of the Constitution, to report on the welfare of the Scheduled Tribes in the States and the administration of the Scheduled Areas. The Presidential Order appointing the Commission may define its composition, powers and procedure and may make other incidental or ancillary provisions. No such provision has been made in the Constitution as regards the Scheduled Castes.

Article 339[2] empowers the Centre to issue directives to any State giving directions as to the drawing up and execution of schemes specified in the directives to be essential for the welfare of the Scheduled Tribes in the State. Article 339[2] is supplementary to Article 275[1] which provides, *inter alia*, that grants–in–aid shall be payable to a State out of the Consolidated Fund of India for purposes of meeting costs of such schemes of developments as the State may undertake with the approval of the Government of India for promoting the welfare of the Scheduled Tribes in that State. Thus, Article 275[1] furnishes the *raison d'etre* of Article 339. The Central Government has been given the power to give directions as respects such schemes because it

267 . *Ashutosh Gupta v. State of Rajasthan* [2002] 4 SCC 34, at p. 40.

268 . *Indra Sawhney v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217.

pays the cost thereof.

The main problem with the Scheduled Tribes is to improve their socio–economic conditions not at a very quick pace, but in such a way as not to do violence to their social organization and way of life. The need is to evolve ways and means of gradual adjustment of the tribal population to the changed conditions, and their slow integration in the general life of the country without undue and hasty disruption of their way of living.

It has been thought that it may be harmful to the tribal people if they are brought indiscriminate contact with the outside world. Thus, the legislatures have been empowered to impose restrictions on the fundamental rights of other citizens guaranteed by Article 19[1][d] and 19[1][e] in the interest of the Scheduled Tribes, so that movement of people from the progressive to the tribal areas, may be restricted. Accordingly, to check exploitation of the tribals, many States have enacted laws prohibiting non–tribals into the tribal areas without permits, living of non–tribals permanently in tribal areas and the transfer of tribal land to non–tribals. Reservations can also be made for them in educational institutions and government services under Articles 15[4], [5] and 16[4].

[E] Other Backward Classes

Besides the Scheduled Castes and the Scheduled Tribes, there are Other Backward Classes. The Constitution extends some protection to the OBCs as these classes have been neglected for long. The OBCs are to be found amongst all religious groups—Hindus, Muslims, Christians, *etc*.

Under Article 15[4], the State is empowered to make any special provision for the advancement of any socially and educationally backward class besides the Scheduled Castes and the Scheduled Tribes. The expression "*special provision*, *for advancement*" has a wide connotation. It may include many things, such as, reservation of seats in educational institutions, financial assistance scholarship, free housing and so on. Article 15[5] now enables the State to enact a law relating to the admission of Scheduled Castes, Scheduled

Tribes or socially and educationally backward classes of citizens in educational institutions other than the minority educationally institutions referred to in Article 30[l]. The **Central Educational Institutions** [*Reservation in Admission*] **Act**, 2007 provides for reservation of seats in Central Educational Institutions *inter alia* for the OBCs. "Other Backward Classes" has been defined as "*the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government*". Presumably having regard to Article 335, specified institutions of excellence, research institutions and institutions of national and strategic importance have been kept outside the scope of the Act. Under Article 16[4], the state can make provisions for the reservation of appointments or posts in favour of "*any backward class of citizens*".

While there exist in the Constitution special provisions for reservation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha and the State Legislative Assemblies,[269] and for the representation of the Anglo–Indian Community in these various Houses, **there exists no such provision for reservation of seats for socially and educationally Backward Classes in the Lok Sabha and the State Legislative Assembles**.

Again, while under Article 335, there is a constitutional obligation to consider the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointment to services and posts in connection with the affairs of the Centre and the States, **there exists no corresponding provision for the OBCs**. However, under Article 16[4], it is permissible to reserve posts in favour of any backward class of citizens which, in the opinion of the concerned Government, is not adequately represented in the services of the State or the Central Government.

It has been ruled by the Supreme Court that Article 16[4] must be read along with Article 335. Though on the express terms of Article 335, the OBCs are not included therein, even the OBCs are also covered by the thrust of

269. Articles 330 and 332.

Article 335.[270] This means that when the State proposes to provide reservation for OBCs, "*if it is considered by the appropriate authority that such reservation will adversely affect the efficiency of the administration*, *then exercise under Article 16[4] is not permissible*."

The Other Backward Classes have not been specified in the Constitution for, at the time of the Constitution–making, not much information was available about them. The Constitution in its various provisions does not even use a single uniform expression, but uses various expressions, to characterize Backward Classes. In Articles 15[4], 15[5] and 340, the expression used is "socially and educationally backward classes. In Article 16[4], the expression used is "*backward*" *simpliciter*, in Article 46 the term used is "*weaker sections of the people*". **One of the main criteria for determining socially and educationally backward classes is poverty**. **Therefore the principle of exclusion of** "***creamy layer***" **is necessary**.[271]

[1] Backward Classes Commissions

To facilitate the task of identifying the backward classes and laying down criteria for the purpose Article 340[1] empowers the President to appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of "*socially and educationally backward classes*" in India and the difficulties under which they labour.

The Commission may recommend the steps that should be taken by the Central and State Governments to remove their difficulties and improve their condition. The Commission may also make recommendations as to the grants which should be made for the purpose by the Central or any State, and the conditions subject to which such grants should he made. The Presidential Order appointing the Commission is to define the procedure to be followed by the Commission.

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270 . *Indra Sawhney v. Union of India [I]* AIR 1993 SC 477: [1992] Supp 3 SCC 217; *Indra Sawhney v. Union of India [II]* AIR 2000 SC 498: [2000] 1 SCC 168; *Ashok Kumar Thakur v. Union of India* [2008] 6 SCC 1: [2008] 5 JT 1.

271. *Ashok Kumar Thakur v. Union of India* [2008] 6 SCC 1: [2008] 5 JT 1.

The Commission is to investigate the matters referred to it and present its report to the President setting out the facts as found by it and making its recommendation.[272] The report of the Commission together with a memorandum setting out the action taken thereon by the Central Government is to be laid before each House of Parliament.[273]

[2] First Backward Classes Commission

As envisaged by the Constitution, the **Backward Classes Commission** was appointed by the President in January, 1953, under the Chairmanship of **Kaka Kalelkar**. The Commission was asked, among other things, to determine the criteria to be adopted for classifying socially and educationally backward classes.

The Commission submitted its report in 1955. The report was not unanimous and disclosed a considerable divergence of opinion among its members and failed to specify any easily discernible objective tests to define "*backwardness*". The majority of the members of the Commission expressed the view that the position of the individual in the social hierarchy based on caste should determine backwardness.

The Central Government could not accept such a criterion because "*the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste*".

Besides, while some members in some castes may be characterized as backward "*educationally and economically*", some may not be so classified. Similarly, among the so–called upper and advanced classes, there are large number of persons who are not less backward educationally and economically, and even among the backward classes some castes are more backward than others. Then, conditions differ from State to State and region to region.

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272. Article 340[2] of the **Indian Constitution**.
273. Article 340[3].

The Commission also suggested certain other criteria to identify backwardness, e.g., lack of general educational advancement among the major sections of a caste or community, inadequate representation in the field of trade, commerce and industry, communities consisting of a large percentage of small landowners with uneconomic holdings, *etc*. The Government's reaction to this was that "*these are obviously vague tests*, *more or less of an individual character*, *and even if they are accepted they would encompass a large majority of the country's population*". And, if the entire community, barring a few exceptions, were thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive attention or adequate assistance, nor would such a dispensation fulfil the conditions laid down in Article 340 of the Constitution.

The Government of India thus came to the conclusion that further investigation was necessary with a view to devise some positive and workable criteria to specify the socially and educationally backward classes so as to give them adequate assistance and relief in all suitable ways so as to enable them to make up for the leeway of the past and to acquire the normal standards of life prevalent in the country on a systematic and elaborate basis. In the meantime, relief was to be provided to such groups of people to whom disabilities were attached by reasons of environment and occupations considered to be low, and to other classes who, adjudged in the light of reasonable standards, might well be regarded as socially and educationally backward. The task to devise positive and workable criteria to identify backwardness on an all–India basis thus remained incomplete. No indisputable yardstick could be evolved for the purpose. Each States defined backwardness in its own way, and political expediency played some role in this matter. There was thus no uniformity of approach in the country in this respect.

For purposes of Articles 15[4], [5] and 16[4], it is for the State concerned to list the backward classes. The Centre can also list them for purposes of admission into Central educational institutions and Central

Services. Even the Centre was not able to do. The task is an extremely difficult one. Many communities desire to be characterized as backward because of the facilities of admissions and services which are available to such classes, and they thus bring political influence to bear upon the government for being recognized as "*backward*". When a class is designated as backward, then even rich and well educated members of the class claim the privileges available; the more unfortunate members of the class thus get excluded. This is against the best interests of the really backward persons. This frustrates the basic objective of the Constitution, *viz*., amelioration of the really and factually weak and downtrodden people.

A bulk of case–law has arisen on this paint. The courts have been able to instill some rationality in this regard by insisting that for purposes of Articles 15[4], [5] and 16[4], caste cannot be the sole determinant of backwardness and that other tests like economic, professional, environmental, educational should also be taken into consideration.

The practice to name the castes as "*Backward Classes*", without any economic considerations, has two main defects. **One**, it has a tendency to perpetuate the caste system and, thus, hamper the growth of an egalitarian society. To accept caste as the basis of backwardness, it will lead to legitimization and perpetuation of the caste system in the country which goes against the secular character of the Indian polity. Also, the traditional caste system is breaking down and is gradually being replaced by contractual relations between individuals.

The future Indian society has undoubtedly to be classless and casteless. It is also not true to assume that all members of a caste are equally socially and educationally backward. Within a backward caste, if no economic considerations are applied, then all the privileges may be utilized by well to do people leaving the poor in the cold. It is, therefore, imperative that the castes as such should not be recognized for purposes of giving assistance. Instead, economic backwardness of classes of people should be the criteria for the

purpose.

These considerations have had an impact on the judicial approach concerning characterization of backward classes so much so that caste cannot be taken as the sale criterion for the purpose and increasing emphasis is being laid on economic factors.[274] Reference may be made here to a few of these judicial pronouncements.[275]

[3] Second Backward Classes Commission

The Government of India again appointed the Backward Classes Commission [known as the **Mandal Commission** after its Chairman **B**.**P**. **Mandal**] under Article 340 on 1st January, 1979 with a view to investigate the conditions of the socially and educationally backward classes within the territory of India. The terms of reference of the Commission were as follows:

a) to determine the criteria for defining the socially and educationally Backward Classes;
b) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;
c) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in Central and State Governments in favour of Backward Classes; and
d) to make such recommendations as the Commission thinks proper.

The Commission submitted its report on 31st December, 1980. The Commission was *inter alia* "*entrusted with the task of determining the criteria for defining the socially and educationally backward classes in the country*". To determine social and educational backwardness, the Commission evolved eleven indicators or criteria, grouped under three broad heads—**social**, **educational** and **economic**.

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274 . Reference may be made in this connection to the discussion under Articles 15[4] and 16[4].

275 . *Balaji v. State of Mysore* AIR 1963 SC 649: [1963] Supp 1 SCR 439; *R. Rajendran v. State of Madras* AIR 1968 SC 1012: [1968] 2 SCR 186; *P. Sagar v. State of Andhra Pradesh* AIR 1968 SC 1379: [1968] 3 SCR 595; *K.S. Jayasree v. State of Kerala* AIR 1976 SC 2381; *Indira Sawhney v. Union of India [I]* AIR 1993 SC 477: [1992] Supp 3 SCC 217; *Indira Sawhney v. Union of India [II]* AIR 2000 SC 498, at p. 505: [2000] 1 SCC 168.

The Commission looked at the whole question of reservation of quotas for backward classes in recruitment for government services.[276] The Commission held that [*besides the Scheduled Castes and the Scheduled Tribes who amount to 22.56 percent of the total population*], 52 percent of the total Indian population could be characterized as backward and, therefore, 52 percent of all posts could be reserved for them. The Commission, however, refrained from making such a drastic recommendation in view of the Supreme Court's ruling that the total quantum of reservations under Article 16[4] should be below 50 percent. In view of this legal constraint, the Commission was obliged to recommend reservation of 27 percent only for the OBCs so that the total reservation for Scheduled Castes, Scheduled Tribes and the Other Backward Classes would amount to a little less than 50 percent.

The Commission by and large identified castes with backward classes and more or less entirely ignored the economic tests.[277] The Commission also ignored the fact that even among the so–called higher castes, there may be a number of socially and educationally backward people deserving of help. On the whole, the Commission's recommendations have proved to be very controversial.

Subsequent to the Report of the Backward Commission, the question of characterizing backward classes again cropped up before the Supreme Court. In *K.C. Vasanth Kumar v. State of Karnataka*,[278] the judges of the Supreme Court expressed a diversity of views. The only point on which all the judges were agreed was that "*caste*" cannot be the sole determinant of backwardness, but that it is not an irrelevant test and can be taken into account along with other factors. Some of the judges were in favour of adopting the means–cum–caste test to determine backwardness.

Then, in 1993, in the famous *Indra Sawhney v. Union of India*,[279] a nine Judge Bench of the Supreme Court considered in depth the question of

276 . Report of the Backward Classes Commission, [1980], at p. 52.
277 . Report of the Backward Classes Commission, [1980], at p. 52.
278. AIR 1985 SC 1495.
279. *Indra Sawhney v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217.

backwardness and reservation of posts under Article 16[4]. Recently Parliament enacted the **Central Educational Institutions** [*Reservation in Admission*] **Act**, 2006 providing 27 percent quota to OBCs in institutions for higher education without identifying who could be considered to be an OBC. Further, the Act was amended vide the **Central Education Institutions** [*Reservation in Admission*] **Amendment Act**, 2012 provides that the seats reserved for OBC, where those reserved for SC and ST or both taken together fall below a total of 50 percent of the total seats available shall be subjected to such short fall. It further provides that the Act shall stand extended to 6 years from the earlier period prescribed in the Principal Act. The Supreme Court in *Ashok Kumar Thakur v. Union of India*[280] clarified that if the determination of "*Other Backward Classes*" by the Government is with reference to a caste, it shall exclude the "*creamy layer*" among such caste. The excessive reservation provided to OBC has been criticized and challenged. However this very Court had categorically held that the Government shall set–up the cut off marks in cases of OBC not lower than 10 marks below the general category, thus providing a peaceful end to all the deliberation on the matter.

[F] Apparatus to Supervise Safeguards

In order to ensure that the safeguards provided to the various groups under the Constitution do not just remain mere paper safeguards but are implemented effectively, the Constitution–makers felt it necessary to set up a machinery to keep a continuous watch and vigilance over the working of these safeguards throughout the country, and also to bring to the notice of the government and the legislature concerned any defects existing in the protection of these various groups.

[1] Commissioner for Scheduled Castes and Scheduled Tribes

Article 338[1] provided for the appointment of a Commissioner for the Scheduled Castes and Scheduled Tribes. He was appointed by the President. His duty was to investigate all matters relating to the safeguards provided to the

280. [2008] 6 SCC 1.

Scheduled Castes and the Scheduled Tribes under the Constitution and to report to the President upon the working of those safeguards to the President from time to time. These reports were to be laid before each House of Parliament.[281]

The Commissioner used to make annual reports. The Commissioner used to collect materials for these reports from his own personal observations, information received by him from various State Governments, Government of India and non–official agencies. The Commissions used to receive a large number of complaints from individuals and non–official agencies relating to injustices against and harassment of the Scheduled Castes and the Scheduled Tribes. He investigated these complaints in order to ascertain facts. Although he has all the powers of a civil court for the purposes of such investigation, **he was not in fact a court and was not empowered to issue orders like a civil court**.[282]

His reports usually dealt with such matters as social disabilities, legislative measures adopted by the various governments for the advancement of the Scheduled Castes and the Scheduled Tribes, representation of these communities in Parliament and State legislatures; administrative set up in the governments to look after the interests of these various classes; reservations made for them in government services; educational facilities granted to the students of these classes by the government; welfare schemes of the State Governments for improving the conditions of the Scheduled Castes, Backward Classes, Scheduled Tribes and Scheduled areas and grants–in–aid by the Central Government to the State Governments for these schemes.

In brief, the reports of the Commissioner contained valuable information and important source material not only on the working of the various safeguards—constitutional, statutory and administrative—for the Scheduled Castes, Scheduled Tribes and other weaker and backward sections of the population, but also on sociological and economic conditions of these people in

281. Article 338[2] of the **Indian Constitution**.

282 . *All India Indian Overseas Bank SC and ST Employees Welfare Assocn. v. Union of India* [1996] 6 SCC 606.

the various regions of the country.

In addition to the obligations imposed on the Commissioner under the Constitution, he also came to discharge, by convention, certain other functions, such as, representation of the Union Government on the managing committees of the non–official agencies receiving grants from the Centre; examining accounts of these organizations; advising the Central Government regarding the schemes for development of the Scheduled Tribal areas, removal of untouchability and welfare of the Scheduled Tribes and Other Backward Classes, submitted by the State Governments and non–official agencies for grants–in–aid.

On the whole, the Commissioner was concerned with the amelioration and development of the Scheduled Castes and the Scheduled Tribes, Tribal Areas and their administration, removal of untouchability, *etc*. To maintain a live contact with local conditions, a few Regional Assistant Commissioners functioned throughout the country to assist the Commissioner.[283]

In his report for the year 1957–58, the then Commissioner made an extremely valuable suggestion. He stated that backwardness has a tendency to perpetuate itself and become a vested interest and that if the ultimate goal of having a classless and casteless society is to be attained, the lists of Scheduled Castes and Scheduled Tribes would have to be reduced from year to year and replaced in due, course by a list based on criteria of *income –cum–merit*. This has not, however, happened so far. In fact, the list originally drawn in 1950 has become longer and longer since then. More and more communities constantly pressurize for inclusion in the list. Logically, with the rising tempo of development activities, one would have expected that some of these communities would by now be ready to be excluded from the list of Scheduled Castes, but, what one actually finds is a reverse process in operation, *viz*., **that of enlargement of the lists as more and more communities want to enjoy the rights and privileges available to these classes**.

283. Reports of the Commissioner for Scheduled Castes and Scheduled Tribes.

The Advisory Committee for the revision of the lists of Scheduled Castes and Scheduled Tribes, appointed by the Central Government in 1965, suggested that the more advanced communities in the lists concerned be gradually descheduled and a deadline be fixed when these lists would totally be dispensed with in the interest of complete integration of the Indian population. But it is not expected that any such suggestion will be acted upon in the near future because **this is an area where political expediency takes precedence over sagacious action**.

In 1968, however, Parliament appointed a Parliamentary Committee on the Welfare of the Scheduled Caste and Scheduled Tribes and, thus, another concrete step was taken towards strengthening the supervisory mechanism over the working of the safeguards for these people.

The committee consists of 20 members elected from the Lok Sabha, and 10 members elected from the Rajya Sabha. It has been invested with powers to criticize, guide and control the Government of India in the matter of Scheduled Castes and Scheduled Tribes. It considered the reports of the Commissioner of Scheduled Castes and Scheduled Tribes. The committee reports to both Houses of Parliament on the action to be taken by the Government for the welfare of these people.

The committee also goes into the question of their employment in services under the Central Government including the public sector undertakings. The committee could thus go deeper into the major recommendations made by the Commissioner and could assess how far these recommendations had been implemented.

Further under Article 338[3], the Commissioner of Scheduled Castes and Scheduled Tribes also discharged similar functions **with respect to such other Backward Classes as the President**, **on receipt of the report of the Backward Classes Commission**, specified by order. No such classes were ever specified.

[2] National Commission for Scheduled Castes and Scheduled Tribes

In course of time, it began to be felt that instead of a special officer [Commissioner of Scheduled Castes and Scheduled Tribes], a more effective arrangement for the purpose would be to have a high level multi–member Commission to guarantee constitutional safeguards for these people. Accordingly, Article 338 was amended by the **Constitution** [*65th Amendment*] **Act**, 1990, so as to abolish the office of the Commissioner and to provide for the appointment of the National Commission for Scheduled Castes and Scheduled Tribes.[284] By a subsequent amendment[285] the Commission was bifurcated into the **National Commission for Scheduled Castes**[286] and the **National Commission Scheduled Tribes**.[287]

Each Commission is to consist of a Chairperson, Vice–Chairperson and three other members to be appointed by the President of India. Subject to any law made by Parliament, the conditions of service and tenure of office of these persons is to be determined by rules made by the President.[288]

The Commissions are to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution or under any other law or under any order of the Government. The Commissions are also to evaluate the working of the safeguards. The Commissions are to inquire into specific complaints with respect to deprivation of any fights and safeguards to these people and to participate and advise on the planning process of socio–economic development of the Scheduled Castes and Scheduled Tribes as the case may be and to evaluate the progress of their development under the Union and any State.[289]

Furthermore, the Commissions are to make recommendations as to the measures to be taken by the various Governments for the effective implementation of these safeguards and other measures for the protection, welfare and socioeconomic development of the Scheduled Castes and

284. Article 338[1].
285. The **Constitution** [*89th Amendment*] **Act**, 2003 *w.e.f.* 19th February, 2004.
286. Article 338.
287. Article 338–A.
288. Article 338[2] and Article 338–A[2].
289. Article 338[5][a], [b], [c] and Article 338–A[5][a], [b], [c].

Scheduled Tribes.[290]

In addition, the Commissions are to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes or Scheduled Tribe as the President may, subject to any law made by Parliament, by rule specify.[291]

The Central and every State Government are required to consult the Commissions on all major policy matters affecting Scheduled Castes and Scheduled Tribes. The Commissions have power to regulate their own procedure.[292]

The Commissions are to make annual reports to the President. They can also make reports as and when it is necessary. These reports are to be placed before each House of Parliament along with a memorandum by the Government as to the action taken or proposed to be taken on the recommendations made by the Commissions. Any report of the Commissions pertaining to a State Government is to be forwarded to the State Governor and is to be placed before the State Legislature with a government memorandum explaining the action taken or proposed to be taken on these recommendations or the reasons, if any, for the non–acceptance of any of such recommendations.[293]

The Commissions have been given the power of a civil court trying a suit and, in particular, in respect of such matters as summoning and examination of witnesses, discovery and production of documents.[294]

Further the Supreme Court has ruled that the Commission has no power to grant injunctions whether temporary or permanent.[295]

The Commissions have several State offices located in different States and Union Territories. These offices serve as the "*eyes and ears*" of the Commissions as these offices keep the Commissions informed of all important

290. Article 338[5][e] and Article 338–A[5][e].
291. Article 338[5][1] and Article 338–A[5][f].
292. Article 338[9] and Article 338–A[9].
293. Article 338[d], [6], [7], and Article 338–A[5][d], [6], [7].
294. Article 338[8], and Article 338[8].
295. *All India Indian Overseas Bank v. Union of India* [1996] 6 SCC 606: [1996] 10 JT 287.

activities, decisions and orders of the State Governments concerning SCs and STs.

The important constitutional safeguards for the SCs and STs are as follows:

a) Article 46 refers to developmental and protective safeguards; Article 17, Article 23, Article 24, Article 25[2][b] confer social safeguards; Article 244, Article 275[1], Fifth and Sixth Schedules confer economic safeguards, Article 15[4], [5] Article 29[1] and Article 350–A refer to educational and cultural safeguards.
b) Political safeguards are conferred by Articles 164[1], 330, 332, 334, 371–A, 371–B, 371–C, 371–F.
c) Articles 16[4], 16[4–A], 335 and 320[4] confer service safeguards.

Article 338[5][c] and 338–A[5][c] of the Constitution refer to socio–economic development of the SCs/STs. These are very important function of the Commissions, which have to keep track of all the major policy decisions, legislative or executive action by the Government of India or any State Government. The Commissions are required to inquire into specific complaints with respect to the deprivation of rights and safeguards of SCs and STs.[296]

A number of statutes have been enacted to provide safeguards to SCs/STs. For example, to give effect to Article 17 the **Protection of Civil Rights Act**, 1955, has been enacted. This Act makes the practice of untouchability as both cognizable and non–compoundable offence and provides for strict punishment for the offences committed under the Act. Under the Act, responsibility is cast on the State Governments to take such measures as may be necessary for ensuring that the rights arising from abolition of untouchability are made available to the persons subjected to any disability arising out of untouchability.

There is also the **Scheduled Castes and Scheduled Tribes** [*Prevention of Atrocities*] **Act**, 1989. The Act specifies the atrocities which are made penal under the Act.

The Commissions are concerned with devising ways and means to

296. Article 338[5][b] and 338–A[5][b].

ensure effective implementation of these Acts. The Commissions collect monthly statistics concerning the offences committed under these Acts.[297] The Commissions make suggestions to the State Governments for effectively dealing with the crimes committed under these Acts. The Commissions are concerned with the education of the children of SCs and STs and make recommendations for strengthening the infrastructure or the purpose.[298]

Another area of interest for the Commissions is economic development of the SCs and STs. For this purpose, the Commission's review the development programmes undertaken by the States for SCs and STs.

[3] National Commission for Backward Classes

In *Indra Sawhney v. Union of India*,[299] the Supreme Court had directed that an expert body consisting of official and non–officials be established at the level of the Centre and each State to look into the complaints of wrong inclusion or non–inclusion of groups, classes and sections in the lists of Backward Classes other than the Scheduled Castes and Scheduled Tribes. Accordingly, Parliament has enacted the **National Commission for Backward Classes Act**, 1993, to establish the National Commission for Backward Classes.

The function of the Commission is to examine requests for inclusion of any class of citizens as a Backward Class in the lists and hear complaints of over–inclusion or under–inclusion of any Backward Class in such lists and tender such advice to the Central Government as it deems appropriate.[300] The advice of the Commission shall ordinarily be binding upon the Central Government.[301] Lists of Backward Classes are prepared by the Central Government from time to lime for purposes of making provision for the reservation of appointments or posts in favour of the Backward classes of citizens which; in the opinion of that Government, are not adequately

297. See, National Commission for SCs and STs, 4th Report, [1996–97], at pp. 231–246.
298. Ibid, at pp. 260–264.
299. AIR 1993 SC 477: [1992] Supp 3 SCC 217.
300. Section 9[1] of the **National Commission for Backward Classes Act**, 1993.
301. Section 9[2].

represented in the service under that Government or any other authority under the control of that Government.[302]

The Central Government revises these lists from time to time. At the expiration of three year from the enforcement of this Act, and after every succeeding period of ten years thereafter, the Government is bound to undertake revision of the lists with a view to excluding therefrom those classes who have ceased to be Backward Classes, or for including in such lists new Backward Classes. While undertaking any such revision, the Central Government is to consult the Commission.[303]

The Commission consists of the following members nominated by the Central Government:

a) a Chairperson, who is or has been a Supreme Court or a High Court Judge;
b) a social scientist;
c) two persons having special knowledge in matters relating to Backward Classes; and
d) a member–secretary, who is or has been an officer of the Central Government in the rank of a Secretary to the Government of India.[304]

Every member holds office for a term of three years from the date he assumes office.[305]

The Commission meets as and when necessary and has power to regulate its own procedure.[306]

While performing its functions, the Commission enjoys powers of a civil court trying a civil suit in respect of such matters as summoning witnesses *etc*.[307]

The Commission submits an annual report of its activities during the year to the Central Government.[308] The Central Government lays the report before both Houses of Parliament along with a memorandum of action taken on

302. Section 2[c].
303. Section 11.
304. Section 3.
305. Section 4.
306. Section 8.
307. Section 10.
308. Section 14.

the advice tendered by the Commission and the reasons for the non–acceptance of any such advice.[309]

Several States have set up State Commissions for Backward Classes after the decision in *Indra Sawhney*. Thus the Kerala State Commission for Backward Classes was constituted under the provisions of the **Kerala State Commission for Backward Classes Act**, 1993. Similarly the Karnataka Backward Classes Commission has been constituted under the **Karnataka State Commission for Backward Classes Act**, 1995. The Tamil Nadu Backward Classes Commission has been constituted as a permanent body under Article 16[4] read with Article 340 of the Indian Constitution under a Government Order in 1993.

[4] National Commission for Women

Women as a class neither belong to a minority group nor are they regarded as forming a Backward Class. India has traditionally been a male dominated society and, therefore, presently women suffer from many social and economic disabilities and handicaps. It thus becomes necessary that such conditions be created, and necessary ameliorative steps be taken, so that women as a class may make progress and are able to shed their disabilities as soon as possible.

The Constitution does not contain many provisions specifically favouring women as such. There is Article 15[3], reference to which has already been made earlier, which is a provision of permissive nature as it merely says that the state is not prevented from making any special provision for women. Then, there are such general provisions as Articles 14 and 15[2] which outlaw any kind of general discrimination against women. Article 21 is also there which can be used to spell out some safeguards for women. The Supreme Court has, in course of time, by its interpretative process of these various constitutional provisions extended some safeguards to women.

309. Section 15.

Reference may be made to a few of these judicial pronouncements.[310]

To ameliorate the general social condition of the women in the country, Parliament has enacted the **National Commission for Women Act**, 1990, to establish the National Commission for Women [NCW].

The Commission consists of the following:

a) a Chairperson, committed to the cause of women;
b) five members nominated from amongst persons having experience in law, trade unionism, management of an industry, administration, economic development health, education, social welfare, women's voluntary organizations;
c) a member–secretary who is either a member of a civil service under the Centre, or an expert in the field of management, sociological movement.[311]

All these persons hold office for three years and are appointed by the Central Government.[312]

The Commission has power to constitute committees as may be necessary to deal with special issues taken up by the Commission from time to time.[313] The Commission has power to regulate its own procedure[314] and has power of a civil court in matters like summoning witnesses.[315] The Commission presents an annual report of its activities,[316] which is presented to both Houses of Parliament along with a government memorandum of action taken thereon.[317]

The terms of reference of the Commission as laid down in Section 10 of the Act are very comprehensive. The Commission discharges the following functions:[318]

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310 . *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922: [1996] 1 SCC 490; *Vishaka v. State of Rajasthan* AIR 1997 SC 3011: [1997] 6 SCC 241; *Chairman, Rly. Board v. Chandrima Das* A1R 2000 SC 988: [2000] 2 SCC 465; *Madhu Kishwar v. State of Bihar* AIR 1996 SC 1864: [1996] 5 SCC 125; *G. Sekar v. Geetha* [2009] 6 SCC 99; *Githa Hariharan v. Reserve Bank of India* AIR 999 SC 149: [1999] 2 SCC 228.

311. Section 3.
312. Section 4.
313. Section 8.
314. Section 9.
315. Section 10[4].
316. Section 13.
317. Section 10[1].
318. Ibid.

a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;
b) present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
c) make in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any State;
d) review, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislation;
e) take up the cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities;
f) look into complaints and take *suo motu* notice of matters relating to—
    i) deprivation of women's rights;
    ii) non–implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;
    iii) non–compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women, and take up the issues arising out of such matters with appropriate authorities;
g) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as recommend strategies for their removal;
h) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity;

i) participate and advise on the planning process of socio economic development of women;
j) evaluate the progress of the development of women under the Union and any State;
k) inspect or cause to be inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise, and take up with the concerned authorities for remedial action, if found necessary;
l) fund litigation involving issues affecting a large body of women;
m) make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil;
n) any other matter which may be referred to it by the Central Government.

The Central Government is required to lay before the two Houses of Parliament all the reports sent to it by the Commission under [b] above along with a memorandum explaining the action taken or proposed to be taken on the recommendations and the reasons for non–acceptance, if any, or any such recommendations.[319]

If a recommendation relates to a State Government, the Commission sends the same to that government which lays the same before the State Legislature along with an explanatory memorandum.[320]

The Central Government makes grants to the Commission for being utilized for the purposes of the Act.[321] The salaries and allowances payable to the Chairperson and members of the Commission and its administrative expenses are to be paid out of the grants made by the Central Government.[322] While investigating any matter referred to in [a], or Sub–clause [i] of Clause [f], the Commission enjoys all the powers of a civil court trying a suit, such as, summoning of witnesses, receiving evidence on affidavits *etc*.

319. Section 10[2].
320. Section 10[3].
321. Section 11.
322. Section 6.

Further Section 16 of the Act makes it obligatory on the part of the Central Government to consult the Commission on all major policy matters affecting women.

As related the Commission has defined its function as follows:

"*The ultimate objective of the affairs of the Commission is to help and enable the women to live a dignified life without distress and with undiscriminated socio–economic status in the society*."

In this regard more recently, in *Seema v. Ashwani Kumar*,[323] certain guidelines were laid down for the compulsory registration of marriages. The Commission submitted an affidavit of its opinion that non–registration of marriages affects women the most and a law making marriage as compulsorily registration would be of critical importance to various women–related issues such as:

a) Prevention of child marriages and to ensure minimum age of marriage.
b) Prevention of marriages without the consent of the parties.
c) Check illegal bigamy/polygamy.
d) Enabling married women to claim their right to live in the matrimonial house, maintenance, *etc*.
e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.
f) Deterring men from deserting women after marriage.
g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.

The Supreme Court[324] accepted the views expressed by the Commission and directed the States and the Central Government to take the necessary steps to effect such a law.

Thus to conclude the perambulary concept of socio–economic justice has been translated by the framers into specific provision in Part–III and Part–IV in the present **Indian Constitution**. However, this constitutional goal of

323. [2006] 2 SCC 578, at p. 583: AIR 2006 SC 1158.
324. *Seema v. Ashwani Kumar* [2006] 2 SCC 578, p. 583: AIR 2006 SC 1158.

socio–economic justice can be achieved only if the courts adopt a pragmatic and sociological approach without making much ado about the rights in interpreting socio–economic legislations, which contemplate change in the social structure, effect a transition from *serfdom* to freedom or attempt to remake material conditions of the society. The fact that such a goal has been embodied in the Preamble itself testifies its value–signifying predominant position in the Constitution.

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Chapter 4

EXISTING RESERVATION POLICY SINCE ITS INCEPTION

I. General

The spirit of equality pervades the provisions of the **Indian Constitution**, as the main aim of the founders of the Constitution was to create an egalitarian society wherein social, economic and political justice prevailed and equality of status and opportunity are made available to all. However, owing to historical and traditional reasons, certain classes of Indian citizens are under severe social and economic disabilities [so] that they cannot effectively enjoy either equality of status or of opportunity.

Therefore the Constitution accords to these weaker sections of society protective discrimination in various articles, including Article 15[4]. This clause empowers the state, notwithstanding anything to the contrary in Articles 15[1] and 29[2], to make special reservation for the advancement of any

socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes.[1]

Reservation is an affirmative action taken by the state to remove the persistent or present and continuing effects of past discrimination on particular segments of the society to:

a) lift the "*limitation on access to equal opportunities*";
b) grant opportunity for full participation in the governance of the society;
c) overcome substantial chronic underrepresentation of a social group; and
d) serve/achieve the important constitutional/governmental objectives.

II. Historical Background of Reservation Policy

[A] Reservation during Pre–Independence Period

Policies involving reservation of seats for the marginalized section of the population have been in existence in the country for a long period of time. In the late 19th century, after the "*first war of independence*", the British began to view the Indian population as a heterogeneous group. They initiated a range of policies for specific categories of the subject population—religious minorities as well as those belonging to lower castes. However, by the late 19th century the British had started preparing a list of "*depressed classes*" and they set–up scholarships, special schools and other programmes for their betterment. Also, with a view to assuaging the sentiments of the growing movements against the Brahmin domination in the government and administration, the British introduced some form of reservations. Therefore, in **Bombay**, seats were reserved for all except Brahmins, Marwaris, Banias, Parsis and Christians. In 1927, in **Madras** presidency, government reserved five of every 12 jobs for non–Brahmin Hindus, two each for Brahmins, Christians and Muslims and one for others. A few princely states like **Baroda**, **Travancore** and **Kolhapur** also introduced similar provisions.[2]

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1. Daniel Müller, ***Reservations and Time: Is There Only One Right Moment to Formulate and to React to Reservations?***, The European Journal of International Law, Vol. 24[4], [2013], at pp. 1113–1134.
2. Divgi Pranav Jitendra, ***Reservations in India: A Constitutional Perspective***, World Journal on Juristic Polity, [2017], at pp. 1–18.

In addition, the efforts of Dr. **B.R. Ambedkar** in particular and the all–India depressed classes in general eventually helped to expand the net of reservations. While the British had earlier reserved seats only in legislative bodies, in 1943, reservations in services came into effect. Accordingly, 8.33 percent posts against direct recruitment made through open competition were reserved for scheduled castes. These instructions issued in 1943 can be called as origin of reservation in government services.

[B] Reservations during Post–Independence Period

[1] Reservation in Services in Favour of SCs and STs

At the time of independence, instructions were issued on 21st September, 1947 to provide reservations of 12.5 percent for Scheduled Castes in respect of vacancies arising in recruitment made through open competition. However, for recruitments made otherwise than open competition, reservation of 16.66 percent was fixed. After the Constitution was promulgated, the then ministry of home affairs in its resolution of 13th September, 1950 provided five per cent reservation for Scheduled Tribes apart from the reservation that was already in effect for the Scheduled Castes. According to the population ratio of these communities, based on the 1961 Census, government on 25th March, 1970 increased the seats reserved for SCs and STs from 12.5 percent and five percent to 15 percent and 7.5 percent respectively. Scheduled Castes reservations were also available to Sikhs and Buddhists and ST to all minorities, as ST identity is caste/religion–neutral.[3]

In addition, to facilitate the fulfilment of the reservation quota, certain concessions are also given to SC and ST candidates in the form of relaxation of the maximum age limit prescribed for direct recruitment, exemption from payment of fees prescribed for recruitment/selection, relaxation of standards, including relaxation of experience, *etc*.[4]

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3. Kumar R., ***Constitutional Amendments: An Instrument for Social Transformation***, Research Inspiration–An International Multidisciplinary e–Journal, Vol. 3[1], December, 2017, at pp. 440–446.
4. Ibid.

[2] Reservations in Services in Favour of OBCs

The princely State of Mysore instituted a system in which all communities other than Brahmins were denominated "*backward classes*" from 1918 and places were reserved for them in colleges and state services. In independent India, several states implemented the reservation in services and admissions in educational institutions in favour of backward classes much earlier than the Government of India.

In this respect, to facilitate the task of identifying the backward classes and laying down criteria for the purpose, under the **Indian Constitution** Article 340[1] empowers the President to appoint a Backward Classes Commission consisting of such persons as he thinks fit to investigate the conditions of "*socially and educationally backward classes*" in India and the difficulties under which they labour.

The Commission may recommend the steps that should be taken by the Central and State Governments to remove their difficulties and improve their condition. The Commission may also make recommendations as to the grants which should be made for the purpose by the Centre or any State, and the conditions subject to which such grants should he made. The Presidential Order appointing the Commission is to define the procedure to be followed by the Commission.

Furthermore, the Commission is to investigate the matters referred to it and present its report to the President setting out the facts as found by it and making its recommendations.[5] The report of the Commission together with a memorandum setting out the action taken thereon by the Central Government is to be laid before each House of Parliament. [6] In this respect certain Commissions were appointed from time to time which are referred as below:

[2.1] First Backward Classes Commission

As envisaged by the Constitution, the **Backward Classes Commission**

5. Article 340[2] of the **Indian Constitution**.
6. Article 340[3].

was appointed by the President in January, 1953, under the Chairmanship of **Kaka Kalelkar**. The Commission was asked, among other things, to determine the criteria to be adopted for classifying socially and educationally backward classes.

The Commission submitted its report in 1955. The report was not unanimous and disclosed a considerable divergence of opinion among its members and failed to specify any easily discernible objective tests to define "*backwardness*". The majority of the members of the Commission expressed the view that the position of the individual in the social hierarchy based on caste should determine backwardness.

The Central Government could not accept such a criterion because "*the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste*".

Besides, while some members in some castes may be characterized as backward "*educationally and economically*", some may not be so classified. Similarly, among the so–called upper and advanced classes, there are large numbers of persons who are not less backward educationally and economically, and even among the backward classes some castes are more backward than others. Then, conditions differ from State to State and region to region.

The Commission also suggested certain other criteria to identify backwardness, *e.g.*, lack of general educational advancement among the major sections of a caste or community, inadequate representation in the field of trade, commerce and industry, communities consisting of a large percentage of small landowners with uneconomic holdings, *etc*. The Government's reaction to this was that:

"*These are obviously vague tests, more or less of an individual character, and even if they are accepted they would encompass a large majority of the country's population*".

And, if the entire community, barring a few exceptions, were thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive attention or adequate assistance, nor would such a dispensation fulfil the conditions laid down in Article 340 of the **Indian Constitution**.

The Government of India thus came to the conclusion that further investigation was necessary with a view to devise some positive and workable criteria to specify the socially and educationally backward classes so as to give them adequate assistance and relief in all suitable ways so as to enable them to make up for the leeway of the past and to acquire the normal standards of life prevalent in the country on a systematic and elaborate basis. In the meantime, relief was to be provided to such groups of people to whom disabilities were attached by reasons of environment and occupations considered to be low, and to other classes who, adjudged in the light of reasonable standards, might well be regarded as socially and educationally backward. The task to devise positive and workable criteria to identify backwardness on an all–India basis thus remained incomplete. No indisputable yardstick could be evolved for the purpose. Each States defined backwardness in its own way, and political expediency played some role in this matter. There was thus no uniformity of approach in the country in this respect. Though the Commission recognized a number of causes for social and educational backwardness, yet it eventually use the criterion of caste to identify socially and educationally backward classes. The Commission listed 2399 castes as socially and educationally backward and recommended various welfare measures for OBC's including reservation in Government services and educational institutions. The Central Government did not accept its recommendations because the caste based reservation were considered a retrograde step.

It is to be referred here that for the purposes of Articles 15[4], [5] and 16[4], it is far the State concerned to list the backward classes. The Centre can also list them for purposes of admission into Central educational institutions

and central services. At this point even this Centre was not able to do. The task was an extremely difficult one. Many communities desire to be characterized as backward because of the facilities of admissions and services which are available to such classes, and they thus bring political influence to bear upon the government for being recognized as "*backward*". When a class is designated as backward, then even rich and well educated members of the class claim the privileges available; **the more unfortunate members of the class thus get excluded**. This is against the best interests of the really backward persons. **This frustrates the basic objective of the Constitution**, ***viz.***, **amelioration of the really and factually weak and downtrodden people**.

A bulk of case–law has arisen on this paint. The courts have been able to instill some rationality in this regard by insisting that for purposes of Articles 15[4], [5] and 16[4], caste cannot be the sole determinant of backwardness and that other tests like **economic**, **professional**, **environmental**, **educational** should also be taken into consideration.

The practice to name the castes as "*Backward Classes*", without any economic considerations, has two main defects. **One**, it has a tendency to perpetuate the caste system and, thus, hamper the growth of an egalitarian society. To accept caste as the basis of backwardness, it will lead to legitimization and perpetuation of the caste system in the country which goes against the secular character of the Indian polity. Also, the traditional caste system is breaking down and is gradually being replaced by contractual relations between individuals.

The future Indian society has undoubtedly to be classless and casteless. It is also not true to assume that all members of a caste are equally socially and educationally backward. Within a backward caste, if no economic considerations are applied, then all the privileges may be utilized by well to do people leaving the poor in the cold. **It is**, **therefore**, **imperative that the castes as such should not be recognized for purposes of giving assistance**. **Instead**,

economic backwardness of classes of people should be the criteria for the purpose.

These considerations have had an impact on the judicial approach concerning characterization of backward classes so much so that caste cannot be taken as the sole criterion for the purpose and increasing emphasis is being laid on economic factors. Reference may be made here to a few of these judicial pronouncements.

In *Balaji v. State of Mysore*,[7] the Supreme Court ruled with reference to Article 15[4], that it may not be irrelevant to take into account "*caste*" to determine social backwardness. But it should not be made the "*sole dominant test*" for the purpose without regard to other relevant factors. It was observed in the instant case that "*social backwardness is on the ultimate analysis the result of poverty to a very large extent*". The Court also emphasized that for purpose of Article 15[4], the backwardness must be social and educational and not ***either*** social or educational.

Furthermore, in *R. Rajendran v. State of Madras*,[8] the Court accepted classification of backward classes based on "*caste*", because social and educational backwardness of the castes was based on their occupations.

In *P. Sagar v. State of Andhra Pradesh*,[9] caste–wise classification was rejected because no other factor except caste was taken into consideration:

"*The Court maintained that in determining whether a particular section caste forms a class, caste could not be excluded altogether. But in case the caste was made a criterion, proper inquiry or investigation should be conducted by the State Government before listing certain castes as socially and educationally backward.*"

In *K.S. Jayasree v. State of Kerala*,[10] the Supreme Court upheld a government order listing backward classes but exempting therefrom such families as had an aggregate annual income of `10,000. The order was challenged by a candidate belonging to the backward class but who was denied

7. AIR 1963 SC 649: [1963] Supp 1 SCR 439
8. AIR 1968 SC 1012: [1968] 2 SCR 186.
9. AIR 1968 SC 1379: [1968] 3 SCR 595.
10. AIR 1976 SC 2381.

the privilege of preferential admission to a medical college because her family income exceeded `10,000 annually. **The Court emphasized that poverty or economic standard is a relevant factor in determining backwardness**. Neither caste nor poverty alone could be the sole or dominant test, but both are relevant, to determine backwardness. With the improvement in economic position of a family, social backwardness disappears. To permit these persons to take advantage of the privileges meant for backward persons, is to deprive the real backward poor persons of their chance to make progress.

[2.2] Second Backward Classes Commission

The Government of India again appointed the Backward Classes Commission [known as the **Mandal Commission** after its Chairman **B.P. Mandal**] under Article 340 on 1st January, 1979 with a view to investigate the conditions of the socially and educationally backward classes within the territory of India. The terms of reference of the Commission were as follows:

a) to determine the criteria for defining the socially and educationally Backward Classes;
b) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;
c) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in Central and State Governments in favour of Backward Classes; and
d) to make such recommendations as the Commission thinks proper.

Thereon the Commission submitted its report on 31st December, 1980. The Commission was *inter alia* "*entrusted with the task of determining the criteria for defining the socially and educationally backward classes in the country*". To determine social and educational backwardness, the Commission evolved eleven indicators or criteria, grouped under three broad heads—**social**, **educational** and **economic**.

The Commission looked at the whole question of reservation of quotas

for backward classes in recruitment for government services. [11] The Commission held that [*besides the Scheduled Castes and the Scheduled Tribes who amount to 22.56 percent of the total population*], 52 percent of the total Indian population could be characterized as backward and, therefore, 52 percent of all posts could be reserved for them. The Commission, however, refrained from making such a drastic recommendation in view of the Supreme Court's ruling that the total quantum of reservations under Article 16[4] should be below 50 percent. In view of this legal constraint, the Commission was obliged to recommend reservation of 27 percent only for the OBCs so that the total reservation for Scheduled Castes, Scheduled Tribes and the Other Backward Classes would amount to a little less than 50 percent.

The Commission by and large identified castes with backward classes and more or less entirely ignored the economic tests. [12] The Commission also ignored the fact that even among the so–called higher castes, there may be a number of socially and educationally backward people deserving of help. **As submitted through the research study**, **on the whole**, **the Commission's recommendations have proved to be very controversial**.

Subsequent to the Report of the Backward Commission, the question of characterizing backward classes again cropped up before the Supreme Court. In *K.C. Vasanth Kumar v. State of Karnataka*,[13] the judges of the Supreme Court expressed a diversity of views in this regard. The only point on which all the judges were agreed was that "*caste*" cannot be the sole determinant of backwardness, but that it is not an irrelevant test and can be taken into account along with other factors. **Some of the judges were in favour of adopting the means–cum–caste test to determine backwardness**.

Then, in 1993, in the famous *Indra Sawhney v. Union of India*,[14] a nine Judge Bench of the Supreme Court considered in depth the question of backwardness and reservation of posts under Article 16[4].

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11. Report of the Backward Classes Commission, [1980], at p. 52.
12. Report of the Backward Classes Commission, [1980], Chapters IV, V, and VII.
13. AIR 1985 SC 1495.
14. AIR 1993 SC 477: [1992] Supp 3 SCC 217.

Justice **Pandian** stated that before a conclusion is drawn that a caste is backward:

"*The existence of circumstances relevant to the formation of opinions is a* ***sine qua non****. If the opinion suffers from the vice of non–application of mind or formulation of collateral grounds, or beyond the scope of statute, or irrelevant and extraneous material, then that opinion is challengeable.*"[15]

Similarly, Justice **Jeevan Reddy**, emphasized that opinion in regard to backwardness must be based on relevant material. He went on to observe that under Article 16[4], reservation is not being made in favour of a "*caste*" but a backward class. "*Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16[4]*". Justice **Jeevan Reddy**, further emphasized, "*once backward, always backward is not acceptable*". Therefore, if a caste ceases to be backward in course of time, it should be excluded from the list of backward classes.

Furthermore, the Supreme Court has observed in *Indra Sawhney v. Union of India [II]*:

"*Caste only cannot be the basis for reservation. Reservation can be for a backward class of citizen of a particular caste. Therefore, from that, the creamy layer and the non–backward class of citizens are to be excluded.*"[16]

In 2006, the Parliament enacted the **Central Educational Institutions** [*Reservation in Admission*] **Act**, 2006 providing 27 percent quota to OBCs in institutions for higher education without identifying who could be considered to be an OBC. The Supreme Court in *Ashok Kumar Thakur v. Union of India*[17] has clarified that if the determination of "*Other Backward Classes*" by the Government is with reference to a caste, it shall exclude the "*creamy layer*" among such caste. Further, as noted earlier, the Court held, that there can be no definite determination of the number of OBCs without including economically backward classes.[18]

[3] Reservation in Admissions in Educational Institutions

Education was the first and foremost commandment of Dr. **B.R. Ambedkar** and he called it the "*milk of the lioness*". Education is also one of

15. *Indra Sawhney v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217.
16. *Indra Sawhney v. Union of India [II]* AIR 2000 SC 498, at p. 505: [2000] 1 SCC 168.
17. [2008] 6 SCC 1.
18. *Ashok Kumar Thakur v. Union of India* [2008] 6 SCC 1, at p. 601.

the most important criteria to measure the forwardness or backwardness of any group of persons. Many social reformers and princely states of **Kolhapur**, **Baroda** and **Mysore** realized the need for education and they rendered their contribution in providing educational facilities to the untouchables and other backward classes. **Mahatma Jyoti Rao Phule** was the first person in India who started a school for the untouchables in Pune in 1848. **Sahuji Maharaj Bhonsle** encouraged the non–Brahmanical classes in every possible way. He provided free education with lodging, boarding and scholarship to the students belonging to these communities. At the official level, the step was taken by the Madras government by framing the Grant–in–Aid Code in 1885 so as to regulate financial aid to the educational institutions providing special facilities to the students of depressed classes. Under British India, the provision for extension of education to the "*depressed classes*" was made much later.

However, in 1944 the then Ministry of Education prepared a scheme of post–matric scholarship for the students belonging to scheduled castes and it was extended to the scheduled tribes in 1948. Though after independence, specific guidelines to the states to take special care of the educational and economic conditions of the weaker sections, particularly those belonging to the scheduled castes and scheduled tribes, were given under Article 46, yet there was no provision to provide reservation in admissions in educational institutions under the Constitution in the beginning. The government of Madras made rules for reserving seats for the Scheduled Castes, Scheduled Tribes and OBCs. However, the validity of the said rule was challenged in *State of Madras v. Smt. Champakam Dorairajan*[19] and the Supreme Court declared such rule as unconstitutional. To overcome the situation arisen after the court judgment, the **Constitution** [*1st Amendment*] **Act**, 1951 was passed by inserting Clause [4] in Article 15. It empowered the state to make special provision for the advancement of socially and educationally backward classes, Scheduled Castes and Scheduled Tribes.

19. AIR 1951 SC 525: [1951] SCR 525.

The then Ministry of Education, now ministry of human resource development, for the first time in 1954 wrote to the state governments suggesting that 20 percent seats should be reserved for Scheduled Castes and Scheduled Tribes in admissions in educational institutions with a provision of five per cent relaxation in minimum qualifying marks wherever required. Subsequently, this was modified in April 1964 by bifurcating the existing percentage as 15 percent for Scheduled Castes and 5 percent for Scheduled Tribes with interchangeable provision in the event of non–fulfilment of seats according to quota. Similar action was taken by the ministry of health and family welfare in respect of reservation of seats in the universities having medical education facilities and medical and dental colleges for admission to all postgraduate courses. University Grants Commission, which was constituted in 1956, made provision towards reservation in admission in the undergraduate and postgraduate levels in favour of Scheduled Castes and Scheduled Tribes with due relaxation and concession. The percentage of reservation was revised in 1982 as 15 percent for scheduled castes and 7.5 percent for scheduled tribes. Presently, reservations are available to scheduled castes and scheduled tribes in admissions to the various undergraduate and postgraduate general, technical, medical and other professional courses in the universities and colleges. In addition to the reservation facility in admissions, provisions have also been made for freeship, scholarship, coaching and hostel facilities with a view to strengthening the educational base of Scheduled Castes and Scheduled Tribes.

Inorder to understand the existing reservation policy in India, an overview of the constitutional Provisions is necessary which are as follows:

[3.1] Constitutional Provisions and Reservation Policy

The Constitution adopted a two–fold strategy for ensuring equality for the "*depressed classes*". On one hand it provided equality before the law, ensuring that everyone, irrespective of their caste, will receive equal protection of the law and be treated alike; on the other hand it empowered the State to make special provisions to promote the educational and economic interest of

the SCs, STs, OBCs and minorities to provide legal and other safeguards against discrimination in multiple spheres. The different provisions relating to reservations enshrined in the Constitution are as under:

[3.1.1] Article 14

It requires "*the State not to deny any person equality before the law or the equal protection of the laws within the territory of India*". Thus Article 14 uses the following two expressions:

1) equality before law, and
2) equal protection of laws.

The objective of these expressions is to establish "*equality of status*" as mentioned in the preamble to the Constitution. This right to equality provides access to public resources, such as drinking water, well, roads, *etc*. Thus the Constitution gave the right to equality and made it a central component of the fundamental rights.

[3.1.2] Article 15

Prohibits discrimination on the ground of religion, race, caste, sex or place of birth. Further Article 15[4] empowers the state to make any special provision for the advancement of any socially and educationally backward class of citizen or the scheduled castes and scheduled tribes.

[3.1.3] Article 16

According to Clauses [1], [2] and [3] of Article 16, no discrimination shall be made only on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them in respect of any employment or appointment under the State. However, the principle of equality permitted a few exceptions. Article 16[4] was an enabling provision. It was included as an exception to the general principle of equality of opportunity. It did not mandate but certainly permitted the state to reserve seats for backward classes of citizens in public service. Thus Article 16[4] spoke of backward classes, not castes, and did not spell out just who constituted these backward classes. Subsequently, Articles

16[4–A] and 16[4–B] were also inserted by making amendments in the **Constitution** [*81st Amendment*] **Act**, 2000 and the **Constitution** [*85th Amendment*] **Act**, 2001 respectively.[20]

[3.1.4] Article 46

Being the most important article under Part IV of the Constitution [Directive Principles of State Policy], it stipulates that "*the State shall promote with special care the educational and economic interests of weaker sections of the people and in particular of Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation*". The phrase "*weaker sections of the society*" has not been defined under the Constitution. The Supreme Court, in the case of *Shantistar Builders v. Narayan Khimalal Totame*,[21] directed the central government to lay down appropriate guidelines regarding the expression "*weaker sections of the society*". Further, the Supreme Court, in the *Indira Sawhney* case,[22] differentiated the phrase "*backward class of citizens*" mentioned under Article 16[4] from "*weaker sections of the people*" of Article 46. According to the apex court, the expression "*weaker sections of the people*" is wider than the expression "*backward class of citizens*" or SEBCs or SCs or STs. It connotes all sections of the society who are rendered weak due to various causes, including poverty and natural and physical handicaps.

[3.1.5] Article 335

While Article 16[4] enables the state to make provision for reservations in favour of SCs, STs and OBCs, Article 335 imposes responsibility on the state to ensure the maintenance of efficiency of administration. Accordingly, a proviso to Article 335 has been inserted by the **Constitution** [*82nd Amendment*] **Act**, 2000 so as to overcome the crisis arising after the Supreme Court decision in *S. Vinod Kumar v. Union of India*.[23] It empowers the state to make any

20. Divgi Pranav Jitendra, ***Reservations in India: A Constitutional Perspective***, World Journal on Juristic Polity, [2017], at pp. 1–18.
21. AIR 1986 SC 180.
22. *Indira Sawhney v. Union of India* AIR 1993 SC 477: [1992] Supp 3 SCC 217.
23. [1996] 6 SCC 580.

provision in favour of SCs and STs for the relaxation of marks or lowering of standards for reservation in promotions.

[4] Institutional Arrangements to Implement and Monitor the Reservation Policy

The central government has developed administrative mechanisms for regulating, monitoring and implementing the reservation policy and other programmes. At the national level there are the ministry of social justice and empowerment, ministry of tribal affairs, ministry of minority affairs and Planning Commission [Backward Caste Division] as the nodal set–up for policy formulation, finalization and implementation of the programmes for the development of Scheduled Castes, Scheduled Tribes, OBCs and minorities and overseeing their overall development. These ministries and the Planning Commission also carry out evaluation and monitoring of the various educational and welfare schemes/programmes meant for the SCs, STs, OBCs and minorities.

Besides, the Department of Personnel and Training [DOP&T] in the ministry of personnel, public grievances and pensions, Government of India regulates and monitors the reservation policy in public services. Its primary responsibilities are to enforce the rules and make changes thereof whenever warranted and also monitor the fulfilment of the reserved quotas. As regards reservation policy in admissions in educational institutions, the ministry of human resource development [*department of secondary and higher education*] is the nodal authority. Further, in each ministry/department and government–funded organization, there are separate administrative units for scheduled castes, scheduled tribes and OBCs with liaison officers who are responsible for ensuring that instructions issued by the government on reservations for SCs, STs or OBCs are strictly complied with. The department of personnel and training, through administrative heads of the ministries and organizations, monitors and regulates reservations at the national level.

In addition, there are the under–mentioned independent institutions at the field level to ensure proper implementation of the reservation policy as approved by the government as also to monitor the impact of various schemes/programmes for the welfare and development of SCs, STs and OBCs.

[4.1] Apparatus to Supervise Safeguards

In order to ensure that the safeguards provided to the various groups under the Constitution do not just remain mere paper safeguards but are implemented effectively, the Constitution–makers felt it necessary to set up a machinery to keep a continuous watch and vigilance over the working of these safeguards throughout the country, and also to bring to the notice of the government and the legislature concerned any defects existing in the protection of these various groups.

[4.1.1] Commissioner for Scheduled Castes and Scheduled Tribes

Prior to **65th Amendment**, 1990, Article 338[1] provided for the appointment of a Commissioner for the Scheduled Castes and Scheduled Tribes. He was appointed by the President. His duty was to investigate all matters relating to the safeguards provided to the Scheduled Castes and the Scheduled Tribes under the Constitution and to report to the President upon the working of those safeguards to the President from time to time. These reports were to be laid before each House of Parliament.[24]

The Commissioner used to make annual reports. The Commissioner used to collect materials for these reports from his own personal observations, information received by him from various State Governments, Government of India and non–official agencies. The Commissions used to receive a large number of complaints from individuals and non–official agencies relating to injustices against and harassment of the Scheduled Castes and the Scheduled Tribes. He investigated these complaints in order to ascertain facts. Although he had all the powers of a civil court for the purposes of such investigation, he was not in fact a court and was not empowered to issue orders like a civil

24. Article 338[2] of the **Indian Constitution**.

court.[25]

His reports usually dealt with such matters as social disabilities, legislative measures adopted by the various governments for the advancement of the Scheduled Castes and the Scheduled Tribes, representation of these communities in Parliament and State legislatures; administrative set up in the governments to look after the interests of these various classes; reservations made for them in government services; educational facilities granted to the students of these classes by the government; welfare schemes of the State Governments for improving the conditions of the Scheduled Castes, Backward Classes, Scheduled Tribes and Scheduled areas and grants–in–aid by the Central Government to the State Governments for these schemes.

In brief, the reports of the Commissioner contained valuable information and important source material not only on the working of the various safeguards—constitutional, statutory and administrative—for the Scheduled Castes, Scheduled Tribes and other weaker and backward sections of the population, but also on sociological and economic conditions of these people in the various regions of the country.

In addition to the obligations imposed on the Commissioner under the Constitution, he also came to discharge, by convention, certain other functions, such as, representation of the Union Government on the managing committees of the non–official agencies receiving grants from the Centre; examining accounts of these organizations; advising the Central Government regarding the schemes for development of the Scheduled and Tribal areas, removal of untouchability and welfare of the Scheduled Tribes and other backward classes, submitted by the State Governments and non–official agencies for grants–in–aid.

On the whole, the Commissioner was concerned with the amelioration and development of the Scheduled Castes and the Scheduled Tribes, Tribal Areas and their administration, removal of untouchability, *etc*. To maintain a

25. *All India Indian Overseas Bank SC and ST Employees Welfare Assocn. v. Union of India* [1996] 6 SCC 606.

live contact with local conditions, a few Regional Assistant Commissioners functioned throughout the country to assist the Commissioner.[26]

In his report for the year 1957–58, the Commissioner made an extremely valuable suggestion. He stated that backwardness has a tendency to perpetuate itself and become a vested interest and that if the ultimate goal of having a classless and casteless society is to be attained, the lists of Scheduled Castes and Scheduled Tribes would have to be reduced from year to year and replaced in due, course by a list based on criteria of *income–cum–merit*. This has not, however, happened so far. In fact, the list originally drawn in 1950 has become longer and longer since then. More and more communities constantly pressurize for inclusion in the list. Logically, with the rising tempo of development activities, one would have expected that some of these communities would by now be ready to be excluded from the list of Scheduled Castes, but, what one actually finds is a reverse process in operation, *viz*., that of enlargement of the lists as more and more communities want to enjoy the rights and privileges available to these classes.

However the Advisory Committee for the revision of the lists of Scheduled Castes and Scheduled Tribes, appointed by the Central Government in 1965, suggested that the more advanced communities in the lists concerned be gradually descheduled and a deadline be fixed when these lists would totally be dispensed with in the interest of complete integration of the Indian population. But it is not expected that any such suggestion will be acted upon in the near future because this is an area where political expediency takes precedence over sagacious action.

In 1968, Parliament appointed a Parliamentary Committee on the Welfare of the Scheduled Caste and Scheduled Tribes and, thus, another concrete step was taken towards strengthening the supervisory mechanism over the working of the safeguards for these people.

The committee consists of 20 members elected from the Lok Sabha, and

26. Reports of the Commissioner for Scheduled Castes and Scheduled Tribes.

10 members elected from the Rajya Sabha. It has been invested with powers to criticize, guide and control the Government of India in the matter of Scheduled Castes and Scheduled Tribes. It considered the reports of the Commissioner of Scheduled Castes and Scheduled Tribes. The committee reports to both Houses of Parliament on the action to be taken by the Government for the welfare of these people.

The committee also goes into the question of their employment in services under the Central Government including the public sector undertakings. The committee could thus go deeper into the major recommendations made by the Commissioner and could assess how far these recommendations had been implemented.

Under Article 338[3], the Commissioner of Scheduled Castes and Scheduled Tribes also discharged similar functions with respect to such other Backward Classes as the President, on receipt of the report of the Backward Classes Commission, specified by order. No such classes were ever specified in this period.

[4.1.2] National Commission for Scheduled Castes and Scheduled Tribes

In course of time, it began to be felt that instead of a special officer [**Commissioner of Scheduled Castes and Scheduled Tribes**], a more effective arrangement for the purpose would be to have a high level multi–member Commission to guarantee constitutional safeguards for SC's ST's. Accordingly, Article 338 was amended by the **Constitution** [*65th Amendment*] **Act**, 1990, **so as to abolish the office of the Commissioner and to provide for the appointment of the National Commission for Scheduled Castes and Scheduled Tribes**.[27] By a subsequent amendment,[28] the Commission was bifurcated into the National Commission for Scheduled Castes[29] and the National Commission Scheduled Tribes.[30]

27. Article 338[1].
28. The **Constitution** [*89th Amendment*] **Act**, 2003 *w.e.f.* 19th February, 2004.
29. Article 338.
30. Article 338–A.

Each Commission is to consist of a Chairperson, Vice–Chairperson and three other members to be appointed by the President of India. Subject to any law made by Parliament, the conditions of service and tenure of office of these persons is to be determined by rules made by the President.[31]

The Commissions are to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution or under any other law or under any order of the Government. The Commissions are also to evaluate the working of the safeguards. The Commissions are to inquire into specific complaints with respect to deprivation of any fights and safeguards to these people and to participate and advise on the planning process of socio–economic development of the Scheduled Castes and Scheduled Tribes as the case may be and to evaluate the progress of their development under the Union and any State.[32]

Furthermore, the Commissions are to make recommendations as to the measures to be taken by the various Governments for the effective implementation of these safeguards and other measures for the **protection**, **welfare** and socio–economic development of the Scheduled Castes and Scheduled Tribes.[33]

In addition, the Commissions are to discharge such other functions in relation to the protections, welfare and development and advancement of the Scheduled Castes or Scheduled Tribe as the President may, subject to any law made by Parliament, by rule specify.[34]

In this respect, the Central and every State Government are required to consult the Commissions on all major policy matters affecting Scheduled Castes and Scheduled Tribes. The Commissions also have power to regulate their own procedure.[35] For this are to make annual reports to the President. They can also make reports as and when it is necessary. These reports are to be

31. Article 338[2] and Article 338–A[2].
32. Article 338[5][a], [b], [c] and Article 338–A[5][a], [b], [c].
33. Article 338[5][e] and Article 338–A[5][e].
34. Article 338[5][1] and Article 338–A[5][f].
35. Article 338[9] and Article 338–A[9].

placed before each House of Parliament along with a memorandum by the Government as to the action taken or proposed to be taken on the recommendations made by the Commissions. However, any report of the Commissions pertaining to a State Government is to be forwarded to the State Governor and is to be placed before the State Legislature with a government memorandum explaining the action taken or proposed to be taken on these recommendations or the reasons, if any, for the non–acceptance of any of such recommendations.[36]

The Commissions have also been given the power of a civil court trying a suit and, in particular, in respect of such matters as summoning and examination of witnesses, discovery and production of documents.[37] However, the Supreme Court has ruled that the **Commission has no power to grant injunctions whether temporary or permanent**.[38]

The Commissions have several State offices located in different States and Union Territories. These offices serve as the "*eyes and ears*" of the Commissions as these offices keep the Commissions informed of all important activities, decisions and orders of the State Governments concerning SCs and STs.

In addition, a number of statutes have been enacted to provide safeguards to SCs/STs. For example, to give effect to Article 17 the **Protection of Civil Rights Act**, 1955, has been enacted. This Act makes the practice of untouchability as both cognizable and non–compoundable offence and provides for strict punishment for the offences committed under the Act. Under the Act, responsibility is cast on the State Governments to take such measures as may be necessary for ensuring that the rights arising from abolition of untouchability are made available to the persons subjected to any disability arising out of untouchability.

There is also the **Scheduled Castes and Scheduled Tribes** [*Prevention*

36. Article 338[d], [6], [7], and Article 338–A[5][d], [6], [7].
37. Article 338[8], and Article 338[8].
38. *All India Indian Overseas Bank v. Union of India* [1996] 6 SCC 606: [1996] 10 JT 287.

of Atrocities] **Act**, 1989. The Act specifies the atrocities which are made penal under the Act.

The Commissions are concerned with devising ways and means to ensure effective implementation of these Acts. The Commissions collect monthly statistics concerning the offences committed under these Acts.[39] The Commissions make suggestions to the State Governments for effectively dealing with the crimes committed under these Acts. The Commissions are concerned with the education of the children of SCs and STs and make recommendations for strengthening the infrastructure or the purpose.[40]

Another area of interest for the Commissions is economic development of the SCs and STs. For this purpose, the Commission's review the development programmes undertaken by the States for SCs and STs.

[4.1.3] National Commission for Backward Classes

In the *Indra Sawhney v. Union of India*,[41] the Supreme Court had directed that an expert body consisting of official and non–officials be established at the level of the Centre and each State to look into the complaints of wrong inclusion or non–inclusion of groups, classes and sections in the lists of Backward Classes other than the Scheduled Castes and Scheduled Tribes. Accordingly, Parliament has enacted the **National Commission for Backward Classes Act**, 1993, to establish the National Commission for Backward Classes.

The function of the Commission is to examine requests for inclusion of any class of citizens as a Backward Class in the lists and hear complaints of over–inclusion or under–inclusion of any Backward Class in such lists and tender such advice to the Central Government as it deems appropriate.[42] The advice of the Commission shall ordinarily be binding upon the Central Government.[43] Lists of Backward Classes are prepared by the Central Government from time to lime for purposes of making provision for the

39. See, National Commission for SCs and STs, 4th Report, [1996–97], at pp. 231–246.
40. Ibid, at pp. 260–264.
41. AIR 1993 SC 477: [1992] Supp 3 SCC 217.
42. Section 9[1] of the **National Commission for Backward Classes Act**, 1993.
43. Section 9[2].

reservation of appointments or posts in favour of the Backward classes of citizens which; in the opinion of that Government, are not adequately represented in the service under that Government or any other authority under the control of that Government.[44]

The Central Government revises these lists from time to time. At the expiration of three year from the enforcement of this Act, and after every succeeding period of ten years thereafter, the Government is bound to undertake revision of the lists with a view to excluding therefrom those classes who have ceased to be Backward Classes, or for including in such lists new Backward Classes. While undertaking any such revision, the Central Government is to consult the Commission.[45]

The Commission consists of the following members nominated by the Central Government:

a) a Chairperson, who is or has been a Supreme Court or a High Court Judge;
b) a social scientist;
c) two persons having special knowledge in matters relating to Backward Classes; and
d) a member–secretary, who is or has been an officer of the Central Government in the rank of a Secretary to the Government of India.[46]

Every member holds office for a term of three years from the date he assumes office.[47]

The Commission meets as and when necessary and has power to regulate its own procedure.[48]

While performing its functions, the Commission enjoys powers of a civil court trying a civil suit in respect of such matters as summoning witnesses *etc*.[49]

The Commission submits an annual report of its activities during the

44. Section 2[c].
45. Section 11.
46. Section 3.
47. Section 4.
48. Section 8.
49. Section 10.

year to the Central Government.[50] The Central Government lays the report before both Houses of Parliament along with a memorandum of action taken on the advice tendered by the Commission and the reasons for the non–acceptance of any such advice.[51] Several States have set up State Commissions for Backward Classes after the decision in *Indra Sawhney*.

[5] Reservation Policy for Women

Women as a class neither belong to a **minority group** nor are they regarded as forming a **Backward Class**. India has traditionally been a male dominated society and, therefore, presently women suffer from many social and economic disabilities and handicaps. It thus becomes necessary that such conditions be created, and necessary ameliorative steps be taken, so that women as a class may make progress and are able to shed their disabilities as soon as possible.

The Constitution does not contain many provisions specifically favouring women as such. There is Article 15[3], reference to which has already been made earlier, which is a provision of permissive nature as it merely says that the state is not prevented from making any special provision for women. Then, there are such general provisions as Articles 14 and 15[2] which outlaw any kind of general discrimination against women. Article 21 is also there which can be used to spell out some safeguards for women. The Supreme Court has, in course of time, by its interpretative process of these various constitutional provisions extended some safeguards to women.[52]

[5.1] National Commission for Women

To ameliorate the general social condition of the women in the country, Parliament has enacted the **National Commission for Women Act**, 1990, to establish the National Commission for Women.

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50. Section 14.
51. Section 15.
52. *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922: [1996] 1 SCC 490; *Vishaka v. State of Rajasthan* AIR 1997 SC 3011: [1997] 6 SCC 241; *Chairman, Rly. Board v. Chandrima Das* AIR 2000 SC 988: [2000] 2 SCC 465; *Madhu Kishwar v. State of Bihar* AIR 1996 SC 1864: [1996] 5 SCC 125; *G. Sekar v. Geetha* [2009] 6 SCC 99; *Githa Hariharan v. Reserve Bank of India* AIR 1999 SC 149: [1999] 2 SCC 228; *Payal Sharma v. Supdt., Nari Niketan Kalindri Vihar, Agra* AIR 2001 All 254; *John Vallamattom v. Union of India* [2003] 6 SCC 611.

The Commission consists of the following:

a) a Chairperson, committed to the cause of women;
b) five members nominated from amongst persons having experience in law, trade unionism, management of an industry, administration, economic development health, education, social welfare, women's voluntary organizations;
c) a member–secretary who is either a member of a civil service under the Centre, or an expert in the field of management, sociological movement.[53]

All these persons hold office for three years and are appointed by the Central Government.[54]

The Commission has power to constitute committees as may be necessary to deal with special issues taken up by the Commission from time to time.[55] The Commission has power to regulate its own procedure[56] and has power of a civil court in matters like summoning witnesses.[57] The Commission presents an annual report of its activities,[58] which is presented to both Houses of Parliament along with a government memorandum of action taken thereon.[59]

The terms of reference of the Commission as laid down in Section 10 of the Act are very comprehensive. The Commission discharges the following functions:[60]

a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;
b) present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
c) make in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any State;
d) review, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae,

53. Section 3.
54. Section 4.
55. Section 8.
56. Section 9.
57. Section 10[4].
58. Section 13.
59. Section 10[1].
60. Section 10[1].

inadequacies or shortcomings in such legislation;

e) take up the cases of violation of the provisions or the Constitution and of other laws relating to women with the appropriate authorities;
f) look into complaints and take *suo motu* notice of matters relating to—
    i) deprivation of women's rights;
    ii) non–implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;
    iii) non–compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women, and take up the issues arising out of such matters with appropriate authorities;
g) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as recommend strategies for their removal;
h) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity;
i) participate and advise on the planning process of socio–economic development of women;
j) evaluate the progress of the development of women under the Union and any State;
k) inspect or cause to be inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise, and take up with the concerned authorities for remedial action, if found necessary;
l) fund litigation involving issues affecting a large body of women;
m) make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil;
n) any other matter which may be referred to it by the Central Government.

The Central Government is required to lay before the two Houses of Parliament all the reports sent to it by the Commission under [b] above along with a memorandum explaining the action taken or proposed to be taken on the recommendations and the reasons for non–acceptance, if any, of any such recommendations.[61]

If a recommendation relates to a State Government, **the Commission sends the same to that government which lays the same**

61. Section 10[2].

before the State Legislature along with an explanatory memorandum.[62]

The Central Government makes grants to the Commission for being utilized for the purposes of the Act.[63]

The salaries and allowances payable to the Chairperson and members of the Commission and its administrative expenses are to be paid out of the grants as mentioned above.[64]

While investigating any matter referred to in [a], or Sub–clause [i] of Clause [f], the Commission enjoys all the powers of a civil court trying a suit, such as, summoning of witnesses, receiving evidence on affidavits *etc*.

Section 16 of the Act makes it obligatory on the part of the Central Government to consult the Commission on all major policy matters affecting women.

In *Seema v. Ashwani Kumar*,[65] the Commission submitted an affidavit of its opinion that non–registration of marriages affects women the most and a law making marriage as compulsorily registration would be of critical importance to various women–related issues such as:

a) Prevention of child marriages and to ensure minimum age of marriage.
b) Prevention of marriages without the consent of the parties.
c) Check illegal bigamy/polygamy.
d) Enabling married women to claim their right to live in the matrimonial house, maintenance, *etc*.
e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.
f) Deterring men from deserting women after marriage.
g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.

62. Section 10[3].
63. Section 11.
64. Section 6.
65. [2006] 2 SCC 578, p. 583: AIR 2006 SC 1158.

The Supreme Court [66] accepted the views expressed by the Commission and directed the States and the Central Government to take the necessary steps to effect such a law.

Thus, to conclude the policy of reservation had a statutory effect in terms of induction of Scheduled Castes, Scheduled Tribes and other Backward Classes into public sector employment and in educational institutions still fails short of the target in certain categories of jobs and higher education. Reservation did not provide equal opportunities within each group/community have not benefited from reservation equally. Almost in all categories of beneficiaries among Scheduled Castes, Scheduled Tribes or other backward classes, there is growing some of deprivation amongst different categories, which is leading to internal dissension.

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66. *Seema v. Ashwani Kumar* [2006] 2 SCC 578, p. 583: AIR 2006 SC 1158.

Chapter 5

JUDICIAL APPROACH TOWARDS RESERVATION

I. General

The concept of justice is of imponderable import. From **Plato** to **Gandhi** and others, all the social thinkers had made efforts in the quest of justice for abolishing injustice, tyranny and exploitation.

In the present chapter, an endeavour is made inorder to find out the attitude and role of the judiciary in evolving secular and rational criterion to cope with the problem of protective discrimination, in safeguarding the fundamental rights of the under privileged in particular and citizens in general which were at stake on account of the policy of reservation adopted by the Government from time to lime. The attempt is also intended to sought for analyzing the contribution of the judiciary towards shaping and reshaping this policy after taking into consideration various factors and felt necessity of time in such a way as to strike a reasonable balance among numerous relevant considerations in order to bring justice to the downtrodden and the under–privileged.

The authority of Vedic texts which prescribed the standards/norms to regulate the human conduct, founded on the direct revelations was the basic assumptions of

Hindu law. To such law, even the king was subject.[1] Justice has always been equated with the Dharma in our Shastras, and there was the description of courts of justice as Dharmadhikari. Justice **Krishna Iyer** envisages Dharma, as the "*fulfillment*" factor of justice.

However, in the Post–Vedic period, the parameters of justice were based on the strict conformity to observance and the strict enforcement of caste rules, within the prescribed norms and their disregard as well as violation was the platform for the punishment. The quality of justice conditioned by the stricter law of Manu particular was anti–*shudras* and anti–women.

However, during the Muslim era, especially in the Pre–Moghul period, Muslim rule was essentially autocratic, theocratic and irresponsible devoid of the concept of the rule of law, morality, tolerance, social harmony and justice. During this period also justice was given the supreme place.[2] But the essence of Justice was completely arbitrary and inconsistent with the elementary justice.

During British era, it was realized by the Indians that there can be no justice without freedom and freedom without justice. Gandhi and others fought to secure for Indians some principles like idea of law, the freedom of persons, natural justice, civil liberties, natural justice and equality for law which were the backbone of British nations of justice.

However, after Independence, the Indian Constitution abounds with the natural and social justice and in its very Preamble and Parts III and IV of the Indian Constitution speaks about the justice as one of the great values cherished by its makers. In a narrow sense, justice is often understood to mean the justice of law or justice according to law. **But in the present scenario**, the term justice is used in the wider connotation and different forms are included in the term justice like social justice, economic justice and political justice. All aspects of human life are dealt with by the concept of the social justice. The concept of the social justice is varied. When India got independence and converted into an independent sovereign republic, the

1. Das Gobind, **Justice in India**, N.M. Tripathi, Bombay, [1967], at p. 14.
2. Sen A.K., Setalvad M.C. and Pathak G.S., **Justice for the Common Man**, Eastern Book Co., Lucknow, [1967], at p. 18.

urge of this concept of social justice gathered momentum. The concept of equality is integral to most contemporary theories of justice.

Thus, realizing that in India masses had suffered a lot and recognizing the reality of prevailing inequalities in the Indian society, at the helm of the **Constitution**, the mandate of the social equality and social justice was placed by the founding fathers and attempts were also made for creating a system where each and every member of the society is empowered to participate in the liberties and the freedom to be provided under the Constitution. So, the founding fathers inserted the fundamental rights and directive principles in the Indian Constitution with this noble aim.

The founding fathers accorded the highest place to "*justice*" among the noble aims and objectives of the Constitution. The Preamble speaks of "*We*, *the people of India*" resolving to secure ***inter–alia*** "***Justice—social***, ***economic*** *and* ***political***" to "***all its citizens***". The juxtaposition of words and concepts in the Preamble is important. Again, priority to social and economic justice over political justice is enjoined clearly by the Preamble.[3] In the quest of justice people turn to the judiciary.

Under Article 32 of the **Indian Constitution**, the judiciary in India is under an obligation for the enforcement of the fundamental rights as envisaged in Part III of the Indian Constitution itself.

The superior judiciary in India has performed exceedingly well over the last five decades and has contributed significantly to the advancement of public good and good governance. It has succeeded in preserving, protecting and promoting the fundamental rights of the vulnerable groups and other citizens against the "*innovations of exerted democracy*" and for that purpose, it has drawn substantially upon the Directive Principles of State Policy enshrined in Part IV.[4]

Thus, it is the courts that have given fundamental rights and directive principles their real meaning. In their struggle for bringing justice to the poor section of

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3. **Report of the National Commission to review the Working of the Constitution**, Vol. I, Chapter 7, at para 7.1.1.
4. **Report of the National Commission to review the Working of the Constitution**, Vol. II, Book–I, p. 705.

the society recourse to the provisions given under Part III and Part IV of the **Indian Constitution** have been taken by the judiciary often. The approach tends to encourage the down–trodden and under privileged to redeem themselves of previous in–equalities and has opened new doors in order to fulfill the mandate of achieving social equality.[5]

Judicial remedies are sought in cases of abuse of protective discrimination policy. It is the onerous constitutional duty of the courts to allow or disallow the preferential treatment in accordance with the constitutional norms. The judiciary has the honor of protecting the constitutional mandate of classless or casteless society through guarding against the perpetuation of the caste system.

The judiciary has always been cautious in allowing the preferential treatment to disadvantaged classes under permissible classification. Many landmark judgments have been pronounced by Indian judiciary giving concrete and sound solutions to the problems arising out of the policy of reservation.

Through the pronouncement of many judgments, the role of judiciary is seen towards rationalization by search; for the determination of scientific, objective, secular and rational criteria of the identification of the backwardness of the Backward Classes and also the extent of the reservational benefits.

Furthermore, the Supreme Court has by pronouncing significant judgments, played a very important role for the purpose of solving its problems and tuning its implementations. For the purpose of study the reservations can be of four kinds: **political reservation**, **educational reservation**, **reservation in employment** and **social reservation**.

II. Kinds of Reservation

[A] Political Reservation

The State is empowered for taking steps to provide to the Scheduled Castes and the Scheduled Tribes due representation. For the purpose of the **political reservations**, the provisions of the Constitution for the benefits of the Scheduled

5. The first annual Dr. K.R. Narayanan memorial lecture on the theme "***Problem of Social Inequality and Possibilities of Judicial Intervention***" delivered by the Chief Justice K.G. **Balakrishnan**, at Dr. K.R. Narayanan Centre for Dalit and Minorities Studies, Jamia Milia Islamia University on 13th November, 2007.

Castes and the Scheduled Tribes are mandatory. All these provisions have been provided under Article 330 regarding reservation of seats for the Scheduled Castes and the Scheduled Tribes in Central Legislative Assembly, under Article 332 of the **Indian Constitution** in respect of reservation of seats of Scheduled Castes and the Scheduled Tribes in Legislative Assembly of States, in Municipalities under Article 243–T, in various *Panchayat* [*local self Government*] level bodies, namely, village, *taluk* [*block*] and district.[6] These constitutional provisions reveal the ambivalence of the Constitution makers and the policy drafters in India. Constituencies [*for the seat in the Parliament and State Assemblies*] are reserved for the members of the Scheduled Castes and the Scheduled Tribes in the proportion to their share in the population. The constitutional provisions for the political reservation of the Scheduled Castes and the Scheduled Tribes were made mandatory in 1950, and it was decided that this provision would last only for ten years but since then every ten years, the Indian Constitution has had to be amended for keeping on extending this kind of reservations for this category of persons.

However it is to be submitted through the research work that **Article 330 does not take away the right of the Scheduled Castes and the Scheduled Tribes candidates from contesting in the unreserved seats**. This has been laid down by the Apex Court in the case of *V.V. Giri v. Dippala Suri Dora*,[7] wherein, the Apex Court upheld the decision of the High Court reasoned on the grounds that the reasoning given by the High Court had been correct. The Court opined that a member of Scheduled Castes and Scheduled Tribe does not forgo his right of seeking the election to the general seat merely because the additional concession of the reserved seat is availed of himself by him through making the prescribed declaration for the same purpose, because an additional claim was represented over and above the claim for the reserved seat.[8]

In another case of *Punjab Rao v. D.P. Meshram and Ors*,[9] initially in the

6. Article 243–D of the **Indian Constitution**.
7. AIR 1959 SC 1318.
8. In this context, it was also pertinent that under the Constitutional scheme and the framework provided under the **Representation of People Act**, elections were held for the constituencies and not for seats as such.
9. AIR 1965 SC 1179.

Presidential Order, Buddhists were excluded from Scheduled Castes. Thus, any Buddhist could not claim to be of a Scheduled Caste.[10] Thus, it was held by the tribunal that the corrupt practices had not been established and also that the elected Member of Legislative Assembly was not a member of the Scheduled Castes anymore after his conversion to the Buddhism and the impugned election was set aside. However, the decision of the Tribunal was overturned by the High Court on the grounds of the insufficiency of the evidence because all the prosecution witnesses had been the members of the political parties which were against the party and Member of Legislative Assembly himself.

The argument was put forth in the Supreme Court that there was high probability of the conversion of the respondent to Buddhism, because that had been advocated by Dr. **B**.**R**. **Ambedkar** and many prominent members belonging to the Scheduled Castes under his leadership who had so converted. For which the following are the instances which sought to corroborate this:

1) A declaration which had been signed by the respondent himself, stating that he had converted to Buddhism;
2) The picture of Lord Buddha inscribed on wedding invitations of the wedding of the daughter of the Member of Legislative Assembly, circulated by the Member of Legislative Assembly;
3) A conversion of a temple dedicated to Lord Shiva to one dedicated to Lord Buddha.

It was admitted by the respondent himself which had been testified to by the witnesses. The evidence and the argument of the conversion of the respondent were accepted in this light. Hence the Election Commission Order was upheld.

These judgments had been decided by the Supreme Court to give the solution to the problems regarding political reservation. However as noted in

10. In this case, in front of the Election Commission, the appellant filed a petition alleging that: [1] before the election, the elected MLA had been converted to Buddhism and hence he had become ineligible for standing for the election from this constituency [*whose seat was meant only for a reserved candidate*], and [2] the MLA had committed several corrupt practices and he was guilty of those practices.

respect of this kind of reservation, the judgments delivered by the Apex Court are few but as observed through the study, in respect of **educational reservation** and the **job reservations**, a lot of guidelines and suggestions and solutions had been provided from time to time by the Supreme Court.

[B] Educational Reservation

Under the constitutional provisions, the seats have been reserved for the Scheduled Castes and the Scheduled Tribes students in the educational institutions: in colleges and the universities run by the Central and State Governments and Governmental aided educational institutions under Article 15 of the **Indian Constitution**. A number of financial schemes support these provisions like scholarships, special hostels for the Scheduled Castes and Scheduled Tribes students, grants for books, concession in fees and remedial coaching *etc*., following are discussed some of the most recent judicial pronouncements from the Apex Court and the various High Courts:

[1] Article 15[4]

Clause [4] was added by the **Constitution** [*1st Amendment*] **Act**, 1951, as a result of the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*.[11] In that case the Court struck down the communal Government Order of the Madras Government which, with the object to help the backward classes, had fixed the proportion of students of each community that could be admitted into the State medical and engineering colleges. Although the Directive Principles of State Policy embodied in Article 46 of the **Indian Constitution** lays down that the State should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice, the Court held that:

"*The Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights*."[12]

Now Clause [4] enables the State to make special provisions for the advancement of socially and educationally backward classes of citizens or for

11. AIR 1951 SC 226.
12. *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226, at p. 228.

the Scheduled Castes and Scheduled Tribes. Such provisions include reservations or quotas and can be made in the exercise of executive powers without any legislative support.[13]

Furthermore, in the case of *D.P. Joshi v. State of Madhya Pradesh*,[14] the issue of domicile based classification and its validity came up before the Supreme Court.[15] Wherein the rule was held to be in the favour of the respondents by the majority and the validity of the rule was also upheld. It meant that the preferential treatment of residents of Madhya Pradesh was upheld by the Supreme Court.

Yet in another case of *Joseph Thomas v. State of Kerala*,[16] the validity of the reservation based on residence was upheld. Wherein, a 5:8 distribution of the seats was upheld between the residents of the Malabar area and Travancore Cochin area.

However, in the case of *Gullapalli Nageswara Rao v. Principal, Medical College, Guntur*,[17] the rule regarding the admission which was based on the qualifying marks instead of a common entrance test was challenged as being unjust and arbitrary. It was contended by the respondents that for affording equal opportunities to the multipurpose candidates, it was necessary

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13. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217.
14. AIR 1955 SC 334.
15. The following is the factual matrix of the case:
    It was stated by the one of the rules of Mahatma Gandhi Memorial Medical College, which is an educational institution run by the State of Madhya Pradesh as—
    "For all the students who are bonafide residents of Madhya Pradesh students no capitation fee should be charged. But for other non–Madhya Pradesh students the capitation fee should be retained as at present at `1300 for nominees and at `1500 for others."
    Bona fide residents' for the purpose of this rule was defined as:
    "One who is,—
    a) a citizen of India, whose original domicile is in Madhya Pradesh, provided he has not acquired a domicile elsewhere, or
    b) a citizen of India, whose original domicile is not in Madhya Pradesh but who has acquired a domicile in Madhya Pradesh and has resided there for not less than 5 years at the date, on which he applies for admission, or
    c) a person who migrate from Pakistan before 30th September, 1948 and intends to reside in Madhya Pradesh permanently,
    d) a person or class of persons or citizens of an area or territory adjacent to Madhya Pradesh or to India in respect of whom or which a Declaration of Eligibility has been made by the Madhya Pradesh Government."
    The petitioner challenged the constitutionality of the above mentioned rule.
16. AIR 1958 Ker 33.
17. AIR 1962 AP 212.

to provide the said reservation. The reason was that the Pre–University Course [PUC] candidates had to study more subjects and their examinations were more difficult. The reservation was upheld by the High Court on the ground that in the matter of securing higher percentage of marks in their subjects, the Higher Secondary Course [HSC] candidates were at a disadvantage and so, in comparison to the Pre–University Course candidates, they were unequally placed.

[1.1] Socially and Educationally Backward Classes

A major difficulty raised by Article 15[4] is regarding the determination of who are "*socially and educationally backward classes*". This is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determination. Article 15[4] lays down no criteria to designate "*backward classes*"; it leaves the matter to the state to specify backward classes, **but the courts can go into the question whether the criteria used by the State for the purpose are relevant or not**.

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the Supreme Court's approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and 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.

From the several judicial pronouncements concerning the definition of backward classes, several propositions emerge. **First**, the backwardness envisaged by Article 15[4] is **both**, **social and educational and not either social or educational**. This means that a class to be identified as backward

should be both socially and educationally backward.[18] In *M.R. Balaji v. State of Mysore*,[19] the Court equated the "*social and educational backwardness*" to that of the "Scheduled Castes and Scheduled Tribes". The Court observed:

"*It was realized that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Scheduled Tribes and it was thought that some special provision ought to be made even for them.*"

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 and thus the whole object of reservation would be frustrated.[20]

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 classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society. Also this test would break down in relation to those sections of society which do not recognize caste in the conventional sense as known to the Hindu society.

Fifthly, poverty, occupations, place of habitation, all contributes to backwardness and such factors cannot be ignored.

Sixthly, backwardness may be defined without any reference to caste. As the Supreme Court has emphasized, Article 15[4] "*does not speak of castes, but only speaks of classes*", and that "*caste*" and "*class*" are not synonymous. Therefore, exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests.

However, after the enactment of the above mentioned first Constitutional Amendment in 1951, *Balaji* was the first case which came up before the Supreme Court.[21]

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18. *M.R. Balaji v. State of Mysore* AIR 1963 SC 649: [1963] Supp 1 SCR 439.
19. AIR 1963 SC 649: [1963] Supp 1 SCR 439.
20. *Janki Prasad Parimoo v. State of Jammu & Kashmir* AIR 1973 SC 930: [1973] 1 SCC 420.
21. *Jagwant Kaur v. State of Maharashtra* AIR 1952 Bom 461.

Another landmark case in *M.R. Balaji v. State of Mysore*,[22] the area of affirmative action, may be regarded as conscious judicial attempt to search a rational and scientific approach which is consistent with and true to noble ideal of secular welfare democratic set up by the welfare State of the country.[23] An order of the Mysore Government issued under Article 15[4] reserved seats for admission to the State medical and engineering colleges for backward classes and "*more*" backward classes. This was in addition to the reservation of seats for the Scheduled Castes [15 percent] and for the Scheduled Tribes [3 percent]. Backward and more backward classes were designated on the basis of "*castes*" and "*communities*".

The Court declared the order bad on several grounds in *Balaji v. State of Mysora*.[24] The **first** defect feet in the Mysore order was that it was based solely on caste without regard to other relevant factors and this was not permissible under Article 15[4]. Though caste in relation to Hindus could be a relevant factor to consider in determining the social backwardness of a class of citizens, it must not be made the sole and dominant test in that behalf. Christians, Jains

22. AIR 1963 SC 649.
23. In this case, an Order was issued by the Mysore Government reserving the seats in the State in the medical and engineering colleges. The reservation provided under this Order was as follows: Backward Classes—28 percent; more Backward Classes—20 percent; and the Scheduled Castes and the Scheduled Tribes—28 percent. The reserved seats were 68 percent of the available seats in the college and for the general merit pool; only 32 percent seats were left. On the ground of the violation of Article 15[4], the validity of this Order was challenged. There were two main issues to be decided **one** was; should caste be treated as the sole criterion for determining backwardness of a particular class. Regarding the first issue under this case, it was held by the Supreme Court that under Clause [4] of Article 15, the backwardness must be both socially and educational. For ascertaining whether for the purpose of Article 15[4] a class should be taken as Backward or not, the caste of a group of persons could not be the sole or the predominant factor. It was also held that the main determining factor in respect of social backwardness would be the result of poverty. In determining the social backwardness of a class of persons in our society the relevant factors could be the place of habitation and one's occupation. Thus, the test of social backwardness which was based predominantly if not solely on the ground of caste was invalidated by the court. Thus, the Court made it clear that the group of citizens to whom Article 15[4] applies is described as class of citizens not as castes of citizens. Secondly, the Court has put 50 percent cap on reservation in almost all the states except Tamil Nadu [69 percent under the ninth scheduled] and Rajasthan [68 percent quota including 14 percent for forward castes, post *Gurjar* Violence, 2008], has not exceeded 50 percent limit. Tamil Nadu exceeded limit in 1980, Andhra Pradesh tried to exceed limit in 2005 which was again stalled by the High Court. In this regard, it was held by the Court that in the zeal of promoting the welfare of the Backward Classes, in ignoring altogether the advancement of the rest of the society, the State would not be justified. If into the institution of the higher education, from admission, the qualified and competent students were excluded, the National interest would suffer.
24. AIR 1963 SC 649: [1963] Supp 1 SCR 439.

and Muslims do not believe in the caste system and, therefore, the test of caste could not be applied to them. In as much as identification of all backward classes under the impugned order had been made solely on the basis of caste, the order was bad. "*Social backwardness is in the ultimate analysis the result of poverty to a very large extent*".

Secondly, the test adopted by the State to measure educational backwardness was the basis of the average of student-population in the last three high school classes of all high schools in the State in relation to a thousand citizens of that community. This average for the whole State was 6.9 per thousand. The Court stated that assuming that the test applied was rational and permissible to judge educational backwardness, it was not validly applied. Only a community well below the State average could properly be regarded as backward, but not a community which came near the average. The vice of the Mysore order was that it included in the list of backward classes, caste or communities whose average was slightly above, or very near, or just below the State average *e.g.*, Lingayats with an average of 7.1 percent were mentioned in the list of backward communities.

Thirdly, the Court declared that Article 15[4] does not envisage classification between "*backward*" and "*more backward classes*" as was made by the Mysore order. 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. By adopting the technique of classifying communities into backward and more backward classes, 90 percent of the total State population had been treated as backward. The order, in effect, sought to divide the State population into the most advanced and the rest, and put the latter into two categories—backward and more backward—and the classification of the two categories was not envisaged by Article 15[4]. "*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 community as a whole*.

The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserve practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15[4]." The State has "*to approach its task objectively and in a rational manner*".

In *Balaji*, the Supreme Court could sense the danger in treating "*caste*" as the sole criterion for determining social and educational backwardness. The importance of the judgment lies in realistically appraising the situation when the Court said that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome of social backwardness.

The Court drew distinction between "*caste*" and "*class*". An attempt at finding a new basis for ascertaining social and educational backwardness in place of caste is reflected in the *Balaji* decision.

The Court also ruled that reservation under Article 15[4] should be reasonable. It should not be such as to defeat or nullify the main rule of equality enshrined in Article 15[1]. While it would not be possible to predicate the exact permissible percentage of reservation it can be stated in a general and broad way that it ought to be less than 50 percent: "*how much less than 50 percent would depend upon the relevant prevailing circumstances in each case*". Also a provision under Article 15[4] need not be in the form of a law, it could as well be made by an executive order.

Similarly, there was case of *R. Chitralekha v. State of Mysore*,[25] which involved a challenge to the criteria of admission to University of Mysore,

25. AIR 1964 SC 1823.

which, based upon the interview, included 25 percent of the marks.[26] In this case, the system of interview was upheld by the Supreme Court for admitting the students into a University. **Secondly**, in this case, it was laid down by the Government of Mysore that on the following basis, the classification of the socially and educationally Backward Classes should be made: [i] economic conditions, and [ii] occupations. **But the caste of the applicant was not taken into consideration by the order of the Government as one of the criteria for the backwardness**. It was further held by the Supreme Court that for the purpose of ascertaining the social backwardness of a group of citizens, though the caste of a group of the citizens might be a relevant factor, but in this behalf, it could not be the dominant or sole or even the essential test. The court had also explained the case of *M.R. Balaji v. State of Mysore*[27] by saying that though caste was a relevant test for determining the social backwardness of citizens still it was not void merely because it ignored caste if such determination was based on other relevant criteria. Hence, the most contentious issue was the determination of Backward Classes. **The criteria adopted by the Mysore Government were accepted to ascertain the backwardness of a class in this case**.

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26. In this case, by a letter addressed to the Director of Technical Education, the Government informed him that it had been decided by the Government for setting aside 25 percent of the maximum marks of the examination for an interview in the optional subjects. The following were the grounds for the challenge:
    1) No order was issued by the Government to the selection committee fixing the criteria for the allocation of the marks or prescribing the marks for the purpose of interview and that the letter could not taken to be a valid offer as the requirements of Article 166 of the Constitution was not conformed to by it because in the name of the Governor it was not issued.
    2) On the basis of the higher or different qualifications from those prescribed by the University for admitting students into the colleges, no power had been vested in the Government for appointing the selection committees. In the Union list there was an entry of the coordination and the determination of the standards, and it was not under the competency of the State legislature for making a law to maintain the standards of University education. An order could not be issued by the State to maintain the standards of the University since power of the executive of the State was co–extensive with the legislative power of the State.
    3) By the **Mysore University Act**, on the Mysore University, the power was conferred to make rules. And this power could not be exercised by the Government.
    4) In respect of private colleges, this power could not be exercised by the Government though aid was being received by them from the Government.
    5) The system of holding the interviews and the viva voce allowed the interviewers scope for acting arbitrarily and manipulating the results, so this system was arbitrary and illegal. Thus, there was contention that it was violative of Article 14.
27. AIR 1963 SC 702.

To quote Chief Justice **Wanchoo** specking for the Constitution Bench pointed out that:

"*If the reservation in question had been only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15[1]. But it would 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 infavour 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]. It is true that in the present cases, the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that the caste was the sole consideration and that persons belonging to these castes are not also a class of socially and educationally backward citizens.*"[28]

Furthermore in *State of Kerala v. Jacob Mathew*,[29] the Kerala High Court had earlier adopted a similar line of reasoning. However, in the case of *P. Rajendran v. State of Madras*,[30] the test of backwardness was upheld by the Supreme Court which was solely based on the caste of the beneficiary. It was held that though the list of the Backward Classes by the Madras Government described them by reference to caste and though the reservation of seats based on caste alone would be invalid, consideration of caste was not irrelevant to the question of backwardness. The judgment in *Rajendran's* case appears to present a withdrawal from judicial efforts to search secular and rational criterion for determination of the backwardness.

Further in *P. Sagar v. State of Andhra Pradesh*,[31] before the Andhra Pradesh High Court, an almost identical provision came up for challenge where again, there was rule that in all the categories taken together, 1/3rd of the total number of seats should be provided to the Higher Secondary Course, Multipurpose ISC and Multipurpose candidates and to the Pre–University Course candidates, at least 50 percent of the seats should be provided. The provision was upheld by the High Court on the same grounds relying on the earlier decision. There was no common entrances test to the candidates

28. *P. Rajendran v. State of Madras* AIR 1968 SC 1012, at pp 790–91.
29. AIR 1964 Ker 316. Also see, *NTR University of Health Science Vijaywada v. G. Babu Rajendra Prasad* [2003] 5 SCC 350.
30. AIR 1968 SC 1012.
31. AIR 1968 AP 165.

belonging to the Pre–University Course and Higher Secondary Course categories. **But**, **this issue was not contested when this case came up before the Supreme Court on appeal**. Wherein the Andhra Pradesh notification was apparently invalidated by the Court which was based on the exclusive caste criterion, with the observation that in Article 15[4], the expression "*class*" means because of certain likeness or common traits, a homogeneous section of the people grouped together in the determination of which there cannot be the exclusion of the caste altogether.

Similarly, a case relating to State of Rajasthan, in the case of *Surendra Kumar v. State of Rajasthan*,[32] the reservation was struck down by the Court relating to the children of political sufferers from Rajasthan, due to the following reasons:

a) that if the object was only to provide the benefits of the reservation to the political sufferers, no reason was there why these benefits were restricted to the residents of Rajasthan only;
b) that the term "*political sufferer*" was so wide that it was not possible to determine exactly who was a political sufferer;
c) that there was an end of the independence movement several years ago, and if political sufferers were to be provided with the facilities for their suffering due to their participation in the independence movement, they could be provided only once; and
d) that for such a classification, there was no justification because the only valid classification could be that, which results in attracting the best possible talent towards the medical profession.

Further in the case of *D.N. Chanchala v. State of Mysore*,[33] University–wise allocation for admission in medical colleges in the State of Karnataka was held to be valid. The scheme was that students passing from colleges affiliated to one University were first admitted to government medical colleges affiliated to that University and only 20 percent seats in each of such medical colleges

32. AIR 1969 Raj 182. See also, *Ramchandra v. State of Madhya Pradesh* AIR 1961 MP 247.
33. AIR 1971 SC 1762.

could be allotted, to outsiders. **This was upheld on the ground that universities were set up for satisfying the educational needs of different areas**. The Supreme Court upheld University–wise distribution of seats, though it was not in conformity with the principle of section based on merit and marked a departure from this principle. The justification for taking this view was that constitutional preference was not constitutionally impermissible for two reasons. **First**, it would be quite legitimate for students attached to a University to desire to have training in specialized subjects, like, medicine, in colleges affiliated to their own University as it would promote institutional continuity which has its own value. **Second**, any student from any part of the country can pass the qualifying examination of that University, irrespective of the place of his birth or residence.

The scheme of University–wise allocation was then modified by adding the rider that the proportion of admissions should be fixed by the proportion of the number of students presented by the concerned Universities for the pre–degree and BSc examinations. This was held to be bad. The Court could not see any nexus between the registered student–strength and the seats to be allotted. The result of the rider was to discriminate against the backward area where the pre–degree or degree students would be fewer. The fewer the colleges, the fewer the pre–degree or degree students and so the linkage of the division of seats with the registered student–strength would make an irrational inroad into the scheme of University–wise allocation. "*Such a formula would be a punishment for backwardness*, *not a promotion of their advancement*."[34] It is clear from this decision that the Court would accept some kind of reservation if it is designed to remove backwardness.

This case was followed by *Vasundara v. State of Mysore*.[35] Under this case, Rule 3 of the **Selection Rules** was challenged according to which residing in the State for 10 years was a pre–requisite for the purpose of getting admission into the MBBS

34. *State of Kerala v. T.P. Roshana* AIR 1979 SC 766, 774: [1979] 1 SCC 572.
35. AIR 1971 SC 1439.

course.[36] The observations in *Kumari Chitra Ghosh v. Union of India*[37] were relied upon by the Supreme Court and so, the constitutionality of the rule was also upheld.

In the *State of Uttar Pradesh v. Pradeep Tandon*,[38] in admission to medical colleges in Uttar Pradesh in favour of candidates from—[1] rural areas, [b] hill areas and [c] Uttarakhand areas was challenged. The classification was based on geographical or territorial considerations because in government view the candidates from these areas constituted socially and educationally backward classes of citizens. Justices **K.K. Mathew**, **N.L. Untwalia**, and Chief Justice **Ray**, observed, who were speaking on the behalf of the Court that under Article 15[4], the accent was on classes of citizens and the State is not enabled for bringing within the protection of Article 15[4] the socially and educationally backward areas. It was emphasized that the backwardness contemplated under Article 15[4] was both social and educational and the socially and educationally backward classes of citizens were groups other than the groups based on castes. The traditional unchanging condition of citizens could contribute to social and educational backwardness. The place of habitation and its environment could be a determining factor in judging the social and educational backwardness. The Court upheld reservations for persons from hill and Uttarakhand areas. It was found that the absence of means of communication, technical processes and educational facilities kept the poor and illiterate people in the remote and sparsely populated areas backward. However, reservation of seats for rural areas was invalidated because the division of the people on the ground that the people in the rural areas were poor and those in the urban areas were not, was not supported by the facts. Further, the rural population was heterogeneous and not all of them were educationally backward.

The question was again considered in *Kumari K.S. Jayasree and Anr v.*

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36. In this case, according to the primary argument, fixing the ten year period was arbitrary because if this rule was to be adopted by all the States, the children of those citizens would never be able for getting admission in any State who often was compelled to shift their residence and it was arbitrary to fix the ten year period. It was argued by the respondents that the selection of the students were ensured by this rule who were more likely after they pass out to serve as doctors.
37. AIR 1970 SC 35.
38. [1975] 1 SCC 267: AIR 1975 SC 563. See also, *Arti Sapru v. State of Jammu and Kashmir* [1981] 2 SCC 484, 488: AIR 1981 SC 1009.

State of Kerala and Anr,[39] where the Supreme Court was called upon to determine whether the constitutional protection could be extended to a person who belonged to a backward community but the family's income exceeded the prescribed limit of certain amount per annum.

The Court held that in ascertaining social backwardness of a class of citizens, it may not be irrelevant to consider the caste of the group of citizens. Castes cannot, however, be made the sole or dominant test as social backwardness is, in the ultimate analysis, the result of poverty to a large extent, though social backwardness which results from poverty is likely to be aggravated by considerations of caste. This shows the relevance of both caste and poverty in determining the backwardness of the citizens but neither caste alone nor poverty alone can be the determining test of social backwardness. It was, therefore, held that the impugned order prescribing the income limit was valid, as the classification was based not on income but on social and educational backwardness. It was recognized that only those among the members of the mentioned castes, whose economic means were below the prescribed limit were socially and educationally backward, and the educational backwardness was reflected to a certain extent by the economic conditions of the group.

In *State of Kerala v. N.M. Thomas*,[40] in a different context, Justice **Krishna Iyer**, stated that the better–off among the *Harijans*, who should be given protection in the matter of employment, should not be permitted to negative the benefits of preferential treatment to *Harijans* as a class.

There was another decided case *Jagdish Saran [Dr.] v. Union of India*.[41] In this case, a rule which was reserving 70 percent of the seats to Delhi University Medical graduates in the Post–Graduate medical courses and keeping 30 percent open to all, including the Delhi University graduates was challenged as violating Articles 15 by a

39. [1976] 3 SCC 736: AIR 1976 SC 2381.
40. [1976] 2 SCC 310: AIR 1976 SC 490.
41. AIR 1980 SC 820.

medical graduate from Madras University.[42] Though in view of imperfect, scanty, fragmentary and unsatisfactory materials, the rule was not invalidated, it was explained by Justice **Krishna Iyer**, that [i] where the aspiring candidates are not belonging to an educationally Backward Class in that case there is no place of institution–wise segregation or reservation in Article 15; [ii] where special provisions are made with the larger goal and objective of getting over their disablement by the disabled in consistence with the individual spirit and general good; [iii] making of the reservation in every University and in every course cannot be justified by exceptional circumstances as a matter of course; [iv] there should not be excessive or societal injurious quantum of the reservation which was measured by the overall competency of the end product, *viz*., degree holders; [v] the quantification of the reservation is influenced by a host of variables and that one of the factors is that the lesser the role of reservation in case of higher the level of the specialty; [vi] the burden to prove the ex–facie deviation from equality is on the party who seeks to justify it.

For the people coming from certain areas adjoining the Line of Control, reservation was made and as being violative of Article 14, this was challenged. But in the case of *Nishi Maghu v. State of Jammu and Kashmir*,[43] the Court held that without identifying the areas and without laying any objective standard for guiding the selection committee, the classification for the rectification of the regional imbalance made for the determination of the areas of imbalance was not valid. However, with reference to the nature of occupations and the classification made on the basis of the areas adjoining the actual line of control and "*bad pockets*" in Jammu and Kashmir, being really backward areas, and of these areas the residents being socially and educationally backward, the reasonable legislative classification test stood satisfied and the classification of "*social castes*" made

42. In this case, the contention was that institution–based reservation includes college–wise reservation as well and this kind of reservation *i.e*., institution–based reservation was validated. However, there were other factors which led the Court allowing only University–based reservation as one of the institutional continuity and the argument was rejected by the court saying that the residence–based reservation and the University–based reservation were two different types of reservation. Consequently, from University–based reservation system, a college–based reservation system stands on a different footing.
43. AIR 1980 SC 1975; *State of Madhya Pradesh v. Kumari Nivedita Jain* AIR 1981 SC 2045; *Arti Sapru v. State of Jammu and Kashmir* AIR 1981 SC 1009; *Inder Dev Arya v. University of Rajasthan* AIR 1981 Raj 269; *Suman Gupta v. State of Jammu and Kashmir* AIR 1983 SC 1235.

was upheld.

However after the judgment of *Pradeep Jain [Dr.] v. Union of India*,[44] where in it was declared by the Apex Court that the whole scale institutional reservation was not permissible. It was observed by the Education Review Committee that to the students from the outside States, at least 25 percent of the seats should he opened. However, the upper limit of reservation of 70 percent was fixed by the Court and it was also stated that the percentage must be fixed by the State depending upon the various factors but in no case this upper limit should be crossed.[45] It was done for ensuring that during admissions, the merit is not sacrificed. It was also mandated by the court that over the years, the percentage should be reduced. However, this limit was got fixed at 50 percent in the institutes of higher education *i.e*., in case of post graduate institutes in the light of the extra–weightage provided to merit based selection.

There should not be any kind of reservation in the institutes for specialization and super–specialization because this would result in the compromising merit and in *Dinesh Kumar [Dr.] v. Motilal Nehru Medical College, Allahabad*,[46] the kind of reservation contemplated was elucidated in the following words:

"*To take an example, suppose there are 100 seats in a medical college or University and 30 percent of the seats are validly reserved or candidates belonging to Scheduled Castes and the Scheduled Tribes. That would leave 70 seats available for others belonging to non–reserved categories. According to our judgment, 30 percent of 70 seats, that is, 21 seats out of 70 and not 30 percent of the total number of 100 seats, namely, 30 seats, must be filled up by open competition regardless of residence requirement or institutional preference*."

Thus it could be concluded that, from these and some other decisions of the highest Court of the land as well as of the High Courts, **no clear and**

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44. AIR 1984 SC 1420.
45. *Pradeep Jain [Dr.] v. Union of India* AIR 1984 SC 1420, in Para 21 it was held: "*But, in our opinion, such reservation should in no event exceed the outer limit of 70 percent of the total number of open seats after taking into account other kinds of reservations validly made. The Medical Education Review Committee has suggested that the outer limit should not exceed 75 percent. But we are of the view that it would be fair and just to fix the outer limit at 70 percent. We are laying down this outer limit of reservation in an attempt to reconcile the apparently conflicting claims of equality and excellence. We may make it clear that this outer limit fixed by us will be subject to any reduction or attenuation which may be made by the Indian Medical Council which is the statutory body of medical practitioners whose functional obligations include setting standards for medical education and providing for its regulation and co–ordination*."
46. AIR 1985 SC 1059.

uniform policy, **guidelines or test of determining backwardness for purposes of Articles 15[4] and 16[4] emerges**. Tired with this judicial vacillation, perhaps, the State of Karnataka asked the Supreme Court to give clear guidelines on this vexed question in *K.C. Vasanth Kumar v. State of Karnataka*.[47] But ironically five judges of the Supreme Court expressed five separate opinions on the question. Chief Justice **Chandrachud** said, that the backward classes "*should be comparable to the Scheduled Castes and the Scheduled Tribes in the matter of their backwardness*" and "*they should satisfy the necessary test such as a State Government may lay down in the context of prevailing economic conditions*".[48] Justice **Desai** said, "*the only criterion which can be realistically devised is the one of economic backwardness*".[49] Justice **Chinappa Reddy** concluded:

"*Class poverty*, *not individual poverty*, *is therefore the primary test.... Despite individual exceptions*, *it may be possible and easy to identify social backwardness with reference to caste*, *with reference to residence*, *with reference to occupation or some other dominant feature*."[50]

In the opinion of Justice **Sen**:

"*The predominant and the only factor for making special provisions under Article 15[4] or for reservation of posts and appointments under Article 16[4] should be poverty*, *and caste or a sub–caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes or Scheduled Tribes*."[51]

Finally, Justice **Venkataramiah**, seems to be favouring a test in which the lowest among the castes similar to Scheduled Castes and Scheduled Tribes, the means or economic condition and the occupation may all be counted in making a determination of backwardness. From this divergence of opinions it

47. [1985] Supp SCC 714; *State of Madhya Pradesh v. Kumari Nivedita Jain* AIR 1981 SC 2045; *Arti Sapru v. State of Jammu and Kashmir* AIR 1981 SC 1009; *Inder Dev Arya v. University of Rajasthan* AIR 1981 Raj 269; *Suman Gupta v. State of Jammu and Kashmir* AIR 1983 SC 1235; *NTR University of Health Science Vijaywada v. G. Babu Rajendra Prasad* [2003] 5 SCC 350; *Islamic Academy of Education and Anr v. State of Karnataka and Ors* [2003] 6 SCC 697; *Saurabh Chaudri and Ors v. Union of India and Ors* [2003] 11 SCC 146; *P.A. Inamdar v. State of Maharashtra* AIR 2005 SC 3226; *I.R. Coelho [Dead] by LRS v. State of Tamil Nadu* [2007] 2 SCC 1: AIR 2007 SC 861; *Ashok Kumara Thakur v. Union of India* [2008] 6 SCC 1, at p. 486: [2008] 3 MLJ 1105; *K. Manorama v. Union of India* [2010] 10 SCC 323.
48. *K.C. Vasanth Kumar v. State of Karnataka* [1985] Supp SCC 714, at p. 723.
49. Ibid, at p. 734.
50. Ibid, at p. 769.
51. Ibid, at p. 770.

may be concluded that except Justice **Desai**, who would consider poverty as the only test of backwardness, all others consider caste also a relevant consideration at least at this stage of the Indian society.

However, in the case of *Dinesh Kumar [II] v. Motilal Nehru Medical College, Allahabad*,[52] the Supreme Court reconsidered some of the matters decided by it in *Dinesh Kumar I* and issued some fresh and modified directions as regards admissions to Post–Graduate Medical Courses. **One**, the medium of the all India examination to be conducted for admission for these courses shall be English. **Two**, instead of making available 50 percent of the open seats after taking into account reservations validly made, 25 percent of the total number of seats without taking into account any reservations should be made available for being filled on the basis of an all India entrance examination. The reason behind the new formula was that a State could, under the old formula, reduce the number of the open seats by increasing reservations on various grounds. The new formula frees the open seats from any reservations which may be made by a State. **Three**, the entrance examination would be conducted by the All India Medical Science Institute instead of the Medical Council of India which does not have the necessary infrastructure for the purpose. In *Dinesh II*, the Supreme Court also rejected the suggestion that a weightage of 15 percent of the total marks obtained by a candidate of the all India Entrance Examination for admission to the Post–Graduate Course to the doctors who had put in a minimum of three years of rural service. **The Court insisted that selection of candidates for admission to Post–Graduate medical course should be based on merits and no factor other than merit should be allowed to tilt the balance in favour of a candidate**.

In this regard, the University of Rajasthan issued an ordinance providing for the addition of 5 percent marks to the total marks obtained by a student at the entrance examination by way of college wise institutional preference which

52. AIR 1986 SC 1877: [1986] 3 SCC 727. Also see, *NTR University of Health Science Vijaywada v. G. Babu Rajendra Prasad* [2003] 5 SCC 350.

meant that these marks were to be added to the marks obtained a student applying for admission to the Post–Graduate Course in any of the five medical colleges in the State provided the student had passed his MBBS course from the same college to which admission was sought in the Post–Graduate Course. In *State of Rajasthan v. Ashok Kumar Gupta [Dr.]*, [53] the Apex Court disapproved the college–wise institutional preference as violative Article 14.

Furthermore in *Pradeep Jain v. Union of India*,[54] the Court pointed out the necessity to select best and most meritorious students for admission to the technical institutions and medical colleges by providing equal opportunity to all citizens in the country and expressed the view that reservations of seats for the admissions in medical colleges for MBBS and Post–Graduate medical courses on the basis of domicile [*including all other reservations like those for Scheduled Castes, Scheduled Tribes and Backward Classes*] should "*in no event, exceed the outer limit of 70 percent which again needs to be reduced*".

In the case of *Municipal Corporation of Greater Bombay v. Thukral Anjali Deokumar*,[55] the petitioner used the logic of University based reservation to justify the college based reservation in this case, primarily the arguments were based on a reference given to a system of college–wise reservation as being valid, in *Pradeep Jain [Dr.] v. Union of India*[56] and *Jagadish Saran [Dr.] v. Union of India*.[57]

In these cases, the contention was taken that **institution–based reservation was valid and the college–based reservation was included in the institutional reservation**. However, this argument was rejected by the Court stating that the two cases were related to different fact situations, the former was related with the residence–based reservation and the latter was dealing with the University–based

53. AIR 1989 SC 177: [1989] 1 SCC 93.
54. AIR 1984 SC 1420.
55. AIR 1989 SC 1194.
56. AIR 1984 SC 1420.
57. AIR 1980 SC 820.

reservation. Beyond the specific factual matrix, the ratio of these cases could not be stretched. A number of other arguments were also raised.[58] Factually, it was proved that the result of such type of reservation system would be admission of less meritorious students [*based on the assumption that merit is directly proportional to the marks obtained*] over more meritorious students.[59] This resulted in the patent discrimination against the more meritorious students.

In another case of *Deepak Sibal v. Punjab University*,[60] out of the 150 seats in the LL.B. course in the evening college which was conducted by Punjab University, 64 seats were reserved for the Scheduled Castes, Scheduled Tribes and the Backward Classes.

The Court was agreeable to permit 50 percent reservation for the regular or bona fide employees out of the remaining 86 seats and leaving remaining 43 seats open for the general candidates on the merit basis, *i.e.*, 71 percent could be allowed as

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58. Other arguments raised were as follows:
    1) The Colleges had differential marking standards and separate practical examinations, involving 50 percent of the marks. Hence to equate all the students who passed from the different colleges would not be fair.
    2) With respect to the facilities available, each college differed. While with respect to A specialization one college may be having very good facilities and with respect to B specialization, another college will have better facilities than the first college. Hence, when it comes to a specialization, the students from the former college will be better off than the students from the latter college.

    There was rejection made of the Contention No. 1 saying that marking was done by one internal examiner and there were also three external examiners for the same purposes who were appointed by the University. So, a uniform marking was expected. Contention Number 2 was negatived saying that: "*It may be that the number of accident and injury cases in the hospital attached to Lokmanya Tilak Memorial Medical College is higher than the number of such cases in the hospitals attached to other colleges, but that does not prove or lead to the conclusion that that students of other colleges will be deficient in surgery or less meritorious than the students of Lokmanya Tilak Medical College*."
59. *Municipal Corporation of Greater Bombay v. Thukral Anjali Deokumar* AIR 1989 SC 1194, in Para 14, it was observed: "*Thus, although Dr. Anjali Deokumar Thukral and Dr. Sumeet Godambe secured more marks that the students admitted in the post–graduate course in Obstetrics and Gynaecology in the said G.S. Medical College, except the said Dr. Ganpat Sawant. They were refused admission in view of college wise institutional preference. Similarly, in respect of other disciplines many meritorious students could not get admission even though they secured higher marks than those admitted in the post–graduate degree course by virtue of the impugned rules*."
60. AIR 1989 SC 903.

reserved posts and 29 percent to be left open for others on merit.[61]

In *Fazal Ghafoor [Dr.] v. Union of India*,[62] a relief was sought by filing an application in the Supreme Court under Article 32 through "*a declaration that all the Post–Doctoral seats [Super–Specialties] in all the Universities and State of India including the All–India Medical Institutes should not have any regional or domicile reservations and should be open for All–India competition on merit*". Speaking through Justice **Rangnath Mishra**, the Supreme Court reiterated its earlier stand taken in *Pradeep Jain's* case[63] **that in specialties there should really be no reservation**.

A challenge to a provision was made in the case of *Miss Asha J. Nanavati v. State of Gujarat*,[64] under which M.P. Shah Charitable Trust had been provided with the right for nominating 12 students to the M.P. Shah Medical College but that challenge was quashed by the High Court. However, a separate writ before the Supreme Court was made before the Supreme Court in which the same provision was challenged in the case of *State of Gujarat v. M.P. Shah Charitable Trust*.[65] The Supreme Court holding the principle of *res–judicata* to be not applicable struck down the provision under the light of the observation of the case of *J.P. Unnikrishna v. State of Andhra Pradesh*,[66] that like a business, an educational institution cannot be run. Merely due to the reason that a sizeable sum had been donated by the donor 40 years ago, his successors would not be provided with a perpetual right to nominate students. For a long period of 12 years, the

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61. In the same case, for the private sector employees, the admission was not open. To all those who were in *bona–fide* employment including self employment, the admission was kept open till 1986. But there was then the amendment of the rule excluding the private sector employees and the self–employed employees. This classification was unreasonable and was challenged for being violative of Article 14. On the following grounds, the classification was justified by the respondents:
    1) A lot of mischief may be caused by the private employers through the production of the bogus certificates.
    2) It was in the interest of the public to impart legal education to the Government employees.
    3) The provision was made with the object of assuring a tenure of employment likely to continue for three years to a candidate and this assurance of employment could be provided only in the case of Government employment.
    4) No possibility of wastage of a seat should be there.

    Contention 1 was rejected by the Court stating the reason that only a few cases of production of bogus certificates were not enough for excluding all the private employees from getting the benefit from the evening college. Contention 3 was also not accepted on the ground that only due to the reason that the Government employees had greater security of work in comparison to the private employees, it was not implied that both of them were unequal.
62. AIR 1989 SC 48.
63. AIR 1984 SC 1420.
64. Special Civil Application No. 1232 of 1974.
65. AIR 1994 SCW 2584.
66. AIR 1993 SC 2178.

benefit had already been enjoyed by them. Moreover, such a kind of provision was not acceptable in a Government aided institution.[67]

An argument was raised in the case of *Ajay Kumar Singh v. State of Bihar*[68] that to the Post–Graduate Medical Courses, the candidate seeking admission would have already benefited from the reservation to the undergraduate course at the time of admission and that during that period they were supposed to bring improvement in their efficiency and merit for competing with other candidates at the time of admission to the Post–Graduate Medical Courses. Moreover, there was another argument that providing for the reservation in the Post–Graduate courses was similar to the reservations in the promotions and so as per the dicta in *Indra Sawhney v. Union of India*,[69] it was prohibited.[70] As being untenable, the latter contention was rejected summarily. The Court further held:

"*A class/caste may he backward in present time, but it may not be so in coming years due to their socialization with the society and job opportunities. Once a caste is socially and educationally backward community, it cannot remain so for all times to come. It requires periodical review.*"

The reservation was provided by the State of Punjab in favour of the Scheduled Castes and the Scheduled Tribes on the one hand and those by whom their schooling had been done in the rural areas, on the other hand; and

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67. In Para 12 it was observed: "*M.P. Shah Medical College was established by the Government of Saurashtra. At all times, it has been maintained and run by the Government of Saurashtra/Gujarat—from out of their own funds. Every Medical College must necessarily have a hospital attached to it with requisite bed–strength and facilities; there cannot be a Medical College; without such an attached hospital. For this reason, an existing Government hospital was renamed as 'Kasturba Gandhi Hospital' and attached to the college. Apart from the sum of `15 lakhs 'donated' in the year 1954, no further sum has been donated nor any other expenditure incurred by M.P. Shah or the respondent–trust over the last forty years. There is also no evidence to show that the college was established exclusively with the amount 'donated' by M.P. Shah and that no funds or property of the Government was utilized for the purpose. The material placed before us does not also show that the Government of Saurashtra was in no position to spare a sum of `15 lakhs in 1954 for establishing the college or that for that reason it approached or requested M.P. Shah to donate the said amount.*"
68. [1994] 4 SCC 401.
69. AIR 1993 SC 477.
70. In this case, this argument was rejected by the court reasoning that:
    1) The argument was based on the assumption that for his graduation course, the students who were claiming reservation for his graduation course had availed of reservation. This was a faulty assumption because of the chance that an applicant for his graduation course had got in by merit; however due to higher competition he had to avail of reservation at the post–graduation level.
    2) Moreover, there was no rule that during the course of the educational career of a student, he cannot be given the benefit of reservation at more than one stage. It is a matter of policy for the Government to decide whether or not to permit granting of reservation more than once.

for the former *i.e.*, the Scheduled Castes and the Scheduled Tribes, a special relaxation of minimum qualifying marks was also provided by the Government. The claim of the Petitioner who belonged to the latter class was rejected by the Punjab High Court when the same privilege was claimed to be extended to the latter class in the case of *Rupinder Singh Guram v. State of Punjab*.[71] It was held by providing reason by the Court that merely because both of the classes were recipient of reservation, so, could not be considered equals, Because inherently both of the classes were unequal, so their unequal treatment never resulted in a violation of Article 14.

In the case of *Anil Kumar Gupta v. State of Uttar Pradesh*,[72] it was enunciated that Horizontal reservation can be classified further into two types.[73] In this case, the impugned system of reservation was provided by the State Government. It was also stated that such a system would qualify as "*compartmentalized horizontal reservation*" and in such kind of case if under both the "*especially reserved category*" and the "*reservation for SCs, STs and Backward Classes category*", if there are not enough applicants then the remaining seats are not transferable to the general category.[74] Conversely, in case from the "*especially reserved category*" if there are not enough applicants under the "*overall horizontal reservation*" system, then there would be a

71. AIR 1995 P&H 99.
72. [1995] 5 SCC 173.
73. In this case, the impugned system of reservation provided:
    1) Reservation for the SCs, STs and the OBCs—50 percent.
    2) Horizontal reservation for,—
        a) Actual dependents of the freedom tighters—5 percent.
        b) Sons/daughters of soldiers/deceased/disabled in war—2 percent.
        c) Physically handicapped—2 percent.
        d) Candidates of hill area–3 percent.
        e) Candidates of Uttarakhand area—15 percent.
        f) The total horizontal reservations amounted was 15 percent.
74. In Para 17, the following illustration was provided: "*Take this very case*; *out of the total 746 seats*, *112 seats [representing fifteen percent] should be filled by special reservation candidates*; *at the same time*, *the social reservation in favour of OBCs is 27 percent which means 201 seats for the OBCs*; *if the 112 special reservation seats are also divided proportionately as between Other Classes*, *OBCs*, *SCs and STs*, *30 seats would be allocated to the OBCs category*; *in other words*, *thirty special category students can be accommodated in the OBCs category*; *but say only ten special reservation candidates belonging to OBCs are available*, *then these ten candidates will*, *of course*, *be allocated among Other Backward Classes quota but the remaining twenty seats cannot be transferred to Other Classes category [they will be available for OBCs candidates only] or for that matter*, *to any other category*; *this would be so whether requisite number of special reservation candidates [56 out of 373] are available in Other Classes category or not*; *the special reservation would be a water tight compartment in each of the vertical reservation classes [OBCs*, *SCs and STs*."

transfer of the remainder of the seats to the general category.[75] While observing that the impugned provision was vague and the correct mode of selection ought to be specified by the State, it was proclaimed by the Supreme Court that the following was the proper method of selection:

- **Step 1**: Based on merit, fill up the general category seats [50 percent].
- **Step 2**: Fill up the vertical reservation seats [50 percent].
- **Step 3**: Find out in the above mode, how many "*especially reserved category*" candidates are selected.
- **Step 4**: The allocation end, if the quota fixed is satisfied for the horizontal reservations; if not, then "*the especially reserved seats*" as per steps 5, 6 and 7 are filled up.
- **Step 5**: In case the system followed is "*overall horizontal reservation*", if amongst the vertically reserved category, the enough seats are not filled up, then to the general quota the remaining seats are transferred and the seats in order of merit are allocated to the "*especially reserved category*" students.
- **Step 6**: In case the system is "*compartmentalized horizontal reservation*", then no such transfer takes place; allocation as mentioned in step 5 is followed within the permissible limits.
- **Step 7**: For every allocation made either to the general quota or the vertically reserved quota, in the merit list in that quota the power most person misses out.

According to the Court it was not clear what was provided by the

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In the same Para, it was held: "*As against this*, *what happens in the overall reservation is that while allocating the special reservation students to their respective social reservation category*, *the overall reservation in favour of special reservation categories has yet to be honoured. This means that in the above illustration*, *the twenty remaining seats would be transferred to Other Classes category which means that the number of special reservation candidates in Other Classes category would be 56+20=76. Further*, *if no special reservation candidate belonging to Scheduled Castes and the Scheduled Tribes is available then the proportionate number of seats meant for special reservation candidates in Scheduled Classes and Scheduled Tribes also get transferred to Other Classes category. The result would be that 102 special reservation candidates have to be accommodated in the Other Classes category to complete their quota of 112. The converse may also happen*, *which will prejudice the candidates in the reserved categories. It is*, *of course*, *obvious that the inter se quota between Other Classes*, *Other Backward Classes*, *Scheduled Castes and Scheduled Tribes will not be altered*."

impugned provision and to the State a direction was given from next time for making it clearer. However, it was also pointed out by the court that the classification of the classes as recipient of the horizontal reservations was baseless because categories 3 and 5 were expressly held in the case of *State of Uttar Pradesh v. Pradip Tandon*,[76] to be "*socially and educationally backward*" and these classes would be recipient of vertical reservations. So, in addition to the reservation already provided, providing 6 percent reservation to the socially and educationally backward would be illegal.

It was explained by the Supreme Court in the case of *Valsamma Paul v. Cochin University*[77] that social and economic disabilities had been suffered by the *Dalits* [*Scheduled Castes*] and Tribes [*Scheduled Tribes*] which were recognized by Articles 17 and 15[2] and as a result, they had been recognized as socially, culturally and educationally backward. It was said by the Court that the purpose of reservation allowable under Articles 15[4] and 16[4] was the removal of handicaps, disadvantages, restrictions and the sufferings from which the members of the Dalits or Tribes or Other Backward Classes were suffering and reservation was sought for bringing them in the mainstream of the nation's life by providing them opportunities and facilities. However, it was cautioned by the Court that by voluntary mobility, the acquiring the status of Scheduled Castes *etc*., into these categories would frustrate the benign policy of the Constitution provided under Articles 15[4] and 16[4] of the Indian Constitution and it would amount to play fraud on the Constitution. Thus, it was ruled by the Court that a candidate being born in the forward caste and having the advantageous start in the life and who had march of advantageous life but by adoption or marriage or conversion, was transplanted in the Backward Caste would not become eligible for getting the benefit of the policy of reservation provided under Articles 15[4] or 16[4], as the case might be. It was ruled further by the Court that the recognition of the candidate for the

76. AIR 1975 SC 563. Also see, *State of Punjab and Ors v. Jagjit Singh and Ors* decided on 26th October, 2016; *State of Punjab and Ors v. Rajinder Singh and Ors* LPA No. 337 of 2003, decided on 7th January, 2009; *State of Punjab and Ors v. Rajinder Kumar* LPA No. 1024 of 2009, decided on 30th August, 2010; *Avtar Singh v. State of Punjab and Ors* CWP No. 14796 of 2003.
77. AIR 1996 SC 1011.

purpose of his entitlement to the benefits of the reservation by the members of the Backward Class would not be relevant.[78]

In the judgment of *M.C. Sharma v. Punjab University, Chandigarh*,[79] the Rules 5, 8 and 10 of the **Punjab University Calender Volume III** were struck down by a full Bench of the Punjab and Haryana High Court by which it was provided that only a woman could be appointed as the principal of a Women's Institution. It was observed by the High Court that there was no basis for depriving a male for becoming a Principal, while permitting him in a Women's Institution for discharging the duties of the Head of Department.

In the case of *Mohan Bir Singh Chawla v. Punjab University, Chandigarh*,[80] the Supreme Court was posed with the question in respect of the validity of a rule which added 10 percent marks to the marks obtained in the qualifying examination, for the students coming from the Punjab University. Certain principles were summarized by the Court.[81] On the bases of these principles it was concluded by the Court that to the students from specific

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78. Also see to the same effect, *Urmila Ginda v. Union of India* AIR 1975 Del 115; *Mrs. Vaishali v. Union of India* [1978] 80 Bom LR 182; *Smt. D. Neelima v. Dean, P.G. Studies Andhra Pradesh Agriculture University, Hyderabad* AIR 1993 A.P. 299; *State of Tripura v. Namita Majumdar* [1998] 8 SCC 217; *Madhuri Patel v. Addl. Commr. Tribal Development* AIR 1995 SC 94; *Murlidhar v. Vishwanath* [1995] Supp 2 SCC 549; *State of Bihar v. Abha* AIR 2003 Jhar 40. The Rajasthan High Court in *Vikas Soni v. M.R. Engineering College, Jaipur* AIR 2003 Raj 158, has, however, upheld the claim to the quota for "*children of defence personal killed*" for admission to Engineering College, made by the petitioner who was adopted by the widow of a deceased defence personnel.
79. AIR 1997 P&H 87.
80. AIR 1997 SC 788.
81. From the decided cases, the following principles emerge:
    1) In any event, college–wise preference is not permissible.
    2) University–wise preference is permissible provided it is relevant and reasonable. Seventy to eighty percent reservation has been sustained, even where students from different universities appear at a common entrance test. The trend, however, is towards reducing the reservations and providing greater weight to merit.
    3) The rule of preference on the basis of domicile requirement of residence is not bad provided it is within reasonable limits, *i.e.*, it does not result in reserving more than eighty five percent seats in graduate courses and more than seventy five seats in post–graduate courses. But district–wise reservation is an anathema.
    4) Where the students from different universities appear at a common entrance test/examination [*on the basis of which admissions are made*] the rule of university–wise preference too must shed some of its relevance. The explanation of difference in evaluation, standards of education and syllabus lose much of their significance when admission is based upon a common entrance test. At the same time, the right of the State Governments [*which have established and maintained these institutions*] that regulate the process of admission and their desire to provide for their own students should also be accorded due deference.
    5) The fair and proper rule is the higher you go, in any discipline, lesser should be the reservations of whatever kind.

Universities, the concept of addition of marks was permissible; but 10 percent marks was not reasonable amount and so nothing more than 5 percent marks was allowable/permissible. It was further held by the Apex Court in this case that it would be dangerous to depreciate merit and excellence at higher levels of education.

The decision of the Uttar Pradesh Government was quashed by a Division Bench of the Supreme Court in *Sadhna Devi v. State of Uttar Pradesh*,[82] dispensing with the requirement in the written examination held for the purpose of admission, by the candidates belonging to the special categories, of obtaining minimum qualifying marks to Post–Graduate and Diploma Courses in the field of Medicine and Surgery. Further, it was ruled by the court that it was not in the power and capacity of the Government who had laid down a system for the purpose of holding the admission tests, to do away with the requirement of obtaining the minimum qualifying marks for the special category of the Scheduled Castes/Scheduled Tribes/Other Backward Classes candidates. The Court observed that the Government was enabled for admitting the candidates of special categories even in a case when the lesser marks than the general candidates had been obtained by them, provided the minimum qualifying marks for filling up the quota of seats reserved for them had been obtained by them. It was laid down by the Court that merit would definitely be compromised when there was provision for minimum eligibility criteria in favour of Scheduled Castes and Scheduled Tribes.

It was observed in the case of *Post–Graduate Institute of Medical Education and Research v. K.L. Narasimhan*,[83] in respect of reservation in the super–specializations that sacrificing the excellence was not implied by the reservation. Because the same course of study was required to be undergone and same standard was required to be maintained by each and every student

82. AIR 1997 SC 1120. See also, *State of Madhya Pradesh v. G.D. Tirthani* AIR 2003 SC 2952. Also see a judgment delivered by a Bench of three learned Judges of the Supreme Court, wherein—it was ruled that the question as to whether a Hindu belonging to a Scheduled Caste/Scheduled Tribe would retain his Scheduled Castes/Scheduled Tribes status on conversion to other religion, would have to be decided on merits of each case. *See*, **The Tribune**, 9th February, 2004.
83. AIR 1997 SC 3687.

who secured admission for obtaining a degree into the post–graduate specialty or super–specialty and there was no special relaxation for the reserved category. However, providing opportunities for the handicapped was a constitutional duty and the denial of that duty would go against the concept of equality. Hence, the Court held that the reservation was permissible in super–specialties as well.

The decision in the case of *State of Madhya Pradesh v. Kumari Nivedita Jain*[84] is appeared to have been overruled by the Court in this respect. With approval the Court referred to the decisions in *Jagdish Saran [Dr.] v. Union of India*,[85] and *Pradeep Jain [Dr.] v. Union of India*,[86] wherein for the purpose of admission to Post–Graduate Medical Courses, the importance of the merit was being emphasized. The judgment in *Mohan Bir Singh Chawla v. Punjab University, Chandigarh*,[87] was also referred to by the Court wherein again, it was observed by the Supreme Court that:

"*The higher you go, in any discipline, lesser should be the reservation of whatever kind.*"

It was further directed by the Court that if the reserved seats could not be filled on account of failure of the candidates belonging to the categories of Scheduled Castes/Scheduled Tribes/Other Backward Classes for obtaining the minimum qualifying marks, then to the candidates belonging to the general category such seats should be made available. Borrowing the language which was used in the case of *Jagdish Saran [Dr.] v. Union of India*,[88] it was held by the court that keeping such seats unfilled would be "*a national loss*". In such a case, it might be noted that there would have to be the application of the

84. AIR1987 SC 2045.
85. AIR 1980 SC 820.
86. AIR 1984 SC 1420.
87. AIR 1997 SC 788. See also, *AIIMS Students Union v. AIIMS* AIR 2001 SC 3262; *Gulshan Prakash v. State of Haryana* AIR 2010 SC 288: [2010] 1 SCC 477; *Suraj Bhan Meena v. State of Rajasthan* [2011] 1 SCC 467; *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14; *M. Nagaraj v. Union of India* AIR 2007 SC 71; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308; *State of Punjab and Ors v. Jagjit Singh and Ors* decided on 26th October, 2016.
88. *Jagdish Saran [Dr.] v. Union of India* AIR 1980 SC 820. See also, *Preeti Srivastava v. State of Madhya Pradesh* AIR 1999 SC 2894; *Narayan Sharma v. Pankaj Kr. Lehkar* AIR 2000 SC 72.

principle of alternative exchange.[89]

It was held by a Division Bench of the Supreme Court in the case of *Jagdish Negi v. State of Uttar Pradesh*,[90] the backwardness of the citizens could not continue indefinitely. It was under the power of the State to decide whether the citizens had ceased to belong to the reserved category and from time to time also to review its policy of the reservation.

The reasoning and the conclusions which were drawn in the case of *Sadhana Devi [Dr.] v. State of Uttar Pradesh*,[91] were reiterated and agreed by the Supreme Court by a majority of 4 to 1 in the case of *Preeti Srivastava v. State of Madhya Pradesh*[92] by further saying that between the qualifying marks fixed for the reserved and the general category candidates, the disparity should not be big. It was also held by the Court that between the groups of students, a large differentiation in the qualifying marks would make it difficult at the post-graduate level to maintain the requisite standard of teaching and training and to the mandate of Article 15[4] it would be contrary. So, in the post–graduate institutes, the relaxation of the minimum qualifying entrance examination marks for the Scheduled Castes and the Scheduled Tribes was permissible to reasonable extents, while in the super–specialties, the same was prohibited.[93] In the same case, the ratio that reservation was permissible in super–specialties as was decided in the case of *Post–Graduate Institute of Medical Education and Research v. K.L. Narasimhan*,[94] was overruled by the Supreme Court.

The Madras High Court in *Puvvala Sujatha [Minor] v. Union of India*,[95] observed that in favour of applicants from Pondicherry, the residence–based reservation was not the reservation under Article 15[4] but it was case of

89. *Superintending Engineer, Public Health, U.T. Chandigarh v. Kuldeep Singh* AIR 1997 SC 2133.
90. AIR 1997 SC 3505. See also, *Indra Sawhney v. Union of India* AIR 1993 SC 477; *A. Periakaruppan v. State of Tamil Nadu* AIR 1971 SC 2303.
91. AIR 1997 SC 1120.
92. AIR 1999 SC 2894.
93. In Para 26 it was observed: "*In the premises the special provisions for Scheduled Castes/Scheduled Tribes candidates whether reservations or lower qualifying marks at the speciality level have to be minimal. There cannot, however, be any such special provisions at the level of super–specialties.*"
94. AIR 1997 SC 3687.
95. AIR 2000 Mad 234. Also see, *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.

"*concession or a source of selection decided by the Central Government*". The Court submitted that as understood in the context of private international law, the concept of domicile would be a more rational basis to grant reservations for the sons of the soil. Two components are contained in the domicile: [i] residence [ii] intention for making that place a permanent home.[96] If for the sons of the soil, the primary rationale behind giving reservation is that these beneficiaries of the reservation are going to settle down within the State and serve the people residing within the same State and by whom it is intended to continue residing permanently with the State, the benefits of the reservation ought to be granted. In India, there is no reorganization of the concept of the State domicile[97] and it has been held in the context of reservation that there should not be the understanding of the concept of the domicile in the sense as it is understood in "Private International Law".[98]

Again it was explained by the Apex Court in the case of *K. Duraisamy v. State of Tamil Nadu*[99] that there were a number of differences in the concepts of reservation and fixation of quota as far as their purport, content as well as object is concerned. The nature of the expression reservation is diverse and it may be brought about in the diverse ways with variety of purposes and manifold objects. About the meaning, content and purport of the expression "*reservation*", it was held by the Court that "*they depend upon the purpose and object with which it is used*". For the implementation of the reservation, the peculiar principles of the interpretation which were laid down by the courts and envisaged under the **Indian Constitution** for the purpose of ensuring the effective and adequate representation to the Backward Classes taken as a whole, could not be readily applied, the Court ruled, out of the context and the unmindful of the purpose of the reservations. It was further laid down by the Court that for one or more of the classified group or category, whenever a

96. Setalvad Atul M., **Conflict of Laws**, [2007], at p. 122; Dicey, Morris and Collins, **Conflict of Laws**, Sweet & Maxwell [2016], at para 6–005.
97. See *D.P. Joshi v. State of Madhya Pradesh* AIR 1955 SC 334; *Pradeep Jain [Dr.] v. Union of India* AIR 1984 SC 1420.
98. Ibid.
99. AIR 2001 SC 718. *See also*, *K.K. Gupta v. MPSEB* AIR 2001 SC 308; *State of Tamil Nadu v. T. Dhilipkurnar* [1995] 5 SCALE 67.

quota was fixed or provided, the candidates falling in and answering the description of the different classified groups for whose benefits there was fixation of a respective quota, would have to, against the quota fixed for each of such category, confine their respective claims, with no body in one category who was having any kind of right for staking a claim against the quota which was earmarked for the other class or category. In this case, in a scheme for admission to super–specialty and the Post–Graduate Medical Courses, each for in–service candidates and non–service candidates, 50 percent seats were earmarked. It was ruled by the Court explaining the difference between the reservation and the quota fixation that quota could not be worked out for in–service candidates after the exclusion of those in–service candidates who on the basis of merit got the admission. Their claim would have to be confined only for the in–service candidates within the quota fixed. For the purpose of the promotion, for the benefits of various categories of posts, the fixation of quotas or different avenues and ladders in feeder cadres has been held to be a prerogative based upon the structure and pattern of the department of the employer. However, by considering the relevant factors, it can be done such as in the feeder post, the cadre strength, the more or less suitability of the holders, their experience, nature of duties and the channels of promotion which were available in the feeder cadres to the holders of posts.[100]

In the case of *State of Punjab v. Dayanand Medical College and Hospital*,[101] the role of the Medical Council was explained and it was observed that the ratio of *Preeti Srivastava [Dr.] v. State of Madhya Pradesh*[102] could not be stretched so far to mean that the reservations could be prescribed only by the Medical Council. The States could decide about the percentage of the reservation in a better way which was necessitated by the appointing committees, than the Medical Council itself.

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100. See, *Dwarka Prasad v. Union of India* AIR 2003 SC 2971.
101. AIR 2001 SC 3006. See also, *Medical Council of India v. State of Karnataka* AIR 1998 SC 2423; *NTR University of Health Science Vijaywada v. G. Babu Rajendra Prasad* [2003] 5 SCC 350; *Islamic Academy of Education and Anr v. State of Karnataka and Ors* [2003] 6 SCC 697.
102. AIR 1999 SC 2894.

However, the boundaries could be laid by the Medical Council so that the standards were not affected. The Court also observed that the question of whether the reservation was permissible was not decided by the Bench.

Further, in *All India Institute of Medical Sciences Students Union v. All India Institute of Medical Sciences*,[103] it was observed by a three–judge Bench of the Supreme Court stating the purpose of the reservation in the context of the admission in the medical colleges:

"*Reservation as an exception may be justified subject to discharging the burden of providing justification in favour of the class which must be educationally handicapped. The rationale or reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there, the quantum of reservation should not be excessive or societally injurious. The higher the level of the specialty, the lesser the rule of reservation.*"

However, the Full Bench decision which was given in the case of *M.C. Sharma v. Punjab University, Chandigarh*,[104] was overruled in appeal by the Supreme Court in the case of *Vijay Lakshmi v. Punjab University*.[105] The view which was taken by the Supreme Court was that the policy of the Government had been taken keeping in consideration the morality because the students in the Women's Institutions were all young girls. Over a policy decision, the court could not sit in appeal as long as there were reasonable basis for the policy decision. It was held that:

"*The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. One may believe in absolute freedom, one may not believe in such freedom but in such case when a policy decision is taken by the State and rules are framed accordingly, it cannot be termed to be arbitrary or unjustified.* ***Hence, it would be difficult to hold that rules empowering the authority to appoint only a lady Principal or a lady teacher or a lady doctor or a woman Superintendent are violative of Articles 14 or 16 of the Indian Constitution***."[106]

Since, there was direct nexus of the classification with the object of the

103. AIR 2001 SC 3262. See also, *NTR University of Health Sciences v. G.B.R. Prasad* AIR 2003 SC 1947.
104. AIR 1997 P&H 87.
105. AIR 2003 SC 3331.
106. Ibid, at para 5.

Act. Thus, the provision was upheld by the Apex Court as being in consonance with Article 14.

Further, the ratio decided in the case of *Pre–Post Graduate Medical Sangarsh Committee v. Bajarang Soni [Dr.]*,[107] was followed in the case of *State of Madhya Pradesh v. Gopal D. Tirthani*[108] in which 20 percent reservation was upheld for in–service candidates. For the in–service candidates, other kinds of differential treatment have also been struck down by the Supreme Court, In the case of *Harish Verma v. Ajay Srivastava*,[109] the lowering of minimum qualifying marks was declared invalid for in–service candidates. And in the case *State of Madhya Pradesh v. Gopal D. Tirthani*,[110] having separate entrance tests for both classes was held to be invalid and it was held that a common entrance test must be conducted for both in–service candidates and open candidates.

[2] Article 15[5]

In *T.M.A. Pai Foundation v. State of Karnataka*,[111] it was held that in furtherance of national interest, the regulations would be permissible. Between "*regulations*" and "*restrictions*", the earlier drawn distinction is done away with by this and it is also suggested that the reservation may be in the national interest and so permissible.

In the case of *T.T. Saravanan v. State of Tamil Nadu*,[112] from the "*especially reserved candidates list*", the exclusion of the grand children of the freedom fighters was upheld by the Madras High Court while quashing the challenge on the basis that the exclusion was made without applying the mind. There were the arguments given that there was no sense made for providing the

107. AIR 2001 SC 2743.
108. AIR 2003 SC 2952.
109. AIR 2003 SC 3371.
110. AIR 2003 SC 2952.
111. AIR 2003 SC 355.
112. [2004] 4 MLJ 283. Also See, *I.R. Coelho [Dead] by LRS v. State of Tamil Nadu* [2007] 2 SCC 1: AIR 2007 SC 861; *Ashok Kumara Thakur v. Union of India* [2008] 6 SCC 1, at p. 486: [2008] 3 MLJ 1105; *K. Manorama v. Union of India* [2010] 10 SCC 323; *Gulshan Prakash v. State of Haryana* AIR 2010 SC 288: [2010] 1 SCC 477; *Suraj Bhan Meena v. State of Rajasthan* [2011] 1 SCC 467; *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14.

reservation for the children of the freedom fighters because there would be nobody claiming under that category. However, it was decided by the court that the purpose of providing the impugned reservation system was only aiding those who due to their parents being freedom fighters might have suffered and that the same kind of suffering would not have been undergone by the grandchildren. Thus, the view was taken by the court that with the proper application of mind and with a valid rationale, the reservation had been provided and was hence valid.

In the case of *P.A. Inamdar v. State of Maharashtra*,[113] the explanation was given about the term "*national interest*" as being an act in furtherance of public safety, national integrity and national security. It is more than clearly based on this definition that the imposition of a reservation system would not fall within the ambit of this term. It was further stated by the Supreme Court that providing the benefits under the reservation system amounts to a violation of the right guaranteed under Article 30[1]. In this case, the Supreme Court held that:

"*Such impositions of quota of State seats or enforcing reservation policy of the Stale on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30[1] or a reasonable restriction within the meaning of Article 19[6] of the Indian Constitution*."[114]

Thus, it is quite clear that if with the interpretation provided by *P.A. Inamdar*[115] one agrees to the verdict of *TMA Pai*,[116] in the private unaided institutions, the imposition of the reservation is not permissible. Therefore, it is submitted that if the reservations are imposed in the public/national interest and the law which was laid down in the case of *P.A. Inamdar*[117] goes against the

113. AIR 2005 SC 3226.
114. *P.A. Inamdar v. State of Maharashtra* AIR 2005 SC 3226, at para 122.
115. Ibid.
116. *T.M.A. Pai Foundation v. State of Karnataka* AIR 2003 SC 355.
117. AIR 2005 SC 3226. Also see, *Gulshan Prakash v. State of Haryana* AIR 2010 SC 288: [2010] 1 SCC 477; *Suraj Bhan Meena v. State of Rajasthan* [2011] 1 SCC 467; *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14.

dicta in the case of *TMA Pai* disregarding the same.

The effects of *P.A. Inamdar v. State of Maharashtra*,[118] were as legislatively overruled by way of the 93rd Constitutional Amendment that came into force from 20th January, 2006 and which introduced Article 15[5]. Pursuant to this new amended policy, when the Government evinced intention to reserve 27 percent seats for OBCs in institutions of higher learning, the whole issue got precipitated, and led to the prolonged strike by medicos all over the country that was later called off on the intervention of the Supreme Court, which was seized of the matter by accepting the Writ Petitions[119] challenging the validity of the **Central Education Institutions** [*Reservation in Admission*] **Act**, 2006, notified by the Government on 4th January, 2007. It makes 27 percent reservation compulsory for OBCs in institutions like the IITs, IIMS, AIIMS, PGIMS and others from next academic session starting in June. However, in the case of *Ashoka Kumar Thakur v. Union of India*,[120] the validity of Article 15[5] was challenged. In the context of a challenge to the validity of the **Central Educational Institutions** [*Reservation in Admission*] **Act**, 2006, the provision was challenged which sought to impose the reservations in central educational institutions. The important thing to be noted is that the challenge to this provision was not made by any unaided non–minority institution. In this case, the five–judge Constitution Bench consisting of Justice Dr. **Arijit Pasayat**, Justice **C.K. Thakker**, Justice **R.Y. Raveendran**, Justice **Dalveer Bhandari** headed by Chief Justice **K.G. Balakrishnan** unanimously held that:

1) identification of Other Backward classes solely on the basis of caste will be unconstitutional;
2) failure to exclude the "*creamy layer*" from the benefits of reservation would render the reservation for Other Backward classes under Act 5 of

118. AIR 2005 SC 3172.
119. The Writ Petitions [Civil] No. 265 of 2006; 269 of 2006, 598 of 2006, 29 of 2007, 35 of 2007, 53 of 2007, 231 of 2007, 313 of 2007, 335 of 2007, 336 of 2007, 425 of 2007, 428 of 2007 and Contempt Petition [Civil] 112 of 2007.
120. AIR 2008 SC 1.

2007 unconstitutional; and

3) Act 5 of 2007 providing for reservation for Other Backward classes will however be valid if the definition of "*Other Backward Classes*" is clarified to the effect that if the identification of Other Backward classes is with reference to any caste considered as socially and economically backward, "*creamy layer*" of such caste should be excluded.

The judges also expressed their separate decisions in this judgment on a number of important issues.

This judgment of the Supreme Court can change the lives of many formally excluded sections from the halls of higher learning and privilege. It is unfortunate that because of partisan politics, some are still unwilling to accept this equitable decision, thus, putting in jeopardy the implementation of this overdue measure for the poor segments of the Other Backward classes.

This case was followed by the case of *Gulshan Prakash [Dr.] and Ors v. State of Haryana and Ors*.[121] In this case, challenge in the appeal was made by the appellants in order to quash the prospectus issued by Maharshi Dayanand University, Rohtak, Haryana for the MD/MS/PG Diploma Courses for the Academic Session 2007–2008 to the extent that any reservation of seats was not provided for the Scheduled Castes or the Scheduled Tribes candidates. Similarly, challenge in the Writ Petition related to the prospectus issued by the aforesaid University filed under Article 32 of the **Indian Constitution** for the same courses for the Academic Session 2009–10. The petitioners in Special Leave Petition [C] Number 4590 of 2008 and Writ Petition [C] Number 69 of 2009 were one and the same.

The Apex Court held that Article 15[4] is an enabling provision and the State Government is the best judge to grant the reservation in favour of the Scheduled Castes and the Scheduled Tribes and the Backward Class categories, at Post–Graduate level in the admission and the decision of the State of Haryana suffered no infirmity for not taking its own decision in respect of

121. AIR 2010 SC 288.

reservation depending upon various factors. Since it had been decided by the Government of Haryana for granting the reservation for Scheduled Castes, Scheduled Tribes and Backward Class candidates for the purpose of admission at MBBS level *i.e*., under graduate level, then it did not mean that the State was bound to grant the reservation at the Post–Graduate level also. The decision of the State Government had already been conveyed by it that it was not in favour of providing the reservation for Scheduled Castes/Scheduled Tribes/Other Backward Classes at the Post–Graduate level. In such circumstances, the mandamus against their decision could not be issued by the Court and their prospectus could not be faulted with in Post–Graduate Courses for not providing the benefits of the reservation. However, it was further held by the Court that irrespective of the above conclusion, the State of Haryana was at liberty for reconsidering its earlier decision, if it was so desired by it, and if the circumstances warranted in the future years. As a result, the Civil Appeal as well as the Writ Petition failed and accordingly, the same were dismissed with no order as to costs.

In the case of *P.V. Indiresan v. Union of India*,[122] two questions were raised, **first** relating to the meaning of the words "*cut–off marks*" used in the clarificatory order dated 14th October, 2008 in *P.V. Indiresan and Ors v. Union of India*[123] in regard to the decision of the Constitution Bench in *Ashoka Kumar Thakur v. Union of India*,[124] and **second**, whether all vacant seats in the reserved quota after the seats have been filled, shall revert to the general category. The Supreme Court affirmed the decision dated 7th September, 2010 of the learned Single Judge of the High Court that the order dated 14th October, 2008 clarifying that where minimum eligibility marks in the qualifying examinations are prescribed for admission, say as 50 percent for general category candidates, the minimum eligibility marks for Other Backward Classes should not be less than 45 percent [*that is 50 less 10 percent of 50*].

122. [2011] INSC 724 [*decided by Supreme Court on 18th August, 2011*] Appeal No. 7084 of 2011, [Arising out of SLP [C] No. 27965/2010].
123. [2009] 7 SCC 300.
124. AIR 2008 SC 1.

The minimum eligibility marks for Other Backward Classes can be fixed at any number between 45 and 50, at the discretion of the Institution. Or, where the candidates are 40 percent for general category candidates, the qualifying marks for Other Backward Classes candidates should not be less than 36 percent [that 40 less 10 percent of 40]. This clarification was given subject to the following conditions:

a) If any Central Educational Institution has already determined the "*cut–off marks*" for Other Backward Classes with reference to the marks secured by the last candidate in the general category, and has converted the unfilled Other Backward Classes seats to the general category seats and allotted the seats to the general category candidates, such admissions shall not be disturbed. But where the process of conversion and allotment is not completed, the Other Backward Classes seats shall be filled by Other Backward Classes candidates.
b) If in any Central Educational Institution, the Other Backward Classes reservation seats remain vacant, such institutions shall fill the said seats with Other Backward Classes students. Only if Other Backward Classes candidates possessing the minimum eligibility/qualifying marks are not available in the Other Backward Classes merit list, the Other Backward Classes seats shall be converted into general category seats.
c) If the last date for admissions has expired, the last date for admissions shall be extended till 31st August, 2011 as a special case, to enable admissions to the vacant Other Backward Classes seats.

[C] Reservation in Employment

The employment is a means of the social leveling and when there is public employment, it helps in direct participation in the running of the affairs of the society. As ordained by the Preamble of the Indian Constitution, an attempt made deliberately for securing the employment to those who in the past were designedly denied the same, is an attempt to provide them with social and economic justice. Because unless there is equal participation of all sections of

the society in the State power, irrespective of their caste, religion, race, sex and also unless in the sharing of the State power, all the discriminations made on those grounds are eliminated by the positive measures, the trinity of the goals of the Constitution, *viz*., socialism, secularism and democracy cannot be realized. So, it was thought advisable by the drafters of the Constitution along with Article 14 to incorporate Article 16 specifically providing in the matters of public employment for equality of opportunity. Under Article 16[4], in the State employment, the reservation is provided for a "*class of people*" who must be "*backward*" and "*in the opinion of the State*" are "*not adequately represented*" in the services of the State.

Like any other employer, the State is entitled for laying, down the qualifications for the employment and insisting that those must be satisfied by the applicants. However, on the State, there is an additional burden while laying down certain qualifications to adhere to the provisions of the Constitution as provided in Part III. Those qualifications which are reasonable and rational and have a nexus with the appointment in question will be valid, but any arbitrary or irrational requirement will be liable to be struck down by the courts. Thus, in the cases of abuse of the protective discrimination policy, the judicial remedies are sought. Since right involved in the protective discrimination are not the substantive rights, but only the permissive rights, so, the beneficiaries of such arrangements generally do not go to the courts. It is only the persons whose rights are adversely affected due to the reverse discrimination go to the courts against the Governmental action. And the disputes arise between the victims of the reverse discrimination and the sponsorer of the protective discrimination. Who comes to the court of laws as initiator or who has to defend it, does not make any difference because interested parties may join the issue as the interveners.

The case of *B. Venkataramana v. State of Madras*[125] was a case directly under Article 16[4] and was held in a decision which was delivered on the same day by the same Bench of seven judges. In this case, the reservation of

125. AIR 1951 SC 229.

the posts was made by the Communal Government Order of the Government of Madras for the Harijans and Backward Hindus and also for the other communities like Muslims, non–Brahmin Hindus and Brahmins and Christians. The reservation was upheld by the Court for the benefits of Harijans and Backward Hindus and was also held in this respect that those posts were reserved not on the ground of religion, caste, race, *etc*., but there was the necessity of making a provision for the reservation regarding such posts for the benefits of the Backward Classes of citizens. However, the reservation was struck down by the Court in favour of other than Harijans and Backward Classes based on the ground that it was impossible to take those classes as Backward Classes. In the decision pronounced by the Court it can be seen that into *Harijan* and Backward Classes, the classification of the Backward Classes was upheld by the Court as being allowable under Article 16[4] since the said two groups were citizens belonging to the Backward Classes and it was not a classification which was made on the ground of the race, caste, religion, *etc*. The writ petition was permitted on the ground that the allocation of the vacancies to and among the communities other than Backward Classes of Hindus and *Harijans*, cannot be sustained in view of Clauses [1] and [2] of Article 16.

Since, in *B. Venkataramana v. State of Madras*[126] reservation for the Backward Hindus comprising of certain castes was allowed, some High Courts thoughts caste could be permissible basis of classification.[127] However, in one of such cases,—*R.K. Singh Ram Singh v. State of Mysore*,[128] Mysore High Court stressed the requirement for deciding the backwardness on intelligible principle. The Government move in 1959 to determine backwardness on the basis of 1941 census report which was declared to be unintelligible, as change in circumstances since then might have rendered some classes forward within eighteen years and declaration of 95 percent of the population as backward was

126. AIR 1951 SC 229
127. *R.K. Singh Ram Singh v. State of Mysore* AIR 1960 Mys 338; *Partha v. State of Mysore* AIR 1961 Mys 220.
128. Ibid.

declared bad.

Furthermore, it had been held earlier in *General Manager*, *South Railway v. Rangaehari*[129] by the Supreme Court that the State could exercise the power of reservation conferred on it not only to provide for the reservation of the appointment but also to provide for the representation in the selection posts as well as promotional posts. It means that the Supreme Court in this case had permitted that under Article 16[4], the reservation could be made from a lower to a higher post or cadre *i.e.*, not only at the initial stage of the recruitment but even in the matters of promotion also. It had been a law for more than 30 years.

The case of *T. Devadasan v. Union of India*[130] is popularly known as "*carry forward rule case*" in which the scope of Article 16[4] was considered by the Supreme Court. In this case, the Court pronounced upon the constitutionality of the rules framed by the Central Government regarding "*carry forward*" which was framed for regulating the appointment of the persons belonging to the category of Backward Classes in the public services.[131] By a majority of four to one it was held by the Court that the rule of carry forward as was not *ultra–vires* and invalid but the rule which was amended in the year 1955 on the ground that under Article 16[4] the vested power in the State Government could not be so exercised in the matters of public employment as to deny reasonable equality of opportunity to the members of classes who were not backward. It was thought by the majority that the object of that provision was to ensure that the members of the Backward Classes were not handicapped excessively by their backwardness from the

129. AIR 1962 SC 36.
130. AIR 1964 SC 179.
131. The Government indicated its intention by a resolution of the year 1950 for reserving 12.5 percent and 5 percent in favour of the Scheduled Castes and Scheduled Tribes respectively in any year of the total available vacancies. In the year 1952, it was provided by the supplementary instructions issued by the Government that if the number of the suitable candidates available in any particular year was less than the number of the reserved posts, for that particular year, so in excess posts shall be treated as unreserved but in the next year the number of posts which for such candidates would have been otherwise reserved in the normal course would be increased by the number which in the preceding year had been converted into non–reserved posts. At a time under the year 1952 instructions this process of carrying over which was to operate for the period of one year, was directed for operating at a time for two years by making an amendment in 1955.

public employment and when the State by providing reservation for the benefits of the Backward Classes did in effect provide an opportunity to the Backward Classes in the matters of public employment equal to other classes. From this premise, it was further held by the Court that where the reservation was as excessive in its character as in practice to deny to other classes in a reasonable opportunity, it amounts a mockery and fraud upon the **Indian Constitution**. Because in the year 1961, as a result of the application of the impugned Rule 29 vacancies out of the 45 actually filled, went to the candidates belonging to the category of the Scheduled Castes and the Scheduled Tribes. That became about 64 percent of the reservation quota which was not below the limit of 50 percent which was laid down in the case of *Balaji*.[132] So, the carry forward rule regulating reservation of vacancies in favour of the candidates belonging to the Scheduled Castes and Scheduled Tribes was struck down as invalid and unconstitutional by the Court.

Further in *State of Punjab v. Hira Lal*,[133] case of *Rangachari*[134] was approved and followed by Supreme Court. The Court specifically ruled out the acceptance of the argument that the word "*posts*" in Article 16[4] meant posts filled by initial appointment and held "*posts*" referred to selection posts. It was also observed in this case that the rule in Article 16[1] made was meaningless by virtue of the provision of reservation provided under Article 16[4] if the State's decision would not be open to judicial review. However, the burden of establishing the fact was on the person who took the plea that particular reservation was offensive to Article 16[1].

An important question arose in *State of Kerala v. N.M. Thomas*[135] regarding the relationship of Articles 14, 15 and 16. **Does equality under Article 16 have a different content from equality under Article 14**? **Does Article 16[4] provide an exception to Article 16[1]**, **or does Article 16[4] indicate one of the methods of achieving equality embodied under Article**

132. *M.R. Balaji v. State of Mysore* AIR 1963 SC 649, where a reservation of 68 percent of seats in educational institutions by the State was held invalid.
133. AIR 1971 SC 1777.
134. AIR 1962 SC 36.
135. [1976] 2 SCC 310: AIR 1976 SC 490.

16[1]. More specifically the nature of Clauses [1] and [2] of Article 16 came up for discussion. The point at issue was whether Article 16[1] protected exemption of Lower Division Clerks belonging to the Scheduled Castes and Scheduled Tribes from passing the special tests for promotion as Upper Division Clerks and the filling up of 34 out of 51 vacancies of Upper Division Clerks by promoting Lower Division Clerks from these groups in preference to those who had passed those tests. The question was whether this arrangement could be upheld under Article 16[1] or Article 16[4]. The majority of five judges, Chief Justice **Ray**, Justice **Mathew**, Justice **Beg**, Justice **Krishna Iyer** and Justice **Fazal**, held that these arrangements did not fall under Article 16[4] but were valid under Article 16[1]. The majority was of the view that Article 16[1] permitted reasonable classification and did not forbid the State from rendering social justice to the backward classes. Its opinion rested on the premise that the impugned exemption had been granted only for a temporary period. Chief Justice **Ray** stated categorically that Articles 14, 15 and 16 form part of a string of constitutionally guaranteed rights supplementing each other. Article 16 was explained as an incident of guarantee of equality contained in Article 14 and, therefore, permitted reasonable classification of the employees in matters relating to employment or appointment. Article 16[1] using the expression "*equality*" made it relatable to all matters of employment, and permitted classification on the basis of object and purpose of law or State action except classification involving the discrimination prohibited by Article 16[2]; Article 16[4] indicated one of the methods of achieving equality embodied in Article 16[1], and explained that classification on the basis of backwardness did not fall within Article 16[2]. In other words, a rule giving preference to an unrepresented backward community was valid and would not contravene Articles 14, 16[1] and 16[2]; Article 16[4] removed any doubt in this respect. Justice **Mathew**, emphasized that the guarantee of equality before the law is something more than is required by formal equality, and Article 16[1] means effective material equality, and that Article 16[4] is not to be read by way of an exception to Article 16[1]. Justice **Krishna Iyer**, agreed with the

Chief Justice, stating very clearly that Article 16[4] is an illustration of constitutionally sanctified classification and has been put in the Constitution due to the overanxiety of the draftsmen to make matters clear beyond possibility of doubts. However, he clarified that only *Harijans* should be allowed or permitted preferential treatment on the basis of reasonable classification read into Article 16[1] based on Articles 46 and 335 so that casteism does not come back by the back door. Justice **Khanna** and Justice **Gupta**, in their dissent, followed *Balaji* and argued that carving out classes of citizens for favoured treatment in matters of public employment, except in cases for which there is an express provision in Clause [4] of Article 16, would in the very nature of things run counter to the principle of equality of opportunity enshrined in Clause [1] of Article 16. They adhered to the view that reservation of seats for backward classes should not be at the cost of efficiency. It was pointed out that the exemption, though only for a limited period, would not lend constitutionality to the impugned rules.

The impact of the majority opinion treating equality of opportunity and provision for reservation as supplementary and complementary to each other, is seen, as asserted by Justice **Krishna Iyer** and Justice **Fazal Ali**, in the extent of reservation permissible under Article 16[4] which could be as high as 80 percent. Justice **Krishna Iyer**, emphasized overall representation in a department not depending on recruitment in a particular year but the total strength in a service cadre. More importantly, the upshot of the majority opinion is that the concept of equality is something more than formal equality and enables the underprivileged groups to have a fair share by having equal chance and enables the State to give favoured treatment to these groups for achieving real equality by reference to the perceived social needs. This approach, ultimately, promotes "*actual*" equality, equality in fact and results, and enables the State to adopt new strategy to bring the underprivileged at par with the rest of the society by providing all possible opportunities and

incentives to these groups, reservation being one of them.[136] Justice **Beg**, agreed with the minority in so far as he held that the encroachments in the field of Article 16[1] should only be permitted to the extent they are warranted by Article 16[4], and to read broader concept of social justice and equality into Article 16[1] itself would stultify this provision and make Article 16[4] otiose. Justice **Krishna Iyer**, also raised a doubt about the *Balaji* formulation with regard to the characterization of "*backward class*" as one homogeneous class in disregard of further classification within that class itself as "*more*" backward or "*less backward*". He emphasized that only *Harijans* should be allowed to have preferential treatment and care should be taken to prevent creamy elites among the *Harijans* from swallowing the benefits of preferential treatment.

Five years later in *Akhil Bharatiya Shoshit Karamchari Sangh v. Union of India*,[137] it appears that Justice **Krishna Iyer**, had second thoughts about the extent and scope of Articles 15[4] and 16[4] when he observed that Article 16[4] imparts the seemingly–static equality embedded in Article 16[1] a dynamic quality by importing equalization strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16[1] or as an exception to it. Before the decision in *Thomas*, Article 16[4] was construed as an exception to Article 16[1] and this construction was an accepted norm for working out the extent and scope of Article 16[1]. It was in the majority opinion [including Justice **Krishna Iyer**] in *Thomas* that Article 16[4] was construed as an aspect of Article 16[1] and given altogether a dynamic interpretation. Following the majority opinion in *Thomas*, Justice **Chinnappa Reddy**, emphasized that Article 16[4] is not in the nature of an exception to Article 16[1]; it is a facet of Article 16[1] fostering and furthering the idea of equality of opportunity with special reference to underprivileged and deprived class of citizens.

In *Akhil Bharatiya Shoshit Karamchari Sangh*, Justice **Krishna Iyer**, emphasized, as he did in the *Thomas* case, the categorization of Scheduled

136. *Jagdish Rai v. State of Haryana* AIR 1977 P&H 56, 60.
137. [1981] 1 SCC 246: AIR 19981 SC 298.

Castes and Scheduled Tribes as a class on the basis of which the classification could be justified as just and reasonable within the meaning of Articles 15[1] and 16[1] because these classes stand on a substantially different footing from the rest of the Indian community in our Constitution. Other weaker sections in this context, in his opinion, would mean not other "*backward class*" but dismally depressed categories comparable economically and educationally to Scheduled Castes and Scheduled Tribes. In other words, in his opinion, classification of Scheduled Castes and Scheduled Tribes as a special category could be justified within the meaning of Articles 15[1] and 16[1], whereas classification of weaker sections on the basis of *backward classes* may have to conform to the requirements of Articles 15[4] and 16[4]. However, Justice **Chinnappa Reddy**, did not make any such distinction between the two classes. The *Mandal Commission* case [138] approves the classification of backward classes into backward and more backward **but disapproves that the backward classes must be so situated as the SCs and STs**.

The *Thomas* view on the relationship between Clauses [1] and [4] of Article 16 that the latter is not an exception but complementary to the former has been confirmed in the *Mandal Commission* case. But the *Mandal Commission* case has also held that Clause [4] exhausts all special provisions for the backward classes and no favour can be granted to them under Clause [1]. However, the Court has admitted that Clause [1] permits classification and under it special provisions can be made for handicapped or disadvantaged groups other than the backward classes.

Article 16[1] is confined to "*employment*" by the State and has reference to employment in service rather than as contractors. Accordingly, a contract for the supply of goods is not a contract of employment in the sense in which that word has been used in the article. Independent contractors cannot call themselves employees of the State and cannot claim the right conferred under this clause.

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138. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217: AIR 1993 SC 477.

The requirement of reasonableness discussed under the new approach to equality has been applied to Article 16[1] also unreasonable actions in relation to service matters have been invalidated.[139]

Again in *P&T Scheduled Castes/Scheduled Tribes Employees' Welfare Association v. Union of India*,[140] it had been observed by the Court that Article 16[4] "*is only an enabling clause*" and under it "*no writ can be issued ordinarily compelling the Government for making the reservation*". However, in fact the Central Government was directed by the Court in that case for conferring on the Scheduled Castes and Scheduled Tribes employees, the same advantages in the P&T department as in the other departments or the Government which were enjoyed by the employees belonging to the category of Scheduled Castes and the Scheduled Tribes because the "*equality clause of the Constitution*" was violated by the less advantageous treatment of the P&T employees.

Once again the question was considered by a nine–Judge Bench of the Supreme Court in *Indra Sawhney v. Union of India*.[141] In that case the Court was asked to pronounce on the constitutional validity of two office memoranda of the Central Government. One of them, which were initially brought before the Court, was issued on 13th August, 1990. Implementing partially the Mandal Commission Report, it reserved 27 percent vacancies in civil posts and services under the Government of India to be filled by direct recruitment from the socially and educationally backward classes [SEBCs]. Before the Court could decide the validity of this memorandum, the other memorandum was issued on 25th September, 1991. It provided for preference to the poorer sections of SEBCs in respect of 27 percent reservation made by the first memorandum and also made additional reservation of 10 percent vacancies for "*other economically backward sections of the people*" who were not covered by any existing schemes of reservation.

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139. *A.L. Kalra v. Project and Equipment Corpn*. [1984] 3 SCC 316.
140. AIR 1989 SC 139, 142.
141. [1992] Supp 3 SCC 217: AIR 1993 SC 477.

The first memorandum stated:

"*The SEBC would comprise in the first phase the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Government's list*."

By a six to three majority [*in which the four majority judges gave a common opinion while the two other judges concurred in separate opinions and the three minority judges gave three separate opinions*] the Court upheld the first memorandum but invalidated the addition of 10 percent by the second.

Among others, one of the contentions before the Court was that the first memorandum was based on the Mandal Commission Report which took caste as a dominant, rather sole, criterion for determining the SEBCs. The Commission in fact had made a nationwide survey of the entire population and on that basis had evolved 11 indicators divided into **social**, **educational** and **economic**. Every indicator was assigned a weightage which together made 22 points. These indicators were applied to "*castes/classes*". The castes/classes which scored 50 percent or more points under these indicators were listed as SEBCs. The Commission also took into account some other factors both with respect to Hindus and non–Hindus. Rejecting the contention of the petitioners, the Court held that "*class*" or "*classes*" in Articles 15[4] and 16[4] respectively are not to be construed in the Marxist sense. The Constitution does not define these classes nor does it lay down any methodology for their determination. The Court could also not devise any method for determination. The central idea and overall objective, the Court said, should be to consider all available groups, sections and classes in the society. Since caste represented an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one could, according to the Court, well begin with it and then go to other groups, sections and classes. **Caste**, **however**, **was not an essential factor for determining the social and educational backwardness**. It is also not necessary that SEBCs should be similarly situated as SCs and STs. Within SEBCs classification between the backward and more backward is permissible. To maintain the cohesiveness and character of a class the "*creamy*

layer" can and must be excluded from SEBCs. The Court also clarified that "*backward class of citizens*" in Article 16[4] is a wider category than SEBCs in Articles 15[4] and 340. In the former, accent is on social backwardness while in the latter it has to be both social and educational. It also held that the economic criterion alone cannot be the basis of backwardness although it may be a consideration along with or in addition to social backwardness. The Court also suggested creation of a permanent body at the central and state levels to look into the complaints of over and under–inclusion as well as to revise the lists of SEBCs periodically.

Following the Court's directions the Centre and the States have appointed backward class commissions for constant revision of such classes and for the exclusion of creamy layer from amongst them. Unreasonably high standard for determining the creamy layer have been invalidated [142] and wherever any government has failed to implement the requirement of appointing a commission and exclusion of creamy layer it has issued necessary directions compelling them to do so.[143]

With this larger Bench decision, the matter seems to have been settled that caste can be an important or even sole factor in determining the social backwardness and that poverty alone cannot be such a criterion. If the primary intention of the Constitution–makers was, as it appears to be, to compensate for the handicaps from which certain sections of the society have suffered under our social arrangements then caste cannot be ignored as an important factor in determining backwardness. It is only when distributive justice or utilitarian principle and not compensatory justice become the basis of protective discrimination that poverty and alienation may become important factors in determining backwardness. Some people argue, and rightly so, that the latter arrangement would not require the support of Articles 15[4] and 16[4], because that can be justified under the concept of equality enshrined in Article 14 itself and therefore these provisions should be utilized only for ameliorating caste

142. *Ashok Kumar Thakur v. State of Bihar* [1995] 5 SCC 403.
143. *Indra Sawhney v. Union of India* [2000] 1SCC 168.

disabilities.[144] Since birth in a particular caste or community is a determining factor for the availability of special provision under Articles 15[4] or 16[4], a person who had the advantageous start in the life being born in forward caste but is transplanted in backward class by adoption or marriage or conversion at a later stage does not become eligible to the benefit of reservation under any of the above provisions.[145]

In the case of *Indra Sahwney v. Union of India*,[146] the Court examined the scope and extent of Article 16[4] in detail and clarified various aspects on which there was difference of opinion in various earlier judgments. The majority opinion of the Supreme Court on various aspects of reservation provided in Article 16[4] may be summarized as follows:

a) Backward class of citizen in Article 16[4] can be identified on the basis of caste and not only on economic basis.
b) Article 16[4] is not an exception to Article 16[1]. It is an instance of classification. Reservation can be made under Article 16[1].
c) Backward classes in Article 16[4] are not similar to as socially and educationally backward in Article 15[4].
d) Creamy layer must be excluded from Backward Classes.
e) Article 16[4] permits classification of Backward Classes into Backward and more Backward Classes.
f) A Backward class of citizens can not be identified only and exclusively with reference to economic criteria.
g) Reservation shall not exceed 50 percent.
h) Reservation can be made by "*Executive Order*".
i) No reservation in promotions.
j) Permanent Statutory body to examine complaints of over–inclusion/under–inclusion.
k) Mandal Commission Report—No opinion Expressed.
l) Disputes regarding new criteria can be raised only in the Supreme Court.

In the case of *Ashok Kumar Thakur v. State of Bihar*,[147] the addition of economic criteria for the purpose of the application of the exclusion rule in the

144. Errabbi B., ***Protective Discrimination: Constitutional Prescriptions and Judicial Perception***, 10 & 11, Delhi L.Rev., [1981–82], at p. 66 ff; Tripathi P.K. ***Some Insights into Fundamental Rights***, [1972], pp. 203 ff: who maintains that caste should not be a criterion at all. Also see, Singh P., **Equality**, **Reservation and Discrimination in India**, [1985]: below and, ***Promoting Equality through Reservations: A Critique of Judicial Policy and Political Practice***, P. Singh, 20 Delhi L.Rev., [1988], at p. 23.
145. *Valsanuna Paul v. Cochin University* AIR 1996 SC 1011.
146. AIR 1993 SC 477.
147. AIR 1996 SC 75.

case of Class I officers of the Central Government or State Government or an undertaking or an institution fully or partially financed by them had been held to be invalid. The criteria to be fixed for the determination of creamy layer, for the purposes of reservation under Article 16[4] in State services involves the question regarding the interpretation of the Constitution and it is also the subject–matter of the judicial decisions of the Supreme Court and thus, the report fixing the criteria can be reviewed by the Court. While appointing a commission, the terms of reference may be subject to the judicial review.[148]

In *R.K. Sabbarwal v. State of Punjab*,[149] the distinction between the terms "*posts*" and "*vacancies*" was explained by Constitution Bench of the Supreme Court with reference to the scope of Article 16[4]. It was held by the Court that the meaning of the word "*post*" was an appointment, job, office or employment and a position to which a person was appointed, while the meaning of the word "*vacancy*" was an unoccupied post or office. The court explained that the plain meaning of the two expressions made it clear that to enable the "*vacancy*" to occur there must be a "*post*" in existence. By the number of posts comprising the cadre, the cadre–strength was always measured and therefore, in respect of a post in a cadre, the right to be considered for the appointment could be claimed. As a consequence, in relation to the number of posts by which the cadre-strength was formed, the percentage of reservation had to be worked out. It was made clear by the Court that in operating the percentage of reservation, the concept of "*vacancy*" had no relevance. Reservation in promotion with consequential seniority was the cause of serious prejudice to the general category people. This has come to light in this case, The Apex Court further held that the roster system is a running account which is to operate only till the quota provided under the instructions is reached and not thereafter. Once the prescribed percentage of representation is secured the numerical test of adequacy would be satisfied and henceforth the roster would

148. *Nair Service Society v. State of Kerala* AIR 2007 SC 2891; *Ram Krishna Dalmia v. Justice S.R. Tendulkar* AIR 1958 SC 538.
149. AIR 1995 SC 1371. See also, *Union of India v. Virpal Singh Chauhan* AIR 1996 SC 448; *J.C. Malik v. Union of India* [1978] 1 SLR 844; *Baburam v. C.C. Jacob* AIR 1999 SC 1845.

not survive. Thus, the Apex Court ensured maintenance of balance between the reserved category and the General category. The Court observed that the rule of reservation gave accelerated promotion, but it did not give the accelerated consequential seniority. The Court explained that a reasonable balancing of the rights of General candidate and roster candidate would be achieved by following the catch up rule.

The Supreme Court in its judgment dated 1st October, 1996 in the case of *S. Vinod Kumar v. Union of India*,[150] held that such relaxations in matters of reservation in promotion were not permissible under Article 16[4] of the Constitution in view of the command contained in Article 335 of the Constitution. The Apex Court also held that the law on the subject of relaxations of qualifying marks and standards of evaluation in matters of reservation in promotion is one laid down by the nine–Judge Constitution Bench of the Supreme Court in the case of *Indra Sawhney v. Union of India*.[151] Para 831 of *Indra Sawhney* judgment also held such relaxations as being not permissible under Article 16[4] in view of the command contained in Article 335 of the Constitution. In order to implement the judgments of the Supreme Court, such relaxations had to be withdrawn with effect from 22nd July, 1997.

Granting of seniority to those members who had been promoted to higher grade by virtue of reservation in promotion following the roster system created a serious problem. This was highlighted in the case of *Union of India v. Virpal Singh Chauhan*.[152] The view expressed in this case was concurred by the Supreme Court holding that accelerated promotion was provided by the rule of the reservation, but the accelerated consequential seniority was not given by it. It was explained by the Court that by following the catch–up rule, there would be the achievement of the reasonable balancing of the rights of the general candidate and the roster candidate. According to this rule, if "*in case any senior general candidate at level 2 reaches level 3 goes further upto level 4*, *in case any candidate [roster point promotee] at level 3 goes further upto level 4*, *in*

150. [1996] 6 SCC 580.
151. AIR 1993 SC 477.
152. AIR 1996 SC 448.

that case the seniority at level 3 has to modified by placing such a general candidate above the roster promotee reflecting their inter se at level 2".[153] In this case the Supreme Court opined that it was open to the State if it was so advised to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in feeder category and that as and when a General Candidate who was senior to him in the feeder category is promoted, such senior candidate will regain his seniority over the reserved candidate not withstanding that he is promoted subsequent to the reserved candidate.

This case was followed by the case of *Ajit Singh Janjua and Ors v. State of Punjab and Ors [I]*[154] in which similar problem relating to the reservation in promotion in favour of Scheduled Castes and Scheduled Tribes was discussed and similar solution was provided by the Apex Court that the members belonging to the category of Scheduled Castes and Scheduled Tribes cannot be promoted only on the basis or their "*accelerated seniority*" against the general category posts. When the members of Scheduled Castes and Scheduled Tribes category have got promotion on the basis of reservation on the application of roster before their seniors in the lower grade belonging to general category then they have not superseded them in this process because there was no *inter se* comparison of merit between them. And when such seniors belonging to the general category are promoted later, then it cannot be said that they have been superseded by such members of Scheduled Castes or Backward Classes who have been promoted earlier. Since, this rule will violate the equality clause.

In a significant decision in the case of *Ajit Singh Janjua v. State of Punjab II*,[155] the cases of *Ashok Kumar Gupta v. State of Uttar Pradesh*[156] and

153. In *M.G. Badappanavar v. State of Karnataka* AIR 2001 SC 260, the Apex Court, relying upon Ajit Singh II issued directions for determining the seniority of roster point promotees of reserved category vis–à–vis general category candidates, in accordance with the catch–up rule.
154. AIR 1996 SC 1189.
155. AIR 1999 SC 3471.
156. AIR 1947 SC 2360.

Jagdish Lal v. State of Haryana [157] were overruled by a five Judges Constitution Bench of the Supreme Court and it was held that these cases were not decided correctly. It was again explained by the Court that in certain posts, providing due representation of certain classes was the primary objective of the Articles 16[4] and 16[4–A].[158] It was ruled by the court that neither any fundamental right was conferred by both the Articles 16[4] and 16[4–A] nor any constitutional duty was imposed by them, but the nature of these Articles was that they were only enabling provisions vesting a discretion in the State for considering to provide the reservation if the circumstances mentioned so warranted in those Articles. With approval, the decisions in the cases of *Virpal*[159] and *Ajit Singh*[160] were reiterated by the Supreme Court.

The Supreme Court held in the case of *Meera Kanwaria v. Sunita*,[161] that a person who was a high caste Hindu and in his/her life, he/she was not subjected to any kind of social or educational backwardness, could not *ipso facto* become a member of Scheduled Caste or Scheduled Tribe by reason of marriage alone. He/she could not be allowed to defeat the very provisions made by the State in the absence of any strict proof for reserving certain seats for disadvantaged people. It could not be said that the purposes of the reservation under Articles 15[4] and 16[4] of the Constitution on the one hand, and Articles 330 and 331 on the other, were different.

However Article 32 of the **Indian Constitution** was invoked by the Petitioners for a writ in the nature of certiorari for quashing the **Constitution** [*85th Amendment*] **Act**, 2001 which had inserted Article 16[4–A] of the Constitution providing the reservation benefits to the beneficiaries in promotion with consequential seniority retrospectively from 17th June, 1995 as being unconstitutional and violative of the basic structure in the case of *M.*

157. AIR 1997 SC 3133.
158. Further the Court held: "*The Constitution has laid down in Articles 14 and 16[1] the permissible limits of affirmative action by way of reservation under Article 16[4] and 16[4–A].*
159. *Union of India v. Virpal Singh* AIR 1996 SC 448.
160. *Ajit Singh Janjuya v. State of Punjab* AIR 1996 SC 1189. See also, *Jatinder Pal Singh v. State of Punjab* AIR 2000 SC 609.
161. AIR 1997 SC 2366. See also, *Suresh Chandra v. J.B. Agrawal* AIR 1997 SC 2487; *Union of India v. Medhav Gaganan* AIR 1997 SC 3074.

Nagaraj v. Union of India.[162] The Court held that it could not be said that by the insertion of the concept of the "*consequential seniority*", the structure of Article 16[1] stood abrogated or destroyed. The Article 16[4–A] and 16[4–B] flow from Article 16[1] and Article 16[4] is an enabling provision then Articles 16[4–A] and 16[4–B] are also the enabling provisions. They do not alter the structure of the Article 16[4]. The object behind the impugned constitutional amendments was conferring the discretion on the State for making the reservations in favour of Scheduled Castes/Scheduled Tribes in promotions subject to certain constitutional limitations and circumstances. The Court further ruled that as long as in Article 16[4], the boundaries namely, the ceiling–limit of 50 percent, the principle of creamy layer, backwardness, efficiency of administration and inadequacy were retained in Articles 16[4–A] and 16[4–B] as the controlling factors and the compelling reasons, then the constitutional invalidity could not be attributed to these enabling provisions. It means that if the State wished to exercise their discretion of making such provision for the reservation in favour of Scheduled Castes/Scheduled Tribes in matters of promotions then, the quantifiable data showing backwardness of the class and inadequacy of the representation of that class in public employment had to be collected in addition to compliance of Article 335. The Court further held that if the State had compelling reasons, even then the State would have to see that it was not led to excessiveness by its reservation provision so as to breach the ceiling–limit of 50 percent or obliterate the creamy layer or extend the reservation indefinitely. Subject to above, the constitutional validity of the **Constitution** [*77th Amendment*] **Act**, 1995, the **Constitution** [*81st Amendment*] **Act**, 2000, the **Constitution** [*82nd Amendment*] **Act**, 2000 and the **Constitution** [*85th Amendment*] **Act**, 2001 were upheld.

In this regard in the case of *I.R. Coelho [Dead] by Legal Representatives v. State of Tamil Nadu and Ors*,[163] the Supreme Court had given a very important judgment on a very controversial issue and the former

162. AIR 2007 SC 71.
163. AIR 2007 SC 861.

Chief Justice **Y.K. Sabharwal** had set up a nine–Judge Constitution Bench in this case to examine the power of Parliament to amend the ninth Schedule of the Constitution from time to time facilitating the placing of at least 30 odd laws passed by different State Assemblies in it, including the controversial **Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes** [*Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State*] **Act**, 1993 **which had raised the ceiling limit of reservation to 69 percent in the State overreaching the Supreme Court verdict in the *Mandal Commission* case fixing it at 50 percent to strike a balance between Article 16[1] individual's right to equality and Article 16[4] providing equal opportunity to Backward Classes**. The **Constitution** [*76th Amendment*] **Act**, 1994 was enacted with a view to include **Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes** [*Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State*] **Act**, 1993 as Act No. 45 of 1994 dated 19th July, 1994 providing for 69 percent reservation, within the purview of the Ninth Schedule to the Constitution so that it gets protection under Article 3l–B of the Constitution in regard to the judicial review. The Supreme Court of India consisting of a nine Judge Constitution Bench namely, Chief Justice **Y.K. Sabharwal** and Justices **Ashok Bhan**, **Arijit Pasayat**, **B.P. Singh**, **S.H. Kapadia**, **C.K. Thakker**, **P.K. Balasubramanyan**, **Altamas Kabir** and **D.K. Jain** concluded on 11th January, 2007 as follows:

"*Ninth Schedule law has already been upheld by the court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1993, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and principles underlying there under. Action taken and the transactions finalized as a result of impugned Acts shall not be open to challenge*."

Furthermore, it was observed by the Court in the case of *Nair Service*

Society v. State of Kerala, [164] that while appointing a Commission for identifying creamy layer, the direction of the State to the Commission for giving maximum benefit to a particular section of people was not proper and that would be against the principles laid down in the case of *Indira Sawhney*. Besides, it had been held by the Court[165] that the report of the Commission for the purpose of identification of creamy layer pertaining to the fixation of income limit should be based on the scientific data and the evidence of experts and it [*the report*] should not be accepted by the State[166] if it was not based on the scientific data and evidence of experts.

In *Rajesh Kumar Davia v. Rajasthan Public Service Commission*,[167] the horizontal reservation has been explained by giving suitable example by the Court. Suppose there are two hundred vacancies and the vertical reservation in favour of the Scheduled Castes is 15 percent and the horizontal reservation for the benefits of the women is 30 percent, the proper description of the number of posts reserved for the Scheduled Castes should be: For Scheduled Castes: 30 posts, of which 9 posts are for the women. In this case, the difference between vertical reservation and horizontal reservation has been clarified by the Court. It has been observed by the Court that the **under Article 16[4]**, **social reservation in favour of Scheduled Castes**, **Scheduled Tribes and the Other Backward Classes are** "***vertical reservations***". **In favour of physically handicapped**, **women *etc*.**, **the special reservations under Articles 16[1] or 15[3] are** "***horizontal reservations***" **whereas in favour of Backward Classes**, **a vertical reservation is made under Article 16[4]**, the non–reserved posts may be competed for by the candidates belonging to such Backward Class and if they are appointed on their own merit to the non–reserved posts, then their numbers will not be counted against the quota reserved for the respective Backward Class. Therefore, if the number of candidates belonging to the category of the Scheduled Castes, who get selected to the open competition

164. AIR 2007 SC 2891.
165. Ibid.
166. *Nair Service Society v. State of Kerala* AIR 2007 SC 2891.
167. AIR 2007 SC 3127.

vacancies, by their own merit, equals or even exceeds the percentage of posts reserved for the Scheduled Castes candidates, it cannot be said that the reservation quota has been filled for the Scheduled Castes. In addition to those selected under Open Competition category, the entire reservation quota will be intact and available.[168] But, applicable to the vertical [*social*] reservations, the aforesaid principle will not apply to the horizontal [*special*] reservations. Where within the social reservation for the Scheduled Castes, a special reservation for women is provided, the proper procedure is first to fill up the quota in order of merit for the Scheduled Castes and then find out the number of candidates belonging to the special reservation group of "*Scheduled Castes Women*" among them if in such list, the number of women is equal to or more than the number of special reservation quota, then there is no need for the further selection towards the special reservation quota. Only in case of any shortfall, the requisite number of women belonging to the category to Scheduled Castes shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to the Scheduled Castes. The horizontal [*special*] reservation differs from the vertical [social] reservation to this extent. Thus, within the vertical reservation quota the selection of women on merit will be counted against the horizontal reservation for the women. It has been explained by the Court by an illustration.[169]

Another important legal question arose in the case of *Union of India v. Ramesh Ram and Ors*[170] when a three judge Bench of the Court referred the

168. *Indira Sawhney v. Union of India* AIR 1993 SC 477; *R.K. Sabbarwal v. State of Punjab* [1995] 2 SCC 745.

169. The illustration is as follows: If 19 posts are reserved for the Scheduled Castes [of which the quota for women is four], in accordance with merit from out of the successful eligible candidates, 19 candidates shall have to be first listed. If four Scheduled Castes women are contained in such list of 19 candidates then by including any further Scheduled Castes women candidate, there is no requirement for disturbing the list. On the other hand, if only two women candidates are contained in the list of 19 Scheduled Castes candidates, then in accordance with merit the next two Scheduled Castes women candidates will have to be included in the list and from the bottom of such list, the corresponding number of candidates shall have to be deleted, so as to ensure that four women Scheduled Castes candidates are contained in the final 19 selected Scheduled Castes candidates. But if more than four women candidates are contained in the list of 19 Scheduled Castes candidates, selected on own merit, in the list all of them will continue and on the ground that "Scheduled Castes women" in excess of the prescribed internal quota of four have been selected, there is no question of deleting the excess women candidate.

170. AIR 2010 SC 2691.

case to the Constitutional Bench. The question was whether the candidates belonging to the reserved category, who on account of their merit got recommended against the general/unreserved vacancies [*without getting the benefit of any relaxation/concession*], could opt for a higher choice of service which was earmarked for the reserved category and could thereby migrate to the reservation category. The constitutional validity of the Sub–rules [2] and [5] of the **Civil Service Examination Rules relating to the Civil Services Examinations** in the years 2005 to 2007 held by the Union Services Commission was also the subject–matter of the appeals by the special leave. The Supreme Court held that the candidates of reserved category "*belonging to Other Backward Classes, Scheduled Classes/Scheduled Tribes categories*" with regard to the specific characteristics of the Union Public Service Commission examinations, who were selected on merit and placed in the list of the candidates belonging to General/Unreserved category, **were free at the time of allocation of the services for choosing to migrate to the respective reserved category**. **The Court again ruled that a right to a post in the reserved category was not automatically rescinded by the reserved candidate although having done well enough to have qualified in the examination in the open category**. The reserved status of an MRC candidate [*candidate selected on merit*] by the operation of Rule 16[2] was protected so that he was not denied of the chance by his/her better performance to be allotted to a more preferred service. If vis–à–vis under Articles 14, 16 and 335, such rule was declared redundant and unconstitutional then there would be frustration of the whole object of the equality clause in the Constitution and as per the general qualifying standard, the selected MRC candidates [*candidates selected on merit*] would be disadvantaged because the candidates of his/her category who in the merit list was below him/her, might attain a better service by availing the benefits of the reservation at the time of making the allocation of the services. **Thus**, **the promise was outlined in the Preamble of the Constitution by which the equality of status and opportunity as conceived**, **in spirit and in essence was protected by Rule 16**. It was further held that Rule 16[2] of Civil

Services Examination was not inconsistent with Rule 16[1] of the Rules or Articles 14, 16[4] and 335 of the Constitution. **So**, **the validity of the Rule 16 of the Civil Service Examination Rules**, **2005 was upheld by the Apex Court**.

Furthermore, in the case of *Suraj Bhan Meena and Anr v. State of Rajasthan and Ors*, [171] the judgment of Rajasthan High Court quashing Notifications dated 28th December, 2002 and 25th April, 2008 issued by the State of Rajasthan was upheld by the Apex Court relying upon the decision of *M. Nagaraj*,[172] on the ground that no exercise was undertaken in terms of Article 16[4–A] to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Castes and Scheduled Tribes communities in public services. The Supreme Court also held that as no study was undertaken by Chopra Committee with respect to Gurjar belonging to Special Backward Classes particularly when Gurjars were already covered under the category of Other Backward Classes so, there was no rhyme or reason to provide them special status by including them in Special Backward Classes without undertaking requisite study.

In three writ petitions, which were filed in the cases of *Captain Gurvinder Singh and Ors v. State of Rajasthan*,[173] *G. Sharma v. State of Rajasthan*[174] and *All India Equality Forum v. State of Rajasthan and Anr*,[175] the Rajasthan High Court on 22nd December, 2010 stayed the operation of **Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State Act**, 2008 [hereinafter referred to as Act 2008] granting five percent reservation in favour of Gurjars on 22nd December, 2010 and the State Government was directed to undertake a data collection exercise within a year for justifying the quota for the members of the community under the Special Backward Classes category. Further

171. AIR 2011 SC 874.
172. AIR 2007 SC 71
173. D.B. CWP No. 13491/2009: D.B. CWP No. 1645/2016.
174. D.B. CCWP No. 12810/2009: D.B. CWP No. 1645/2016.
175. D.B. CWP No. 13884/2009: D.B. CWP No. 1645/2016.

challenge is made to the report submitted by the Other Backward Classes Commission recommending five castes for Special Backward Classes with 5 percent reservation. Five castes have been thereby shifted from the CWP No. 1645/2016 along with other petitions category of Backward Classes to Special Backward Classes.

In view of the discussion made above, the report of the SBC Commission cannot be accepted and is, CWP No. 1645/2016 along with other petitions accordingly, quashed. As a consequence of the aforesaid apart from the discussion made in reference to Article 16[4–B] of the Constitution of India and the judgments of the Apex Court, the impugned Notification dated 16th October, 2015 issued by the **State Government and the Rajasthan Special Backward Classes** [*Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State*] **Act**, 2015 are struck down.

[D] Social Reservation

It was in the context of legal policy on eradication of untouchability, in *State of Karnataka v. Appa Balu Ingale*, [176] that the Supreme Court significantly pronounced:

"*The judge must bear in mind that social legislation is not a document for fastidious dialects but means of ordering of the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedoms of the people and the legal order can weigh with utmost equal care to be made to provide the underpinning of the highly inequitable social order. The power of judicial review must, therefore, be exercised with insight into social values to supplement the changing social needs.*"

This observation and practice had not only clarified about judicial responsibility but also demonstrated the effective method of enforcing the legal policy. The case involved charge against the respondents that they restrained the complainant party by show of force from taking water from a newly dug–up borewell on the ground that they were untouchables. The trial court and the appellate court, on appreciation of the evidence,

176. [1994] SCC [Cri] 1762: [1995] Supp 4 SCC 469.

reached the concurrent finding that the charge against the respondents–accused was proved beyond reasonable doubt. But the High Court disbelieved evidence of witnesses on the ground that there was not uniformity or consistency in regard to actual words uttered by the accused persons and the manner in which they prevented the complainant party from taking water from the well. Justice **Kuldip Singh** declined to agree with High Court and found the evidences as established beyond reasonable doubt. Justice **K**. **Ramaswamy** elaborately dealt with the sociological and constitutional angulations of untouchability and observed that the application of the test of a reasonable man acting in similar circumstances and reasonable doubt of a reasonable man was the rule, and that the approach of doubtful Thomas or vacillation or doubting with prejudice was not appropriate in the context of offences under social legislation where *mens rea* is not an essential ingredient. It can be inferred from his judgment that the rule of benefit of doubt cannot be overstretched in the context of untouchability. Toning down of the rule's rigour in a constitutionally condemned offence could come from appropriate analysis of the issue in its historical and social setting. Since there is explanation about the term untouchability in this judgment, the erstwhile difficulty in the application of the statute is substantially allayed. How that difficulty was problematic can be seen by looking to an earlier case, *Mangala* decided by the Bombay High Court.[177]

The facts in *Mangala* involved allegation under Section 7 of the **Protection of Civil Rights Act**, 1955 about the practice of untouchability done by the accused against a Buddhist. The High Court ruled:

"*It was for the prosecution…to first show that the complainant was a member of the Scheduled Caste and that the act was committed in relation to him as a member of the Scheduled Caste and acquitted the accused reversing the lower court's decision*."

It is commented by Paramanand Singh that if there had been proper definition to the term "*untouchability*" it would have been possible to

177. *Mangala v. State of Maharashtra* AIR 1979 Bom 282.

establish commission of the offence since accrual of right from abolition of untouchability was available to former–untouchables also.[178] Compared to the narrow approach adopted in *Mangala*, *Appa Balu* has made a positive contribution. Virtual overruling of *Mangala* took place in *State of Kerala v. Chandramohanan*.[179] In this case a question arose whether daughter of converted Christian [*formerly Scheduled Tribe*], who was victim of sexual offence, was to be treated as ST for the purpose of the **Scheduled Castes and Tribes** [*Prevention of Atrocities*] **Act**, 1989. The Court declined to hold that merely by change of religion, a person ceased to be a member of Scheduled Tribe and that the question as to whether he ceased to be a member thereof or not must be determined by the appropriate Court upon the fact of each case. In such a situation, it has to be established that a person who has embraced another religion is still suffering from social disability and also following the customs and tradition of the community, which he to belong earlier.

Regarding constitutionality of denial of right to bail to offenders under the **Scheduled Castes and Tribes** [*Prevention of Atrocities*] **Act**, 1989, the Supreme Court adopted an approach to strengthen the legal framework. In *State of Madhya Pradesh v. Ram Kishna Bhalothia*[180] the Court held that the offences under Act formed distinct class by themselves and could not be compared with other offences and hence exclusion of right to bail was not violative of Articles 14 and 21 of the **Indian Constitution**. The Court reversed the judgment of Madhya Pradesh High Court and agreed with the decision of Rajasthan High Court in *Jai Singh v. Union of India*.[181] The Court viewed that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorize them. In these circumstances, if anticipatory bail is not made available to persons who

178. Singh P., ***Scheduled Castes and the Law***, in Baxi Upendra [ed.], **Law and Poverty**: **Critical Essays**, N.M. Tripathi, Bombay, [1988], at p. 160.
179. [2004] 3 SCC 429: [2004] SCC [Cri] 818.
180. [1995] 3 SCC 221: AIR 1995 SC 1198.
181. AIR 1993 Raj 177.

commit such offences, such a denial could not be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and could not be compared with other offences. The Court observed:

"*Looking to the historical background relating to the practice of* '*untouchability*' *and the social attitudes which lead to the Commission of such offences against Scheduled Castes and Scheduled Tribes*, *there is justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences*, *there is every likelihood of their misusing their liberty while on anticipatory bail to terrorize their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21*."[182]

However, the Court has insisted on legalistic approach to avoid the abuse of special laws. In *Masumsha Hasanasha Musalman v. State of Maharashtra*[183] it was held:

"*To attract the provisions of Section 3[2–(v)] of the* ***Scheduled Castes and Tribes*** *[Prevention of Atrocities]* ***Act***, *1989*, *the* ***sine qua non*** *is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the* ***Indian Penal Code*** *is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients*, *no offence under Section 3[3–(v)] of the Act arises*."

Similarly, the requirements of committal proceeding before taking cognizance of the case by the Special Court and designation of Session Court as Special Court have been insisted in some cases.[184]

From the above discussion about various findings pronounced by the Supreme Court and the amendments made by Parliament for invalidating those concrete judgments, it is quite very obvious that initially, the Parliament used to amend the Constitution to facilitate socio–economic reforms for the benefit of labouring masses. However, in the current years, the authority to amend the Constitution is used to nullify sound decisions of the Supreme Court which

182. *State of Madhya Pradesh v. Ram Kishna Bhalothia* [1995] 3 SCC 221: AIR 1995 SC 1198.
183. [2000] 3 SCC 557: [2000] SCC [Cri] 722: AIR 2000 SC 1876.
184. *M.A. Kuttappan v. E. Krishnan Nayanar* [2004] 4 SCC 231: [2004] SCC [Cri] 1073; *Moly v. State of Kerala* [2004] 4 SCC 4 SCC 584: [2004] SCC [Cri] 1348; *Gangula Ashok v. State of Andhra Pradesh* [2000] 2 SCC 504: AIR 2000 SC 740: AIR 2000 SCW 279: [2000] CriLJ 819; *Vidyadharan v. State of Kerala* [2004] 1 SCC 215: AIR 2003 SCW 6511.

strengthen the fundamental structure of the Constitution and supplement its objects, merely for the purpose of gaining electoral benefits.

To conclude, the judiciary has done creditable work by giving outstandingly concrete judgments relating to issues of preferential and protective discrimination. Judiciary has effectively preserved and safeguarded the fundamental rights of the citizens and defenseless factions which were at stake because of the policy of reservation implemented by the Government from time to time. This compliment can appropriately be addressed to the Supreme Court of India too. The Apex Court of India has magnificently discharged its arduous responsibility sentry of the qui–vive.

The judiciary has been active to the Indian circumstances while interpreting and re–interpreting laws. In the arena of socio–economic justice, the judiciary has adopted deviating approaches to the Backward Classes for giving life to the socio–economic actions aiming at the amelioration of their lot. In the course of time, even a tendency was developed by the courts for treating all provisions connecting with positive discrimination as obligatory ones. This was consistent with the move from the treatment of reservation as a matter of right. Because the difference between mandatory and enabling provisions has appeared to be blurred in the course of time basically due to the rhetoric of social justice. Uncontrolled discretion to the State has been provided by the Court for determining the condition that is suitable for activating the affirmative action for the Backward Classes. However, the power of a judicial system lies in its capability to correct its own blunders of interpretation from time to time and stir to the fore. By trial and error, still the Supreme Court has been shaping the Constitution in the right direction.

Conversely, right from the commencement with the inauguration of the Constitution, a propensity is indicated by the judicial decisions as how in spite of their greatest labours for budding secular and coherent criterion to deal with the problem of protective discriminations, the Government has for all times on one excuse or other been infringing the judicially laid standards. It

[Government] has, in place of shielding and escalating wellbeing of genuine deservers of the policy of reservations, adopted the policy of reverse discrimination *i.e*., snatching from upper castes strata of the society and giving to the lower castes section in the name of this policy of reservation. The lack of strong leadership with essential visualization and vigor for accomplishment of the constitutional objectives is the weakness of Indian democracy.

In concluding terms, it can be stated that the special provisions in the shape of policy of reservation in favour of Scheduled Castes, Scheduled Tribes Other Backward Classes and women in our Constitution are acknowledged to be inadequate and insufficient. Therefore, the judiciary has from time to time done the admirable job through the issuance of concrete guidelines to plug the loopholes in the policy in a number of rational landmark judgments. It has also through the pronouncement of various solution providing judgments, solved numerous problems relating to this policy and has attempted to keep a rational equilibrium among different categories of people by protecting their fundamental right of equality.

However, on the other hand, Government has ventured to nullify those judgments by making a number of amendments in the Constitution only to make their vote bank intact. No government and no legislature in the country has ever made the efforts for creating a classless and casteless society in addition to amelioration of the conditions of the really needy and deserving beneficiaries [*poor segments in various categories*] even more than six decades have gone by.

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Chapter 6

RESERVATION AND ITS IMPACT ON INDIAN SOCIETY

I. General

Law's competence, efficacy and difficulty to interact with society for ensuring and expanding freedom, welfare and justice to people can be properly understood by looking to the social milieu and community's structure upon which it operates. The internal structure of a hierarchic society or operation of patriarchy can hardly be ignored when the social division is responsible for emergence and prevalence of special privileges and unusual disabilities of specific groups at the social plane. **One of the foremost social realities that shape inter–group and inter–personal social relations in India is caste system**. The unequal opportunities and conditions of dignity offered by the social categorization through caste system in educational and economic fronts cannot be silently tolerated by a welfare state. **Untouchability**, **which is the culmination of caste prejudice of pollution/purity**, **is one of the grossest violations of human rights to which legal system has been quite sensitive**. While filling the values of cosmopolitan culture into a tradition bound hierarchic

society faces all the challenges of modernization, levelling up the lowly and the weak by ameliorative policy attains abundant significance in the context of legal system adhering to social justice and social revolution. The social responses to issues relating to composition, inter–group mobility and inter–group tension have resulted in conflicts, sensitive struggles and evolution of compromise policies. Overall direction towards social integration of different communities and building up of harmonious society is visible in these policies. **The present chapter focuses on reservation and its impact on Indian society and the views of the various sociologists regarding the various factors for reservation**.

II. Empowerment as a Method of Social Transformation

Overcoming the impeding handicap through empowerment is a special means chosen for social transformation in welfare democracy. Amelioration and elevation of a social segment, which is not able to compete with an advanced segment because of present disabilities emanating from past discriminations, can be done by providing positive advantages and assistances to the powerless. That the victims of exploitation, whether arising from caste prejudice, gender discrimination or child abuse, are seriously marginalized because of lack of ability to withstand pressure is a factor that should be responded by energizing the deprived through affirmative action, according to this approach. Power as an ability to alter the legal relations with others[1] is an important factor that dispels one's disabilities and carves out new opportunities hitherto denied. Empowerment is a purpose oriented action of reinforcing the ability of the disadvantaged group to gain self–generating power to be equal partners in the process of development,[2] to remove vulnerability of the exploited and to prevent the perpetration of exploitation, violence

1. Beteille Andre, **Antinomies of Society**, Oxford University Press, New Delhi, [2000], at pp. 271–275. Also see, Kumar R., ***Constitutional Amendments: An Instrument for Social Transformation***, Research Inspiration–An International Multidisciplinary e–Journal, Vol. 3[1], December, 2017, at pp. 440–446.
2. Singh Yogendra, **Culture Change in India**, Rawat Publications, New Delhi, [2000], at p. 124.

and injustice. According to **Andre Beteille**:

"*The idea of empowerment may be invoked in virtually any context: in speaking about human rights, economic security, capacity building, skill formation or the conditions of dignified social existence.*"[3]

By strengthening the marginalized and the unorganized, and by building up social and economic capabilities among individuals and communities, and by moving the society from hierarchy to equality, it radically redistributes power and contributes to social transformation. As visualized by **Rabindranath Tagore**, this requires infusing the language of soul and language of humanity into the mouths and hearts of the weak.[4] This involves a positive policy of adding strength where it is lacking; removing obstacles in the path of progress; and it essentially reflects the idea of social justice. Since knowledge, skill, job, property and political position have dimensions of power, providing access to them on the basis of equality of opportunity reflects the policy of empowerment. **Thus, the questions, what is actually added, to whom, how much and how long become relevant in this sphere when social justice is connected to the factor of need and desert**. Justice **K. Ramaswamy** observed in *Air India Statutory Corpn. v. Union of India*:[5]

"*In a developing society like ours, steeped with unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc., to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstances. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen, etc., are languishing and to secure dignity of their person. The Constitution, therefore, mandate the State to accord justice to all members of the society*

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3. Beteille Andre, **Antinomies of Society**, Oxford University Press, New Delhi, [2000], at p. 268.
4. *Into the mouth of these*
   Dumb, Pale and meek
   We have to infuse the language of soul
   Into the heart of these
   Weary and worn, dry and forlorn
   We have to minstrel the language of humanity—Rabindranath Tagore, Kadi and Komal cited by P.N. Bhagwati in *Bandhua Mukti Morcha v. Union of India* [1984] 3 SCC 161: AIR 1984 SC 802.
5. [1997] 9 SCC 377.

in all facets of human activity. The concept of social justice embeds equality to favour and enliven the practical content of life."

It was observed by the Supreme Court in *M. Nagaraj v. Union of India*:[6]

"*Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social.*"

Since the concept of equal citizenship and equal liberties of all is a foundational value of the Constitution, distribution of benefit and burden on the basis of community, caste and gender becomes odd, and needs to be justified by a balanced application of "*formal equality*" and "*proportional equality*". Identification of the most deserving beneficiaries and use of the most appropriate means of empowerment are the stepping stones towards real amelioration. **Caste has been used by the Governments as one of the criteria for identifying the backward classes. Lack of proper measure for excluding the creamy layer and disinclination for internal reservation have been problematic factors in identifying the most deserving ones**. While giving of fee concessions, scholarships, additional training facilities, loans and other advantages is employed as means of empowerment, the major policy is creation of quotas in jobs and educational institutions. Chief Justice **K.G. Balakrishnan**, has observed in *Ashok Kumar Thakur v. Union of India*:[7]

"*Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few.*"

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6. [2006] 8 SCC 212.
7. [2008] 6 SCC 1, at para 6.

Whether proliferation and continuation of these approaches would bring real enhancement of overall social competence is a debatable point.[8]

III. Caste as a Divisive Factor

Caste provides primordial criterion of forming and perpetuating social groups, and renders rigid social division. **A caste is a horizontal segmental division of society spread over a district or a region or the whole State and also sometimes outside it**.[9] It emerges from subjective factors like birth or affiliation, and is justified on the basis of religion or social practice. Unity within the endogamous group and coexistence of other groups outside it are the features of caste system. Basically constituting a hierarchic system of relations amidst various strata of society, it has great bearing on opportunities for marriage alliance, inter–dining and other social intercourses. Mindset of caste affinity and prejudice [*casteism*] has deepened the differences. Religious competence and disabilities attributed to various social layers, without much rational justification, have influenced its iniquitous growth. Sociologists find caste divisions amidst Muslims, Christians, Sikhs and other religious minorities but not amidst tribal people.[10] Caste system is not peculiar to India but traceable in neighbouring countries of India. The system is segmentary since each caste is normally divided into various sub–castes or *upjatis*. Like sex or age, caste has become person's individual and social identity in a very real sense because in any locality everybody knows the caste of everybody else.

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8. See, for discussion, Beteille Andre, **Antinomies of Society**, Oxford University Press, New Delhi, [2000], at pp. 281–86: Beteille views that quotas can at best touch only the upper fringes of the redistribution of power in our complex society and that the belief about their ability to bring radical or even perceptible redistribution of power is merely a wishful thinking.
9. Desai I.P., **Should "Caste" be the Basis for Recognizing Backwardness**, [1985]: Desai adopts this definition in *K.C. Vasanth Kumar v. State of Karnataka* [1985] Supp 1 714; According to Justice **E.S. Venkataramiah**, "*A caste is an association of families which practices the custom of endogamy* ***i.e.****, which permits marriages amongst the members belonging to such families only... A caste is based on various factors, sometimes it may be a class, a race or racial unit. A caste has nothing to do with wealth...*" at p. 786, para 110, *Vasanth Kumar* case.
10. Christopher J. Fuller, *Caste* in Veena Das [Ed.], **Sociology and Social Anthropology**, Oxford University Press, New Delhi, [2003], at p. 477.

In *C.M. Arumugam v. S. Rajgopal*[11] the Supreme Court held:

"*A caste is more a social combination than a religious group. But since, as pointed out by Chief Justice Rajamannar, in G.* ***Michael v. Venkateswaran***,[12] *ethics provides the standard for social life and it is founded ultimately on religious beliefs and doctrines, religion is inevitably mixed up with social conduct and that is why caste has become an integral feature of Hindu society. But from that it does not necessarily follow as an invariable rule that whenever a person renounces Hinduism and embraces another religious faith, he automatically ceases to be a member of the caste in which he was born and to which he belonged prior to his conversion.*"

Cultural factors like language, caste traditions and customary practices about family life vary from caste to caste to some extent. Differences in food habit, dress and lifestyle have been wedged by the caste factor.[13] Aptitude for traditional occupation is also influenced by caste considerations. As observed, **because of unequal economic and educational opportunities available for different castes in the past, severe handicaps for certain castes have also been experienced**. Frequently, the forum of caste has been springboard for political venture as caste considerations weigh heavily in political and electoral process. **A brief journey to the historical evolution and development of the caste system, its inequities and efforts for its reform will provide useful insights to know the law–society interaction in this realm**.

Social division on the basis of profession and race was laid down in *Purushsukta*, the Rig Vedic hymn, giving rise to four castes: *kshatriyas* [*warriors*], *brahmanas* [*priests*], *vaishyas* [*prosperous landlords and traders*] and *shudras* [*cultivators*].[14] Priests asserted their position as highest caste giving a mythical justification in *Purushsukta*. The idea that different castes were born from different parts of the same social body suggested about existence of organic links amidst them and about their

11. [1976] 1 SCC 863: AIR 9176 SC 939.
12. AIR 1952 Mad 474.
13. Dubey S.C., **Indian Society**, National Book Trust, New Delhi, [1992], at pp. 56–58.
14. Thapar Romila, **History of India**, Vol. I, Penguin Books, New Delhi, [1966], at pp. 37–41.

equal importance. Religious stamp was given by tracing castes to God's acknowledgement that he formulated them on the basis of their character and action.[15] While this had allowed upward or downward movement in the ladder of caste system through their benevolent action, subsequently the caste division was rigidified by making it hereditary and by limiting commensality and marriage alliance to caste members.[16] The fear about corruption [*sankara*] of *varnas*, and damage to domestic honour and sexual propriety persuaded for rigidity of caste distinction. Continuance of caste system was facilitated by accommodating numerous sub–castes [*jati*] in each caste [*varna*].[17] Individuals could get remedies only through caste *panchayats*. By the **Smriti period**, caste taboos became rigid and legal obligations or punishments differed with castes. The twice–born or *dvijas*, a status available for upper castes, had exclusive rights about access to learning. Considerations of purity and pollution got further ascendance resulting in treating the outcastes as untouchables. **Fa Hien** refers to the practice of *dvijas* to purify themselves even at the sight of the untouchables.[18] The orthodox concept of purity and pollution had a sway in temple worship practices, and excluded the unclean from religious precincts, rendering them religious have–nots.

Opposed to the orthodox practice is the intellectual and rational exposition of spiritual equality reflected in social movements, religious literature and attempts of social reforms, which ranged from the times of Buddha to modern days. Buddha rejected caste system, and preached **Eight–Fold Path** of leading moral life without causing pain to others. He instructed his disciples:

"*Go into all lands and preach this gospel. Tell them that the poor*

15. "*Chaturvarnyarn maya srishtam guna karma vibhagashah...*" The four orders of castes were created by **Me** classifying them according to their qualities and actions and apportioning corresponding duties to them. Bhagavadgita, IV–B.
16. Thapar Romila, **History of India**, Vol. I, Penguin Books, New Delhi, [1966], at p. 40.
17. Kuppuswamy B., **Social Change in India**, 5th Edn., Konark Publishers, Delhi, [1993], at p. 185.
18. Thapar Romila, **History of India**, Vol. I, Penguin Books, New Delhi, [1966], at p. 153; Mujumdar R.C., Rayachaudhry H.C. and Dutta Kalikinkar, **An Advanced History of India**, 4th Edn., Macmillan, Madras, [1978], at p. 189.

and the lowly, the rich and the high, are all one, and that all castes unite in this religion as do the rivers in the sea."[19]

Jainism was also a non–caste sect.[20] During the post–Gupta period, **Shankaracharya** relied upon Upnishad and Vedas to put forward the concept of unity of soul with *brahman*, the need to go beyond illusion [*maya*] and perceive the reality through control of senses.[21] Anyway, true Hinduism's incompatibility with untouchability was an insight in his philosophy.

However, during the intellectual renaissance of the 19th century the trend setting thoughts of **Raja Ram Mohan Roy**, **Dayanand Saraswati**, **Gopal Hari**, **Jyotiba Phule** and **M.G. Ranade** appealed for abandoning class distinctions.[22] **Phule** tried to liberate the masses from the sacerdotal authority and make them conscious of their rights through education and enjoy individual dignity, and said:

"*As human beings are all creatures of the same Divine Being, why should one caste deem itself superior to others?*"[23]

Further, anti–untouchability approach attained considerable attention in the course of nationalist movement for freedom. Gandhiji suggested in 1920s religious solutions to the evils of caste and untouchability. Temple entry movement was started in certain parts of **Maharashtra** and **Kerala**. Gandhiji had soft policy of weaning away the caste Hindus from the practice of untouchability and also placating the depressed classes to adopt clean way of life with boldness. Regarding *varna* system Gandhiji had a belief that it provided for division of labour and not social inequality. He opined:

"*All **varnas** are equal, for the community depends no less on one*

19. Mahajan V.D., **Ancient India**, 5th Edn., S. Chand, New Delhi, [1970], at p. 160.
20. Thapar Romila, **History of India**, Vol. I, Penguin Books, New Delhi, [1966], at p. 68.
21. Ibid, at p. 185.
22. Tara Chand, **History of the Freedom Movement in India**, Publications Division, New Delhi, [1967], at pp. 255, 271–75; Ram Mohan Roy said in 1824: "*The caste divisions are as destructive of national union as of social enjoyment*". Krishna Rao M.V., **The Growth of Indian Liberalism in 19th Century**, H. Venkatramiah & Sons, Mysore, [1950], at pp. 211–13.
23. Tara Chand, **History of the Freedom Movement in India**, Publications Division, New Delhi, [1967], at pp. 274–75.

than another."

He regarded superiority of one *varna* over another as denial of law; caste system as harmful to both spiritual and national life; and untouchability, an unwarranted belief and inhuman sin.[24]

In late 1920ss, Dr. **B.R. Ambedkar** emerged as the champion of the cause of Depressed Classes by his speeches and writings on the wrongs inflicted upon them. He stood for annihilation of caste and bitter denunciation of Shastrik prescriptions of caste discrimination. Going to the religious roots of caste system, he found solution for the problem in discarding religious practice itself. He disagreed with the division of labour theory of caste as it provided for watertight compartments. He said:

"*As an economic organization caste is, therefore, a harmful institution inasmuch as it involves the subordination of man's natural powers and inclinations to the exigencies of social rules*."[25]

He held that caste had killed public spirit, destroyed sense of public charity and impeded public opinion; and that it failed to sympathize with the deserving and ignored the interests of meritorious. Since nothing could be eternal, and change is the law of life, society had the responsibility of revising its standards and of bringing revolution regarding old values, he reasoned.[26] Pt. **Jawaharlal Nehru** believed in equality as the dominant value of the new age before which caste system could not stand as archaic superstructure. Since caste does not stand by itself, but is an integral part of the larger scheme of social organization, changes should be brought in larger sphere through social and economic forces to build up a cohesive and stable social organization.[27]

From the above historical survey, it can be inferred that while at the social level harsh practices of caste prejudices and untouchability caused social degradation, the intellectuals, rational thinkers and

24. Gandhi M.K., **Harijan**, 11th July, 1936 and 18th July, 1936.
25. Ambedkar B.R., ***Annihilation of Caste*** extracted in Sen Amiya P., **Social and Religious Reform**, Oxford University Press, New Delhi, [2003], at p. 192.
26. Ibid, at pp. 196–99.
27. Nehru Jawaharlal, **Discovery of India**, at pp. 246–47.

reformists supplied motivating force for eradication of the evils experienced of caste system. It is significant that the innate voice of reform coming from within the society repeatedly at various stages of historical development kept alive the aspiration for justice. The attitude of social self–correction reflected mature shift from status to freedom. **It is this mindset of the Indian society that prepared itself for epoch–making decision about eradication of untouchability**.

Through the research study it is analyzed that the prominent sociological views about caste system do provide valuable insight about caste's operation as divisive factor and appropriate policy needed to deal with it. Caste as a structural unit of social stratification was found by the western sociologists to posses the characteristics such as: institutionalized inequality, closure of social system in respect of internal mobility, an elementary level of division of labour legitimized on ritual bases of reciprocity, **and emphasis on quality** [***ritual purity or racial purity***] **rather than performance**. **Louis Dumont** views that caste system is based on the fundamental social principle of hierarchy [*homo hierarchicus*], a product of collectivist approach within specific communities and thrived through the dichotomy between the principles of purity and pollution, which kept the former superior over the latter.[28] Caste endogamy reflected separation. Caste *panchayat* asserted dominance upon the individual members. However, **Dumont's** view is subject to wide criticism for being excessively divisive, and for lacking evidences about exclusive influence of purity–pollution dichotomy.[29] Further, **Ghurye** considered *varna* system as resulting in consolidation of the Brahmin class with privilege to declare the duties of other castes and degradation of the *shudras*.[30] Furthermore, **M.N. Srinivas**, a noted sociologist,

28. Dumont Louis, **Homo Hierarchicus**: **The Caste System and its Implications**, **in Contributions to Indian Sociology**, Vol. VIII, [1965], at pp. 90–99.
29. Singh Yogendra, **Social Stratification and Change in India**, Manohar, New Delhi, [2002], at pp. 109–11.
30. Ghurye G.S., **Caste**, **Class and Occupation**, Popular Book Depot, Bombay, [1961]: Ghurye considers caste as cultural phenomenon resulting in status based stratification.

identified two sorts of mobility in the functioning of caste system, which diluted the rigours of the divisive system. His view is that Sanskritisation and horizontal solidarity are the means of mobility. He further says:

"*Sanskritisation is the process by which a 'low' Hindu caste, or tribal or other group, changes its customs, ritual, ideology and way of life in the direction of a high and frequently, 'twice–born' caste. Generally such changes are followed by a claim to a higher position in the caste hierarchy than that traditionally conceded to the claimant caste by the local community*."[31]

However, **horizontal solidarity involves a process where various sub–castes or *jatis* come together to form a large caste**. Because of occupational diversity on non–caste pattern due to modernization, inter–structural mobility has provided fluidity and class solidarity.

In this regard scholars like **A.R. Desai predicts merger of caste with class because caste is a social manifestation of the forces of mode of production and ownership of property based on agrarian feudal complex**, and is likely to shed its identity as a consequence of industrialization and basic change in the economic structure.[32] According to **Yogendra Singh**, the institutionalized inequality and its cultural and economic coordinates are indeed the factors, which render caste in India a unique system of social stratification.[33] Further a well known women sociologists **Iravathi Karve** looks to caste's function towards other groups as one of negative aloofness and self–preservation; and towards its own members, opening up of a social universe, providing various facilities, services and protections. In the background of violent caste rivalries and feuds, she regards inter–caste cooperation for common life as superficial. She suggests:

"*The handicapped castes must first be brought on par with*

31. Srinivas M.N., **Social Change in Modern India**, Orient Longman, Hyderabad, [1972], at p. 6.
32. Desai A.R., **Rural Sociology in India**, Popular Prakashan, Bombay, [1969], at pp. 111–12. Yogendra Singh views that caste is only a structural reality and that it would disappear when society in India evolves in a higher level of industrialization. *See*, Singh Yogendra, **Social Stratification and Change in India**, Manohar, New Delhi, [2002], at p. 44.
33. Singh Yogendra, **Social Stratification and Change in India**, Manohar, New Delhi, [2002], at p. 32.

advanced castes as regards education and economic opportunities before one can talk of breaking the caste system. Today the untouchable leaders of outstanding ability can rise high only by subjecting the advanced castes to political pressure through their caste membership."[34]

I.P. Desai and **A.M. Shah** consider that the realities of caste system cannot be understood merely with reference to the principle of hierarchy. **Shah** considers the division traceable in caste as intrinsic in its historical evolution, and continuing in its natural course[35] whereas **Desai** finds caste division's persistence in the ritual of hierarchy, hereditary occupation and the ideology of purity and pollution. Desai views that increasing pace of social change radically alters the ongoing relation between hierarchy and division and that the newly merging hierarchy acts as a rival to the traditional one with potentiality of replacing it. He points out that since increasing number of individuals are stepping out of caste–bound occupations, the attributes of traditional division do not continue with new set of collectivities, and hence, the idea of identifying social backwardness on the basis of ritual criteria is objectionable.[36] **Shah** admits changes occurring within the caste system, but states about its continuation. **While the criterion of untouchability distinguishes other castes from Scheduled Castes, regarding Other Backward Classes, no such reliable criterion is forthcoming.**

Today, more than 25 percent of people live in urban areas. All the members belonging to a caste are not engaging in caste–based occupation. Caste–based discrimination is not practiced in providing services in urban society.[37] Further **Andre Beteille** has noted that in metropolitan cities and amidst intelligentsia, in both fact and perception, caste is becoming

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34. Karve Iravati, ***Indian Social Organization: An Anthropological Study*** in **The Cultural Heritage of India**, Vol. II, The Ramakrishna Mission, Calcutta, [1937], at p. 552.
35. Shah A.M., ***Judicial and Sociological views of the OBCs*** in Ghanshyam Shah [ed.], **Social Transformation in India**, Vol. I, Rawat Publications, New Delhi, [1997], at p. 258; *see also*, Sheth D.L., **The Future of Caste in India**: **A Dialogue**, in Ghanshyam Shah [ed.], **Social Transformation in India**, Vol. I, Rawat Publications, New Delhi, [1997], at p. 238.
36. Desai I.P., ***Should Caste be the Basis for Recognizing Backwardness?***, Economic and Political Weekly, 19[28], [1984], at pp. 1106–16.
37. Shah A.M., ***Judicial and Sociological views of the OBCs*** in Ghanshyam Shah [ed.], **Social Transformation in India**, Vol. I, Rawat Publications, New Delhi, [1997], at p. 272.

increasingly irrelevant in many areas of life. While membership in a particular caste may be helpful in finding a job, meritocratic qualifications are frequently more important and are normally regarded as the only legitimate ones. Hence, caste unit has lost its rigidity and public legitimacy, and the desirability of continuation of caste–based reservation is a debatable one.[38] **However as noted through the study**, **politicization of caste affinity and division has complicated the problem by offering to include more castes into the list of OBC** [*as many as 250 new castes were added after* ***Indra Sawhney*** *case*] and expanding the reservation benefits through law by "*vote bank politics*".[39]

The phenomenological approach adopted by **Dipankar Gupta** on caste looks to the contemporary reality that since no caste thinks itself as inferior to others, and on the **other hand** projects self–esteem and tries to win political gain, the traditional system of hierarchy does not continue, especially in the context of changed economic and political scenario in villages.[40] The village patrons and oligarchy have declined in economic power and could hardly influence and control other castes. Increase in the extent of non-agricultural income in villages, non–profitability in agriculture, the reduced extent of land holding and dependence upon agricultural labour which is becoming scarce and costly because of urban opportunities, have totally altered the power relations

38. Beteille Andre, **The Idea of natural Inequality and other Essays**, Oxford University Press, New Delhi, [1983], at pp. 125–26.
39. Justice Chinnappa Reddy, has very graphically described it in Karnataka Third Backward Class Commission, [1990]: "*And, we have political parties and politicians who, if anything, are realistic, fully aware of the deep roots of caste in Indian society and who, far from ignoring it, feed the fires it were and give caste great importance in the choice of their candidates for election and flaunt the caste of the candidates before the electorate. They preach against caste in public and thrive on it in private*." Justice Dr. **Arijit Pasayat** and Justice **Thakker**, after referring to politics of including a large number of new castes and over–anxious political consideration to pass 93rd Constitutional Amendment and central Legislation on the subject, have observed in *Ashok Kumar Thakur v. Union of India* [2008] 6 SCC 1: "*In reality, the object was to give a wrong impression to the people that they were concerned about the backwardness of the people and they were the 'Messiahs' of the poor and the downtrodden. In reality, in their hearts the ultimate object was to grab more votes. The lack of seriousness of the debate exhibits that the debate was nothing but a red–herring to divert attention from the sinister, politically motivated design masked by the 'tearful' faces of the people masquerading as champions of the poor and downtrodden*."
40. Gupta Dipankar, ***Caste Today: The Relevance of a Phenomenological Approach***, India International Center Quarterly, [Summer, 2005], at pp. 138–53.

amidst castes. As a result, **multiplicity of hierarchies has emerged leaving no room for dominance of single hierarchy**. However as noticed while this has eclipsed the caste system, it has not eradicated caste identities.[41] Gupta's emphasis on political struggle of castes and great deal of their assertion "*from below*" contests the idea of Sanskritisation. **He does not rule out divisive characteristic of caste politics**.

Similar to the imitative tendencies to climb in the social ladder through Sanskritisation, there has emerged a tendency to climb the economic ladder by deviant methods of getting the reservation advantage. In the background of unusual and dubitable methods of getting into the family fold of Scheduled Castes or Scheduled Tribes by **reconversion**,[42] **adoption**,[43] **marriage**,[44] and **false certificates** and sometimes by **retaining the status in spite of religious conversion**—which may be called "Reverse Sanskritisation" or "Scheduled Castisation"—caste's function of division and hierarchy need to be meticulously examined even in the course of reforms.[45] **In other words**, **caste as a badge of entitlement to privilege also continues to be a divisive factor**. **Caste's divisive tendency continues even after religious conversion also**.

Justice **Raveendran**, in *Ashok Kumar Thakur v. Union of India*[46] observed:

"*Caste has divided this country for ages. It has hampered its growth. To have casteless society will be realization of noble dream. To start with, the effect of reservation may appear to perpetuate caste… It is significant that the Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination*

41. Gupta Dipankar, ***Caste Today: The Relevance of a Phenomenological Approach***, India International Center Quarterly, [Summer, 2005], at p. 152.
42. *C.M. Arumugam v. S. Ramgopal* [1976] 1 SCC 863: AIR 1976 SC 939; *Principal, Guntur Medical College v. Y. Mohan Rao* [1976] 3 SCC 411: AIR 1976 SC 1904.
43. *Khazan Singh v. Union of India* AIR 1980 Del 60; for a critique see, Sampath B.N., ***Pseudo Scheduled Castes: A Gift of Adoption Law***, 23, JILI 596, [1981], at p. 599.
44. *N.E. Horo v. Jahanara Jaipal Singh* [1972] 1 SCC 771: AIR 1972 SC 1840 where the status of scheduled tribe was conceded for a lady when she married a scheduled tribe. But Delhi High Court in *Urmila Ginda v. Union of India* AIR 1975 Del 115 refused to apply this principle to a high caste Hindu girl when she married a *chamar* fearing that it would defeat the policy of reservation.
45. Sampath B.N., ***Pseudo Scheduled Castes: A Gift of Adoption Law***, 23, JILI 596, [1981], at p. 599.
46. [2008] 6 SCC 1, at p. 717.

in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in the status on the basis of caste."

According to the Learned Judge making reservation a permanent policy, rather than a temporary crutch, would create a fractured society with mutually suspicious groups and halted vehicle of progress.

IV. Non–discrimination on the Ground of Caste as a Constitutional Policy

Eradication of untouchability, **prohibition of discrimination amidst citizens on grounds of caste**, **special measures of protective discrimination like reservation for Scheduled Castes**, **Scheduled Tribes**, **Socially and Educationally Backward Classes** and **Other Backward Classes** and enabling of **temple entry** are major public policies developed by the Indian society. These policies got incorporated into the Constitution and influenced various legislative and administrative measures.

[A] Background

In the beginning of the 20th century some of the states like Mysore and Kolhapur initiated the policy of absorbing the depressed classes to administration by reservation.[47] Under the **Government of India Act**, 1919 formal recognition of the suppressed classes took place. While in the Central Assembly one of the fourteen non–official nominees was required to be the representative of the depressed classes, the Provincial Legislatures were required to have fixed proportion of depressed class members. Census reports from 1871 to 1931 disclosed statistics about castes and sub–castes: the size, the economic and social position and locality of concentration. In a sense, colonialism "*consolidated*" the "*traditional*" caste society.

Further, Gandhiji suggested, in 1920s, religious solutions to the evils of caste and untouchability.[48] Temple entry movement started in certain parts of

47. Bayly Susan, **Caste**, **Society and Politics in India**, Cambridge University Press, Cambridge, [1999], at p. 242. Princely State of Mysore had initiated the policy of reservation for backward classes in 1895.
48. Ibid, at p. 249.

Maharashtra and **Kerala**. Gandhiji had soft policy of weaning away the caste Hindus from the practice of untouchability and placating the depressed classes to adopt clean way of life with boldness as a measure of uplift.[49] Furthermore, in late 1920s, Dr. **B.R. Ambedkar** emerged as the champion of the cause of depressed classes by his speeches and writings on the wrongs inflicted upon them.[50] He stood for annihilation of caste and bitter denunciation of Shastrik prescriptions of caste discrimination. Later in 1931, he made crucial demand for separate electorate for depressed classes. This was opposed by the Congress leadership as divisive. The **Poona Pact** of 1932 resolved this conflict by providing for proportion of special seats in the provincial legislatures for the depressed classes but doing away with separate "*untouchable*" electorates.[51] Following the **Poona Pact**, the policy of ameliorating the depressed classes by scheduling their castes on the basis of census data of 1931 began.[52] Massive efforts were put by **Gandhiji** and **Ambedkar** separately by launching specific associations and by creating public opinion towards equal rights in the matter of **temple entry**, **school admission** and **access to public facilities**.[53]

However, with the dawn of independence, the process of making of the Constitution was influenced by the above social and political development. The idea of bringing social revolution through positive state intervention through abolition of untouchability in all its forms was unanimously prevailing the Constituent Assembly. The Constitution makers had clear perception about the evils of caste system. The discussion made by **Shibban Lal Saxena**, **Muniswamy Pillai**, **Dakshayini Velayudhan**, **Monomohon Das** and **K.T. Shah** brought out the heinous facets of

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49. Harijan Sevak Sangh was instrumental in implementing Ganghiji's ideas, however, amidst dissatisfaction about loss of identity. *See*, Bayly Susan, **Caste, Society and Politics in India**, Cambridge University Press, Cambridge, [1999], at pp. 250–51.
50. Bayly Susan, **Caste, Society and Politics in India**, Cambridge University Press, Cambridge, [1999], at pp. 256–57.
51. Ibid, at p. 262; Louis Fischer, **Life of Mahatma Gandi**, Bharatiya Vidyabhavan, Bombay, [1951], at pp. 392–09.
52. The Census Commissioner **J.H. Hutton** had formulated criteria such as: serving of the caste by Brahmins, barbers *etc*., who serve the caste Hindus; occurrence of pollution by contact or proximity; taking of water from them by upper caste people; prohibition of use of roads, schools and other public conveniences; entry into temples; and having ordinary social intercourse.
53. Louis Fischer, **Life of Mahatma Gandi**, Bharatiya Vidyabhavan, Bombay, [1951], at pp. 392–09. Also see, Kuppuswamy B., **Social Change**, Konark Publishers, Delhi, [1996], at pp. 232–33.

untouchability and also the determination to put an end to it.[54] **Monomohon Das** viewed that abolition of untouchability proposed to save one–sixth of the population from perpetual subjugation, humiliation and disgrace. He said:

"*The custom of untouchability has not only thrown millions of the Indian population into the dark abyss of gloom and despair, shame and disgrace, but it has also eaten into the very vitality of our nation.*"[55]

However, there is no evidence in the Constituent Assembly Debates regarding formation of casteless society. But state action discriminating on the basis of caste only is prohibited. The package of reforms included special provisions, reservation in public employment, allowing of temple entry reforms, support to educational and economic empowerment, political reservation for limited duration [*which was extended from time to time through constitutional amendments*] and other supervisory and monitoring arrangements for implementation. Further, supporting central legislation declaring detailed policies to prevent and remedy the untouchability offences was also contemplated. Thus, eradication of untouchability is a policy that has several dimensions and asks for holistic approach for planning and effective implementation.

[B] Meaning of "Untouchability"

There is no definition of the term "*untouchability*" either in the Constitution or Legislation enacted for its eradication. Because of complexities involved in the practice, the lawmakers have abstained from giving a formal legal definition to the term. This has enabled some flexibility to suit to the varieties of situations although compelled some difficulty of identifying mental element in the crime. An attempt was made in revising the **Untouchability** [*Offences*] **Act** in 1971–75 to suggest that its essence consists in the subjection of any member of the Scheduled Castes/Scheduled Tribes or others connected with them to any discrimination, disability, suffering, liability or restriction or a condition on

54. CAD, Vol. VII, Book 2, 29th November, 1948, at pp. 659–68.
55. Ibid, at p. 666.

the ground of pollution and isolation, caste, race, religion, or any of them of such person or of his parents or family. But, the majority of members in the Joint Committee declined to incorporate the definition into the Act.[56] Courts have relied on historical data and legislative policy in identifying untouchability.

In India, the "*untouchables*" occupy the lowest rung in the social ladder. Impregnable walls of separation with graded inequalities erected between different sections among Hindus and "*untouchability*" stand together and aggrandize the problem. Initially, the glorified concept and superstition of purity and pollution in the context of religion amidst the priestly class had resulted in exclusion of untouchables from good things of life. Denied of even access to potable water sources, education, cultural life and economic pursuits, they were made to live as beasts of burden at the outskirts of the villages, towns, slums, *etc*., Manu Smriti prohibited them to wear decent clothes, wear precious metallic ornaments or even to use decent utensils, food and drink. They were to serve the society in menial jobs as slaves and serfs. Caste system segregated them from the main stream of the national life and prevented the Hindus from becoming an integrated society with fraternity, human dignity and affinity.

Gandhiji who employed multi–pronged effort to mitigate the problem said:

"*Untouchability means pollution by the touch of certain persons by reason of their birth in a particular state of family. It is a phenomenon peculiar to Hinduism and has got no warrant in reasons or Shastras*."

He condemned the practice as a sin against humanity. According to Dr. **Ambedkar**:

"*The untouchability is the notion of defilement, pollution, contamination and the ways and means of getting rid of that defilement. It*

56. Upendra Baxi criticizes the majority approach for failing to give a conceptual clarity needed for a judge in proceeding with the case in search of a component of the mental state of the accused at the time of purported offence. *See*, Baxi Upendra, ***The Protection of Civil Rights Act: Pitfalls in Implementation*** in Upendra Baxi [ed.], **Law and Poverty Critical Essays**, N.M. Tripathi, Bombay, [1988], at pp. 175, 177.

is a permanent hereditary stain which nothing can cleanse."

He called it as "*a diabolical contrivance to suppress and enslave humanity*". Chief Justice **P.B. Gajendragadkar**, held that:

"*Untouchability is founded by superstition, ignorance, complete misunderstanding of the true teachings of Hindu religion*."

Justice **K. Ramaswamy**, observed in a landmark case of *State of Karnataka v. Appa Balu Ingle*[57] that:

"*The untouchability has been grown as an integral facet of socio–religious practices being observed for over centuries; kept the* ***dalits*** *away from the mainstream of the society on diverse grounds, be it of religious, customary, unfounded beliefs of pollution, etc.*

It is an attitude and way of behaviour of the general public of the Indian social order towards *dalits*. Though it has grown as an integral part of caste system, it became an institution by itself and it enforced disabilities, restrictions, conditions and prohibitions on *dalits* for access to and the use of places of public resort, public means, roads, temples, water sources, tanks, bathing *ghats*, *etc*., entry into educational institutions or pursuits of avocation or profession which were open to all but by reason of birth, they suffered from social stigma. Untouchability and birth as a scheduled caste are thus intertwined root causes of disability. Untouchability, therefore, is founded upon prejudicial hatred towards *dalits* as an independent institution. It is an attitude to regard *dalits* as pollutants, inferiors and outcastes.

Dr. **Ambedkar**, with his characteristic clarity and piercing appeal to *dalits*, stated that in order to have a clear understanding of untouchability and its practice in real life one should know the types of the atrocities perpetrated against the depressed classes. The instances of beating or harassing by caste Hindus for the simple reason that the depressed classes claimed the right to enroll their children in government schools; for claiming the right to draw water from a public well; for exercising the right to take a marriage procession with the groom on

57. [1995] Supp 4 SCC 469: [1994] SCC [Cri] 1762.

horseback; for putting on clothes of good quality, for using utensils made of metal like copper, *etc*., for bringing land under cultivation; for refusing to carry dead animals and eat carrion, or for walking through the village with socks and shoes on, or for not bowing down before the caste Hindus. In brief, untouchability is a unique and unfortunate phenomenon of oppression by the upper strata of the society upon the lowest strata through imposition of rule of totally submissive behaviour. Because of religious reasons attributed to the practice of untouchability, it is not a short or temporary feature but a long–standing one, viewed.

[C] Legislative Measures on Untouchability

Legal system has largely used conflict model of social change in dealing with the problem of untouchability by providing for special rules of evidence, special courts and state's power to extern any person inimical to the legal policy and to impose collective fine. While in the province of Madras a law had been enacted in 1938 to prohibit imposition of disability on account of untouchability and caste, in other parts of India at the dawn of independence various statutes on the subject had been passed. In exercise of the power in second part of Article 17 and Article 35[a][ii], the **Untouchability** [*Offences*] **Act**, 1955, was made, which was amended in 1976 to be renamed as **Protection of Civil Rights Act** [PCRA] to plug various loopholes experienced in the course of its application. In 1989, the **Scheduled Castes and the Scheduled Tribes** [*Prevention of Atrocities*] **Act** was passed to make legal equipment more effective. The state laws continue by virtue of Article 372, and those provisions, which are inconsistent with the Act of 1955, are repealed. **Parliament alone has legislative power in the matter of "*untouchability*" in view of the need for uniform policy on the subject throughout India**. Abolition of untouchability in itself is complete and its effect is all pervading applicable to State actions as well as acts or omission by individuals, institutions, juristic or body of persons.

The **Protection of Civil Rights Act** intends to prescribe punishment for the preaching and practice of "*untouchability*", for the enforcement of any disability arising therefrom and for matters connected therewith.[58] **It is not confined to Hindus nor its protection limited to untouchables residing in the locality mentioned under the Constitution** [***Scheduled Castes***] **Order**, **1950**. It is applicable upon persons who take any part in the excommunication of, or imposition of any social disability on, any person who refuses to practise untouchability or does any act in furtherance of the objects of this new law. In addition to the normal penalty for an offence, the Court may also cancel or suspend, any licence in respect of profession, trade, calling or employment when an offence is committed under this law during the course of any such profession, trade, calling or employment. **The Act does not define untouchability but makes express provisions with respect to the more common forms of untouchability**, **which are practiced in India**.

Furthermore another special law the **Scheduled Castes and Scheduled Tribes** [*Prevention of Atrocities*] **Act**, 1989 was enacted. The reason of enacting is clear from the reading of the statement of objects and reasons. It refers to various offences, indignities, humiliations and harassments committed against the Scheduled Castes and the Scheduled Tribes and denial of number of civil rights in spite of various measures to improve their socio–economic conditions because of which they remain vulnerable. The conflict model of social change through law is clear when it employs the state power to take the side of SCs/STs. The **Statement refers** to their awareness and assertion of their rights owing to spread of education, *etc*., they are trying to assert their rights which are

58. For a critical survey of the working of the Act *see*, Singh P., **The Scheduled Castes and the Law**, at pp. 156–63; Baxi Upendra, **The Protection of Civil Rights Act**: **Pitfalls in Implementation**, at pp. 175–85 and Baxi Upendra, **Untouchable's Access to Water**: **Two Moralities of Law Enforcement**, at pp. 186–90 in Baxi Upendra [ed.], **Law and Poverty**: **Critical Essays**, N.M. Tripathi, Bombay, [1988]; Chouhan V.S., ***Human Rights of Tribals: A Grassroot Reality***, JMSG–An International Multidisciplinary e–Journal, Vol. 3[2], October, 2017, at pp. 71–77..

not being taken very kindly by the others.[59] It also refers to an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Caste persons eat inedible substances and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of their women. Holding that existing law was inadequate, **a special Legislation to check and deter crimes against them committed by non–Scheduled Castes and non–Scheduled Tribes was regarded as necessary**.

The listed atrocities in this Act reflect a high degree of contempt and intolerance that banish civilizational standards and human rights principles in social relations. It is the unconscionable character of these acts that has compelled very stringent measures about rules of evidence, supervision, punishment and administration of the law. Section 3[2] of this Act prescribes very severe punishments for acts of non–SCs and non–STs, **which misuse legal and judicial proceedings for inflicting serious injuries or losses to SCs or STs or damage their properties**. The punishment varies with the gravity of the offence, and ranges from death penalty to long–term imprisonment including life imprisonment. **However, it has been viewed by the Courts that severity of punishment by itself does not amount to *ultra vires* of the Constitution**.[60]

While the measures, mechanisms and policies in the above legislative efforts have been comprehensive and innovative, because of exclusive reliance on command and control method they have become inadequate. In this respect however the participative model with

59. When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorize them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self–respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests.

60. *Jai Singh v. Union of India* AIR 1993 Raj 177. Also see, *T.M.A. Pai Foundation v. State of Karnataka* [2002] 8 SCC 481.

constructive role for NGOs and Local Self Government units would yield better result. Further, as a corollary of prohibiting propagation of untouchability [*which are done through expressional acts*], there is need for publicizing anti–untouchability policy concerning which there is no clear policy guideline in the Acts. In the background of severity of the offence, the aggressive posture of the legislation has considerable relevance. But the way in which they are abused by invocation in totally unjustifiable circumstances of ordinary acts unconnected with untouchability is alarming. Judiciary has rightly declined to convict in those cases.

[D] Problem of Inner Reservation or Micro Classification amidst Scheduled Castes

The fact that there has not been uniform level of development amidst various castes grouped under the category of Scheduled Castes has given rise to the problem of uneven competition because of which more advanced sections among them are able to get the benefits and the weaker of the weakest are lagging in the race. **Since there is no application of creamy layer test to exclude the forward section from the competition within the category of Scheduled Castes because of confinement of *Indra Sawhney* judgment only to OBC and SEBC, this unfair situation has arisen**. This has provoked some states to make sub–groups within the Scheduled Castes and allocate quota for each sub–group in a compartmentalized manner. Judicial response to such policy is negative in *E.V. Chinnaiah v. State of Andhra Pradesh*[61] judgment. It appears from the angle of accommodation of both the attainments and needs of social transformation a critical outlook is required on the constitutional development in this regard.

The above case as referred relates to constitutionality of the **Andhra Pradesh Scheduled Castes** [*Rationalization of Reservation*] **Act**,

61. [2005] 1 SCC 394. Also see, *I.R. Coelho [Dead] by LRS v. State of Tamil Nadu* [2007] 2 SCC 1: AIR 2007 SC 861.

2000 enacted on the basis of report given by Justice **Ramachandra Raju Commission** constituted by **State of Andhra Pradesh** in 1996. The Commission looked into the statistical details about the extent to which various castes listed as Scheduled Castes in the Presidential Order got reservation benefits in educational institutions and public employment. It inferred that there was disproportionate distribution of reservation benefits in favour of the *Mala and Adi Andhra groups of Scheduled Castes* whereas the *Madiga and Relli group of Scheduled Castes* were not adequately represented to get the benefits, compared to their respective population. The Commission found that the Scheduled Castes were a very heterogeneous group with wide disparities in social, economic, cultural, occupational and educational levels. Accordingly, it recommended for rational categorization of these castes into four categories and for allocation of their entitlement broadly [*but not strictly*] on the basis of population in order to promote equity and rectify the injustice:

a) **Relli group 1 percent**;
b) **Madiga 7 percent**;
c) **Mala 6 percent**; and
d) **Adi Andhra 1 percent**.

The State Government acted upon the report and issued government order in 1997 for such categorization. When challenged, the three–Judge Bench of the Andhra Pradesh High Court, by a judgment dated 18th September, 1997 quashed the government order on account of non–compliance with Article 338[9] of the Constitution which required the Central and State Governments to consult the National Commission for SCs/STs in all major policy matters affecting the SCs and STs. This defect was rectified by subsequent consultation with the National Commission and getting of appropriate directions from it about the matter. Following those directions, in 2000, an ordinance was issued which was later substituted by the impugned Act.

When challenged again, the High Court of Andhra Pradesh by 4:1 upheld the constitutionality of the Act. The majority had reasoned:

i) The enumeration of Scheduled Castes in the Presidential Order did not lead to an inference that all of them were equal to each other nor did the conglomeration of castes in the Order amount representation of "*a caste*" as a whole;
ii) Distribution of legislative power between two levels of government in federal system made the states competent to enact in the matter of access to educational institutions or services in the State;
iii) As there was no fundamental right to reservation, and instead, the state had discretion to decide its extent and manner, it was within the State's competence and duty to give preference to the most backward in order to uplift the educational and social interests of the Scheduled Castes and guarantee the percolation of reservation benefits equitably; and
iv) There was compliance with Article 338 and there was no violation of Article 341[2] of the Constitution.

Furthermore, the question of constitutionality of the Act came before the Supreme Court in appeal. The five–Judge Constitutional Bench unanimously disagreed with the High Court and declared the **Andhra Pradesh Act** as *ultra vires* of the Constitution. Justice **N**. **Santosh Hegde** gave a leading judgment on behalf of himself, Justice **S**.**N**. **Variava** and Justice **B**.**P**. **Singh**, Justice **H**.K. **Serna** and Justice **S**.**B**. **Sinha**, rendered two separate concurring judgments. The discourse on Article 341 and on reasonable classification constitutes major chunk of judicial reasoning.

Article 341[1] of the **Indian Constitution** provides that the President may, with respect to any State or Union Territory after consultation with the Governor thereof, by public notification, specify the castes, or 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. Further,

according to **Article 341[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.

Thus, the list, which is initially prepared in consultation with the Governor, is given sanctity and kept above manipulations by the states. The Supreme Court referred to the views of the Constitution–makers. Dr. **B.R. Ambedkar** had viewed:

"*The object is to eliminate any kind of political factors having a play in the matter of disturbance in the Schedule so published by the President.*"[62]

While Sh. Kuladhar Chaliha welcomed the policy of consulting Governor before finalizing the list, he suggested for recognizing provincial legislature's voice on the matter consistently with that of Parliament.[63] Sh. **Muniswami Pillai** opposed this suggestion, expressing his apprehension that Ministers in the Provinces might abuse this power to blackmail the specific communities amidst Scheduled Castes in case they did not toe the path suggested by the Ministers.[64] Pt. **Thakur Das Bhargava** proposed an amendment for decennial review of the list by the President so that castes might not become stereotyped and might not lose the capacity of travelling out of the schedule when the right occasion demanded it.[65] Although this proposal was rejected, the dynamic idea behind it to make the privileges available only to the deserving categories and exclude the advanced sections from them had positive features. The only inference that can be drawn from the Constituent Assembly Debates is that the list should not be disturbed by the states.

What really amounts to disturbance of the list needs to be holistically considered by looking to various provisions of the Constitution. It is in this

62. CAD, Vol. IX, at p. 1639.
63. Ibid, at p. 1640.
64. Ibid, at pp. 1640–41.
65. Ibid, at p. 1639.

crucial task that, it is submitted respectfully, the Supreme Court failed to take note of the constitutional perspective of integrated approach. According to Justice **Santosh Hegde**:

"*Therefore any executive action or legislative enactment which interferes, disturbs, rearranges, regroups or reclassifies the various castes found in the Presidential List will be violative scheme of the Constitution and will be violative of Article 341 of the* ***Indian Constitution***."

[E] Problem of Non–birth entry into Caste or Reservation Category

Birth is a non–controversial basis for membership in a caste because the social atmosphere that caste builds and the one in which the child is brought up from the childhood days is likely to influence the growth and competence of the child. An outsider's entry into that social group at a subsequent stage by marriage, conversion or adoption might not be envisaging similar disadvantage, and on the other hand, might have been motivated by an idea just to grab the affirmative action benefit.

[1] Acquisition of Membership by Marriage

Acquisition of membership by marriage was initially conceded by the Supreme Court as enabling the claim for contesting election in constituency reserved for Scheduled Tribes, when elders of the tribe accepted such member.[66] But the Delhi High Court refused to apply the principle in a case relating to a high caste Hindu girl who married a *Chamar* [a SC] and sought reservation benefit on the basis of new status.[67] **The Learned Judge came down heavily upon the practice of sham marriages that defeat the constitutional policy**.[68] Similar approach was adopted in several cases. In *Valasamma Paul*, a case relating to a Syrian Catholic woman [*forward category*] who married a Latin Catholic [*backward class*] and sought reservation meant for Latin Catholic, the Supreme Court declined to extend

66. *N.E. Horo v. Jahanara Jaipal Singh* [1972] 1 SCC 771: AIR 1972 SC 1840.
67. *Urmila Ginda v. Union of India* AIR 1975 Del 115.
68. Singh P., ***The Scheduled Castes and the Law*** in Baxi Upendra [ed.], **Law and Poverty**, N.M. Tripathi Pvt. Ltd., Bombay, [1988], at pp. 132, 153: Paramanand Singh criticizes the judgment for its presumption to consider the marriage as sham and for its failure to consider the social disabilities flowing from such marriage.

such benefit, and observed:

"*The object of reservation is to remove the handicaps, disadvantages, sufferings and restrictions to which the members of the* ***dalits*** *or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities... Therefore, when a member is transplanted into* ***dalits****, Tribes and OBCs he/she must of necessity also undergo the same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle candidate to avail the facility of reservation.*"[69]

However, in the matter of reservation in election, *N.E. Horo* principle is applied ignoring the *Valasamma* ruling. Both in *Lillykutty*,[70] and *Sobha Hymavathi*,[71] the factor of acceptance of marriage by the husband's family was examined; on the basis of facts, the claim was found to be not established; and reservation benefit was denied. Further in *Meera Kanwaria v. Sunita*,[72] a case relating to claim of a Rajput woman for reservation on the basis of false certificate that she was a daughter of a person belonging to Scheduled Castes and was also married to a Scheduled Caste person, the Supreme Court looked to the factor of community's non–acceptance in addition to the government circular that declined to confer status of SC merely on the basis of marriage.

The Court nullified the election on grounds of false claim of reservation. The dichotomy between *N.E. Horo v. Jahanara Jaipal Singh*[73] and *Valsamma Paul v. Cochin University*[74] approaches needs to be resolved by an objective approach and clearer principle.[75]

[2] Through Conversion

The Supreme Court has dealt the question of acquiring the membership of Scheduled Caste through conversion by looking to the

69. *Valsamma Paul v. Cochin University* [1996] 3 SCC 545: AIR 1996 SC 1011, at p. 1022.
70. *Lillykutty v. Scrutiny Committee, SC & ST* [2005] 8 SCC 283.
71. *Sobha Hymavathi Devi v. Setti Gangadhara Swamy* [2005] 2 SCC 244; *I.R. Coelho [Dead] by LRS v. State of Tamil Nadu* [2007] 2 SCC 1: AIR 2007 SC 861.
72. [2006] 1 SCC 344: AIR 2006 SC 597. Also see, *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14.
73. [1972] 1 SCC 771: AIR 1972 SC 1840.
74. [1996] 3 SCC 545: AIR 1996 SC 1011.
75. Pillai K.N. Chandrasekharan, ***Supreme Court on Caste Conversion and Reservation***, 47 JILI 540, [2005], at p. 543.

factor of community's acceptance. In *Arumugam*[76] and *Mohan Rao* cases,[77] the Apex Court held that a person born of Christian parents could become a member of SC on reconversion to Hindu fold, if the members of the caste accepted him as belonging to their fold.

[3] Through the Adoption

Regarding adoption by Scheduled Caste parents as a basis for entitlement to reservation, in *Khazan Singh*[78] the Delhi High Court has approached from legalistic perspective of adoption. The Court reasoned that once adoption is valid, even though the motive is for taking advantage of loophole in the law and is a measure of "*career planning*", in view of future consequence of adoption upon subsequent generation, it is appropriate to consider the person as within the fold of the SC community. The community acceptance theory was also not employed by the judge. **However this judicial approach is criticized as allowing the transformation of loophole into floodgate for unscrupulous people eyeing on state patronage**.[79]

It can be inferred from the above **that the judiciary is, by and large, favouring social mobility transcending the caste distinctions along with avoidance of frauds**.

[F] Caste–based Quota in Non–Governmental Educational Institutions in Private Sector

Demand for spreading the reservation policy into non–governmental educational institutions and private sector has given rise to some constitutional development. Article 15[5] has been added by a constitutional amendment providing for state's power, notwithstanding Articles 15 and 19[1][g], to make special provision for the advancement of the interests of SC/ST or SEBC in the matter of admission to any private

76. *C.M. Arumugam v. Rajgopal* [1976] 1 SCC 863: AIR 1976 SC 939.
77. *Principal, Guntur Medical College v. Y. Mohan Rao* [1976] 3 SCC 411: AIR 1976 SC 1904.
78. *Khazan Singh v. Union of India* AIR 1980 Del 60.
79. Sampath B.N., ***Pseudo–Scheduled Castes: A Gift of Adoption Law***, 23 JILI 596, [1981], at p. 599.

educational institutions, other than minority educational institution, whether getting grants from government or not. While the expensive characters of professional education and lopsided educational development have indirectly excluded the *dalits* from these opportunities, this amendment is said to provide opportunities through procedural justice and convert them into real assets.[80] The constitutional validity of this amendment was challenged before the Supreme Court on the ground that it is violative of basic structure of the Constitution. The Constitutional Bench of the Supreme Court issued temporary injunction on the operation of the provision and governmental notification of caste based quota in the matter of admission. The judgment was rendered in April, 2008 touching only upon educational institutions established or aided by the state other than minority educational institutions under Article 30[1]. Regarding them, it was upheld as conforming to basic structure of the Constitution, and the question of its application to unaided private institutions was not decided as the matter was not argued upon by the private educational institutions.[81] The Court deferred the matter to be decided in appropriate future case.

However, Justice **D. Bhandari**, observed:

"*Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. When you do not take a single paisa of public money, you cannot be subjected to such restriction.*"[82]

There are either promises or pressures in political circles for introducing reservation policy in private sector. With the growth of IT and BT sectors and flourish of multinationals and Indian listed companies, reservationists are aiming their sight at high–end jobs in these spheres. State's power of making infrastructural facilities available is sometimes relied upon for seeking governmental intervention to pressurize the private

80. Guru Gopal, ***Corporate Class and its "Veil of Ignorance"*** in [May, 2005], 549, Seminar 36, at p. 40.
81. *Ashok Kumar Thakur v. Union of India* [2008] 6 SCC 1.
82. Ibid, para 132, *per* Justice Dalveer Bhandari.

sector to follow reservation policy. **Instances of voluntary efforts of the industries in the United States to diversify their workers' composition by including the persons belonging to black race have been cited in support of the demand**. Protagonists of reservation in private sector claim that for reducing economic discrimination, for promoting equitable economic growth, for securing the tenure of *dalit* workers and for minimizing the potential conflict, reservation is essential.[83] It is also argued that with the growth of privatization, the arena of public sector is reduced, and the scope for special provision for the backward classes is also narrowed down.[84]

However, **arguments against caste–based reservation quota in private sector are several**:

a) Freedom of business, trade and occupation is a personal freedom with potentiality to make profit. In order to ensure efficiency and profitability in their unit, private employers need to have autonomy in the hire and fire policy subject only to labour welfare regulations. In the era of Privatization, Liberalization and Globalization, high level of performance cannot be maintained in the private sector without a flexible system of job contracts.[85] Quotas in private sector would mean that there will be less freedom to the company owner to dislodge the non–performing employees and rectify the errors of recruitment or to decline to recruit except through his network of testing, probation and training.[86]

b) In private sector, unlike in the services of government, work practices and norms are oriented to performance rather than seniority and permanence of tenure. **They rely upon contract rather than status**. As **Andre Beteille** has viewed: "*The quota mentality has*

83. Thorat Sukhdeo, ***Why Reservation in Private Sector is Necessary?*** in [May, 2005] 549 Seminar 30, at p. 32.
84. Ibid.
85. Beteille Andre, ***Matters of Right and Policy***, 549 Seminar 17, [May, 2005], at p. 20.
86. Gupta Dipankar, ***Caste Today: The Relevance of a Phenomenological Approach***, India International Center Quarterly, [Summer, 2005], at p. 24.

taken deep roots in India since independence" and it has been serious obstacle to economic development and social progress. Quotas in private sector employment are bound to give rise to strains in the economic as well as the legal systems whose consequences are likely to be far–reaching.[87]

c) Caste based categorization of beneficiaries is not relevant to identify the deprived sections in the economic field. Historical exclusion of communities from political power is not the same as exclusion from economy.[88] Social justice in the economic sector needs to address new forms of exclusion instead of concentrating on traditional ritual status disabilities. Minorities, women and the poor have economic difficulties irrespective of their caste differences, and need to be given adequate support.

Thus to conclude, while caste division of the Indian society had created social hierarchy and obstructed social mobility, the humanists and social reformers looked to the aspects of equal human worth and dignity and condemned social inequality. The deprivation and exploitation arising from caste differentiation have been responded by the legal system with preventive and curative approaches, true to its commitment to the goals of social justice and equality. Prohibition of the practice of untouchability is both constitutional policy and serious commitment through strong legislative framework to spearhead social transformation. The trend of development is towards establishing a highly activist legal measure to deal with the problem of segregation. This has yielded good result, although the measure is not a fait accompli.

Affirmative action as a means of empowerment and an instrument of social justice has taken multiple forms and has been employed by

87. Beteille Andre, **The Idea of natural Inequality and other Essays**, Oxford University Press, New Delhi, [1983], at p. 127.
88. Sheth D.L., ***Considerations for a Policy Framework***, 549, Seminar 62, [May, 2005], at p. 64.

various levels of government with region–specific political policy decisions. There is considerable change in the composition of the service sector, and the marginalized sections have better representation in this sphere.[89] With the growth of society, the features and characteristics of the beneficiaries and of the categories of reservation has also undergone change. However, objectivity has suffered when prejudice, favouritism and mere political consideration are mixed with policy. Exclusion of persons or families who got reservation benefit or of persons who merged with the forward sections by becoming creamy layer from the advantages of affirmative actions would help in channelizing the benefits to the weaker of the weakest. Extension of *Indra Sawhney* principle on this matter to Scheduled Castes and Scheduled Tribes also is required. Instead of treating reservation as the be all and end all of affirmative action, the long–term effect of reservation should be analyzed; the need for actual empowerment of the weaker section by infusing the strength for competition should be realized; and the direction of development should be towards minimizing the dependence on caste factor for identifying the beneficiaries.

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89. It should be remembered that as a consequence of reservation policy during last 57 years', the percentage of *dalits* in Grade I posts has increased from 1 percent at the dawn of independence to 12 percent at present, and before long it will reach 17 percent. In lower Grades there is better representation and in Grade IV there is overrepresentation.

Chapter 7

CONCLUSION AND SUGGESTIONS

I. Conclusion

Equality in dynamic sense means reduction of the harshest forms of inequality. In–equalities prevail in all societies and in India also, for centuries, there has been a domination of social systems which bred in–equality, exploitation and in–justice. The social divisions have been caused by the long spell of subjugation leading to deprivations, divisions and discriminations against a vast section of the Indian society. The truth is that for centuries, social and economic injustice were perpetrated by the so–called higher castes on the lower castes in the Indian social system where equal chances in the opportunities and the facilities of the society were denied to them [*lower castes*].[1] The notion of justice enshrined in the **Indian Constitution** is based upon the equality principle. The Preamble of the **Indian Constitution** holds out a promise to all the citizens of India of securing *social*, *economic* and *political justice*. Furthermore, the Preamble of **Indian Constitution** speaks of "***We***, ***the people of India***" resolving to secure *inter alia* "**Justice**: ***social***, ***economic*** *and* ***political***" to "*all its citizens*".

1. Dhayal R.N., ***Right to Equality and Protective Discrimination***: ***A Socio–Legal Analysis***, JMSG–An International Multidisciplinary e–Journal, Vol. 3[3], January, 2018, at pp. 425–433.

The **Indian Constitution** is described as one of the most right–based Constitutions of the world. The policy of Indian Government of compensatory discrimination comprises a range of preferential schemes. The policy of initiatives used in India to counterbalance the inequalities of society is a policy of reservations. The term "*reservation*" denotes a set quota of public service positions for acknowledged persons that is the deprived persons and includes reservation of seats in educational institutes. Reservation by definition entails some favouritism for the deprived that may otherwise lose in an open competition with those who are lucky to have had a good education, training and rearing. It is added in the **Indian Constitution** as a constructive measure in order to provide the Backward Classes of the citizens an occasion to improve brilliance in the service. The main Constitutional and Statutory provisions relating to the law and policy of reservation have been critically examined in the present study.

The doctrine of equality is the foundation of social justice on which the palace of democracy can be built. In ancient India, the conventional Indian society had witnessed the lavish growth of hierarchal movement embodied in the institutions of *Varna* and *Jati*. The hierarchal social order was created over the centuries with a view to conserve the domination of social status, property and education by the higher caste Hindus. Caste–system is sui–generis in this country to Hindu religion. In addition the Hindu society was divided into four *Varnas*, or classes, a convention which had its genesis in the **Rig Veda**, the first and most important set of hymns in Hindu Scripture which dates back to 1500–1000 BC. The *Aryans*, the priestly caste was called the *Brahmins*, the warriors were called the *Kshatriyas*, the common people divided to agriculture, pastoral pursuits, trade and industry were called the *Vaishyas* and the *Dasas* or non–*Aryans* and the people of mix–blood were allocated the status of Shudras. The Chaturvarna–system has been gradually distorted in shape and meaning and has been replaced by the prevalent caste–system in Hindu society. So, the

caste–system kept a bulky section of people in this country outside the fold of the society who were called the untouchables.[2]

However, with the passage of time elastic caste system got transformed into rigid caste based hierarchal structure as a result of which *Shudras* and untouchables became socially, economically, educationally and politically backward and oppressed. They were compelled to live a life afflicted by grinding poverty, diseases and ignorance and had to bear persistent, unfavourable and harsh effects of discrimination, domination, exploitation and ascendancy of the higher upper castes. The classes in **medieval India** got disintegrated into castes and man's position in society was resolute by birth and not by qualities and thus social mobility in the caste system was not present. This inflexibility of caste–system was a reaction to call the intuition of self preservation and was to act as strong barrier for Hinduism from being submerged wholly into the Muslim culture. Shudras during the medieval period were hated, disbelieved and despised and were subjected to social disabilities.

However, the Britishers adopted a policy of non interference with indigenous caste and religious matters. Due to this policy of British rulers, the vices of caste system were left intact. Britishers followed this policy because it was in their interest that Hindus should remain divided on the foundation of caste. The western concept of equality, emancipation and egalitarianism provided powerful thrust to untouchables to challenge the legality of distinctions based on purity and pollution. During British rule there were introduction of certain legislations to perk up conditions of depressed classes or lower caste people but those legislations did not prove of much avail towards shrinking the rigidity of the caste system. However, special provisions and concessions had been introduced by the Britishers for the educational development of the Backward Classes which was afterward transformed into caste reservation for job.

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2. Divgi Pranav Jitendra, ***Reservations in India: A Constitutional Perspective***, World Journal on Juristic Polity, [2017], at pp. 1–18.

The Indian constitutional policy was based upon the conception that certain social groups in India were innately unequal, were victims of societal discrimination and thus, required compensatory treatment. Severe mechanisms including preferential treatment [*reservation of seats for certain identified groups in legislative bodies*, *in public employment and in educational institutions*] had been adopted by the provisions of the **Indian Constitution** itself. The policy of initiatives used in India to balance the inequalities of society is a policy of reservation.

It is a well–known fact of Indian history that women have not been equivalent associates with males. Women belong to the weaker sections of the society because like the people of depressed classes they had also suffered traditionally. The framers of the **Indian Constitution** sought to check the injustices done to the women by being put in deprived position. The Constitution provided for both negative and positive actions in favour of women. Equality on the basis of sex and individuality of women has been recognized by the **Indian Constitution**. However, the heaven of "*equality*" is still beyond the reach of women in India.

The judiciousness behind reservations or positive discrimination in India is that particular opportunities should be produced for equality of opportunity for some people over and above the general provisions for all. The aim was to steadily equalize the weaker sections with the other classes of people advocating for providing equal opportunities to those who were not equally placed with others and needed extraordinary help. The more indispensable and fundamental way was to advance them swiftly in the social, economic and educational spheres which might facilitate them to stand on their own feet.

The poor and the oppressed people, who are now called as the Scheduled Castes, were shrouded in the darkness of the repression, exploitation and the perplexity and were also the victims of an inferiority complex, deep–rooted poverty, backwardness, illiteracy, exploitation and the social subjugation before the dawn of the liberty. So, they had remained socially, educationally and economically more backward than any of the higher castes in the country. Numerous steps had been taken

from time to time in the pre–Independence India, for improving the status of these strata or sections of the society but they touched only the border or the problem. The noticeable progress has been registered only after the emergence of India as a Sovereign Independent Republic. The **Indian Constitution** as a social document envisions a conversion of Indian society from medieval hierarchical and clogged society into modern, secular and democratic society through the extension of the improved amenities to the oppressed in order to enable them for achieving upward mobility by acquiring social, economic, educational and political authority. The constitutional policy of compensatory discrimination was formulated and implemented to facilitate the lower–status castes to change their social and economic position.

On a perusal of the various provisions of the **Indian Constitution** and particularly of the Preamble, like Articles 14 to 17, 38, 39, 39–A, 46, 330–342, and 366 form the corpus juris of Dalit Jurisprudence to shield Scheduled Castes, Scheduled Tribes and Other Backward Classes from socio–economic injustice and all forms of exploitation. Concentration has been focused on protective discrimination or preferential treatment for three major classes; the Scheduled Castes, Scheduled Tribes, and more recently the Other Backward Classes under constitutional provisions and a variety of laws like, the **Protection of Civil Rights Act**, 1955, the **Bonded Labour System** [*Abolition*] **Act**, 1976, the **Scheduled Castes and Scheduled Tribes** [*Prevention of Atrocities*] **Act**, 1989 and the **Educational Institutions** [*Reservation in Admission*] **Act**, 2007. The National Scheduled Castes and Scheduled Tribes Commissions were constituted for successful implementation of various safeguards provided in the Constitution as well as of various other protective legislations.

The set of protective discrimination programmes can generally be divided into three broad categories:

1) **First** are reservations which give amenities of access to esteemed positions or resources; such as reservation in legislatures, including the reservation in Lok Sabha and State Assemblies.
2) **Second**, reservation in educational institutions.

3) **Third**, reservations in Government services.

The Scheduled Castes and Scheduled Tribes have been provided all the opportunities for the complete development of their individuality for enabling them to come at equality with various other groups in the society. The transition so effected has provided a wider scope to this segment of the society for making selection of the occupations with higher remuneration. Periodically different amendments have also been made by the Government of India in the constitutional provisions, if established essential to be made for the emancipation of these communities. To bring to an end the backwardness of the Scheduled Castes and Scheduled Tribes, the Government has approved them liberal concessions in all walks of the life and particularly in the field of education. However as noted with rampant poverty among the Scheduled Castes and Scheduled Tribes population, many of them are still not able to take benefit of preferential policies. Because these people are very poor, their dropout rate at the higher education level is very high resulting in large mass of illiteracy found among them. A large proportion of these strata of the society live in the rural areas and tribal areas far removed from many of the opportunities for job and the educational reservation.

The benefits of the reservation policy provided to this segment of the people in the **Government jobs** had unbolted the doors of the extensive opportunities to get higher payment jobs. Now owing to the poverty and illiteracy, these people are still in the catalog of the underprivileged strata of the society. The fact that the Scheduled Castes and Scheduled Tribes are still under–represented in Government services and educational institutions undercuts the target of the reservations policy.

Furthermore, in the Constituent Assembly when there was commencement of the debate on the reservations, it was determined that the reservations would be made available in favour of the Scheduled Castes and the Scheduled Tribes, but a little later the door was wide open also for the "*Backward Classes*".

The term "*Other Backward Classes*" is the third kind. It appears in Articles

15[4], 16[4] and 29[2] of the Indian Constitution. But this term of the third category is the most loosely defined. The problems under this category were also different from the first two categories in numerous ways. The number of castes incorporated into this group are rising continuously and also growing at the wish of the politicians and at the public demand.

Reservations in the educational institutions and jobs understandably were provided as an valuable mechanism for helping the deprived sections of the society for rising above social and economic handicaps but it is now quite obvious that regardless of providing reservation facilities in favour of the Other Backward Classes in the field of education and jobs, still there is wide spread under–representation of this group of people in education and in the public service.

Furthermore, cut–off mark system given by the Colleges/Universities in favour of the Backward Classes only gets in the way of the development of the Backward Classes themselves by plunging their competitive spirit.

Although the **Indian Constitution** and various other Legislative enactments and different commissions for women have made several attempts for the attainment of the aim of gender parity, however in real practice, due rights are denied to women and they persist to be the victims of male dominance and are over represented amongst the deprived and poverty ridden persons. The access of the women to unorganized sector—to education, health and productive resources, among others, is inadequate. So, women in India have stayed largely marginalized, poor and socially excluded. In the case of women, admittedly, at the **first** place, there is need to remove the deficiencies of constitutional as well as statutory provisions assuring a place of honor and equal opportunity to women. And at the **second** place, there is need for the formulation of a foolproof and effective implementation mechanism for the proper execution of the laws and policies for the emancipation of the women is the requirement of the present era. For the liberty of women and conversion of their *de–jure* equality into *de–facto* equality, **widespread protective discrimination law** for providing reservation in political, educational and employment to women is the cry of the age.

In India, affirmative action policies have facilitated a very small section or strata of the society of India among under–privileged categories to progress towards a semblance of economic and social equal opportunity. Unlike any other country, the caste identities have been made more prominent by India's affirmative action policies when the target was to lessen the stratification by caste. This is all indicative of the fact that the laws and policies were not well planned, inadequately formulated and badly implemented. The time has come when the laws and policies of reservation should be made need based. The poverty is the root cause of all the ills and is a world phenomenon now. Now–a–day's world is a materialistic one therefore, all the laws and policies of reservation arc needed to be based upon the economic criteria only.

For resolving the problem of the unequal opportunity in India, the policy of reservations should be based on poverty and physical disability of the people irrespective of their caste, religion or tribe. The affirmative action program in India should be without difficulty amendable in keeping with the changes in the legal, social and political circumstances of Indian society. Meaning thereby that in India this policy should be so flexible that if essential, it should be completely finished or the caste based criterion needs to be altered with the economic criterion because of the changes in the social and political conditions of the country. As already noted that what in India could not be attained in almost 65 years of its Independence, can be achievable within the period of 10 years if the policy structure is so designed to eliminate the inequality of the opportunity for making equal representation to all the categories and communities in every sphere of life.

Further through analysis it is noted that, the judiciary has done laudable job by pronouncing extraordinarily sound judgments in relation to problems of preferential and protective discrimination. Judiciary has successfully preserved and safeguarded the fundamental rights of the citizens and helpless groups which were at risk because of the policy of reservation executed by the Government from time to time. In reality, it has been required by the court that reservation policies should be so formulated as to "*strike a reasonable balance*"

among "*several relevant considerations*". To interpret the rule of law in action and to provide justice at the door of poorest of poor, the judiciary in India has made an adequate attempt. The judiciary has also been vigilant to create classless society and gradual abolition of caste consciousness.

In the course of time, even a tendency was developed by the courts for considering all provisions connecting with positive discrimination as mandatory ones. This was consistent with the move from the treatment of reservation as a matter of right, since the difference between mandatory and enabling provisions has emerged to be vague in the course of time fundamentally due to the rhetoric of social justice. By trial and error, still the Supreme Court has been giving shape to the Constitution in the accurate direction.

After making thorough and critical analysis of case law on the topic, it is quite clearly indicated that the commendable job has been done by the judiciary by providing remarkable and sound judgments relating to problems of preferential and protective discrimination from time to time. However, right from the beginning with the inauguration of the Constitution, the Government has at all times on one excuse or other been flouting the judicially laid standards by making new amendments in respect of reservation benefits to be offered to the weaker sections of the society, in the provisions of the Constitution. The procedure of amending the constitutional provisions has been just misused by the Government through invalidation of the numerous significant sound, concrete and solution providing judgments of the Supreme Court which strengthen the fundamental structure of the Constitution and further its objects, only for lifting up their vote banks. The Government has, in place of protecting and increasing wellbeing of real deservers of the policy of reservations, adopted the policy of reverse discrimination only for gaining electoral benefits for themselves.

Summing up the whole, it can be said that the special provisions in the form of policy of reservation for the benefits of Scheduled Castes, Scheduled

Tribes Other Backward Classes and women in our Constitution are proved to be in–adequate and in–sufficient. Therefore, the judiciary has from time to time through the issuance of solid and rational guidelines in a number of exceptionally sound judgments tried its best to remove all these weaknesses and in–adequacies in the policy by ironing out the practical difficulties in effectuating the policy of the reservation. However, on the other hand, Government has misused its power in order to nullify those judgments by making a number of amendments in the Constitution only to make their vote bank intact. In this manner, the Government has hindered the way of the judiciary which was marching towards plugging the loopholes in the provisions of Constitution for the successful achievement of the objective of the policy of the reservation.

The courts have been admiring of the sui–generis nature of the detrimental situation of the Scheduled Castes, Scheduled Tribes and Other Backward Classes and have been permissive as much as possible. However, to the severe actuality of the life, the judiciary has not closed their eyes. Undeniably, it has been obligated by the court that reservation plan should be so formulated as to "*keep a rational balance*" among "*numerous related considerations*". To interpret the rule of law in action and to carry justice at the door of poorest of poor, the judiciary in India has made ample efforts.

The judiciary has attempted its best to solve a number of problems arising due to the policy of reservation in favour of Scheduled Castes, Scheduled Tribes and the Other Backward Classes from time to time. It has done laudable job of providing the solution giving decisions regarding reservation exact from the inception of the Constitution such as, in the three decisions of *State of Madras v. Champakam Dorairajan*,[3] *State of Madras v. C.R. Srinivasan*[4] and *B. Venkataraman v. State of Madras*[5] the political move for perpetuating the caste–system was caught very intelligently.

3. AIR 1951 SC 226.
4. AIR 1951 SC 226.
5. AIR 1951 SC 229.

Towards the rationalization of criteria for identifying the recipients of the benefits of the protective discrimination, the judicial attempt started in *State of Madras v. Champakam Dorairajan*[6]—*B. Venkataraman v. State of Madras*[7] dormantly, which was discussed elaborately in the case of *Balaji*[8] and again was flourished in *R. Chitralekha v. State of Mysore*,[9] *Triloki Nath Tikku v. State of Jammu and Kashmir*,[10] *K.C. Vasantha Kumar v. State of Karnataka*,[11] *Rajendran*,[12] *Balaram*,[13] *Periakaruppan*,[14] *Miss K.S. Jayashree v. State of Kerala*,[15] and *Indra Sawhney v. Union of India*.[16] After this case, in the case of *Ashoka Kumar Thakur v. Union of India*,[17] it was held that the economic criterion was a valid criterion for the determination of the social and educational backwardness.

The limit of 50 percent for the reservation has its basis in *M.R. Balaji v. State of Mysore*.[18] The *Balaji*[19] spirit of accommodation of preferential benefit with the national interest in merit and efficiency was reinforced in *Devadasan v. Union of India*,[20] *Periakaruppan v. State of Tamil Nadu*,[21] *D.N. Chanchala v. State of Mysore*,[22] *Arti Ray Chaudhary v. Union of India*[23] and *K.C. Vasanth Kumar v. State of Karnataka*.[24] The matter was put to rest in the landmark judgment of *Indra Sawhney v. Union of India*[25] wherein it was held that the limit of 50 percent as laid down in *Balaji* was a binding rule. However, in the

6. AIR 1951 SC 226.
7. AIR 1951 SC 229.
8. AIR 1963 SC 649.
9. AIR 1964SC 1823.
10. AIR 1967 SC 1283.
11. AIR 1985 SC 1495.
12. *R. Rajendran v. State of Madras* AIR 1968 SC 507.
13. *State of Andhra Pradesh and Ors v. U.S.V. Balram and Ors* AIR 1972 SC 1375.
14. *Periakaruppan v. State of Tamil Nadu* AIR 1971 SC 2303.
15. AIR 1976 SC 2381.
16. AIR 1993 SC 477.
17. AIR 2008 SC 1.
18. AIR 1963 SC 649.
19. Ibid.
20. AIR 1964 SC 179.
21. AIR 1971 SC2303.
22. AIR 1971 SC 1762.
23. AIR 1974 SC 532.
24. AIR 1985 SC 1495.
25. AIR 1993 SC 477.

case of *Rajesh Kumar Davia v. Rajasthan Public Service Commission*[26] and *Mahesh Gupta v. Yashwant Kumar Ahirwar*[27] it was clarified by the Apex Court that the rule applicable to the vertical reservation **that reservation must not exceed 50 percent does not apply to the horizontal reservation in favour of women and handicapped**.

In the case of *Ashoka Kumar Thakur v. Union of India*,[28] the judges were of the opinion that a periodic review of the policy of reservation must be conducted.

In addition, on the significant issue of exclusion of the creamy layer, elaborate discussions were made in the cases of *Akhil Bharatiya Soshit Karmachari Sangh Rly. Association v. Union of India*[29] and *Miss Jayasree v. State of Kerala*.[30] However, again in the cases of *Indra Sawhney v. Union of India*[31] and *Ashok Kumar Thakur v. Union of India*,[32] the Supreme Court confirmed the "*exclusion of the creamy layer*" to be mandatory.

Regarding reservation in promotions, the judgments delivered by the Supreme Court in *General Manager, Southern Railway v. Rangachari*,[33] *Indra Sawhney v. Union of India*[34] and *Union of India v. Virpal Singh Chauhan*,[35] provided the sound and concrete solutions. Another problem relating to the policy of reservation was the challenges made to the "*carry forward*" rule. In *T. Devadasan v. Union of India*,[36] *Akhil Bharatiya Soshit Karmachari Sangh Rly. Association v. Union of India*,[37] *Indra Sawhney v. Union of India*[38] and *R.K.*

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26. AIR 2007 SC 3127.
27. AIR 2008 SC 3136.
28. AIR 2008 SC 1. Also see, *Suraj Bhan Meena v. State of Rajasthan* [2011] 1 SCC 467.
29. AIR 1981 SC 298. Also see, *State Bank of India SC/ST Employees Welfare Association v. State Bank of India* AIR 1996 SC 1838.
30. AIR 1976 SC 2381.
31. AIR 1993 SC 477.
32. AIR 2008 SC 1. Also see, *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438; *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308.
33. AIR 1962 SC 36.
34. AIR 1993 SC 477.
35. AIR 1996 SC 448.
36. AIR 1964 SC 179.
37. AIR 1981 SC 298. Also see, *State Bank of India SC/ST Employees Welfare Association v. State Bank of India* AIR 1996 SC 1838.
38. AIR 1993 SC477.

Sabharwal v. State of Punjab,[39] the above stated rule was held to be applicable only to initial appointments and not to promotions so long as the 50 percent limit was not crossed by it for a given year.

In *T. Muralidhar Rao and Ors v. State of Andhra Pradesh*,[40] the Court held that the State of Andhra Pradesh was legally authorized to provide 4 percent reservation in favour of Backward Classes among the Muslims. The High Court of Chandigarh has delivered the landmark judgments of *Attar Singh Dhoor and Ors v. State of Punjab*,[41] *Krishah Pal and Ors v. State of Punjab*,[42] and *Devinder Singh v. State of Punjab and Anr*[43] regarding the issue of 50 percent reservation within reservation in favour of *Balmikis* and *Mazabhi Sikhs* in the State of Punjab and held that it was violative of Article 14 and was not permissible under the Constitution of India. Similarly, In the case of *Suraj Bhan Meena and Anr v. State of Rajasthan*,[44] it was held by the Supreme Court that as no exercise was undertaken in terms of Article 16[4–A] to acquire quantifiable data regarding the inadequacy of representation of the Schedule Castes and Scheduled Tribes communities in public services and as no study was undertaken by Chopra Committee with respect to Gurjar belonging to Special Backward Classes particularly when Gurjars were already covered under the category of Other Backward Classes so, there was no rhyme or reason to provide them special status by including them in Special Backward Classes without undertaking requisite study. The Court further held that Rajasthan High Court has rightly quashed the notifications dated 28th December, 2002 and 25th April, 2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Castes and Scheduled Tribes.

However, the Government has annulled several imperative solution

39. AIR 1995 SCW 1371.
40. Date of Decision 8th February, 2010. Msr/Ak.
41. Writ Petition [Civil] No. 15302/2005, [2006] RD–P&H 5564, [17th August, 2006], Date of Decision 25th July, 2006.
42. Writ Petition [Civil] No. 5815/2006.
43. Writ Petition [Civil] No. 182009/2009 [O&M], Date of decision 29th March, 2010.
44. AIR 2011 SC 874.

providing decisions of the Supreme Court aimed at mounting the voter base, from time to time by making new amendments in the provisions of Constitution regarding reservation benefits to be provided to the weaker segments of the society. Numerous instances can be cited in this respect, like, in the case of *Champakam Dorairajan*,[45] the Court took the view that a student by whom the requisite academic qualifications were possessed could not be denied the admission only on the ground of religion, race, caste, language or any of them[46] and so, the Madras Government's communal Government Order was struck down as violating Article 15 or Article 29[2]. Then Sub–clause 4 was inserted to the Article 15 which when originally enacted, contained only three sub–clauses, by the **Constitution** [*1st Amendment*] **Act**, 1951, for only making the judgment invalid. Likewise, to tackle the position after the pronouncement of the Supreme Court of India in the case of *Indra Sawhney*,[47] the **Constitution** [*77th Amendment*] **Act**, 1995 was introduced through which a new Clause [4–A] was added to Article 16 of the Constitution of India for providing the reservation in matters of promotion to Scheduled Castes and the Scheduled Tribes. Furthermore the **Constitution** [*81st Amendment*] **Act**, 2000 has substituted Clause [4–B] after Clause [4] to Article 16 which seeks to end 50 percent ceiling on reservation for Scheduled Castes, Scheduled Tribes and Backward Classes in backlog vacancies which could not be filled up in the previous years due to non–availability of eligible candidates.

In order to wipe out the effect of the judgments of *Virpal*[48] and *Ajit Singh Janjua v. State of Punjab*,[49] Clause [4–A] was added under Article 16 of

45. *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226.
46. In Para 7 it was observed: "*The right to get admission into any educational institution of the kind mentioned in Clause [2] is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this Article. But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right*."
47. *Indra Sawhney v. Union of India* AIR 1993 SC 477.
48. *Union of India v. Virpal Singh Chauhan* AIR 1996 SC 448.
49. AIR 1999 SC 3471. See also, *AIIMS Students Union v. AIIMS* AIR 2001 SC 3262; *NTR University of Health Sciences v. G.B.R. Prasad* AIR 2003 SC 1947.

the Constitution.[50] Consequently, when any Scheduled Caste or Scheduled Tribe Candidate was promoted earlier to General Candidate, his seniority in the new cadre would rank from the date of his joining on promotion. The 85th amendment had been given retrospective effect from 17th June, 1995 *i.e.*, from the date when the **Constitution** [*77th Amendment*] **Act** came into effect.

The **Constitution** [*93rd Amendment*] **Act**, 2005 has inserted Clause [5] in Article 15 of the Constitution, after Clause [4]. The amendment was made by United Progressive Alliance Government to overcome the Supreme Court Constitutional Bench judgment in the *P.A. Inamdar and Ors v. State of Maharashtra Ors.*[51] The 93rd amendment that came into force from 20th January, 2006, extended the ambit of reservations even to "*private educational institutions, whether aided or unaided by the State other than the minority educational institutions referred to in Clause [1] of Article 30*".

From the above discussion about various findings pronounced by the Supreme Court and the amendments made by Parliament for invalidating those concrete judgments, it is quite very obvious that initially, the Parliament used to amend the Constitution to facilitate socio–economic reforms for the benefit of labouring masses. However, in the current years, the authority to amend the Constitution is used to nullify sound decisions of the Supreme Court which strengthen the fundamental structure of the Constitution and supplement its objects, merely for the purpose of gaining electoral benefits.

"*A thorn is to be removed by using another thorn*", says a proverb. Employing of caste criterion for undoing past injustices is largely justified on this notion. For example, in identifying the depressed castes, the 1931 Census looked to the prevalence of the following factors: inability to be served by Brahmans, barbers, water–carriers, tailors who serve the caste Hindus; inability to serve caste Hindus, to enter temples, and to use public conveniences such as roads, ferries, wells or schools; and inability to be

50. Inserted by the **Constitution** [*85th Amendment*] **Act**, 2001.

51 . AIR 2005 SC 3226. Also see, *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308; *State of Punjab and Ors v. Jagjit Singh and Ors* decided on 26th October, 2016.

disassociated from despised occupation.[52] These criteria were based on discrimination in access to human rights and dignity. For ameliorating the conditions of these categories of people and to restore to them their human rights, the criteria chosen were both rational and connected to the purpose. President's notification of Scheduled Castes on this basis for protective discrimination in 1950 was non–controversial. But controversy arose when Other Backward Classes of people or Socially and Educationally Backward Classes of people were to be identified for which no definite criterion of specific past injustice was forthcoming. Further, since Census reports do not disclose caste statistics, and therefore reliance on the 1931 data had become problematic.

In this regard various Backward Class Commissions appointed by State and Central Governments have used the criterion of caste as one of the parameters or initial reference groups. The **First Backward Classes Commission**, 1953 [Kaka Kalelkar Commission] reasoned:

"*A variety of causes—social, environmental, economic and political—have operated both openly and in subtle form for centuries to create the present colossal problem of backwardness. Economic backwardness is the result and not the cause of many social evils.*"

Low social position in traditional caste hierarchy, lack of education, and inadequate representation in government service, trade, commerce or industry were the causes for backwardness, it said. However, the **Second Backward Classes Commission**, 1978 [Mandal Commission] considered caste as a natural collectivity for defining backwardness. While it recognized the changes occurred in the caste system owing to democracy, urbanization, industrialization and mass education, it declined to accept any material alteration in the basic structure of caste. Since it is the opinion of Government about backwardness of any community as OBC or SEBC that is material for protective discrimination programme, State policy influenced by the Commission reports gained significance. The policies were judicially scrutinized and controlled in course of litigations

52. Census of India, Vol. I, [1931, Part I], at p. 472.

from time to time.

Judiciary has consistently emphasized on application of multiple factor tests in identifying the beneficiaries of protective discrimination, and has declined to rely solely on caste in identifying backwardness.[53]

Thus, there is an overpowering mutuality between poverty and caste in the Indian scene. Recognizing poverty as the true source of the evil of social and economic backwardness and caste as a relevant factor in determining backwardness, **the Court also noticed occupation and habitation as two other important contributing factors and finally stressed the need for a penetrating investigation**.

Article 15[4] meant a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste could not be excluded altogether but it could not be solely relied upon. In view of the attempt to balance the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement as against the right of equality of citizens, an objective approach was indispensable. Inclusion of religion as a criterion for identification of backwardness is, however, not convincing as it goes against secularism, since religions bear no indicia of backwardness.

Caste cannot however be made the sole or dominant test... Social backwardness, which results from poverty, is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness.[54]

Relating to this Justice **Kuldip Singh**, has observed:

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53. *M.R. Balaji v. State of Mysore* AIR 1963 SC 649, at p. 659, *per* Chief Justice **P.B. Gajendragadkar**.

54. *K.S. Jayasree v. State of Kerala* [1976] 3 SCC 730: AIR 1976 SC 2381.

"*Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. The Constitution has completely obliterated the caste system and has assured equality before law. Reference to caste under Articles 15[2] and 16[2] is only to obliterate it. The prohibition on the ground of caste is total, the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism—from feudalism to freedom.... Caste poses a serious threat to secularism and as a consequence to the integrity of the country…. Caste and class are different etymologically. When you talk of caste you never mean class or the vice–versa. Caste is an iron frame into which people keep on falling by birth.... Except the aura of caste there may not be any common thread among the caste–fellows to give them the characteristic of a class. On the other hand, a class is a homogeneous group which must have some live and visible common traits and attributes.*"[55]

Justice **Singh** held that castes could not be adopted as collectivities for the purpose of identifying the "*backward class*" under Article 16[4]. He agreed with the reasoning and conclusions reached by Justice **R.M. Sahai**, to the effect that occupation [*plus income or otherwise*] or any other secular collectivity can be the basis for the identification of "*backward classes*". **Caste collectivity is unconstitutional, and as such, not permitted.**

According to Justice **R.M. Sahai**, the backwardness of followers of traditional occupations[56] has been primarily economic or educational, and identification of such class cannot be caste based. Nor it can be founded, only

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55. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217: [1992] SCC [L&S] Supp 1, at pp. 176–7: paras 341 and 342. Prof. **Andre Beteille**, Department of Sociology, University of Delhi in his book **Backward Classes in Contemporary India** has succinctly brought out the distinction between "*caste*" and "*class*" in the following words:
"*Whichever way we look at it, a class is an aggregate of individuals [or, at best, of households], and, as such, quite different from a caste which is an enduring group. This distinction between an aggregate of individuals and an enduring group is of fundamental significance to the sociologist, and, I suspect, to the jurist as well. A class derives the character it has by virtue of the characteristics of its individual members. In the case of caste, on the other hand, it is the group that stamps the individual with its own characteristics. There are some affiliations which an individual may change, including that of his class; he cannot change his caste. At least in principle a caste remains the same caste even when a majority of its individual members change their occupation, or their income, or even their relation to the means of production; it would be absurd from the sociological point of view to think of a class in this way.*"

56. Such as agriculture, market gardening, betel–leaves growers, pastoral activities, village industries like artisans, tailors, dyers and weavers, petty business–cum–agricultural activities, heralding, temple service, toddy selling, oil mongering, combating, astrology, *etc.*, *Indra Sawhney v. Union of India* [1992] SCC [L&S] Supp 1, at pp. 314–15.

on economic considerations, as "*mere poverty*" cannot be the test of backwardness. With these two negative considerations stemming out of constitutional constraints, two positive considerations, equally important and basic in nature, flow from principle of constitutional construction: **one** that the effort should, primarily, be directed towards finding out a criteria which must apply uniformly to citizens of every community, **second** that the benefit should reach the needy. Ideal and wise method, therefore, would be to mark out various occupations, find out their social acceptability and educational standard, and weigh them in a balance of economic conditions. Advantage of occupation–based identification would be that it should apply uniformly irrespective of race, religion and caste. Since Article 16 forbids classification on the ground of caste, no backward class could, therefore, be identified on the basis of caste. Justice **Thommen**, also expressed similar opinion.[57]

The defects of caste criterion in identification of beneficiaries of protective discrimination are brought out in dissenting judgments and academic writings. While for the purpose of eradication of untouchability and amelioration of Scheduled Castes and Scheduled Tribes, caste and racial factors have been regarded as unobjectionable, and even for identifying OBC or SEBC their application is experienced to be problematic. The reasons as follows:

Firstly, since caste is a constitutionally prohibited ground of discrimination and has linkage with religion, use of it even for ameliorative purpose is not appropriate especially when alternative and secular criteria can be used for identification of backward classes. Since for categories other than SC/ST, **caste is not a thorn—like agonizing factor**, **it looses relevance as a countervailing measure**.

Secondly, caste in the present day world is not reflecting attributes of superiority or subordination with privileges and disabilities because of the social dynamics of urbanization and education. As viewed by **A.M. Shah**:

57. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217: AIR 1993 SC 477: [1992] SCC [L&S] Supp 1, at pp. 158–59.

"*A correct understanding of the caste situation today requires recognition of the fact that 25.7 percent of India's population is urban. Therefore, it would be incorrect to define caste only in terms of the village community, as is done frequently.*"[58]

Further, in villages also, the economic changes like fragmentation of land holding, reliance on non–agricultural income or occupation, and scarcity of agricultural labour have resulted in altering the economic power base or subjection of castes.[59]

Thirdly, determination of status of caste on the basis of caste–wise statistics of 1931 census, as is presently done by various Commissions, is unscientific. A long period of 75 years' must have brought tremendous changes in the social and economic position of people in various castes. Some castes have moved upward by dedicated efforts, enterprising attitude and enlightenment, in spite of their past position.[60] According to **Yogendra Singh**, the process of social mobility through new jobs, education, enterprises, access to political offices, etc. have severely fractured the homogeneity of communities, and made it possible now to look at the Indian structure in terms of categories such as occupation, class, ideology *etc*., rather than as communities such as caste, kinship, tribe or religious groups.[61] Further, the constitutional provisions refer to the present backwardness for amelioration.

Fourthly, caste based identifications have great divisive tendency in view of the fact that in order to get the benefits, devious methods are adopted by false attribution of some characteristics or even by false certificates. The means test that is used to keep away the creamy layer is not foolproof in practice in checking undeserved claims. These distortions divide the society further. As Justice **Sen**, said in *Vasanth*

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58. Shah A.M., ***The Judicial and the Sociological View of the Other Backward Classes*** in Shah Chanshyam [ed.], **Social Transformation in India**, Vol. I, Rawat Publications, New Delhi, [1997], at pp. 254, 260.
59. Gupta Dipankar, ***Caste Today: The Relevance of a Phenomenological Approach***, India International Center Quarterly, [Summer, 2005], at p. 153.
60. One example of tremendous development of a caste classified as backward in 1931 census during subsequent decades is the *Bunt* community in **Karnataka**.
61. Singh Yogendra, **Social Stratification and Change in India**, Manohar, New Delhi, [1997], at pp. 161–63, 220–22.

Kumar:

"*Irrational and unreasonable moves by the State will slowly but tear apart the fabric of society.*"[62]

To remember the words of **R.H. Tawney**:

"*Because men are men, social institutions, property rights, and the organization of industry, and the system of public health and education should be planned, as far as is possible to emphasize and strengthen, not the class differences which divide but the common humanity which unite them.*"

Justice **V.R. Krishna Iyer** has given a word of sociological caution:

"*In the light of experience, here and elsewhere the danger of 'reservation', it seems to me, is three–fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest amongst the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near–equals formally categorized as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross–fertilization of castes by inter–caste and inter–class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism.*"[63]

It is viewed that caste–based reservation perpetuates caste system, as reservation once introduced, faces reluctance for withdrawal.[64] Further, the dominant section of the backward caste, in spite of *Indra Sawhney* mandate to exclude creamy layer, would corner the benefits at the cost of the weakest amidst their own brethren.[65]

The critical analysis of the experience and opinions of the persons

62. *K.C. Vasanth Kumar v. State of Karnataka* [1985] Supp SCC 714: AIR 1985 SC 1495: he viewed that unless moderation is not injected into Articles 15[4] and 16[4] decisions growing sense of injustice would destroy rather than advance social justice.
63. *State of Kerala v. N.M. Thomas* [1976] 2 SCC 310.
64. Daniel Müller, ***Reservations and Time: Is There Only One Right Moment to Formulate and to React to Reservations?***, The European Journal of International Law, Vol. 24[4], [2013], at pp. 1113–1134.
65. Rao P.P., ***Right to Equality and the Reservation Policy***, [2000] 42, JILI, 193, at p. 200.

belonging to Scheduled Castes, Scheduled Tribes, and Other Backward Classes in relation to the implementation of the policy of reservation. Conclude that, **one of the foremost social realities that shape inter–group and inter–personal social relations in India is caste system**. The unequal opportunities and conditions of dignity offered by the social categorization through caste system in educational and economic fronts cannot be silently tolerated by a welfare State. **Untouchability**, **which is the culmination of caste prejudice of pollution/purity**, **is one of the grossest violations of human rights to which legal system has been quite sensitive**. While filling the values of cosmopolitan culture into a tradition bound hierarchic society faces all the challenges of modernization, levelling up the lowly and the weak by ameliorative policy attains abundant significance in the context of legal system adhering to social justice and social revolution. The social responses to issues relating to composition, inter–group mobility and inter–group tension have resulted in conflicts, sensitive struggles and evolution of compromise policies.

Furthermore, current reservation policy has not been successful to recognize the acclaimed ambition of building a caste–less society. Rather it has divided the whole motherland on caste basis. It has sown the seeds of categorization between the privileged and the under–privileged among the under–privileged classes. This policy has also resulted into a new trouble of political mobilization. The High Caste communities think discriminated due to Government policy to reserve positions for the Scheduled Castes and Other Backward Classes which in turn appears to be leading to a state of unjust reverse discrimination.

Another problem attached to the policy of reservation is that it has to make compromise with merit and efficiency. It is further highlighted that this policy of reservation is going to loose its bearing owing to prevalence of the present concepts of globalization, privatization and liberalization. When the **Indian Constitution** was enacted in 1950, the reservations were to come to an end after 10 years. However,

having regard to the socio–economic conditions of scheduled castes and scheduled tribes, the Constitution has been amended from time to time, and the period of **10 years** has been extended to **20 years**, then to **30 years**, then to **40 years**, then to **50 years** and then to **60 years**. At present, it [*new amendment in the Constitution*] provides that the reservation will cease after **70 years** *i.e.*, **after 2020**. It shows that this policy does not remain to be a time–bound policy which itself is indicative of its failure. Thus, it is quite clear that the present law and policy of reservation is inadequate and has certain loopholes, lacunas and pitfalls. Consequently, requisite and appropriate amendments in the existing law and policy of reservation are the need of the hour.

The study reveals: **first** that the people belonging to effluent sections irrespective of the category and religion in which they fall are not at all deserve to be the beneficiaries of this policy. However, still they are eligible and are included in the list of beneficiaries at the place of real backward poor person. Only the poverty ridden persons of each and every category and religion are backward in the real sense and so, in the present society now, the caste–criterion as the basis of the policy has nothing to do with the backwardness of the people of the society. **Secondly**, this policy not only has hampered the initiative power and stamina of its beneficiaries but has also created a lot of other problems for them. This policy saps the will and moral strength of those people to discard their crutches and face the world on equal terms. Thus, this policy tends to stigmatize those events whom it is designed to assist. In the present modern world, where only the efficiency is counted, the in–efficient and un–trained low castes people have no place left in any field of life. Women to which category they belong, are always exploited in the male patriarchal society in India. So, they need to be provided with the particular provisions in their favour in addition to their proper and adequate implementation.

It is also sufficiently and clearly observed that the procedure for the issuance of Caste certificates suffers from a number of irregularities like, un–limited discretionary powers vested in the authorities for the issuance of such

certificates, corrupt and mal–practices adopted by them and issuance of the certificates without making proper investigations and enquiries. The issuance of false certificates in turn vests in favour of even the forward classes [*creamy–layer*] the right to get the benefits of this policy leaving nothing for the more backward poor groups among the different categories. The high amount of costs charged by different coaching centers for providing coaching and guidance to the candidates to enable themselves for the entrance examination or PMT and CET *etc*., indicates that only the creamy–layer was able to get the higher education and in turn better job opportunities which itself results into their better financial position and higher standard of living. And the vice–versa is applicable to the poor people irrespective of the castes and religion.

Even after sixty five years of Independence, the overall economic inequalities in India are characterized by such remarks as "*the rich are becoming richer and the poor poorer*" and "*the gulf between the rich and the poor is broadened*". It is evidently specified that poverty levels for members of various religious factions are not homogeneous in India and are observed to vary considerably across ethnic and caste–based identities of group member. On the other hand, it is well documented fact that the intensity of poverty is higher among the Scheduled Castes, Scheduled Tribes and Other Backward Classes on the whole in India. The dawn of freedom is yet to bestow an enthusiastic smile on the Scheduled Castes, Scheduled Tribes and Other Backward Classes who are still striving to achieve liberation from socio–economic domination. Liberty, equality and justice so luxuriantly enshrined in our Constitution have yet to attain any meaningful proposition for these people. Since only "*cream of the crop*" *i.e*., the richer and the more affluent sections among the Scheduled Castes, Scheduled Tribes and Other Backward Classes have grabbed and chewed the larger chunk of the cake.

The policy of reservation has only produced small elite among the Scheduled Castes, Schedule Tribes and Other Backward Classes and has not lent a hand in elevating the socio–economic standing of the fragile and the

underprivileged groups. The members of the backward beneficiary categories arc differentiated into superior and inferior. Consequently, the poorer and the really backward sections among them kept on getting poorer and more backward. The poorest of the poor have received nothing but promises. The discrimination which was practiced on the inferior poverty ridden class by the superior class is in turn practiced by the affluent members of the backward class on poorer members of the said class. However, it is often observed that comparatively rich persons in the beneficiary categories—though they may not have acquired any higher level of education—are able to move in the society without being discriminated socially. However, these rich persons of the beneficiary categories particularly category of Scheduled Castes, even if have crossed the barriers of backwardness but while identifying the class they still come within the collectivity.

Caste based policy of reservation based on "*quota system*" has institutionalized complete fragmentations of society and the actual victims of neglect are the real poor, a social category which cuts across religion, caste or region. The policy of quota–based reservation comes into direct confliction with the real problem by the real poor to transcend every level, But on merely class issue regarding the really exploited classes neither the Indian State nor the theorists of group representation show any attention or concern. The reason for this is that the "*deprived strata of society*" are politically orphans. Thus, at present it has all become a grimy political game with vote making propensity. Caste–based reservation is a populist measure and it just aids in strengthening casteism, communal divisiveness and corruption in the public life, university campuses and public offices. With group identities and interests lifted up to a keystone of political struggle, India now faces the long running scenario of a caste war fought out on various social and economic fronts, at varying intensities. This is due to the policy of caste based reservation because its success is guaranteed by Divide and Rule. In a nutshell, it can very straightforwardly be derived that the present policy of reservation has failed to accomplish the desired objectives for which it was formulated. Social and

economic in–equalities continue to persist. The current policy is generating tension among the different castes thereby endangering the very existence of India as a Nation and is creating a caste conscious society instead of cohesive, unified, caste–less and class–less society, the authentic aim of the **Indian Constitution**. Dr. **B**.**R**. **Ambedkar** visualization did not end at the horizon of Dalit power; but he envisioned an India liberated from caste consciousness, an innovative society no longer trapped in the feudal binaries of master and slave, privilege and privation.

II. Suggestions

The study puts up the shutters with its conclusions as also it advocates certain ways for the reform and modification in the criteria for providing the benefits of the policy of reservation so that it could serve the society better and safeguard the interests of the really needy and deserving vulnerable [*poorest of the poor*] segments of the society irrespective of castes and religion they belong and the real and purest ambition of the constitution makers of making a caste–free society, where everyone would be capable of getting equal rights as well as equal opportunities of making their life prosperous and blissful, could be achieved. For the last more than 70 years, this policy has not proved to be a success but to make it a success now; it should be revised or amended. Thus, in the light of the foregoing discussion, the following suggestions may be incorporated for amending the law and policy relating to reservation in order to create a casteless society as well as to improve the social, economic and political conditions of the weaker section of the social order:

[1] Elimination of Caste Criteria

In India firm and determined efforts are required to be made for systematic and fundamental modification of the policy of the reservation due to caste–war like situation created by the policy of reservation based on caste–criterion. The Government should think seriously in this respect to create an affirmative action program based on caste neutral measures *i.e.*, on economic basis. In order to stop the inter–caste conflicts and other caste–wars, caste

criteria should be totally eliminated to be considered while providing the benefits of the policy of the reservation to poorest segment of the nation.

[2] Implementation of National Economic Policy

Basic criteria of this policy should be changed. Only economic criteria should be adopted as the basis for the purpose of identification of the beneficiaries while providing benefits of the policy of the reservation. The present reservation policy should be transformed into a "**National Economic Policy**" for giving the right to equal representation/equal opportunities to all the communities alike based only on the economic status of the beneficiaries without any discrimination as to caste and religion.

[3] Substitution in Article 16[4] of the Constitution

It is suggested that in Clause [4] or the Article 15 of the **Indian Constitution** for the words "*any socially and educationally backward classes of citizens or for Scheduled Castes or for Scheduled Tribes*" the words "*Economically Backward Citizens*", should be substituted. Further, in Clause [4] of the Article 16 of the **Indian Constitution** for the words "*any Backward Class of citizens which in the opinion of the State, is not adequately represented in the services under the State*", the words "**Economically Backward Citizens**" should be substituted.

[4] Strict Implementation of Exclusion of Creamy–Layer

There should be strict implementation of the concept of exclusion of the creamy–layer so that the benefits of the policy of the reservation should reach the real and needy people among them. The raised limit of the creamy–layer of `4.5 lakhs should be revised and again decreased to `2.5 lakhs for including more and more economically forward people in this limit so that the benefits of policy of the reservation could reach its really deserving and needy beneficiaries. The question of excluding the creamy–layer from among the Scheduled Castes and Scheduled Tribes is also required to be considered and reviewed by the Apex Court unless and until the Parliament amends the Constitution to do so. Proper procedure should be formulated for the identification of

poor segment among the people of India so as to exclude the creamy–layer from the beneficiaries of the reservation policy.

[5] Constitution of Equal Opportunity Commission

Equal Opportunity Commission was required to be set–up immediately after the enactment of the Indian Constitution *i.e.*, 26th January, 1950. But no steps in this regard were taken by the Government. It is, therefore, suggested that the Government should act now to constitute an Equal Opportunity Commission without any further delay on following lines:

a) It should be adapted to the specific socio–economic, judicial and institutional context of the country. The identity of the deprived sections is not so much based upon caste and religion but on their common plight of deprivation and consequent inability to access equality of opportunity. They are poverty ridden people. They do not belong to anyone caste or religion. They largely come from among the Scheduled Castes, Scheduled Tribes, Other Backward Classes, disabled persons, minorities and even from some sections of the majority communities.

b) The National Commission for Scheduled Castes, National Commission for Scheduled Tribes, National Commission for Backward Classes, National Commission for Minorities and National Commission for Women should be merged together into Equal Opportunity Commission.

c) Equality of Opportunity Department should be established in each and every university and research center across the country to help the Equal Opportunity Commission in generating, collecting, processing and disseminating various kinds of data on equal opportunity issues–generic data, reporting data, indices and data from case studies for creation of level playing field in securing equal opportunities to the disadvantaged sections of people as this action will prove to be key to the success of the Equal Opportunity Commission.

d) The terms and references of the Equal Opportunity Commission should be such as to give it the power of making regular and timely review of

the policy of reservation. The Commission is to review the benefits provided and problems occurred due to this policy during the last five years and also recommend the changes or amendments, if required to be made in the present policy of reservation on the basis of its review report, The Commission's recommendations should be binding upon the Government.

[6] Implementation of Affirmative Action Policies

Affirmative action policies should be given the lead. The following affirmative action measures are suggested:

a) **Free guidance**, extra coaching and training should be provided to the poor segments of the society irrespective of caste and religion for the purpose of making them equipped for various entrance examinations in order to get admissions in the technical, medical and all the other professional courses so that they could compete at par with children belonging to privileged classes or advanced categories on the foundation of their own efficiency and capability without using the crutches of reservation.

b) Government should divert maximum of its resources for educational upliftment of the impoverished segment amongst each and every category and community of the society to make them capable of enjoying the benefits of reservation. Educational scholarship of at least `1000/– per month should be provided to each and every child of un–privileged [*poor*] strata of the country irrespective of caste and religion, so that they could get education instead of going in search of employment. It will also help to curb evil of the child labour and also to bring the drop–out rate among them to a halt. Such an allowance should continuously be paid till they become so efficient and capable to earn themselves. Providing free education up to graduation level to the people on the economic lines [***i.e.***, *to poor segments*] is the demand of the time.

c) Free library facilities and free access to computers with internet facilities should be provided by the Government to the poor irrespective of caste and religion society in near proximity to their homes.
d) Extra classes after the teaching hours for improving the level of competence *viz*., training fundamentals on the subjects/courses, aptitude development, development of communication skills *etc*., for the students of poor segments of the society irrespective of caste and religion should be arranged by the Government in order to bring them at par with privileged class students.

[7] No Reservation in Higher Educational Level

There should also be no reservation in higher educational level particularly in the institutes for specialization and super–specialization because this would result in the compromising merit. This policy of reservation is going to loose its relevance due to globalization, privatization and liberalization. In the era of liberalization, privatization and globalization, the main feature of the policy of liberalization include reduction of the Government role in the economic governance, privatization and more dependence on market forces resulting in depletion in the Government jobs and services. The policy of reservation kills the initiative power, confidence and morale among its beneficiaries and thereby reducing their overall efficiency.

[8] Reservation on Economic Basis

Reservation in employment should be provided on economic basis. It is thereby suggested that:

a) It means in India, there is dire necessity to follow and maintain the system under which no compromise with the efficiency of the candidates will be made in the name of affirmative action programme.
b) Special opportunities should be provided for "*after job training*" to the poverty ridden beneficiaries of whatever caste and religion they belong, for the purpose of improving their capacity and efficiency.
c) The policy of reservation should not be made applicable at promotion

level in case of job reservation *i.e.*, the **Constitution** [*77th Amendment*] **Act**, 1995 should be repealed. Because after appointment every employee including those belonging to the poorest segment of the Indian society will come at par with the other employees and so needs to be guaranteed that "*among the equals*, *provisions should be equal and should be equally administered*". And the discrimination will raise inequality among the equals in the society by giving excessive weightage to the incompetent employees and thereby engendering job dissatisfaction among others affecting efficiency in service.

d) The upper limit/extent of reservation should be limited to 20 percent instead of 50 percent and it should be applicable to whole of India alike after making a provision in clear terms in this respect in the Constitution of India. The posts remained unfilled in a year should not be allowed to be carried forward to the next year, *i.e.*, the **Constitution** [*81st Amendment*] **Act**, 2000 should be altogether repealed.

e) Similarly, no reservation should be provided in the top class, Class I and purely merit requiring services as far as possible.

[9] Proper Guidance to the Needy and Under–Privileged

Capabilities and manpower of downtrodden and under–privileged people should be utilized to fullest extent by guiding them properly. The Government should not leave these segments of society to repent upon their fate, with the hope of getting alms in the shape of reservational benefits for their children. On the other hand, if these people are guided properly to utilize their capacities to make progress in order to improve their lot then these poor sections of the society on receiving a very small hand of help from the Government, can change even the fate of the country and will be able to give life of dignity and a futuristic path filled with stars of prosperity and happiness to themselves and to their children. In this regard, it is suggested that:

a) Poverty ridden sections should be provided with the employment or jobs in the same fields in which they are expert. There is a great need to

realize their real man–power and to provide them proper guidance, financial help and certainly with jobs suited for them instead of making just promises of giving reservation benefits to their children. These steps, if taken by the Government will prove a boon not only for the under–privileged and most deserving people but also for our country which is again being divided on the caste–lines because of this caste based policy of reservation.

b) The small business–men of these sections should be provided with incentives loans and advances at subsidized rates for the purpose of starting their own business and in addition to that facility, free training should also be provided to them for helping them in the smooth functioning of their business.

[10] Affirmative Action Policy for Women

The affirmative action policies have given stress on improving the status of women. Women, as they are still socially, economically and educationally backward in India, should be included in the list of beneficiaries and should specifically be provided its benefits in political, educational and employment fields. In this respect, the following are the suggestions:

a) Women should be provided free and compulsory education up to Graduation level by amending Article 21–A of the **Indian Constitution**.

b) They should be given free counselling, guidance and coaching for availing better career opportunities at the higher educational level.

c) The **Representation of People Act**, 1951 should be amended to compel political parties to provide for mandatory nomination of the women candidates for at least one–third of the seats to avoid de–recognition as a national party. All the women organizations should come on a common platform with single target of pressing the political parties to either support the passing of the **Reservation Bill** or face the anger of women voters in the next general elections. Every effort should be turned into a success one for getting the **Women Reservation Bill** enforced. The media both print as well as electronic can play an important role in creating awareness in the society. It can act as

an agent of political socialization for inculcating the values of gender equality and gender justice. In case they are given proper representation in the Parliament and State Assemblies, they can raise the quality of the Parliament and State Assemblies. Besides, they can think to improve their lot in social, political and economic point of view.

[11] Independent Judiciary

The concept of independence of the judiciary which is the corner stone of the **Indian Constitution** should be preserved and promoted at all costs so that no decision of the Court could be adversely affected by the political pressure. Therefore, the following steps are suggested:

a) In order to check the Government from making amendments in this policy of reservation inorder to nullify the judgments of the Apex Court and to keep intact its vote–bank policy, a National Constitutional Review Committee should be formulated by the President of India at the floor of the Parliament House. It should get its power from Article 13[1] in order to make review of the proposed amendments. The eminent Jurists, Chief Justice of India, other judges of the Supreme Court and an academician of eminence in the subject of the **Constitution** should be the members of the committee.
b) All the amendments which have been made by the Government to nullify the judgments of the Supreme Court should again be reviewed judicially by the Apex Court to check their constitutional validity.
c) Whenever there comes a question of making a review of the law and policy of reservation before the Supreme Court, the Constitutional Bench should be equivalent to or larger in comparison to the earlier Benches.

Legislature and judiciary should act within their own spheres and should not try to encroach upon each other's area of action. Both of them should function in the harmonious way so that benefits of reservation policy could arrive at its real beneficiaries *i.e*., poverty stricken factions among the populace of Indian society.

All the policies regarding preferential treatment should be formulated at central Government level and no discretionary powers what so ever in this matter are required

to be given to the State Governments.

The abovementioned suggestions are the most important measures which require an immediate consideration of the Government and the judiciary. So long as a comprehensive and adequate law and policy relating to the reservation on the lone basis of economic criteria is not modeled and enacted, the present policy may be made applicable to all the citizens alike on the basis of their economic standing irrespective of their castes and religions in India. It of course goes without saying that any reform or formulation of law has to take into account not only country's prevailing social and economic conditions but has to confirm to the ethos and aspirations of its people. In case a law and policy is to be re–drafted on the suggested lines, it is hoped that the dreams and the ambitions cherished by the makers of the **Indian Constitution** for the upliftment of the poor, needy and weaker segments of the nation as well as the creation of a caste–less, class–less and just society can be fulfilled with the new amended and reshaped policy of reservation in India.

Thus it is noted that while caste division of the Indian society had created social hierarchy and obstructed social mobility, the humanists and social reformers looked to the aspects of equal human worth and dignity and condemned social inequality. The deprivation and exploitation arising from caste differentiation have been responded by the legal system with preventive and curative approaches, true to its commitment to the goals of social justice and equality. Prohibition of the practice of untouchability is both constitutional policy and serious commitment through strong legislative framework to spearhead social transformation. The trend of development is towards establishing a highly activist legal measure to deal with the problem of segregation. This has yielded good result, although the measure is not a fait accompli.

Affirmative action as a means of empowerment and an instrument of social justice has taken multiple forms and has been employed by various levels of government with region–specific political policy decisions. There is

considerable change in the composition of the service sector, and the marginalized sections have better representation in this sphere.[66] With the growth of society, the features and characteristics of the beneficiaries and of the categories of reservation also undergo change. However, objectivity has suffered when prejudice, favouritism and mere political consideration are mixed with policy. Exclusion of persons or families who got reservation benefit or of persons who merged with the forward sections by becoming creamy layer from the advantages of affirmative actions would help in channelizing the benefits to the weaker of the weakest. Extension of *Indra Sawhney*[67] principle on this matter to Scheduled Castes and Scheduled Tribes also is required. Instead of treating reservation as the be all and end all of affirmative action, the long–term effect of reservation should be analyzed; the need for actual empowerment of the weaker section by infusing the strength for competition should be realized; and the direction of development should be towards minimizing the dependence on caste factor for identifying the beneficiaries.

Thus to conclude, in an ideal world with the intention of fulfilling the needs of the deserving economically backward candidates from both the backward and the general categories, it is desirable to replace the criterion of caste with economic backwardness.

As was rightly put by Sarvajna, a 16th Century visionary of Karnataka:

> "*The light of the home of a man of despised caste,*
> *Is it despicable? Speak not of this caste or that.*
> *He whom God loves alone is of a noble caste.*"

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66. It should be remembered that as a consequence of reservation policy during last 57 years', the percentage of Dalits in Grade I posts has increased from 1 percent at the dawn of Independence to 12 percent at present, and before long it will reach 17 percent. In lower Grades there is better representation and in Grade IV there is overrepresentation.
67. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217: [1992] SCC [L&S] Supp 1.

Summary

The doctrine of equality is foundation of social justice on which the palace of democracy can be built. In ancient India, the conventional Indian society had witnessed the lavish growth of hierarchal movement embodied in the institutions of *Varna* and *Jati*. The hierarchal social order was created over the centuries with a view to conserve the domination of social status, property and education by the higher caste Hindus. Caste–system is sui–generis in this country to Hindu religion. In addition the Hindu society was divided into four *Varnas*, or classes, a convention which had its genesis in the **Rig Veda**, the first and most important set of hymns in Hindu Scripture which dates back to 1500–1000 BC. The *Aryans*, the priestly caste was called the *Brahmins*, the warriors were called the *Kshatriyas*, the common people divided to agriculture, pastoral pursuits, trade and industry were called the *Vaishyas* and the *Dasas* or non–*Aryans* and the people of mix–blood were allocated the status of Shudras. The Chaturvarna–system has been gradually distorted in shape and meaning and has been replaced by the prevalent caste–system in Hindu society. So, the caste–system kept a bulky section of people in this country outside the fold of the society who were called the untouchables.[1]

However, with the passage of time elastic caste system got transformed into rigid caste based hierarchal structure as a result of which *Shudras* and

1. Divgi Pranav Jitendra, ***Reservations in India: A Constitutional Perspective***, World Journal on Juristic Polity, [2017], at pp. 1–18.

untouchables became socially, economically, educationally and politically backward and oppressed. They were compelled to live a life afflicted by grinding poverty, diseases and ignorance and had to bear persistent, unfavourable and harsh effects of discrimination, domination, exploitation and ascendancy of the higher upper castes. The classes in **medieval India** got disintegrated into castes and man's position in society was resolute by birth and not by qualities and thus social mobility in the caste system was not present. This inflexibility of caste–system was a reaction to call the intuition of self preservation and was to act as strong barrier for Hinduism from being submerged wholly into the Muslim culture. Shudras during the medieval period were hated, disbelieved and despised and were subjected to social disabilities.

However, the Britishers adopted a policy of non interference with indigenous caste and religious matters. Due to this policy of British rulers, the vices of caste system were left intact. Britishers followed this policy because it was in their interest that Hindus should remain divided on the foundation of caste. The western concept of equality, emancipation and egalitarianism provided powerful thrust to untouchables to challenge the legality of distinctions based on purity and pollution. During British rule there were introduction of certain legislations to perk up conditions of depressed classes or lower caste people but those legislations did not prove of much avail towards shrinking the rigidity of the caste system. However, special provisions and concessions had been introduced by the Britishers for the educational development of the Backward Classes which was afterward transformed into caste reservation for job.

The Indian constitutional policy was based upon the conception that certain social groups in India were innately unequal, were victims of societal discrimination and thus, required compensatory treatment. Severe mechanisms including preferential treatment [*reservation of seats for certain identified groups in legislative bodies*, *in public employment and in educational*

institutions] had been adopted by the provisions of the **Indian Constitution** itself. The policy of initiatives used in India to balance the inequalities of society is a policy of reservation.

It is a well–known fact of Indian history that women have not been equivalent associates with males. Women belong to the weaker sections of the society because like the people of depressed classes they had also suffered traditionally. The framers of the **Indian Constitution** sought to check the injustices done to the women by being put in deprived position. The Constitution provided for both negative and positive actions in favour of women. Equality on the basis of sex and individuality of women has been recognized by the **Indian Constitution**. However, the heaven of "*equality*" is still beyond the reach of women in India.

The judiciousness behind reservations or positive discrimination in India is that particular opportunities should be produced for equality of opportunity for some people over and above the general provisions for all. The aim was to steadily equalize the weaker sections with the other classes of people advocating for providing equal opportunities to those who were not equally placed with others and needed extraordinary help. The more indispensable and fundamental way was to advance them swiftly in the social, economic and educational spheres which might facilitate them to stand on their own feet.

The poor and the oppressed people, who are now called as the Scheduled Castes, were shrouded in the darkness of the repression, exploitation and the perplexity and were also the victims of an inferiority complex, deep–rooted poverty, backwardness, illiteracy, exploitation and the social subjugation before the dawn of the liberty. So, they had remained socially, educationally and economically more backward than any of the higher castes in the country. Numerous steps had been taken from time to time in the pre–Independence India, for improving the status of these strata or sections of the society but they touched only the border or the problem. The noticeable progress has been registered only after the emergence of India as a Sovereign Independent Republic. The **Indian Constitution** as a social document envisions a conversion of Indian society from medieval hierarchical and clogged

society into modern, secular and democratic society through the extension of the improved amenities to the oppressed in order to enable them for achieving upward mobility by acquiring social, economic, educational and political authority. The constitutional policy of compensatory discrimination was formulated and implemented to facilitate the lower–status castes to change their social and economic position.

On a perusal of the various provisions of the **Indian Constitution** and particularly of the Preamble, like Articles 14 to 17, 38, 39, 39–A, 46, 330–342, and 366 form the corpus juris of Dalit Jurisprudence to shield Scheduled Castes, Scheduled Tribes and Other Backward Classes from socio–economic injustice and all forms of exploitation. Concentration has been focused on protective discrimination or preferential treatment for three major classes; the Scheduled Castes, Scheduled Tribes, and more recently the Other Backward Classes under constitutional provisions and a variety of laws like, the **Protection of Civil Rights Act**, 1955, the **Bonded Labour System** [*Abolition*] **Act**, 1976, the **Scheduled Castes and Scheduled Tribes** [*Prevention of Atrocities*] **Act**, 1989 and the **Educational Institutions** [*Reservation in Admission*] **Act**, 2007. The National Scheduled Castes and Scheduled Tribes Commissions were constituted for successful implementation of various safeguards provided in the Constitution as well as of various other protective legislations.

The set of protective discrimination programmes can generally be divided into three broad categories:

1) **First** are reservations which give amenities of access to esteemed positions or resources; such as reservation in legislatures, including the reservation in Lok Sabha and State Assemblies.
2) **Second**, reservation in educational institutions.
3) **Third**, reservations in Government services.

The Scheduled Castes and Scheduled Tribes have been provided all the opportunities for the complete development of their individuality for enabling them to come at equality with various other groups in the society. The transition so effected has provided a wider scope to this segment of the society

for making selection of the occupations with higher remuneration. Periodically different amendments have also been made by the Government of India in the constitutional provisions, if established essential to be made for the emancipation of these communities. To bring to an end the backwardness of the Scheduled Castes and Scheduled Tribes, the Government has approved them liberal concessions in all walks of the life and particularly in the field of education. However as noted with rampant poverty among the Scheduled Castes and Scheduled Tribes population, many of them are still not able to take benefit of preferential policies. Because these people are very poor, their dropout rate at the higher education level is very high resulting in large mass of illiteracy found among them. A large proportion of these strata of the society live in the rural areas and tribal areas far removed from many of the opportunities for job and the educational reservation.

The benefits of the reservation policy provided to this segment of the people in the **Government jobs** had unbolted the doors of the extensive opportunities to get higher payment jobs. Now owing to the poverty and illiteracy, these people are still in the catalog of the underprivileged strata of the society. The fact that the Scheduled Castes and Scheduled Tribes are still under–represented in Government services and educational institutions undercuts the target of the reservations policy.

Furthermore, in the Constituent Assembly when there was commencement of the debate on the reservations, it was determined that the reservations would be made available in favour of the Scheduled Castes and the Scheduled Tribes, but a little later the door was wide open also for the "*Backward Classes*".

The term "*Other Backward Classes*" is the third kind. It appears in Articles 15[4], 16[4] and 29[2] of the Indian Constitution. But this term of the third category is the most loosely defined. The problems under this category were also different from the first two categories in numerous ways. The number of castes incorporated into this group are rising continuously and also growing at the wish of the politicians and at the public demand.

Reservations in the educational institutions and jobs understandably were provided as an valuable mechanism for helping the deprived sections of the society for rising above social and economic handicaps but it is now quite obvious that regardless of providing reservation facilities in favour of the Other Backward Classes in the field of education and jobs, still there is wide spread under–representation of this group of people in education and in the public service.

Furthermore, cut–off mark system given by the Colleges/Universities in favour of the Backward Classes only gets in the way of the development of the Backward Classes themselves by plunging their competitive spirit.

Although the **Indian Constitution** and various other Legislative enactments and different commissions for women have made several attempts for the attainment of the aim of gender parity, however in real practice, due rights are denied to women and they persist to be the victims of male dominance and are over represented amongst the deprived and poverty ridden persons. The access of the women to unorganized sector—to education, health and productive resources, among others, is inadequate. So, women in India have stayed largely marginalized, poor and socially excluded. In the case of women, admittedly, at the **first** place, there is need to remove the deficiencies of constitutional as well as statutory provisions assuring a place of honor and equal opportunity to women. And at the **second** place, there is need for the formulation of a foolproof and effective implementation mechanism for the proper execution of the laws and policies for the emancipation of the women is the requirement of the present era. For the liberty of women and conversion of their *de–jure* equality into *de–facto* equality, **widespread protective discrimination law** for providing reservation in political, educational and employment to women is the cry of the age.

In India, affirmative action policies have facilitated a very small section or strata of the society of India among under–privileged categories to progress towards a semblance of economic and social equal opportunity. Unlike any other country, the caste identities have been made more prominent by India's affirmative action policies when the target was to lessen the stratification by caste. This is all indicative of the fact

that the laws and policies were not well planned, inadequately formulated and badly implemented. The time has come when the laws and policies of reservation should be made need based. The poverty is the root cause of all the ills and is a world phenomenon now. Now–a–day's world is a materialistic one therefore, all the laws and policies of reservation arc needed to be based upon the economic criteria only.

For resolving the problem of the unequal opportunity in India, the policy of reservations should be based on poverty and physical disability of the people irrespective of their caste, religion or tribe. The affirmative action program in India should be without difficulty amendable in keeping with the changes in the legal, social and political circumstances of Indian society. Meaning thereby that in India this policy should be so flexible that if essential, it should be completely finished or the caste based criterion needs to be altered with the economic criterion because of the changes in the social and political conditions of the country. As already noted that what in India could not be attained in almost 65 years of its Independence, can be achievable within the period of 10 years if the policy structure is so designed to eliminate the inequality of the opportunity for making equal representation to all the categories and communities in every sphere of life.

Further through analysis it is noted that, the judiciary has done laudable job by pronouncing extraordinarily sound judgments in relation to problems of preferential and protective discrimination. Judiciary has successfully preserved and safeguarded the fundamental rights of the citizens and helpless groups which were at risk because of the policy of reservation executed by the Government from time to time. In reality, it has been required by the court that reservation policies should be so formulated as to "*strike a reasonable balance*" among "*several relevant considerations*". To interpret the rule of law in action and to provide justice at the door of poorest of poor, the judiciary in India has made an adequate attempt. The judiciary has also been vigilant to create classless society and gradual abolition of caste consciousness.

In the course of time, even a tendency was developed by the courts for considering all provisions connecting with positive discrimination as mandatory ones. This was consistent with the move from the treatment of reservation as a matter of right, since the difference between mandatory and enabling provisions has emerged to be vague in the course of time fundamentally due to the rhetoric of social justice. By trial and error, still the Supreme Court has been giving shape to the Constitution in the accurate direction.

After making thorough and critical analysis of case law on the topic, it is quite clearly indicated that the commendable job has been done by the judiciary by providing remarkable and sound judgments relating to problems of preferential and protective discrimination from time to time. However, right from the beginning with the inauguration of the Constitution, the Government has at all times on one excuse or other been flouting the judicially laid standards by making new amendments in respect of reservation benefits to be offered to the weaker sections of the society, in the provisions of the Constitution. The procedure of amending the constitutional provisions has been just misused by the Government through invalidation of the numerous significant sound, concrete and solution providing judgments of the Supreme Court which strengthen the fundamental structure of the Constitution and further its objects, only for lifting up their vote banks. The Government has, in place of protecting and increasing wellbeing of real deservers of the policy of reservations, adopted the policy of reverse discrimination only for gaining electoral benefits for themselves.

Summing up the whole, it can be said that the special provisions in the form of policy of reservation for the benefits of Scheduled Castes, Scheduled Tribes Other Backward Classes and women in our Constitution are proved to be in–adequate and in–sufficient. Therefore, the judiciary has from time to time through the issuance of solid and rational guidelines in a number of exceptionally sound judgments tried its best to remove all these weaknesses

and in–adequacies in the policy by ironing out the practical difficulties in effectuating the policy of the reservation. However, on the other hand, Government has misused its power in order to nullify those judgments by making a number of amendments in the Constitution only to make their vote bank intact. In this manner, the Government has hindered the way of the judiciary which was marching towards plugging the loopholes in the provisions of Constitution for the successful achievement of the objective of the policy of the reservation.

The courts have been admiring of the sui–generis nature of the detrimental situation of the Scheduled Castes, Scheduled Tribes and Other Backward Classes and have been permissive as much as possible. However, to the severe actuality of the life, the judiciary has not closed their eyes. Undeniably, it has been obligated by the court that reservation plan should be so formulated as to "*keep a rational balance*" among "*numerous related considerations*". To interpret the rule of law in action and to carry justice at the door of poorest of poor, the judiciary in India has made ample efforts.

The judiciary has attempted its best to solve a number of problems arising due to the policy of reservation in favour of Scheduled Castes, Scheduled Tribes and the Other Backward Classes from time to time. It has done laudable job of providing the solution giving decisions regarding reservation exact from the inception of the Constitution such as, in the three decisions of *State of Madras v. Champakam Dorairajan*,[2] *State of Madras v. C.R. Srinivasan*[3] and *B. Venkataraman v. State of Madras*[4] the political move for perpetuating the caste–system was caught very intelligently.

Towards the rationalization of criteria for identifying the recipients of the benefits of the protective discrimination, the judicial attempt started in *State of Madras v. Champakam Dorairajan* [5]—*B. Venkataraman v. State of Madras*[6]

2. AIR 1951 SC 226.
3. *State of Madras v. C.R. Srinivasan* AIR 1951 SC 226.
4. AIR 1951 SC 229.
5. AIR 1951 SC 226.
6. AIR 1951 SC 229.

dormantly, which was discussed elaborately in the case of *Balaji*[7] and again was flourished in *R. Chitralekha v. State of Mysore*,[8] *Triloki Nath Tikku v. State of Jammu and Kashmir*,[9] *K.C. Vasantha Kumar v. State of Karnataka*,[10] *Rajendran*,[11] *Balaram*,[12] *Periakaruppan*,[13] *Miss K.S. Jayashree v. State of Kerala*,[14] and *Indra Sawhney v. Union of India*.[15] After this case, in the case of *Ashoka Kumar Thakur v. Union of India*,[16] it was held that the economic criterion was a valid criterion for the determination of the social and educational backwardness.

The limit of 50 percent for the reservation has its basis in *M.R. Balaji v. State of Mysore*.[17] The *Balaji*[18] spirit of accommodation of preferential benefit with the national interest in merit and efficiency was reinforced in *Devadasan v. Union of India*,[19] *Periakaruppan v. State of Tamil Nadu*,[20] *D.N. Chanchala v. State of Mysore*,[21] *Arti Ray Chaudhary v. Union of India*[22] and *K.C. Vasanth Kumar v. State of Karnataka*.[23] The matter was put to rest in the landmark judgment of *Indra Sawhney v. Union of India*[24] wherein it was held that the limit of 50 percent as laid down in *Balaji* was a binding rule. However, in the case of *Rajesh Kumar Davia v. Rajasthan Public Service Commission*[25] and *Mahesh Gupta v. Yashwant Kumar Ahirwar*[26] it was clarified by the Apex Court that the rule applicable to the vertical reservation **that reservation must not exceed 50 percent does not apply to the horizontal reservation in**

7. AIR 1963 SC 649.
8. AIR 1964SC 1823.
9. AIR 1967 SC 1283.
10. AIR 1985 SC 1495.
11. AIR 1968 SC 507.
12. AIR 1972 SC 1375.
13. AIR 1971 SC 2303.
14. AIR 1976 SC 2381.
15. AIR 1993 SC 477.
16. AIR 2008 SC 1.
17. AIR 1963 SC 649.
18. Ibid.
19. AIR 1964 SC 179.
20. AIR 1971 SC2303.
21. AIR 1971 SC 1762.
22. AIR 1974 SC 532.
23. AIR 1985 SC 1495.
24. AIR 1993 SC 477.
25. AIR 2007 SC 3127.
26. AIR 2008 SC 3136.

favour of women and handicapped.

In the case of *Ashoka Kumar Thakur v. Union of India*,[27] the judges were of the opinion that a periodic review of the policy of reservation must be conducted.

In addition, on the significant issue of exclusion of the creamy layer, elaborate discussions were made in the cases of *Akhil Bharatiya Soshit Karmachari Sangh Rly. Association v. Union of India*[28] and *Miss Jayasree v. State of Kerala*.[29] However, again in the cases of *Indra Sawhney v. Union of India*[30] and *Ashok Kumar Thakur v. Union of India*,[31] the Supreme Court confirmed the "*exclusion of the creamy layer*" to be mandatory.

Regarding reservation in promotions, the judgments delivered by the Supreme Court in *General Manager, Southern Railway v. Rangachari*,[32] *Indra Sawhney v. Union of India*[33] and *Union of India v. Virpal Singh Chauhan*,[34] provided the sound and concrete solutions. Another problem relating to the policy of reservation was the challenges made to the "*carry forward*" rule. In *T. Devadasan v. Union of India*,[35] *Akhil Bharatiya Soshit Karmachari Sangh Rly. Association v. Union of India*,[36] *Indra Sawhney v. Union of India*[37] and *R.K. Sabharwal v. State of Punjab*,[38] the above stated rule was held to be applicable only to initial appointments and not to promotions so long as the 50 percent limit was not crossed by it for a given year.

In *T. Muralidhar Rao and Ors v. State of Andhra Pradesh*,[39] the Court

27. AIR 2008 SC 1. Also see, *Suraj Bhan Meena v. State of Rajasthan* [2011] 1 SCC 467.
28. AIR 1981 SC 298. See also, *State Bank of India SC/ST Employees Welfare Association v. State Bank of India* AIR 1996 SC 1838.
29. AIR 1976 SC 2381.
30. AIR 1993 SC 477.
31. AIR 2008 SC 1. Also see, *Anupam Thakur v. State of Himachal Pradesh* AIR 2012 HP 14; *National Legal Services Authority v. Union of India* [2014] 5 SCC 438.
32. AIR 1962 SC 36.
33. AIR 1993 SC 477.
34. AIR 1996 SC 448.
35. AIR 1964 SC 179. *Central Bank of India v. SC/ST Employees Welfare Asso.* [2015] 12 SCC 308.
36. AIR 1981 SC 298. See also, *State Bank of India SC/ST Employees Welfare Association v. State Bank of India* AIR 1996 SC 1838.
37. AIR 1993 SC477.
38. AIR 1995 SCW 1371.
39. Date of Decision 8th February, 2010. Msr/Ak.

held that the State of Andhra Pradesh was legally authorized to provide 4 percent reservation in favour of Backward Classes among the Muslims. The High Court of Chandigarh has delivered the landmark judgments of *Attar Singh Dhoor and Ors v. State of Punjab*,[40] *Krishah Pal and Ors v. State of Punjab*,[41] and *Devinder Singh v. State of Punjab and Anr*[42] regarding the issue of 50 percent reservation within reservation in favour of *Balmikis* and *Mazabhi Sikhs* in the State of Punjab and held that it was violative of Article 14 and was not permissible under the Indian Constitution. Similarly, In the case of *Suraj Bhan Meena and Anr v. State of Rajasthan*,[43] it was held by the Supreme Court that as no exercise was undertaken in terms of Article 16[4–A] to acquire quantifiable data regarding the inadequacy of representation of the SCs and STs communities in public services and as no study was undertaken by Chopra Committee with respect to Gurjar belonging to SBCs particularly when Gurjars were already covered under the category of OBCs so, there was no rhyme or reason to provide them special status by including them in SBCs without undertaking requisite study. The Court further held that Rajasthan High Court has rightly quashed the notifications dated 28th December, 2002 and 25th April, 2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the SCs and STs.

However, the Government has annulled several imperative solution providing decisions of the Supreme Court aimed at mounting the voter base, from time to time by making new amendments in the provisions of Constitution regarding reservation benefits to be provided to the weaker segments of the society. Numerous instances can be cited in this respect, like, in the case of *State of Madras v. Champakam Dorairajan*,[44] the Court took the view that a student by whom the requisite academic qualifications were possessed could not be denied the admission only on the ground of religion, race, caste,

40. Writ Petition [Civil] No. 15302/2005, [2006] RD–P&H 5564, [17th August, 2006], Date of Decision 25th July, 2006.
41. Writ Petition [Civil] No. 5815/2006.
42. Writ Petition [Civil] No. 182009/2009 [O&M], Date of decision 29th March, 2010.
43. AIR 2011 SC 874.
44. AIR 1951 SC 226.

language or any of them[45] and so, the Madras Government's communal Government Order was struck down as violating Article 15 or Article 29[2]. Then Sub–clause 4 was inserted to the Article 15 which when originally enacted, contained only three sub–clauses, by the **Constitution** [*1st Amendment*] **Act**, 1951, for only making the judgment invalid. Likewise, to tackle the position after the pronouncement of the Supreme Court of India in the case of *Indra Sawhney v. Union of India*,[46] the **Constitution** [*77th Amendment*] **Act**, 1995 was introduced through which a new Clause [4–A] was added to Article 16 of the Constitution of India for providing the reservation in matters of promotion to Scheduled Castes and the Scheduled Tribes. Furthermore the **Constitution** [*81st Amendment*] **Act**, 2000 has substituted Clause [4–B] after Clause [4] to Article 16 which seeks to end 50 percent ceiling on reservation for Scheduled Castes, Scheduled Tribes and Backward Classes in backlog vacancies which could not be filled up in the previous years due to non–availability of eligible candidates.

In order to wipe out the effect of the judgments of *Union of India v. Virpal Singh Chauhan*[47] and *Ajit Singh Janjua v. State of Punjab*,[48] Clause [4–A] was added under Article 16 of the Constitution.[49] Consequently, when any SC or ST Candidate was promoted earlier to General Candidate, his seniority in the new cadre would rank from the date of his joining on promotion. The 85th amendment had been given retrospective effect from 17th June, 1995 *i.e.*, from the date when the **Constitution** [*77th Amendment*] **Act** came into effect.

The **Constitution** [*93rd Amendment*] **Act**, 2005 has inserted Clause [5]

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45. In Para 7 it was observed: "*The right to get admission into any educational institution of the kind mentioned in Clause [2] is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this Article. But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right.*"
46. AIR 1993 SC 477.
47. AIR 1996 SC 448.
48. AIR 1999 SC 3471. See also, *AIIMS Students Union v. AIIMS* AIR 2001 SC 3262; *NTR University of Health Sciences v. G.B.R. Prasad* AIR 2003 SC 1947.
49. Inserted by the **Constitution** [*85th Amendment*] **Act**, 2001.

in Article 15 of the Constitution, after Clause [4]. The amendment was made by United Progressive Alliance Government to overcome the Supreme Court Constitutional Bench judgment in the *P.A. Inamdar* and *Ors v. State of Maharashtra Ors.*[50] The 93rd amendment that came into force from 20th January, 2006, extended the ambit of reservations even to "*private educational institutions, whether aided or unaided by the State other than the minority educational institutions referred to in Clause [1] of Article 30*".

From the above discussion about various findings pronounced by the Supreme Court and the amendments made by Parliament for invalidating those concrete judgments, it is quite very obvious that initially, the Parliament used to amend the Constitution to facilitate socio–economic reforms for the benefit of labouring masses. However, in the current years, the authority to amend the Constitution is used to nullify sound decisions of the Supreme Court which strengthen the fundamental structure of the Constitution and supplement its objects, merely for the purpose of gaining electoral benefits.

"*A thorn is to be removed by using another thorn*", says a proverb. Employing of caste criterion for undoing past injustices is largely justified on this notion. For example, in identifying the depressed castes, the 1931 Census looked to the prevalence of the following factors: inability to be served by Brahmans, barbers, water–carriers, tailors who serve the caste Hindus; inability to serve caste Hindus, to enter temples, and to use public conveniences such as roads, ferries, wells or schools; and inability to be disassociated from despised occupation.[51] These criteria were based on discrimination in access to human rights and dignity. For ameliorating the conditions of these categories of people and to restore to them their human rights, the criteria chosen were both rational and connected to the purpose. President's notification of Scheduled Castes on this basis for protective discrimination in 1950 was non–controversial. But controversy arose when

50 . AIR 2005 SC 3226. Also see, *Central Bank of India v. SC/ST Employees Welfare Association* [2015] 12 SCC 308; *State of Punjab and Ors v. Jagjit Singh and Ors* decided on 26th October, 2016.

51. Census of India, Vol. I, [1931, Part I], at p. 472.

Other Backward Classes of people or Socially and Educationally Backward Classes of people were to be identified for which no definite criterion of specific past injustice was forthcoming. Further, since Census reports do not disclose caste statistics, and therefore reliance on the 1931 data had become problematic.

In this regard various Backward Class Commissions appointed by State and Central Governments have used the criterion of caste as one of the parameters or initial reference groups. The **First Backward Classes Commission**, 1953 [Kaka Kalelkar Commission] reasoned:

> "*A variety of causes—social, environmental, economic and political—have operated both openly and in subtle form for centuries to create the present colossal problem of backwardness. Economic backwardness is the result and not the cause of many social evils*."

Low social position in traditional caste hierarchy, lack of education, and inadequate representation in government service, trade, commerce or industry were the causes for backwardness, it said. However, the **Second Backward Classes Commission**, 1978 [Mandal Commission] considered caste as a natural collectivity for defining backwardness. While it recognized the changes occurred in the caste system owing to democracy, urbanization, industrialization and mass education, it declined to accept any material alteration in the basic structure of caste. Since it is the opinion of Government about backwardness of any community as OBC or SEBC that is material for protective discrimination programme, State policy influenced by the Commission reports gained significance. The policies were judicially scrutinized and controlled in course of litigations from time to time.

Judiciary has consistently emphasized on application of multiple factor tests in identifying the beneficiaries of protective discrimination, and has declined to rely solely on caste in identifying backwardness.[52]

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52. *M.R. Balaji v. State of Mysore* AIR 1963 SC 649, at p. 659, *per* Chief Justice **P.B. Gajendragadkar**.

Thus, there is an overpowering mutuality between poverty and caste in the Indian scene. Recognizing poverty as the true source of the evil of social and economic backwardness and caste as a relevant factor in determining backwardness, **the Court also noticed occupation and habitation as two other important contributing factors and finally stressed the need for a penetrating investigation**.

Article 15[4] meant a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste could not be excluded altogether but it could not be solely relied upon. In view of the attempt to balance the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement as against the right of equality of citizens, an objective approach was indispensable. Inclusion of religion as a criterion for identification of backwardness is, however, not convincing as it goes against secularism, since religions bear no indicia of backwardness.

Caste cannot however be made the sole or dominant test... Social backwardness, which results from poverty, is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness.[53]

Relating to this Justice **Kuldip Singh**, has observed:

"*Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. The Constitution has completely obliterated the caste system and has assured equality before law. Reference to caste under Articles 15[2] and 16[2] is only to obliterate it. The prohibition on the ground of caste is total, the mandate is that never*

53. *K.S. Jayasree v. State of Kerala* [1976] 3 SCC 730: AIR 1976 SC 2381.

again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism—from feudalism to freedom.... Caste poses a serious threat to secularism and as a consequence to the integrity of the country.... Caste and class are different etymologically. When you talk of caste you never mean class or the vice–versa. Caste is an iron frame into which people keep on falling by birth.... Except the aura of caste there may not be any common thread among the caste–fellows to give them the characteristic of a class. On the other hand, a class is a homogeneous group which must have some live and visible common traits and attributes."[54]

Justice **Singh** held that castes could not be adopted as collectivities for the purpose of identifying the "*backward class*" under Article 16[4]. He agreed with the reasoning and conclusions reached by Justice **R.M. Sahai**, to the effect that occupation [*plus income or otherwise*] or any other secular collectivity can be the basis for the identification of "*backward classes*". **Caste collectivity is unconstitutional, and as such, not permitted**.

According to Justice **R.M. Sahai**, the backwardness of followers of traditional occupations[55] has been primarily economic or educational, and identification of such class cannot be caste based. Nor it can be founded, only on economic considerations, as "*mere poverty*" cannot be the test of backwardness. With these two negative considerations stemming out of

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54. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217: [1992] SCC [L&S] Supp 1, at pp. 176–7: paras 341 and 342. Prof. **Andre Beteille**, Department of Sociology, University of Delhi in his book **Backward Classes in Contemporary India** has succinctly brought out the distinction between "*caste*" and "*class*" in the following words: "*Whichever way we look at it, a class is an aggregate of individuals [or, at best, of households], and, as such, quite different from a caste which is an enduring group. This distinction between an aggregate of individuals and an enduring group is of fundamental significance to the sociologist, and, I suspect, to the jurist as well. A class derives the character it has by virtue of the characteristics of its individual members. In the case of caste, on the other hand, it is the group that stamps the individual with its own characteristics. There are some affiliations which an individual may change, including that of his class; he cannot change his caste. At least in principle a caste remains the same caste even when a majority of its individual members change their occupation, or their income, or even their relation to the means of production; it would be absurd from the sociological point of view to think of a class in this way.*"

55. Such as agriculture, market gardening, betel–leaves growers, pastoral activities, village industries like artisans, tailors, dyers and weavers, petty business–cum–agricultural activities, heralding, temple service, toddy selling, oil mongering, combating, astrology, *etc.*, *Indra Sawhney v. Union of India* [1992] SCC [L&S] Supp 1, at pp. 314–15.

constitutional constraints, two positive considerations, equally important and basic in nature, flow from principle of constitutional construction: **one** that the effort should, primarily, be directed towards finding out a criteria which must apply uniformly to citizens of every community, **second** that the benefit should reach the needy. Ideal and wise method, therefore, would be to mark out various occupations, find out their social acceptability and educational standard, and weigh them in a balance of economic conditions. Advantage of occupation–based identification would be that it should apply uniformly irrespective of race, religion and caste. Since Article 16 forbids classification on the ground of caste, no backward class could, therefore, be identified on the basis of caste. Justice **Thommen**, also expressed similar opinion.[56]

The defects of caste criterion in identification of beneficiaries of protective discrimination are brought out in dissenting judgments and academic writings. While for the purpose of eradication of untouchability and amelioration of Scheduled Castes and Scheduled Tribes, caste and racial factors have been regarded as unobjectionable, and even for identifying OBC or SEBC their application is experienced to be problematic. The reasons as follows:

Firstly, since caste is a constitutionally prohibited ground of discrimination and has linkage with religion, use of it even for ameliorative purpose is not appropriate especially when alternative and secular criteria can be used for identification of backward classes. Since for categories other than SC/ST, **caste is not a thorn—like agonizing factor**, **it looses relevance as a countervailing measure**.

Secondly, caste in the present day world is not reflecting attributes of superiority or subordination with privileges and disabilities because of the social dynamics of urbanization and education. As viewed by **A.M. Shah**:

"*A correct understanding of the caste situation today requires recognition of the fact that 25.7 percent of India's population is urban.*

56. *Indra Sawhney v. Union of India* [1992] Supp 3 SCC 217: AIR 1993 SC 477: [1992] SCC [L&S] Supp 1, at pp. 158–59.

Therefore, it would be incorrect to define caste only in terms of the village community, as is done frequently."[57]

Further, in villages also, the economic changes like fragmentation of land holding, reliance on non–agricultural income or occupation, and scarcity of agricultural labour have resulted in altering the economic power base or subjection of castes.[58]

Thirdly, determination of status of caste on the basis of caste–wise statistics of 1931 census, as is presently done by various Commissions, is unscientific. A long period of 75 years' must have brought tremendous changes in the social and economic position of people in various castes. Some castes have moved upward by dedicated efforts, enterprising attitude and enlightenment, in spite of their past position.[59] According to **Yogendra Singh**, the process of social mobility through new jobs, education, enterprises, access to political offices, etc. have severely fractured the homogeneity of communities, and made it possible now to look at the Indian structure in terms of categories such as occupation, class, ideology *etc*., rather than as communities such as caste, kinship, tribe or religious groups.[60] Further, the constitutional provisions refer to the present backwardness for amelioration.

Fourthly, caste based identifications have great divisive tendency in view of the fact that in order to get the benefits, devious methods are adopted by false attribution of some characteristics or even by false certificates. The means test that is used to keep away the creamy layer is not foolproof in practice in checking undeserved claims. These distortions divide the society further. As Justice **Sen**, said in *Vasanth*

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57. Shah A.M., ***The Judicial and the Sociological View of the Other Backward Classes*** in Shah Chanshyam [Ed.], **Social Transformation in India**, Vol. I, Rawat Publications, New Delhi, [1997], at pp. 254, 260.
58. Gupta Dipankar, ***Caste Today: The Relevance of a Phenomenological Approach***, India International Center Quarterly, [Summer, 2005], at p. 153.
59. One example of tremendous development of a caste classified as backward in 1931 census during subsequent decades is the *Bunt* community in **Karnataka**.
60. Singh Yogendra, **Social Stratification and Change in India**, Manohar, New Delhi, [1997], at pp. 161–63, 220–22.

Kumar:

"*Irrational and unreasonable moves by the State will slowly but tear apart the fabric of society.*"[61]

To remember the words of **R.H. Tawney**:

"*Because men are men, social institutions, property rights, and the organization of industry, and the system of public health and education should be planned, as far as is possible to emphasize and strengthen, not the class differences which divide but the common humanity which unite them.*"

Justice **V.R. Krishna Iyer** has given a word of sociological caution:

"*In the light of experience, here and elsewhere the danger of 'reservation', it seems to me, is three–fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest amongst the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near–equals formally categorized as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross–fertilization of castes by inter–caste and inter–class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism.*"[62]

It is viewed that caste–based reservation perpetuates caste system, as reservation once introduced, faces reluctance for withdrawal.[63] Further, the dominant section of the backward caste, in spite of *Indra Sawhney* mandate to exclude creamy layer, would corner the benefits at the cost of the weakest amidst their own brethren.[64]

The critical analysis of the experience and opinions of the persons

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61. *K.C. Vasanth Kumar v. State of Karnataka* [1985] Supp SCC 714: AIR 1985 SC 1495: he viewed that unless moderation is not injected into Articles 15[4] and 16[4] decisions growing sense of injustice would destroy rather than advance social justice.
62. *State of Kerala v. N.M. Thomas* [1976] 2 SCC 310.
63. Daniel Müller, ***Reservations and Time: Is There Only One Right Moment to Formulate and to React to Reservations?***, The European Journal of International Law, Vol. 24[4], [2013], at pp. 1113–1134.
64. Rao P.P., ***Right to Equality and the Reservation Policy***, [2000] 42, JILI, 193, at p. 200.

belonging to SCs, STs, and OBCs in relation to the implementation of the policy of reservation. Conclude that, **one of the foremost social realities that shape inter–group and inter–personal social relations in India is caste system**. The unequal opportunities and conditions of dignity offered by the social categorization through caste system in educational and economic fronts cannot be silently tolerated by a welfare State. **Untouchability**, **which is the culmination of caste prejudice of pollution/purity**, **is one of the grossest violations of human rights to which legal system has been quite sensitive**. While filling the values of cosmopolitan culture into a tradition bound hierarchic society faces all the challenges of modernization, levelling up the lowly and the weak by ameliorative policy attains abundant significance in the context of legal system adhering to social justice and social revolution. The social responses to issues relating to composition, inter–group mobility and inter–group tension have resulted in conflicts, sensitive struggles and evolution of compromise policies.

Furthermore, current reservation policy has not been successful to recognize the acclaimed ambition of building a caste–less society. Rather it has divided the whole motherland on caste basis. It has sown the seeds of categorization between the privileged and the under–privileged among the under–privileged classes. This policy has also resulted into a new trouble of political mobilization. The high caste communities think discriminated due to Government policy to reserve positions for SCs and OBCs which in turn appears to be leading to a state of unjust reverse discrimination.

Another problem attached to the policy of reservation is that it has to make compromise with merit and efficiency. It is further highlighted that this policy of reservation is going to loose its bearing owing to prevalence of the present concepts of globalization, privatization and liberalization. When the **Indian Constitution** was enacted in 1950, the reservations were to come to an end after 10 years. However, having regard to the socio–economic conditions of scheduled castes and scheduled tribes, the Constitution has been amended from time to time, and the period of **10**

years has been extended to **20 years**,[65] then to **30 years**,[66] then to **40 years**,[67] then to **50 years**[68] and then to **60 years**.[69] At present, it [*new amendment in the Constitution*] provides that the reservation will cease after **70 years**[70] *i.e.*, **after 2020**. It shows that this policy does not remain to be a time–bound policy which itself is indicative of its failure. Thus, it is quite clear that the present law and policy of reservation is inadequate and has certain loopholes, lacunas and pitfalls. Consequently, requisite and appropriate amendments in the existing law and policy of reservation are the need of the hour.

The study reveals: **first** that the people belonging to effluent sections irrespective of the category and religion in which they fall are not at all deserve to be the beneficiaries of this policy. However, still they are eligible and are included in the list of beneficiaries at the place of real backward poor person. Only the poverty ridden persons of each and every category and religion are backward in the real sense and so, in the present society now, the caste–criterion as the basis of the policy has nothing to do with the backwardness of the people of the society. **Secondly**, this policy not only has hampered the initiative power and stamina of its beneficiaries but has also created a lot of other problems for them. This policy saps the will and moral strength of those people to discard their crutches and face the world on equal terms. Thus, this policy tends to stigmatize those events whom it is designed to assist. In the present modern world, where only the efficiency is counted, the in–efficient and un–trained low castes people have no place left in any field of life. Women to which category they belong, are always exploited in the male patriarchal society in India. So, they need to be provided with the particular provisions in their favour in addition to their proper and adequate implementation.

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65. The **Constitution** [*80th Amendment*] **Act**, 1959.
66. The **Constitution** [*23rd Amendment*] **Act**, 1969.
67. The **Constitution** [*45th Amendment*] **Act**, 1980.
68. The **Constitution** [*62nd Amendment*] **Act**, 1989.
69. The **Constitution** [*79th Amendment*] **Act**, 1999.
70. The **Constitution** [*109th Amendment*] **Act**, 2009: Through this amendment, Article 334 of the **Indian Constitution**, for the words "*sixty years*", the words "*seventy years*" has been substituted. Now this amendment has extended the reservation beyond 25th January, 2010. Also See, Kumar R., ***Constitutional Amendments: An Instrument for Social Transformation***, Research Inspiration–An International Multidisciplinary e–Journal, Vol. 3[1], Dec., 2017, at pp. 440–446.

It is also sufficiently and clearly observed that the procedure for the issuance of Caste certificates suffers from a number of irregularities like, un–limited discretionary powers vested in the authorities for the issuance of such certificates, corrupt and mal–practices adopted by them and issuance of the certificates without making proper investigations and enquiries. The issuance of false certificates in turn vests in favour of even the forward classes [*creamy–layer*] the right to get the benefits of this policy leaving nothing for the more backward poor groups among the different categories. The high amount of costs charged by different coaching centers for providing coaching and guidance to the candidates to enable themselves for the entrance examination or PMT and CET *etc*., indicates that only the creamy–layer was able to get the higher education and in turn better job opportunities which itself results into their better financial position and higher standard of living. And the vice–versa is applicable to the poor people irrespective of the castes and religion.

Even after seventy years of Independence, the overall economic inequalities in India are characterized by such remarks as "*the rich are becoming richer and the poor poorer*" and "*the gulf between the rich and the poor is broadened*". It is evidently specified that poverty levels for members of various religious factions are not homogeneous in India and are observed to vary considerably across ethnic and caste–based identities of group member. On the other hand, it is well documented fact that the intensity of poverty is higher among the Scheduled Castes, Scheduled Tribes and Other Backward Classes on the whole in India. The dawn of freedom is yet to bestow an enthusiastic smile on the Scheduled Castes, Scheduled Tribes and Other Backward Classes who are still striving to achieve liberation from socio–economic domination. Liberty, equality and justice so luxuriantly enshrined in our Constitution have yet to attain any meaningful proposition for these people. Since only "*cream of the crop*" *i.e*., the richer and the more affluent sections among the Scheduled Castes, Scheduled Tribes and Other Backward Classes have grabbed and chewed the larger chunk of the cake.

The policy of reservation has only produced small elite among the Scheduled Castes, Schedule Tribes and Other Backward Classes and has not lent a hand in elevating the socio–economic standing of the fragile and the underprivileged groups. The members of the backward beneficiary categories arc differentiated into superior and inferior. Consequently, the poorer and the really backward sections among them kept on getting poorer and more backward. The poorest of the poor have received nothing but promises. The discrimination which was practiced on the inferior poverty ridden class by the superior class is in turn practiced by the affluent members of the backward class on poorer members of the said class. However, it is often observed that comparatively rich persons in the beneficiary categories—though they may not have acquired any higher level of education—are able to move in the society without being discriminated socially. However, these rich persons of the beneficiary categories particularly category of Scheduled Castes, even if have crossed the barriers of backwardness but while identifying the class they still come within the collectivity.

Caste based policy of reservation based on "*quota system*" has institutionalized complete fragmentations of society and the actual victims of neglect are the real poor, a social category which cuts across religion, caste or region. The policy of quota–based reservation comes into direct confliction with the real problem by the real poor to transcend every level, But on merely class issue regarding the really exploited classes neither the Indian State nor the theorists of group representation show any attention or concern. The reason for this is that the "*deprived strata of society*" are politically orphans. Thus, at present it has all become a grimy political game with vote making propensity. Caste–based reservation is a populist measure and it just aids in strengthening casteism, communal divisiveness and corruption in the public life, university campuses and public offices. With group identities and interests lifted up to a keystone of political struggle, India now faces the long running scenario of a caste war fought out on various social and economic fronts, at varying intensities. This is due to the policy of caste based reservation because its

success is guaranteed by Divide and Rule. In a nutshell, it can very straightforwardly be derived that the present policy of reservation has failed to accomplish the desired objectives for which it was formulated. Social and economic in–equalities continue to persist. The current policy is generating tension among the different castes thereby endangering the very existence of India as a Nation and is creating a caste conscious society instead of cohesive, unified, caste–less and class–less society, the authentic aim of the **Indian Constitution**. Dr. **B**.**R**. **Ambedkar** visualization did not end at the horizon of Dalit power; but he envisioned an India liberated from caste consciousness, an innovative society no longer trapped in the feudal binaries of master and slave, privilege and privation.

The research work comprises of seven chapters. There are as follows:

1) **Chapter one** provides the detailed introduction and evolution and genesis of the discriminatory practices based on the caste–system prevalent in India. It also deals with the importance of the present study. It is highlighted that the doctrine of equality is the foundation of social justice on which the palace of democracy can be built.
2) **Chapter two** deals with the historical perspective of right to equality and reservation.
3) **Chapter three** includes various provisions of reservation policy and various other measures adopted in favour of Scheduled Castes, Scheduled Tribes and women under the **Indian Constitution**. The framers of the **Indian Constitution** have given a special place to the erstwhile untouchables under the Constitution. The Scheduled Castes and the Scheduled Tribes are characterized by the poor economic condition as well as by the lowest social or ritual status in the caste hierarchy. The poor and the oppressed people, who are now called as the Scheduled Castes, were shrouded in the darkness of the repression, exploitation and the perplexity and were also the victims of an inferiority complex, deep–rooted poverty, backwardness, illiteracy, exploitation and the social subjugation before the dawn of the liberty. So, they

had remained socially, educationally and economically more backward than any of the higher castes in the country. Numerous steps had been taken from time to time in the pre–Independence India, for improving the status of these strata or sections of the society but they touched only the border or the problem. The noticeable progress has been registered only after the emergence of India as a Sovereign Independent Republic. The **Indian Constitution** as a social document envisions a conversion of Indian society from medieval hierarchical and clogged society into modern, secular and democratic society through the extension of the improved amenities to the oppressed in order to enable them for achieving upward mobility by acquiring social, economic, educational and political authority. The constitutional policy of compensatory discrimination was formulated and implemented to facilitate the lower–status castes to change their social and economic position.

4) **Chapter four** reveals the existing reservation policies. In India, affirmative action policies have facilitated a very small section or strata of the society of India among under–privileged categories to progress towards a semblance of economic and social equal opportunity. Unlike any other country, the caste identities have been made more prominent by India's affirmative action policies when the target was to lessen the stratification by caste. This is all indicative of the fact that the laws and policies were not well planned, inadequately formulated and badly implemented. The time has come when the laws and policies of reservation should be made need based. The poverty is the root cause of all the ills and is a world phenomenon now. Now–a–day's world is a materialistic one therefore, all the laws and policies of reservation arc needed to be based upon the economic criteria only.

5) **Chapter five** analyses the judicial approach towards the policy of preferential discrimination. The judiciary has done laudable job by pronouncing extraordinarily sound judgments in relation to problems of preferential and protective discrimination. Judiciary has successfully preserved and safeguarded the fundamental rights of the citizens and helpless groups which were at risk because of the policy of reservation

executed by the Government from time to time. In reality, it has been required by the court that reservation policies should be so formulated as to "*strike a reasonable balance*" among "*several relevant considerations*". To interpret the rule of law in action and to provide justice at the door of poorest of poor, the judiciary in India has made an adequate attempt. The judiciary has also been vigilant to create classless society and gradual abolition of caste consciousness.

6) **Chapter six** emphasizes on the reservation and its impact on Indian society. The social responses to issues relating to composition, inter–group mobility and inter–group tension have resulted in conflicts, sensitive struggles and evolution of compromise policies. Overall direction towards social integration of different communities and building up of harmonious society is visible in these policies. The present chapter focuses on reservation and its impact on Indian society and the views of the various sociologists regarding the various factors for reservation.
7) **Chapter seven** includes overall conclusion of the study, including observation, finding and suggestions.

In this research study the researcher has tried to cover the whole gamut of protective discrimination related issues and concern in India with an emphasis on legal rights of weaker segments of the society including SC's, ST's and women. It can be an important compendium for the discriminatory practices based on the caste system prevalent in India. Additionally, the thesis can be an important guide for researchers in identifying various research questions for further research on related issues regarding reservation policy in India. Views expressed in the study, not specifically attributed to others, are mine and do not reflect the views of the Government.

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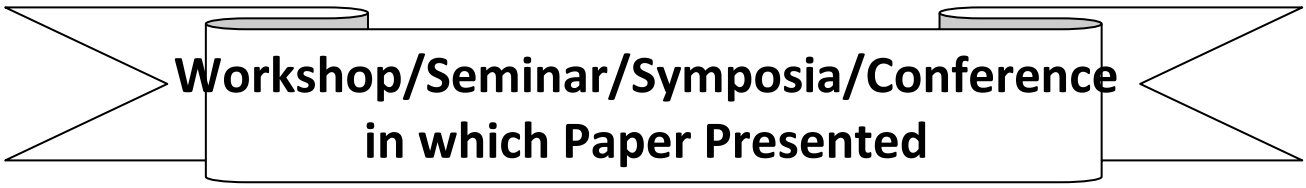
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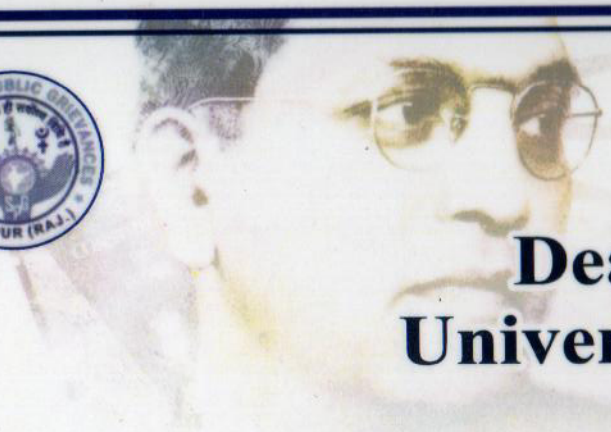
Appendixes

Published Two Research Papers in Referred Research Journals



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Certificate

This is to certify that Dr./Mr./Mrs. Ashok Kumar Meena *of the college/ Institute* Govt Law College, Kota *has participated/presented a paper on topic* Reservation policy and Indian constitution *in the National Seminar on "Constitutional Dream of Justice: Neeessity of ADR" held at Senate Hall, University of Rajasthan, Jaipur on Saturday, 14 April 2018.*

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Designation Lecturer Institute Rajeev Gandhi Vidhi Mahavidyala Tonk has participated/

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TRIBAL DEVELOPMENT: SECURITY AND SOCIAL JUSTICE MEASURES

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- **Abstract**

India is exposed to global interactions from ancient times with an influx of different racial stocks due to war, subjugation and immigration, in addition to a variety of indigenous settlers or tribal peoples in different geographical pockets. The problems have been not merely that of diversity, but also of differences and deprivations that demand resolution by development. Serious differences in tradition, in levels of economic development, and in political participation among the ethnic communities have been looked upon. Human rights values, developmental goals and people's participation through grass root institutions as enshrined in the Constitution have lent great strength to these approaches towards social transformation. The overall historical experience has been towards acceptance of the policy of protective segregation, empowerment and development. However, it is also noted that self–governance with special right to retain customary laws and distinct social and religious practice was a historically evolved right. **The article focuses on features of multi–ethnic society and resolving the problems of pluralism by way of tolerance, protection and development in order to deal with the exploitations and suppressions**.

- **Prologue**

India is exposed to global interactions from ancient times with an influx of different racial stocks due to war, subjugation and immigration, in addition to a variety of indigenous settlers or tribal peoples in different geographical pockets. The problems have been not merely that of diversity, but also of differences and deprivations that demand resolution by development. Serious differences in tradition, in levels of economic development, and in political participation among the ethnic communities have been looked upon. Human rights values, developmental goals and people's participation through grass root institutions as enshrined in the Constitution have lent great strength to these approaches towards social transformation. The overall historical experience has been towards acceptance of the policy of

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protective segregation, empowerment and development. However, it is also noted that self–governance with special right to retain customary laws and distinct social and religious practice was a historically evolved right. The article focuses on features of multi–ethnic society and resolving the problems of pluralism by way of tolerance, protection and development in order to deal with the exploitations and suppressions.

- **International Human Rights Regime for Tribal Development**

The interaction between social transformation and human rights is one of the finest developments that have benefited the mankind in various spheres. Along with growth of humanism, the barbarous practices of genocide got universally condemned.[1] In this regard, the **International Convention on the Elimination of All Forms of Racial Discrimination**, 1965 states that the State parties condemn racial discrimination,[2] and aim to eliminate it in all its forms and promote understanding among all races. In addition, Article 1.4 allows the States to take special measures for the purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals' equal enjoyment or exercise of human rights and fundamental freedoms subject to durational limits. Further the **International Covenant on Civil and Political Rights**, 1966 states that:

"*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*"[3]

Furthermore, the **Vienna Declaration and Programme of Action**, 1993 considers the elimination of racism and racial discrimination, in particular in their institutionalized forms such as apartheid or resulting from doctrines of racial superiority or exclusivity or racial on

[1]. Genocide means any of the following acts which have the intention of destroying, in whole or in part, a national, ethnical, racial or religious group, "*killing members of the group*; *causing serious bodily or mental harm to members of the group*; *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*; *imposing measures intended to prevent birth within the group*; *forcibly transferring children of the group to another group*". Article 2 of the **Convention on Prohibition and Punishment of the Crimes of Genocide**, 1951.

[2]. "*Racial discrimination is any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*". Article 1.

[3]. Article 27 of the **International Covenant on Civil and Political Rights**, 1966.

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tolerance, as a primary objective for the international community and a worldwide promotion programme in the field of human rights.

International Labour Organization[4] has also tried to build up a strong base and comprehensive plan of affirmative action to benefit the indigenous people ever since 1957. Further, the **Indigenous and Tribal Population Convention**, 1957 has importantly in this regard has stated:

"*So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.*"

The ILO Recommendation concerning protection and integration of indigenous and other tribal and semi–tribal populations, 1957 elaborates about their right to land reserve for shifting cultivation and for other purposes, about special measures for their recruitment and fair conditions of employment and for social security. In addition, **Article 2** imposes responsibility upon the Governments for developing, with the participation of the people concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

A provision of far reaching importance that has emphasized protection of identity of the indigenous community is traceable in Article 7. It states that the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well–being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. The improvement of the conditions of life and work and levels of health and education of the peoples concerned shall be a matter of priority in plans for the overall economic development of areas they inhabit.

The **Declaration of San Jose on Ethno–Development** adopted by UNESCO in 1982 further affirms ethno–development as an inalienable right of the indigenous people. It

[4]. According to Lee Swepston, the ILO has the most effective and well–developed mechanism for human rights protection because of wide range of international conventions, examination of reports and input from NGOs. *See*, Lee Swepston, ***The International Labour Organisation's System of Human Rights Protection***, in Janusz Symonides, **Human Rights**: **International Protection**, **Monitoring and Enforcement**, Ashgate, UNESCO Publishing, Hants, (2003), at p. 91.

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conceptualizes ethno–development as an extension and consideration of the elements of its own culture, through strengthening the independent decision–making capacity of a culturally distinct society to direct its own development and exercise self–determination.

Another important international step is the **Rio Declaration** and **Agenda 21**,[5] wherein the special relationship between Indigenous People and their lands is acknowledged. Indigenous People have a vital role in environmental management and development because of their traditional knowledge and practices.[6]

The provisions as given under the **Convention on Biological Diversity**, 1992 calls upon its signatories to "*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices*".[7]

Carrying this theme ahead, the **UN Declaration on International Cooperation**, 1990, has stated that in the background of environmental destruction and external debt, "*development*" requires a healthy, literate and skilled population that has the freedom and the means to participate in decision making.

The thrust of above development is to integrate human rights of the indigenous people with their culture, land and ecology with which they are inextricably connected. In India, the approach to the issue of ethnic minorities has been one of integration, by balancing between isolationist and assimilationist policies. The isolationist policy believed in leaving the tribal people to themselves to live according to their own traditions without external interference. On the other hand, assimilation had the objective of mixing with the mainstream through development, "*civilizing process*" and access to modern amenities. Their right of self–

[5]. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well–being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate and strengthen the role of indigenous people and their communities.
[6]. Principle 22 of the **Rio Declaration**.
[7]. Article 8(j).

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determination, concern for protection of identity and demand for security of their land, resources and institutions as well as state's policy of need–based affirmative action for their development are given great emphasis with an integrated approach. This integrated approach is also reaffirmed by the Indian Constitution–makers who were pioneers in visualizing and planning about the appropriate way of tribal development through security, self–government and social justice.

- **Tribal Development and Security**

To be secure is to be free from dangers, troubles and attacks. Security gives a feeling of self–confidence, and enables development. In the context of tribal development, security connotes protection of land and other natural resources for their reasonable use; protection from exploitation by moneylenders, land grabbers and contractors; protection of environment, especially forest; and safeguarding of their customs, traditional knowledge and culture. For a primarily agro–based community like tribes, land is an invaluable resource. Earth is provider of food, medicine, shelter, and clothing; it is the seat of spirituality, the foundation of culture and language; it is the keeper of history, identity and memory of forefathers.[8]

Historically, tribal areas remained distinct from the general land management system due to their inaccessibility. Inadequacies in land records coupled with poverty and illiteracy gave scope for their exploitation by Zamindars, contractors and middlemen. The protective measures introduced by the British to deal with the situation included recognition of community ownership in some area and prohibition of transfer of land from tribals to non–tribals.[9] As **Simon Commission** report said, in view of the fact that the tribals were primitive people, simple, unsophisticated and frequently improvident: "*there was a risk of their agricultural land passing to the more civilized section of the population, and the occupation of*

[8].The World Council of Indigenous Peoples. *See also*, *Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191.

[9].The **Scheduled Districts Act**, 1874 and the **Agency Tracts and Land Transfer Act** of 1917 contain such provision. Section 4 of the Act of 1917 reads:

1) Notwithstanding any rule of law or enactment to the contrary, any transfer of immovable property situated within the Agency Tracts by a member of a hill tribe shall be absolutely null and void unless made in favour of another member of a hill tribe, or with the previous consent in writing of the Agent or of any other prescribed officer.
2) Where a transfer of property is made in contravention of Sub–section (1), the Agent or any other prescribed Officer may on application by anyone interested, decree ejectment against any person in possession of the property claiming under the transfer and may restore it to the transferor or his heirs.

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the tribals was for the most part agricultural; *and*, *secondly*, *they were likely to get into the* '*wiles of the moneylenders*'. *Accordingly, in the* ***Government of India Act***, *1935 appropriate provisions for protection of land of the tribals were made*".

Paragraph 5(2) of the **Fifth Schedule** to the **Indian Constitution** provides that the Governor may make regulations for the peace and good Government of any area in a State which is for the time being a Scheduled Area. Without prejudice to the above general power, special power has been conferred under Clause (a) to prohibit or to restrict the transfer of land by or among members of the Scheduled Tribes in such area; under Clause (b) to regulate the allotment of land to members of the Scheduled Tribes in such area; and under Clause (c) to regulate money–lending to the tribals in the Scheduled area.

Thus it can be submitted that the non–tribals, at no point of time, have any legal or valid title to immovable property in Agency tracts unless acquired with prior sanction of the Government and saved by any law made consistent with the Fifth Schedule.[10]

Under Paragraph 3(1)(a) of the **Sixth Schedule** to the **Indian Constitution**, the District Councils and Regional Councils have power to make laws with respect to the allotment, occupation or use or the setting apart of land other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non–agricultural purposes or for any other purposes likely to promote the interests of the inhabitants of any village or town.

Further, under Article 31–A proviso, the **Indian Constitution** also recognizes right to compensation at market value when land under personal cultivation and within ceiling limit is taken away by the State.

However it is to be submitted here that inspite of legal measures, land grabbing has been practiced through forcible eviction, *benami* transactions, collusive decrees, forged documents, marriage with a tribal woman.

- **Security of Forest Dwellers**

The symbiotic relationship between the tribal and forest in well-established over the years. It is common knowledge that the *adivasis* and other backward people living within the *jungal* used the

[10]. *Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191.

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forest area as their habitat.

The **Scheduled Tribes and Other Traditional Forest Dwellers** (*Recognition of Forest Rights*) **Act**, 2006 came into being on 29th December, 2006. The main aim of the Act is to recognize and vest upon forest dwelling STs and other traditional forest dwellers, which have been residing in forest from generations but whose rights could not be recorded, their forest land rights and occupation in forest land. It imposes responsibilities upon, and confers authority to them for sustainable use, conservation of biological diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forest while ensuring livelihood and food security of the forest dwellers that are integral to the very survival and sustainability of forest eco system.

The Act has tried to strike a fair balance between protection of wild life and forest rights of forest dwellers.

Grass root democracy is relied upon in decision–making process regarding identification of the genuine occupants. Quite importantly, the Act provides special authorized power to the *Gram Sabha*. The *Gram Sabha* shall be the authority for determining the extent of individual or community forest rights or both given to forest dwellers without the local limits of its jurisdiction. It will be responsible for claims consolidating and verifying them and preparing a map delineating the area of each recommended claim.

- **Security from Environmental Pollution**

The efforts to exclude human intervention in national parks and sanctuaries have necessitated balancing between interests of the forest dwelling tribals to collect minor forest produce and to exercise other traditional rights on the one hand, and conservation of forest and wildlife on the other.[11]

Linking of indigenous rights to conservation of natural resources has great contribution to efficient resource management.[12] Their competence to contribute comes from their intimate

[11]. *Animal and Environmental Legal Defence Fund v. Union of India* (1997) 3 SCC 549: AIR 1997 SC 1071; *Pradeep Krishen v. Union of India* (1996) 8 SCC 599: AIR 1996 SC 2040; *Niyamavedi v. State of Kerala* AIR 1993 Ker 262; *Jaladhar Chakma v. Commr., Aizawl* AIR 1983 Gua 18.

[12]. Stan Stevens (Ed.), **Conservation through Cultural Survival**, Island Press, Washington DC, (1997), at pp. 266–67.

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knowledge of local geography and ecology, their land use and resource management practices and expertise, and their spiritual and traditional commitment to resource conservation. The potential benefits can be identified in enhanced protection of human rights and promotion of welfare, facilitating of rural and economic development, and extension of moral and legal support to communitarian efforts.

- **Security of Tradition and Custom**

The **ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries**, 1989 states that in applying national laws and regulations to the peoples concerned, due regard shall be given to their customs or customary laws; that these peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.[13] While right to retain customary law itself is a human right, subjection of the customary law to other human rights and Fundamental Rights gives scope for purging the customary law and eliminate its objectionable parts. This is a welcome development from the perspective of social reforms and better protection of interests of women.

Amidst various components of culture, their family law constitutes one important aspect, which they prefer to cherish. Both the Fifth and Sixth Schedules contain provisions for allowing them to continue and for **excluding their operation of general law and reforms from their application to tribal**.

As noted the **Hindu law** statutes contain clear provisions to exclude the STs from the application of the statutes unless the Central Government, by notification in the Official Gazette, directs otherwise.[14]

In view of these norms favouring *status quo*, the task of social transformation through introduction of principles of gender and social justice is to be handled through social consensus to be duly evolved and sensitized by modern education. The need to balance between continuity and change is more clearly visible in this domain.

However it is also to be mentioned here that many of the tribal customary laws reflect

[13]. Articles 4, 8, 12 and 13 of the **Draft UN Declaration on Rights of Indigenous Peoples**, 1994.
[14]. For example Section 2(2) of the **Hindu Marriage Act**, 1955; Section 2(2) of the **Hindu Succession Act**, 1956 *etc.*

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norms of male dominated society but in some tribes matriarchial system is prevalent; and that gradual social changes are occurring due to economic factors and modernization, but far reaching changes are yet to occur because of lack of preparedness.

- **Security Against Insurgency**

The North–East part of India has faced insurgency because of pressure upon resources owing to influx of illegal migrants from neighbouring countries and settlers from other parts of India. The **United Liberation Front of Assam and National Socialist Council of Nagaland** had spearheaded armed insurgency and violence against the government and civilians in 1980s and 1990s. The application of special powers under the **Armed Forces Special Power Act**, 1972, **Assam Maintenance of Public Order Act**, 1952 *etc*., in excessive manner has given rise to human right violation issues. Lack of adequate economic development and anger against the non–local settlers have been responded to some extent by the central and state administration by offer of economic reform packages, local autonomy and other long term solutions.

- **Social Justice Measures for Tribal Development**

Social justice is the sine qua non of tribal welfare policy. Article 46 of the **Constitution** requires the State to promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation.[15] Affirmative action in the form of reservations are available under Articles 15(4)(5) and 16(4) to members of the Scheduled Tribes in educational institutions and in public employment. State's power to impose reasonable restrictions[16] upon citizens' freedom of residence and movement in the interests of STs also speaks about the special policy in favour of STs especially for protecting their economic and cultural interests. Under **Article 330** reservation of seats in the House of People for SCs and STs in proportion to the percentage of their population is contemplated. Similar provision is there in respect of State Legislative Assemblies also.[17] First proviso to Article 275(1) provides for assured special financial assistance for promoting the welfare of STs and for raising the level of the specially administered area.

[15]. *Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191.
[16]. Article 19(5).
[17]. Article 332.

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Schemes for Primitive Tribal group, Tribal Research Institution, hostels, residential schools, vocational training and setting up of National ST Finance and Development Corporation and Tribal Cooperative Marketing Development Federation of India Ltd. have extended institutional support for ensuring social justice to STs.

Wherever the matters relating to STs came up before judiciary, they are treated with sensitivity and sympathy.[18]

Thus, it is noted that even in private agency's actions affecting the tribal people's interests the policy of social justice has an entry in order to sensitize the legal environment. Application of reservation policy in jobs, educational institutions and representative bodies and of laws against atrocities on SC/STs has also its own impact of safeguarding the ST interest.

- **Conclusion and Suggestions**

The integrated means of security, self–government and social justice reflect sustainable efforts of involving the community in the task, filling confidence against cultural effacement and economic exploitation, and facilitating their all–round development. Significantly, the orientation towards security surpasses the other components In view of economic exploitation and threat to their socio–cultural existence, their family laws are immunized. Expansion of human rights jurisprudence in this sphere needs to be supported by its effective application. The new Pancahayati Raj law into the traditional one has not caused difficulty because of their common features and availability of measures for adjustments. Multiculturalism has moulded the social transformation strategy by setting its direction and pace. But ever though, there is a need of the process of balancing between continuity and change which may make substantive contribution. However some of the suggestions are put forward which are as follows:

1) With the growth of society, the features and characteristics of the beneficiaries have also undergone change. However, objectivety has suffered when prejudice, favouritism and mere political consideration are mixed with policy. Therefore **there is a need of affirmative action which would help in channelizing the benefits by the executive through various development schemes**.

[18]. *Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191.

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2) The Courts have been admiring of the sui–generis nature of the detrimental situation of the ethnic minorities. Thus it is further duty of the Courts to ameliorate and elevate this social segment which is not able to compete with an advanced segment but without the loss of their identity and culture.
3) Strict implementation of legal measures striving towards resolving the problems of pluralism by extending the mainstream ideology of welfare, democracy, development and national unity.
4) At the *Panchayat* level, self–governance schemes should be implemented to retain customary laws and distinct social and religious practice.
5) Participation of the tribal people and representation in the formulation, implementation and evaluation of plans and programmes at all levels.
6) Strict penal action against any kind of fraud made by the non–tribals concerning the security of forest dwellers.

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Right To Equality and Protective Discrimination in Regard to Reservation : A Socio-Legal Study into its Modern Perspectives

After about three decades of the operation of the policy of protective discrimination, the parameters of the socioeconomic situation have changed enough. Now the SCs and STs are no longer as uniformly backward as they have been when the constitutional provision for preferential facilities for them were made. As individuals they had reached a point at which they seemed to be much less deserving of preferential provisions than the mass of the population to which they belong. Therefore the creamylayer test should also be applied to the SCs and STs for identifying the actual beneficiaries under the Schedule, prepared for them only.

ASHOK KUMAR MEENA

Introduction :

The issue of "protective discrimination" through reservations is steeped in questions of equality, merit and social justice. Understanding the interactions between these questions has long evoked judicial, political and academic debate. The debates on affirmative action or protection discrimination tend to employ the language of rights, particularly the rights of "upper" against the rights of "lower" castes. The demands that the state should distribute benefits of education and employment between different castes and communities is a strong one as it echoes a social ideal that has prevailed in India for centuries. What is noticeable is a continued tendency to assert "rights" of one group as against another, as opposed to rights of an individual as an individual. The Indian Constitution guarantees fundamental rights of equality of opportunity and nondiscrimination to individuals. While the justification for the reservation policy and the quota system has been accepted by all, debates are polarized on 3 main questions: the beneficiaries of the policy, its extent and its permanence. These have been thrashed out since the turn of the century, however debates intensified post Mandal and Indra Sawhney and their legacy continues till date. So, inspired by all these logical situations of contemporary India, where from every state there is hue and cry for reservations and people get delighted to identify themselves belonging to a particular backward class or caste, the reservation has undertaken the issue of protective discrimination, to study it from sociolegal perspective. In the polemical debate on reservations, one often sees a bewildering array of terms employed, like affirmative action, positive discrimination, compensatory discrimination, protective discrimination etc.

Protective Discrimination and Judicial Treatment :

In some of the earlier cases, the Indian Supreme Court understood that the guarantee of Equality in Article 14 simply means the absence of discrimination, but in the later cases, the Court has come to hold that in order that the equality of opportunity may reach the backward classes and the minority, the state must take affirmative action by giving them a "preferential treatment" or "protective discrimination"[(1)] and taking positive measures to reduce inequality. To make equality a living reality for the large masses of people, those who are unequal cannot be treated by identical standards. It is necessary to take into account defacto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons in order to bring real equality. Hence, it is said that "protective discrimination" is a facet of equality under Articles 14, 15 and 16 of the Indian Constitution.

In the historic case of Indra Sawhney v. Union of India[(2)], popularly known as the Mandal case, the Supreme Court examined the scope and extent of reservation under Articles 15[4] and 16[4] respectively in detail and clarified various aspects on which there were difference of opinion in various earlier judgments. The majority opinion of the Supreme Court may be summarized briefly as follows:

(a) Backward Class of citizen in Article 16[4] can be identified on the basis of caste and not only on economic basis. The majority held that a caste can be and quite often is a social class in India and if it is backward socially it would be a backward class for the purpose of Article 16[4].

(b) Article 16[4] is not an exception to Article 16[1]. It is

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an instance of classification. Reservation can be made under Article 16[1].

(c) Backward Classes in Article 16[4] are not similar to as socially and educationally backward in Article 15[4]. It is much wider. Article 16[4] does not contain the qualifying words "socially and educationally" as does Clause [4] of Article 15. Hence the Backward class of citizens in Article 16[4] takes in SCs/STs and all other backward classes of citizens including the socially and educationally backward classes.

(d) Creamy layer must be excluded from backward classes.

(e) Article 16[4] permits classification of backward classes into backward and more backward classes.

(f) A backward class of citizens can not be identified only and exclusively with reference to common criteria.

(g) Reservation shall not exceed 50 percent.

(h) Reservation can be made by "Executive Order".

(i) No reservations in promotion.

(j) Permanent statutory body to examine complaints of overinclusion/under inclusion or noninclusion of groups, classes and sections in the list of other backward classes.

(k) Mandal Commission Report: No opinion was expressed on the correctness or adequacy of the exercise done by the Mandal Commission.

(l) All objections and disputes regarding new criteria can be raised only in the Supreme Court.

Therefore, Articles 14, 15 and 16 including Articles 16[4], 16[4A] must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such a view has been indicated in M.R. Balaji and Ors v. State of Mysore[3], T. Devadasan v. Union of India and Anr[4] and R.K. Sabharwal and Ors v. State of Punjab and Ors.[5] Even in Indra Sawhney case[6], the same view has been held by indicating that only a limited reservation not exceeding 50 percent is permissible. It is to be appreciated that Article 15[4] is an enabling provision like Article 16[4] and the reservation under either provision should not exceed the legitimate limits. In making reservations for the backward classes, the state cannot ignore the fundamental rights of the rest of the citizens.[7]

Therefore, the idea of equality and inequality, the theory that no two people can be equal and the notion that equality of opportunity could combat the drawbacks which many faced due to their social position have occupied the minds of eminent philosophers such as Locke, Rousseau, Huxley and many others. There was nothing ambiguous about the arbitrarily hierarchical and socially and economically exploitative caste system that had guided India since before the Independence. For, centuries, they had been victims of humiliation and oppression and at the dawn of independence, the framing fathers had taken the plight to ensure then with justice,social, economic and political, as set forth in the Preamble of the Indian Constitution and thus inserted an extraordinary phase for the upliftment of the masses of humanity from the morass of subhuman social existence, abject poverty and economic exploitation too.

To offset the accumulated oppression of centuries of deprivation, social Constitutional measures were enacted for the Scheduled Castes and Scheduled Tribes who had traditionally been the victims of socioeconomic oppression, though the word "Other Backward Classes" was further added to the segment. Nevertheless, it reflected the idealism and moral commitment of the founding fathers that in framing the Constitution they sought to establish a democratic secular state based in equal rights for all before the eyes of the law.

Despite the above mentioned fundamental rights which are in clash with the concept of equality in general and the special provisions too meant for certain classes in Part XVI of the Constitution[8], there are certain Directive Principles of State Policy which requires the state to take special care in promoting educational and economic interest of the weaker sections of the people and in particular Scheduled Castes and Scheduled Tribes. Thus, the picture of "equality" concept under the Indian Constitution seems to be greatly diluted and the whole effort of providing equality throughout the Constitution is under the moist of discrimination in some way or other.

Conclusion and Suggestions :

After about three decades of the operation of the policy of protective discrimination, the parameters of the socioeconomic situation have changed enough. Now the SCs and STs are no longer as uniformly backward as they have been when the constitutional provision for preferential facilities for them were made. As individuals they had reached a point at which they seemed to be much less deserving of preferential provisions than the mass of the population to which they belong. Therefore the creamylayer test should also be applied to the SCs and STs for identifying the actual beneficiaries under the Schedule, prepared for them only.

The continued reluctance to define the elements that constitute the "backwardness" of the SCs and STs results in a failure to recognize and attend to the specificities of their situation. It reduces to mechanical, administrative measures what should be carefully designed strategies for the advancement of a historically disadvantage section of Indian society. So, it's high time to frame out the criteria and yardstick through which SC, ST & OBC could be defined.

Economic criteria should be the basic consideration for judging whether a particular individual is eligible for or deserves some special protection or not, along with his social background. Simply on the basis of educational and social backwardness as indicated no one should be judged as belongs to a particular castes or class. It is still unsolved that whether Articles 15[4] and 16[4] are enabling provisions or are guaranteed rights. So, a clear and certain guideline is required to be find out either by the Supreme Court or the Parliament regarding the true character of these two Articles,

to make it adequate for the purpose for which they are made.

Presently various groups demand various benefits. The state is tugged and pushed. It lurches from one concession to another. It becomes paralyzed. It loses its legitimacy and capturing the state become all important. And all this is done in the name of "will of the people", the mandate by the Janata and "social justice". Justicesocial economic and political is a triune phenomenon inscribed as a pledge in the Preambular glory of the Indian Constitution.[9] And with our independence from the British rule we have loss the excuse of blaming the British for anything going wrong, we will have nobody to blame except ourselves. So, time has come to change our attitude towards the framing of casteless society with due protection for the downtrodden and under privileged people, providing Justice,social, economic and political in the true sense of the term. From jurisprudential point of view also it is not enough to work out a just scheme of distribution, from whatever point of view, but there is the further problem of getting it accepted and keeping it acceptable, which requires constant redistribution according to changing circumstance. Both initial acceptance and continued acceptance depend on people feeling that the scheme is at least not unjust.[10] Therefore, "wheel turns history changes". Old order may change yielding place for a new social and economic order, but the process of transition must be accompanied by honest and transparent attitude and then only social justice can be said to have been done. It is equally true that "goals are dreams with deadlines"; hence, social justice is a goal of the Indian Constitution, protective discrimination is the never ending dreams for the politicians for their gain and interest too. Therefore, it can be suggested that there must be deadlines or specified time bar for achieving that goal of social justice through the concept of protective discrimination.

References :

(1) St. Stephens College v. University of Delhi AIR 1992 SCC 558.

(2) AIR 1993 SC 477.

(3) AIR 1963 SC 649.

(4) AIR 1964 SC 179.

(5) AIR 1995 SC 1371.

(6) Indra Sawhney v. Union of India AIR 1993 SC 477.

(7) Union of India v. Ramesh Ram and Ors AIR 2010 SC 2691.

(8) Article 330 to Article 342 of the Indian Constitution.

(9) Iyer Krishna V.R. (1986) : Constitutional Miscellany, Eastern Book Company, at p. 262.

(10) Dias R.W.M. (1985) : Jurisprudence, Aditya Prakashan, at p. 66.

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शोध-पत्र भेजने संबंधी नियम

(1) शोध-पत्र **1500-1700 शब्दों से अधिक नहीं** होना चाहिए।

(2) हिन्दी एवं मराठी माध्यम के शोधपत्रों को कृतिदेव 10 (Kruti Dev 010) में टाईप करवाकर 'पेजमेकर 6.5' में भेजें।

(3) पंजाबी माध्यम के शोधपत्रों को अनमोल लिपि (AnmolLipi) या **अमृत बोली** (Amritboli) या **जॉय** (Joy) में टाईप करवाकर 'पेजमेकर 6.5' में भेजें।

(4) अंग्रेजी माध्यम के शोधपत्र टाईम्स न्यू रोमन (Times New Roman), एरियल फोंट (Arial) में टाईप करवाकर 'पेजमेकर 6.5' या 'माइक्रोसाफ्ट वर्ड' में भेजे जा सकते हैं।

(4) शोधपत्र की विधि - **(1)** शीर्षक **(2)** एबस्ट्रेक्ट **(3)** की-वर्ड्स **(5)** प्रस्तावना/प्रवेश **(5)** उद्देश्य **(6)** शोध परिकल्पना **(7)** शोध प्रविधि एवं क्षेत्र **(8)** सांख्यिकीय तकनीक **(9)** विवेचन या विश्लेषण **(10)** सुझाव **(11)** निष्कर्ष एवं **(12)** संदर्भ ग्रंथ सूची।

(6) संदर्भ ग्रंथ सूची इस प्रकार दें -

For Books :

(1) Name of Writer, "Name of Book", Publication, Place of Publication, Year of Publication, Page Number/numbers.

For Journals :

(2) Name of Writer, "Title of Article", Name of Journal, Volume ....., Issue ....., Page Numbers.

Web references :

http://utc.iath.virginia.edu/interpret/exhibits/hill/hill.html

(7) गुजराती माध्यम के शोधपत्र **हरेकृष्णा (Harekrishna), टेराफोंट वरुण (Terafont Varun), टेराफोंट आकाश (Terafont Aaksah)** में टाईप करवाकर 'पेजमेकर 6.5' में भेजे जा सकते हैं।

(8) शोधपत्र की साफ्टकॉपी रिसर्च लिंक के ई-मेल आईडी researchlink@yahoo.co.in पर भेजने के बाद हॉर्डकॉपी, शोधपत्र के मौलिक होने के घोषणा पत्र के साथ हस्ताक्षर कर 'रिसर्च लिंक' के कार्यालय को प्रेषित करें।

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