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RESERVATION SYSTEM IN INDIA

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ABBREVIATION

Abbreviation		Meaning
• &	:	And
• All	:	Allahabad
• AIR	:	All India Report
• A.P	:	Andhra Pradesh
• Art.	:	Article
• Cl.	:	Clause
• DP	:	Department of Personnel
• DOP&T	:	Department of Personnel and Training
• DPSP	:	Directive Principle of State Policy
• Ed.	:	Edition
• ETC	:	Etcetera
• EWSs	:	Economically Weaker Sections
• Govt.	:	Government
• G.O.	:	Government Order
• Hon‟ble	:	Honourable
• HC	:	High Court
• Ibid.	:	Ibidem
• ILR	:	Indian Law Reports
• JT	:	Judgment Today
• Jr.	:	Junior
• Kant.	:	Karnataka

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• Ker.	:	Kerala
• LSGIs	:	Local Self Government Institutions
• MHA	:	Ministry of Home Affairs
• MYS	:	Mysore
• NCBC	:	National Commission for Backward Classes
• NCST	:	National Commission for Scheduled Tribes
• NCSC	:	National Commission for Scheduled Castes
• OUP	:	Oxford University Press
• OBCs	:	Other Backward Class
• O.M	:	Office Memoranda
• Ors.	:	Others
• O.L.	:	Office Letters
• P.	:	Page
• Para	:	Paragraph
• PwD	:	Persons with Disabilites
• RTC	:	Round Table Conference
• Supp	:	Supplement
• SC	:	Supreme Court
• Sec	:	Section
• SCs	:	Scheduled Castes
• STs	:	Scheduled Tribes
• SCW	:	Supreme Court Weekly
• SCC	:	Supreme Court Cases
• SCR	:	Supreme Court Record
• SBEC	:	Socially Backward Economic Classes
• UOI	:	Union of India
• U.P	:	Uttar Pradesh
• Vs.	:	Versus
• Vol.	:	Volume
• W.E.F	:	With effect from
• Yrs.	:	Years

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RESEARCH METHODOLOGY

The research methodology involved in this research is purely doctrinal/ non empirical. The researcher in this paper will analyze the **"Reservation System in India"**. The researcher will also take into consideration the reservation policy/ system in India. The understanding of the paper is based on various publications as contained in books, journals, newspapers, Constituent Assembly Debates, websites and statutory provisions dealing with the aspect of applicability of Reservation in India. For the sake of convenience, the researcher has divided the paper into various chapters dealing with a particular aspect.

The method which we tend to follow during research will be a combination of more than one approach but the approach which resembles research the most will be doctrinal approach or analytical technique. The object of the study is to analyze the concept of the Reservation, and make as many number of people aware about the concept of the reservation policy/ system and let the people decide whether theimplementation of the same will be beneficial for them or not. A study of the concept, including some research articles and papers along with some newspapers and the history book have been conducted to bring about a significant result that helps in improving the analytical concept of the Reservation policy/ system in the mind of the readers. It aims at providing deep knowledge of the subject matter.

Its main objective is to provide a new source of information, knowledge and wisdom to the readers of this article. The critical analysis of the reservation is a topic, which is otherwise understood to be something which has already been established in various different papers, as we see a lot of journals getting published on the critical issue of the Reservation system.

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CHAPTER-

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INTRODUC

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The policy/system of reservation as envisaged in the provision of the Constitution of Union of India has always been a topic of discussion, wrought sometimes with highly emotive a content that involves social, political, economic, administrative and legal consequences.

Reserving opportunities, resources or offices for individuals or groups for furthering their welfare and thereby ensuring social justice, is the core of the concept of reservation. The basically aim of the reservation system to provide empowering individuals or groups and ensuring their contribution in the decision making process of the State. Socio-economic disability of a person deprives him or her of the chance to compete with others on equal footing. Thus to find out the disability of the person and reserve opportunities for him or her becomes the responsibility of the state when the state is democratic and its objective is welfare of the people. In the judicial parlance the term „reservation" has come to mean reserving opportunities, resources and/or offices for the group of the people who belong to the socially and educationallybackward communities or castes.

The caste-based society situated in India. This has to be eliminated if India has to become democratic in the western sense of the term. Hence Ambedkar believed that the final solution lay in the abolition of caste system itself.[1] But after some time, it seems, he changed his opinion and observed in one of his paper that the caste could not be abolished. He said:

> Caste is religion, and religion is anything but an institution. It may be institutionalised but it is not the same as the institution in which it is embedded. Religion is an influence or force suffused through the life of each individualmolding his character, determining his actions and reactions, his likes and dislikes. These likes and dislikes, actions and reactions are not institutions, which can be lopped off. They

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are forces and influences, which can be dealt with by controlling them or counteracting them. If social forces are to be prevented from contaminatingpolitics and preventing it to the aggrandizement of the few and the degradation of

[1] „Dr. Ambedkar and Caste" Harijan February 11, 1993.

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> the many then it follows that it will contain mechanisms, which will bottle the prejudices and nullify the injustice, which the social forces are likely to cause if they were let loose.[2]

In the current scenario the social mind set has not accustomed to the democratic morality of acknowledging the principle of equality in social intercourse. Ambedkar often remarked that „in the religious sense, if dogmas like caste and untouchability aretaken as test, the untouchables are not Hindus". He was vociferous in his observation that Hinduism was an obstacle to social unity.[3]

Thus a society based on status has to be restructured into a society based on contract. Though the Constitution of India begins with the phrase „We, the People of India"- a phrase contractual in nature, at the pragmatic plane performance of the contractual stipulations has been lopsided. In other words „equality" among the individual members of the society has to be ensured. Thus it is a part of the performance of these stipulations that the policy of „reservation" for the „backward" was envisaged. The „backwardness" may be due to the age-old system of social structure, which in course of time had become so rigid that it would be an insurmountable obstacle in the process of establishing equality among individuals. This social structure also reveals male dominance, which in fact was absent in ancient times.

1.1 Process of Social Change in India

The process of Sanskritization and/or Westernization might have helped a few caste groups in attaining a higher social status. But "Sanskritization as model of status improvement for the Scheduled Castes seems to be relatively irrelevant."[4] Westernization, unlike Sanskritization, continuous to influence the people of different caste and communities.

This is because of the fact that Westernization implies the benefits of industrialism, which everyone desires to have and Sanskritization cannot deliver those benefits and in such a predicament the latter has been losing its relevance. But the process of Westernization is interlinked with the knowledge of a Western European language. In the India contest, English education became the trajectory for westernization.

[2] Dr. Ambedkar Babasaheb, Emancipation of Untouchables (Bangalore 1992) p.30
[3] Dr. Ambedkar Babasaheb, Writing and speeches, Vol.9, Govt. of Maharashtra, (Bombay 1990) p.186
[4] Ravinder Singh Bains, Reservation policy and anti-reservationists. (New Delhi 1994) p.17.

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The process of westernization started when Lord Macaulay introduced English as the language in Indian Provinces. But the impact was felt mainly on the upper castes and English education being passport to appointment in Govt. services, the benefits went to the upper and middle class people while the masses that belonged to lower castes or casteless remained ignorant and backward.[5] This gradually created a cleavage and consequently the civil society got itself divided and the major division being „Brahmin versus Non-Brahmin" in many regions of India. Among the Non-Brahmin, there were different classes of people based on caste hierarchy. The issue of „reservation" should be understood in this background and it is also important to note that reservation to a certain extent prevented the consolidation of the Non-Brahmin communities within the Hindu fold.

To establish a democracy it is essential to ensure equal opportunity for all classes of people so that the dream of egalitarian society could be realized. People should have access to modern facilities, which, in turn, depends on the resources they could command. Here comes the necessity to provide reservation for the classes of people who deserve it. But at the same time „classes" or „castes" that had originated in the old feudalistic era, have been losing their significance and „individual" is getting more attention in the context of modern, western system of democracy. Yet from the point of view of Social Psychology, the whole process of Westernization has not gone deep into the social psyche of the people in India. This leads to a sort of hypocrisy in public life. People speak about socialist, egalitarian society, but in private life their behaviour reveals the strong faith in the cultural background of the past.

1.2 The Impact of Social Reform

The attempts in the direction of reforming Hindu society by socio-religious movements in the 19th and early 20th centuries also reflected this contradiction. Insteadof creating a casteless and classless society, they strengthened the groups based on caste.[6] Obviously these groups began to demand due representation in government services. Such demands did not assume any dangerous proportion, thanks to the then govt. that responded positively to this issue.

[5] See: Bhagwan Das, „Movements in a history of Reservations", Economic and Political Weekly October 28, 2000.
[6] Susan Bayly, The New Cambridge History of India IV.3 Caste, Society and Politics in India (1999) p.155

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The need for such reservation is too construed as a time-bound „program" because this action on the part of the State cannot go on forever. The time limit for this program has also been extended, may be due to political compulsions. Originally when the Constitution adopted „reservation" regarding representation in legislature it was only for 10 years, which was up to 1960; but the time limit has recently been extended to 2010. But the protective discrimination envisaged for education and employment for the Scheduled Castes and Scheduled Tribes and other socially and economically backward classes of people, does not have any time limit. Another argument is that there is a potential danger that the periodical extension of as well as permanent protective discrimination might, instead of effecting equality through gradual regaining of balance between the erstwhile dominant and erstwhile backward classes, create a tendency among the backward to remain formally backward so that the benefits of protective discrimination could continue for ever. In effect this might breed another variety of inequality in the social hermeneutics.[7] Consequently the equality among the citizens might become a mirage and democratic institutions, tothat extent, might suffer.

In such social scenario disputes are bound to arise. Getting education, obtaining positions of power- including positions in law-making bodies and administrative post- and resource sharing are some of the aspects of reservation. Rivalry among the communities is bound to occur because once privileged classes are losing their share of power and hitherto depressed classes are given the benefits of „protective discrimination". The study of my research is about to understand the concept, origin, growth and scope of reservation system in India as well as safeguards institution regarding the reservation system and focuses this aspect on judicial approach indealing with this social condition.

[7] O.P. Sharma, Reservation-A Gimmick (New Delhi 1994)

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CHAPTER- 2

CONCEPTUAL AND ANALYTICAL FRAMEWORK

The existing literature on „reservation policy‟ will give a multi-coloured view on protective discrimination programmes. All three wings of the State legislature, executive and judiciary have to act in the unison for delivering social, political and economic justice to the citizens. But instead of a healthy co-ordination there is a subtle rivalry among them; especially between the political executive and judiciary.

The *legislature* is influenced if not dominated by partyism in a parliamentary system of democracy. This has led to Scheduled Castes organizing themselves into political party in various parts of India. The best example is Bahujan Samaj Party (BSP). Scheduled Tribes, to certain succeeded in having new states for Tribal‟s and Hill people like extent Chhattisgarh, Jharkhand and Uttaranchal. Thus parliamentary system has encouraged the power barging and power broking and this has a boost to caste consolidation and not to caste elimination.

This tendency is reflected in the formation of political executive namely the formation of Council of Ministers both at the Centre and at the State levels. The permanent executive being dominated by the upper caste is not sincere in implementing the reservation policy in its letter and spirit. This inevitably leads to political as well as legal conflicts and political articulations clearly point out the need for an effective monitoring system to see whether the reservational laws are of help to the backward classes in overcoming their social disabilities. In a sense the backward classes to do get political awareness and they often feel that they are being used as „vote banks‟. But this kind of thinking will only encourage divisive tendencies.

The *judiciary*, through in the initial stages approached reservation laws in dry legal way of interpreting laws by letter and grammar, later revealed a more liberal andactive approach in interpreting reservation laws with the touchstone of Constitutional provisions. In legal disputes often the „upper caste‟ approaches the court and challenges the reservation laws. But recently this trend has been reversed.

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2.1 The Concept of Equality

On the concept of equality, as it is incorporated in the Constitution of India, Andre Beteille‟s observation is noteworthy. What was at issue was not simply equality as right available to all individuals but also equality as a policy aimed at bringing about certain changes in the structure of society.

The claims to equality of individuals and collectivities are nicely balanced in the Constitution of India or that they can be nicely balanced. Law and politics in India have, in fact, been bedevilled by these conflicting claims ever since the Constitution came into effect. It cannot be too strongly emphasized that the Constitution treats the provisions in favour of Scheduled Castes and Scheduled Tribes.

The main concern any political society should be the inequality from which some sections suffer. This inequality is to be understood as a historical continuum of an erstwhile character of a society. It might have created political inequality or economic inequality or both and consequently causing political inequality too in the world of realpolitik. Hence constitutional guarantees to social and economic equality along with government. This has been duly acknowledged in the Indian Constitution as special provisions. Ambedkar himself argued in the Constituent Assembly that these special provisions should not be allowed to „eat up‟ the general provisions of equality of opportunity for all individuals alike. These special provisions continue to be in force, and it cannot be argued that, because they take collective identities into account and perhaps even strengthen them, they are by definition hostile to the spirit of equality.[8]

The crux of the problem in cases relating to reservation can be easily understood in one can discern the conflicting facets of the concept of equality. Whenever the legality and legitimacy of reservation are discussed the concept of equality enshrined in Art 14 of the Indian Constitution becomes core theme. The policy of reservation is based on the argument that it would be injustice to treat socially and economically backward people on par with the „upper classes‟.

[8] Andre Beteeille, Society and Politics in India (OUP 1991) p.230

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2.2 The Origin of the Concept

The age of Reason contributed to the politics of the day in Europe the forceful slogan of „Liberty, Equality, and Fraternity" made popular by French Revolution[9], which ignited the thinking world to establishing a political system that came to be styled as democracy.[10] As democracy became the system of government accepted as a norm for the polity by the western world, it has become fashionable to assume that democracy is the best form of government and people in other parts of the world too should adopt such a system. In spite of having a long tradition of governance of states, the people of the Indian sub-continent also came under the spell of the colonial system and at least an articular section of Indian public opinion during the period of freedom struggle wasin favour of the political system of the British masters.[11] Even in Britain the democratic system was a product of evolution and only at a later stage the sovereign power began to devolve gradually and the non-rate payers were given the voting rightas a beginning to achieve what could be termed „political equality".[12]

The concept of equality is an absorbing one. In his Nicomachean Ethics, Aristotle says that „justice is equality, as all men believe it to be, quite apart from any argument". It is pertinent to note that is Greek „equality" and „justice" are synonyms.[13] An opposite extreme view could be obtained from Nietzsche who said, "Equality of all men is the biggest lie ever told."[14] It is only common place to say that individuals differ in many

[9] The Declaration of Independence by the American States eloquently put forth the ideal of equality. See Declaration of Independence in Congress, July 4, 1776. The second paragraph states: "We hold thistruth to be self-evident: That all men are created equal, that they are endowed by the Creator with with certain unalienable rights; that among these are life, liberty and pursuit of happiness; that to secure this rights, governments are instituted among men…", yet it was French revolution that popularized the ideain the realm of politics. Modern history being Euro-centric, the Asian countries have also been influenced by it.

[10] Aristotle terms „democracy" as the degenerated form of „policy". But on modern times the term has acquired some sort of nobility. It is interesting to note the observation of Gerorge Orwell about „Polities and English Language".

[11] Even Gandhi, who had been a bitter critic of the British Parliamentary system of democracy, later came to approve of it. See Anthony J.Parel (Ed.) *The Hind Swaraj* (Cambridge 1977) p.30-31

[12] Albert Venn Dicey has the following observation regarding Bentham"s contribution to the electoral reform in Britain. "Had not Benthamism provided reformers with an ideal and programme, it is more than possible that the effort to amend the law of England might, like many other and endeavour to promote the process of mankind, have missed its mark." *The Lectures on the Relation between Law andPublic Opinion in England during the 19th Century*.(1981) p. 176. Parliamentary Reform Act 1832 was in fact a partial realization of Bentham"s dream.

[13] Vlastos. G, „Justice and equality" in Theories of Rights, (Londan 1989) Jeremy Waldron (Ed.)

[14] Quoted in Warwick McKean, Equality and Discrimination Under International Law.(Londan 1983) p.3

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respects. But they have a basic trait that is to be recognized and encouraged. In the beginning of 20th century L.T. Hobhouse wrote:

> As a matter of the interpretation of experience, there is something peculiar to human beings and common to human being without distinction of class, race or sex, which lies far deeper than all the differences between them, call it what we may, soul, reason, the abysmal capacity for suffering or just human nature, it is something generic, of which there may be many scientific as well as quantitative differences, but which underlies and embraces them all. If this common nature is what doctrine of equal right postulates, it has no reason to fear the test of our ordinary experience of life or of our study of history and anthropology.[15]

2.3 Classification of Equality

Equality has its ramifications reflected mainly as natural equality, social equality, political equality, economic equality, legal equality, and ultimately international equality. The list is not complete; yet it is interesting to note that in the social life of humans, a member of the society always faces problems connected with one kind of equality or other. This multi-dimensional aspect of equality generates complex issues. Parliamentary democracies, which demand support of the majority in the legislaturefor the political executive, makes the problems all the more complicated.[16] Yet within a political society based on a legal framework of constitutionalism these problems should be solved in a peaceful atmosphere observing the legal principles laid down in the basic law of the land.

The concept of equality is intertwined with other social and jurisprudential concept like „right", „liberty", fraternity", „property" and „Justice" thus making the concept a multi-dimensional one. Hence "of all the basic concepts of social, moral and political philosophy none is more intriguing and none is more baffling than it."[17] Perhaps this intriguing nature of the concept might have made Earnest Barker remark: "Equality is a protean notion: it changes its shape and assumes new forms with a ready facility."[18] However the term equality might evoke a sense of levelling. That is why Laski said;

[15] L.T. Hobhouse, Elements of Social Justice. (London 1922) p.9
[16] The political parties in their electoral fights encourage socio-economic inequalities and thus cause the inequalities to persist.
[17] Frank Thakurdas. „In Defense of Social Equality", The Indian Journal of Political Science. Vol. XXXVII No.1 p.1
[18] Earnest Barker, Principles of Social and Political Theory, (London 1967) p.151

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"Undoubtedly it (equality) implies fundamentally a certain levelling process. It means that no man shall be so placed in society that he can overreach his neighbour to the extent, which constitutes a denial of latter‟s citizenship."[19] He further elaborates this levelling process in the following words:

> It means that my realization of my best self must involve as its logical result the realization by others of their best selves. It means such an ordering of social forces as will balance a share in its gain also. It means that my share in thatgain must be adequate for the purpose of citizenship. It implies that even if my voice be weighed as less weighty than that of another, it must yet receive consideration in the decisions that are made. The meaning, ultimately, of equality surely lies in the fact that the very differences in the nature of men require mechanism for the expression of their wills that give to each its due hearing.[20]

The mechanism about which Laski speaks has its legal dimension. Thus the basic law of the land shall contain provisions to ensure equality by a leveling process.

F.A. Hayek, another thinker of renown, says:

> As a statement of fact it is just not true that all men are born equal. We may continue to use this hallowed phrase to express the ideal that legally andmorally all men ought to be treated alike. But if we want to understand what this ideal of equality can or should mean, the First requirement is that we free ourselves from the belief in factual equality.[21]

He opines that there is a conflict between the concept of equality and the reality of inequality. At the same time he believes that „equality before law", which is a prerequisite of a free society, would automatically entail equality in material welfare.

2.4 The Relevance of the Concept of Equality

Equality becomes an essential ingredient for a better life and better life for their members is the aim of all political societies. A deeper analysis would bring forth the truth that the positive aspect of equality is achieved When there is "an appropriate

[19] Harold.J Laski. A Grammer of Politics (London. 1951) p. 153
[20] Ibid., p.153
[21] Hayek. F.A. The Constitution of Liberty (London. 1960) p.87

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opportunity for each; what is to be equalized is not the opportunity to enter a profession or to be successful in business but the opportunity to lead a good life, or to fulfil one‟s personality."[22] Therefore the sense of justice demands that when the policy of reservation is formulated and executed it must have the nexus with the objectives sought, namely „to lead a good life‟ and „fulfil one‟s personality‟. Whether this ultimate goal is achieved by the political systems, is a pertinent question to be asked both by the decision makers and by the justice deliverers.

Modern democracy postulates „equality‟ as the cardinal principle of governance, because of the very fact that democracy presupposes the participation of citizens in the decision making process, and the very decisions the citizens are making or authorize others to make on their behalf affects their future and thereby affects the future of the political society of which they are members. For the better functioning of democratic system political equality becomes the most indispensable ingredient. All democratic states, therefore, ensure equality of citizens by way of giving each one of them one vote. But this „equality‟ is inadequate because of the very fact that other inequalities, especially economic and social inequalities, overwhelm the political equality. Thus 'inequalities' in other spheres of life become significant for this will breed inequities, which will, from within, disrupt the very democratic fabric.

Inequality is inherent in humans. The Marxian philosophy would proclaim that the inequalities were caused by the fact of who owns the means of production. And hence the class difference and consequently class-conflict between the „haves‟ and „have-nots‟ is inevitable. The panacea for resolving this lies in the establishment of socialism. Thus the socialist thinkers make the concept of equality an avowed normfor achieving the utopia of a classless society. Obviously the emphasis of the socialist thinkers is on the economic equality. Criticizing the Marxian approach BertrandRussell says, “The greatest political evil is not inequality of wealth as the Bolshevik theorists insist, but inequality of power."[23]

More or less in the same fashion Dahrendorf points out authority as the basis for inequality. As Bains remarks:

[22] S. Ben and R.S. Peters, Social Principles and Democratic State (1975) p. 119
[23] Bertrand Russell, Roads to Freedom (1919) p. 111

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"[H]is contribution, however, lies in his recognition of authority as the basis of inequality. In conclusion, it may be stated that power plays a major role in the unequal distribution of resources."[24] Thus the concept of equality has an inevitable nexus with that of power. But again power has its own ramifications. A person may try to develop his personality and he may use every avenue power he has. This could be termed as „developmental power". But there are persons who may try to extract advantages from the abilities of others. This could be termed as „extractive power„. This is the qualitative aspect of power. It all depends on the inherent capacity of persons concerned. It has a value - dimension also, because the society may not approve of any misuse of power. The basic principle that society imposes certain moral as well as legal obligations upon the members should understood in the light of this basic postulate.[25]

2.5 The Nature of Equality

Equality is a normative concept. It implies that all persons should be treated equally by providing equal opportunity so that they could develop their personality and thereby the State may also be benefited. In a given socio-politico-economic situation, perfect equality becomes an ideal to be achieved, nevertheless it is a pragmaticprogram that is to be sincerely adopted and vigorously pursued. In this regard it wouldbe better if the lawmakers take note of what Rawls says. There are two essential aspects of equality. "First each person is to have equal right to extensive basic liberty compatible with similar liberty of other. Second, social and economic inequalities are to be arranged so that they are both

(a) reasonably expected to be everyone"s advantage and

[24] Ravindar Singh Bains, Reservation Policy and Anti-Reservation (New Delhi 1994) p.4

[25] C.B. Macpherson, Democratic Theory: Essays in Retrieval (1975) p.53. The existence of human capacities "is attributed to divine creation, or to some evolutionary development of more complex organism, it is a basic postulate. It is an empirical postulate verifiable in a broad way by observation. It is at the same time value postulate, in the sense that rights and obligations can be derived from it without any additional value premise, since the very structure of our thought and language puts an evaluative content into our descriptive statements about man."

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(b) attached to positions and offices equally open to all".[26] Rawls goes on to examine the nexus between „equality' and „justice". He considers „fairness" as an inseparable part the concept of justice.

The concept of equality, therefore, poses problems both at the, philosophical level and on the pragmatic plane. As Ben and Peter"s state: A positive egalitarianism, demanding similar treatment of all, irrespective of any difference, would clearly leadto absurdities. To sweep away all distinctions would be to commit injustices asinexcusable as any under attack. Moral progress is made as much by making new and justifiable distinctions as by eliminating established but irrelevant „inequalities".[27]

It seems that for the elimination of irrelevant inequalities, what Laski calls, „the levelling process" is required.[28] However perfect equality is impossible to achieve and hence "equals should be treated equally and the unequal unequally and the respect in which they are considered unequal must be relevant to the differences in treatment that we propose."[29] Yet the question remains who is to assess the inequality and what normative yardstick one has to adopt.

By the middle of 20th century „equal treatment" of humans had become a strong political as well as emotional issue. It became a cardinal principle of „human rights". The concept of human right in general acquired an emotional content, especially since the pogrom unleashed by Nazis during World War ll. The subsequent Declaration of Human Rights of the United Nations gave a global legitimacy to the concept of „equality". The modem democracies invariably incorporated these rights into their Constitutions.[30] It became a significant principle of democratic constitutionalism.

[26]John Rawls, A Theory of Justice. (1972) p. 61. If Art 15(4) and 16(4) are examined one could find that they reflect the second aspect of Rawls analysis.
[27] S. Ben and R.S. Peters, Social Principles and Democratic State (1975) p. 133
[28] Harold.J Laski. A Grammer of Politics (London. 1951) p. 21
[29] Ibid at p. 114.
[30] Art 1.4 of the International Convention on Elimination of All Form of Racial Discrimination States: Special measure for the sole purpose of securing adequate advancement of certain racial and ethnic groups or individual requiring such protection as may be necessary in order to ensure such groups or individual equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to maintenance of separate rights for different racial groups and they shall not be continued after the objective for which they were taken, had been achieved. (United Nations. 1969).

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2.6 The Concept of Equality and Modern Democracies

The modern liberal democracies, is that to decide the degree of inequality and consequent affirmative action to be taken should „classes of people" be taken as the basic unit or the "individual„. This problem is reflected in the discussion regarding „civil rights" questions in the United States. As Nesiah points out: "Thomas Sowell (1981a), among the first Black academics to speak out against preferential policies, argues that affirmative action programmes have made suspect the qualifications and occupational status of every member of the groups benefited. Sowell has been particularly critical of the application of affirmative action within the academic community."[31] Again he continues to reproduce Sowell"s arguments:

> Sowell distinguishes between what he sees as two contradictory senses in which the term 'civil rights" is used. In the first, „civil rights" means that individuals are viewed and treated within a framework, which is „blind" to theirgender or ethnic origins. In the second, „civil rights" has come to be equated with affirmative action „biased" towards specific ethnic groups or one particular gender. Sowell"s quarrel is with the latter interpretation, and he is particularly critical of the principle of „proportional equality".[32]

In this context observations of Professor Ronald Dworkin are indeed relevant. Speaking on affirmative action, he emphasizes the need to distinguish equality as a right from equality as a policy.[33] According to him political theory has virtually ignored this distinction. He further states that there is a distinction between the right to equal treatment and the right to treatment as an equal. The former is „the righ to an equal distribution of some opportunity, resource or burden" the latter treatment impliesthe right „to be treated with the same respect and concern as anyone else".[34] It seems that the latter one has a socio-psychological dimension. In spite of Constitutional commandments and legal provisions that guarantee „equality", there is hostility and rivalry among the communities. Another observation by Ivan Reid about the British society is indeed thought provoking. "These issues (relating to social class

[31] Devanesan Nesiah, Discrimination- with reason? (OUP 1997) p.30.
[32] Ibid at p.31.
[33] Ronald Dworkin, Taking Rights Seriously, (1977) p. 223-239

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[34] Ibid p. 227.

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differences) are based on questions of social equality and justice."[35] Emphasizing the role of education in this regard he says, "For some the provision of equal opportunities is a sufficient end in itself, for others the end is equality of outcome, which is only achieved when educational attainment of the classes, sexes and ethnic groups is identical."[36]

2.7 Social Justice

The concept closely connected with equality is „social justice". Justice is a word with a host of semantic ramifications. It was the support around which the dialogue on Plato"s Republic revolves. And „ideal state" became the only answer to realize the ideal of justice. The concept is too intangible to be comprehended and too evasive to be implemented. Yet one can safely proceed on the assumption „that justice is a positive ethical social value."[37] Stone has described this ethical value content in the following words: "Men can judge things to be just or unjust without formulating any norms attendant on the vague notions which base their judgments; but to explain such judgments, they will always be found to resort to propositions which are tacitly, if not expressly, normative."[38]

The Preamble of the Indian Constitution too declares Justice, social, political and economic as the noble objective. But unfortunately the Constitutional practice for over half a century presents a sad story of deviation, distortion and dysfunction. Equality of treatment is one of the cardinal principles of a democracy. But in a society that has been practicing inequality as a way of life a sudden shift in the power structure that equality would bring about is something intolerable. But social justice demands this power shift.

Secondly in an unequal society, social justice demands unequals to be treated unequally. In other words those who were at the lower rungs of the social ladder must be given the benefits of „protective discrimination" for the obvious reason that they cannot compete with those who have already been at the upper strata. But here too social tension is created owing to the process of „power shift" from the classes of citizens who were enjoying it to some other classes who were deprived of it. This

[35] Ivan Reid, Social Class difference in Britain (1989) p.13
[36] Ibid.
[37] Julius Stone, Human Law and Human Justice (Bombay 1965) p.31.
[38] Ibid.

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again is to be resolved if social justice is to become reality. The period of transformation inevitably brings in points of conflict. And herein comes the Judiciary that tries to restore justice by umpiring. Hence people often approach the Court in the hope of getting justice. There are many laws including directives in the Constitution for ensuring social justice to the people especially to the underprivileged. Yet even today social justice in its philosophic content has come to become distorted at the pragmatic plane. But this is not something confined to Indian condition.

As *Justice V.R. Krishna lyer comments*: „The Statute Book of India contains much legislation designed to lift the Dalits, to abolish their disabilities and to give them special opportunities for advancement in education and in employment. Bonded labour is by law abolished. Untouchability, by Constitution, is forbidden. The Civil Rights Act goes a long way to eliminate injustice inflicted on the Dalits. Especially stem punishments are prescribed for commission of offences against Scheduled castes and Tribes, but these magic remedies sleep as paper tigers. The social evils continue. The economic wrongs go on. The law is dead, vis-a-vis these unfortunates. There are plans and sub-plans, schemes and projects worked out by the administration at the Central and State levels. There are special reservations for employment and education and these facilities look like reverse discrimination. But what are the raw realities? Tolstoy‟s biting words set the tone for a social audit of the performance. The abolitionof slavery has gone on for a long time. Rome abolished slavery. America abolished it, and we did, but only the words were abolished, not the thing.“[39]

In the Indian political scenario, social justice became an adjunct to the politicaldiscourse when Western political philosophies of „liberalism' and „socialism“ made inroads into the minds of the educated elite. The elite among the depressed andbackward classes came to consider „social justice' an indispensable agenda and as much important as freeing the country from the colonial shackles. This ideal was symbolized in Ambedkar and his efforts to give social justice its due place in the basiclaw resulted in the incorporation of provisions for reservation.

2.8 Jurisprudence of Equality

The jurisprudential perspective of the problem of resolving the conflicts arising out of inequalities has given rise to certain doctrines like „reservation“, „protective

[39] V.R. Krishna Lyer, Social Justice and undone Vast (New Delhi 1991) p.71.

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discrimination‟ and „affirmative action‟.[40] Among these the policy of reservation is move political in nature for it tries to strike a compromise between the equality principles envisaged by law and the political solution that would appeal to the concerned group of citizens. In doing so the supposed purpose is to achieve „social justice‟. When this policy is given legal expression by way of constitutional guaranteeand statutory protection, the justification is found in the doctrine of „protective discrimination‟. The dynamics of law demands that it must be put into effective action. The role of the executive, therefore, is emphasized in the doctrine of
„affirmative action‟. But all these doctrines are only the reflection of various dimensions of the principle of equality in its political ramifications, legislative formulations, executive endeavours and judicial activism.

[40] See Clark D Cunningham and N R Madhava Menon, „ Race, Class, Caste? Rethinking Affirmative Action,‟ Michigan Law Review Vol. 97, No.5 March 1999.

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CHAPTER- 3

RESERVATION SYSTEM

IN INDIA:

ORIGIN & GROWTH

3.1 Historical Background

Legislations regarding „reservation" could be traced back to the colonial period. By the middle of 19th century there emerged reformers in many parts of India. One such reform was the byproduct of persuading the natives especially the depressed classes by the Christian missionaries. This might have inspired the Hindus to effect social reforms or they might have felt ashamed to have such practices as caste discrimination. Consequently there were such moderate reform movements in many pans of the subcontinent. For example a movement was started in the Madras Provincein l852.[41] In 1858 the Government of Bombay Presidency declared that „all schools maintained at the sole cost of Government shall be open to all classes of its subjects without discrimination. But this policy was hardly enforced. For instance a Mahar boywas refused admission and the Bombay Education Department justified the action of the school by saying that „it would not be right for the sake of a single individual, the only Mahar who had ever yet come forward to beg for admission into a school attended only by pupils of caste, to force him into association with them, at the probable risk of making the institution practically useless to great mass of natives.[42]By 1923 the same Government decided to cut off aid to educational institutions that refused admission to members of the Depressed Classes. [43] But often the reform movements addressed issues, which were considered anachronistic and superstitious. The reform movements were concerned not with the evils of caste system as such, but of broader social issues like widow remarriage and education of women and opposition to child marriage. As *Galanter says* they are issues, „which reflected higher

[41] Dr. P. Jagadeesan, Marriage and Social Legislation in Tamil Nadu.(Madras 1990) p.31 Srinivasa Pillay and his like-minded colleagus founded the Hindu Progressive Improvement Society In November1852.

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The major aims of the society were the promotion of widow remarriage, the encouragement of female education and the uplifting of the depressed classes.

[42] Marc Galanter, Competing Equalities (Oxford 1984) p.21.

[43] Department of Social Welfare, Government of India, Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Caste and Connected Documents (1969) p.3.

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caste practices, and options‟ Caste system as such was not challenged.[44] Some authors tried to discover 'Brahminism‟ as the root reason for the discriminatory behavior.

Jyotiba Phule a social activist felt the necessity of reforms within the Hindu fold. In 1860 he called attention to the deplorable conditions in which the depressed classes lived end also the discriminatory treatment meted out to them. In 1858 the Government of Bombay Presidency declared that „all schools maintained at the sole cost of Government shall be open to all classes of subjects without discrimination.‟ During that time the British Government took a serious view of the question of depressed classes. In 1880s, the British administration set up scholarships, special schools and other beneficial programmes for the Depressed Classes. The progressive minded princes in the native states like Baroda, Kolhapur, and Travancore took similar initiatives.[45] Tracing the historical evolution of the policy of reservation, the Committee on the Welfare of Scheduled Castes and Scheduled Tribes stated:

> Realising the inequatious distribution of posts in the administration between different castes and communities, the rulers of some of the then princely states, who were genuinely interested in the upliftment of disadvantaged sections of the society, took initiatives and introduced reservations in the administrative posts in favour of backward castes and communities in their States as early as in the first quarter of 20th century. Mysore and Kohlapur were amongst the firstto do so. Because of the movement for social justice and equity started by the Justice Party, the then Presidency of Madras initiated the reservation in Government employment in 1921. It was followed by the Bombay Presidency comprised of the major portion of present states of Maharashtra, Karnataka andGujarat. Thus the first quarter of the 20th century saw reservation in Government employment in almost whole of South India.[46]

The census of 1910, classified the population into (a) Hindus. (b) Animists and Tribals and (c) The Depressed classes. Thus the plight of the depressed classes was addressed for the first time.

[44] Ibid at 22.
[45] V.A.Pai Panandiker, The politics of backwardness: Reservation Policy in India (Ed.) (1997) p.94.
[46] 16th Report, Committee on the Welfare of Scheduled castes and Scheduled Tribes (2001-2002) submitted to Lok Sabha on 27th August, 2001.

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Eight years later in 1918, the Maharaja of Mysore, having received a petition from the depressed class people, appointed Miller Committee to go into the question of adequate representation of non-Brahmin communities in the services of the State. When the First World War started in 1914, Britain began to pay more attention to the war. And, perhaps to elicit the support of the people in India Britain thought about some Constitutional reform. In the political history of India an association in Madras Province initiated representation to the depressed classes. There was also a strong public opinion in favour of this demand. A minute of dissent by Sir C. Sankaran Nair clearly reflected this trend in the political atmosphere of that time. According to him, "the non-Brahmin and depressed classes have awakened to a sense of their political helplessness and to their wretched condition, and no longer contend to rely upon the government which has left them in this condition for the past hundred years, claim a powerful voice, in the determination of their future."[47] Thus increasing political awareness among the non-Brahmin Classes and Britain"s need to have Indian people"scooperation in war efforts prompted the British rulers to adopt a policy of encouragingthe „gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British empire".[48]

After studying the views expressed by various organizations in India, it was decided to provide representation in the Provincial Assemblies and the Central Legislative Assembly. In the provinces ruled by the British a systematic attempt for the betterment of the Depressed Classes was started with the introduction of Montague- Chelmsford Reform incorporated in The Government of India Act, I919. A demand for the adequate representation in the legislatures was justified on the ground that the depressed classes were subjected to the intellectual and cultural domination of Brahmin priest class.[49]

3.1.1 A Significant Political Movement in Madras Province

In fact the non-Brahman movement had organized into the South India Liberal Federation in 1916. Later it came to be known as Justice Party after the name of its

[47] S.S. Jaswal, Reservation Policy and the Law (New Delhi 2000) p.34.
[48] Sir Harcourt Bulter, India Insistent (1931) p. 73 the policy announcement was made by the then Secretary of State for India Edwin Montagu.
[49] B.R. Ambedkar, Writings and speeches Vol. p. 252-253.

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English newspaper, edited by TM. Nair, a physician by profession. "As a first step, the party agitated for reserved seats for non-Brahmins in the legislative councils, accompanied in by the Montague-Chelmsford Reforms."[50] The main objective of the Justice Party was getting communal representation in the Government offices.

In reply to a question raised in the Madras legislative Council in the year 1914 it was answered that the total of registered graduates of the Madras University was 650 of whom 452 were Brahmins, I2 non-Brahmin Hindus and 74 belonged to other communities. The Madras legislative Council, the Senate of the Madras University and other local and public bodies composed of a large number of Brahmins and the non-Brahmins had hardly a chance of entering these bodies. Out of the 128 permanent District Munsifs in I919, 93 were Brahmins, 25 non-Brahmin Hindus and the rest consisted of Muslims, Indian Christians and Anglo-Indians. Out of 1007 Gazetted posts 609 were filled with Brahmin as against 398 posts held by non-Brahmins,Muslims and Christians. Out of 17,225 clerical posts 9813 were held by Brahmins...[51]

Moreover not a single non-Brahmin was elected to the Legislative Council during the first three decades since it started functioning in I882 when it was started to I917. Thus it was no wonder that when under the Government of India Act 1919 elections were held the Justice Party came out successful and formed ministry. The Indian national Congress had not participated in the elections. It was this Government of Madras that introduced what was later termed as „Communal G.O, which, in the post-Constitutional period, was challenged in *Champakam Dorairajan vs. State of Madras.*[52] It will not be wrong to state that there was a widespread awakening among the „depressed classes‟ and this led to their claiming for adequate representation in the legislatures. *Jaswal writes:*

> The result of the First Dispatch on Indian Constitutional Reforms was that the existence of depressed classes was recognized for the first time in Indian History under the Government of India Act 1919 with the result that among thefourteen non-official members nominated by the Governor general to the Central Legislative Assembly, one was the representative of the „depressed

[50] A.N.Sattanathan, „Reaction to Brahminism: DMK‟s Heritage‟ The Indian Express (Madurai Ed.) 24 August 1967.
[51] P. Venugopal, „Implementation of Social Justice Through Reservation‟ website accessed on 29th March 2003.
[52] AIR 1951 SC 226

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> classes". In the provincial legislatures the depressed classes were represented by four nominations in the Central Provinces, two in Bombay, two in Bihar and one each in Bengal and United Provinces. In Madras ten members were nominated to represent nine specified depressed classes.
>
> It was after the Act of 1919 that the Scheduled Castes, popularly known as depressed classes became a „political entity" for consideration in future set up of constitutional reforms. A thorough examination of the Report of the 32nd Indian National Congress shows that the Congress has mustered enough strength to pass a resolution to urging the people of India to remove all disabilities that were imposed by custom upon the depressed classes. [53]

In Madras Province *Periyar E.V. Ramasamy* spearheaded the non-Brahmin Movement. He declared that „communal justice" was only a means to an end and the end would be casteless society. Periyar E.V. Ramasamy broke with the Congress in 1925 on the issue of dominance of Brahmins within the Indian National Congress in the Madras Province and started the Self Respect Movement with a view to bringing about all round change in Tamil society.[54] So with the positive urge to protect the rights of depressed classes, there emerged the negative force of anti-Brahminism. Often casteism was identified with Brahminism and due mainly to the impact of Western ideals of equality and socialism the non-Brahmin, if not anti-Brahmin, movements emerged in different parts of India. .

The Government of India Act 1919 had a provision that a statutory Commission would be appointed after ten years to report on the matter of establishing a responsible government in India. In keeping with this provision, the British Government appointed Simon Commission. The Commission did not have any Indian member in itand was „all-white" one, in spite of protests from the Indian National Congress and Gandhi the Commission toured every Indian province. The Commission went through memoranda from Government of India, from Committees appointed by the provincial legislative councils and from non-official sources. Obviously the final report contained recommendations for reform. One of the recommendations was the need to safeguard the minorities and other depressed classes of people. The report of the

[53] S.S. Jaswal, Reservation Policy and the Law (New Delhi 2000) p.34.-35.
[54] Dr. P. Jagadeesan, Marriage and Social Legislation in Tamil Nadu.(Madras 1990) p.97-98.

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Commission focused the issue of the depressed classes not only as a social issue of caste, but also as an issue with serious political ramifications. The Commission was of the opinion that the uplift of the depressed classes depended on their gaining political influence, if not participation in the governmental processes. Obviously the representatives of the depressed classes were to be present in the legislature. Many provinces like Bihar and Orissa suggested they would opt for „nomination" because the depressed classes were too backward to choose their own representatives. But the Commission did not favour this idea for it felt that depressed classes needed Opportunities for getting used to ideas and practices of self-government.

3.2 The Role of Colonial Constitutional Reforms in Establishing Equality

The depressed classes demanded a separate electorate. But the Commission did not favour this. However the Commission was not against reserving seats for them. The Commission recommended to reserve seats, for the depressed classes in general constituencies and these seats would be filled by election in which both depressed classes and others would participate.

In I923 government decided not to give grants to those aided schools that refused admission to the children of the depressed classes. In 1928 Government of Bombay set up a Committee under the chairmanship of O.A.B. Starte to identify the Backward Classes and recommend special provisions for their welfare. In the meanwhile under the leadership of Ambedkar the Depressed Class people had begun to articulate forcefully their demands. The Simon Commission, which came to study and make recommendations for Constitutional reforms held negotiations and consultations with different groups of people. The representatives of the „untouchables" participated in them. In the words of Galanter, "Dr. Ambedkar, by this time recognized as an important spokesman, appeared before the Commission to demand reserved seats for the untouchables in legislative bodies, special educational concessions, and recruitment to government posts recommendations substantially accepted in the Commission"s report."[55]

He argued: The depressed classes in India present definite problem in political and social evolution. They are the resultants of historical forces, religious, economic and social. They are the embodiment of exploded (sic) social ideas and the disabilities

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[55] Marc Galanter, Competing Equalities (Oxford 1984) p.30.

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imposed on them by the original framers of Hindu polity have been aggravated by long centuries of segregation and neglect. The origin of these classes and the beginning of their woes rightly belong to the domain of historical research but their betterment, economic and educational, is an imperative problem. Their class- consciousness is growing, stimulated partly by the sympathy of the Government and partly by the belated awakening of the Hindu social conscience.[56]

In the Report submitted in 1930 backward people were categorized: (a) Depressed Classes, (b) Aboriginals and Hill Tribes and (c) Other Backward Classes. But there was stiff opposition to the recommendations of the Simon Commission Report. Therefore the British Government convened a RTC in November 1930, to which delegates from different parties and interest groups were invited. Unfortunately the Indian National Congress, which claimed that it was the only organization that truly represented the people of India, did not participate for it was engaged in The Civil Disobedience Campaign against the government. Though Gandhi, the unquestioned leader of the National Movement, was opposed to any kind of reservation, later changed his position and conceded to setting up separate electorates to religiousminorities like Muslims, Sikhs and Christians. But he opposed vehemently separate electorate for the „depressed classes".[57] The Round Table Conference ended in failure. Subsequently the British Government appointed Lothian Committee in December 1931, to formulate a system of franchise whereby all sections of the people would be represented in the legislatures. The Committee was specifically required „to investigate the need, justification and methods to ensure adequate representation for the Depressed Classes." As one writer observes:

> The Hindu members of the Lothian Committee, the members of the provincial Franchise Committees, and the Hindu witnesses in several provinces conspired to minimize the number of untouchables. Perjuring themselves, the witnesses denied the existence of untouchables in their province. In the United Province, for example, the Franchise Committee reported the number of untouchables as just 0.6 million as against the 1931 (census) figure of 12.6. In Bengal the

[56] J.R. Kamble, Rise and Awakening of Depressed Class in India (New Delhi 1979) p.86.
[57] Lord Irwin, Viceroy of India, hoped that by releasing Gandhi, he would be able to reach anagreement with him. In March 5th, 1931 Gandi-Irwin Pact was announced and „civil disobedience" was discontinued. Again as per the agreemenr Gandhi took part in the Second RTC held from September to December 1931. But the conference failed to solve the problem of „communal representation" in the legislative bodies.

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> Franchise Committee figure was 0.07 million whereas the census figure was 10.3 million. Before the RTC the census figures of the untouchables had not been challenged. When the upper castes found that the untouchables would get representation and facilities based on their population, they resorted to lies to deny the existence of untouchables.[58]

3.3 Simon Commission Report

In 1931 six months after the publication of Simon Commission Report, a Round Table Conference was convened in London to review the Commission‟s Report and how a new Constitution for India could be worked out on the basis of the recommendations of the Commission. Ambedkar and Rao Bahadur Srinivasan represented the Depressed Classes in this Conference.

The focus of the Conference was the position of minorities in the future structure of Government in India. Ambedkar and Srinivasan demanded separate electorate and adult franchise. But the separate electorates were not to be a permanent feature. But the discussion went on without reaching an agreement. Subsequently there was convened the Second Round Table Conference. This time Gandhi also participated; but he vehemently opposed to the system of separate electorate for the Depressed Classes. He criticized the separate electorate as a devise of the British strategy of „divide and rule‟.

The Franchise Committee of the Conference was unable to reach an agreement on the representation of minorities. Thus the then Prime Minister of Britain Ramsay Mac Donald was authorized to make an award, which would be binding on all parties. Called as Communal Award, announced in August I932, it „granted their demand for separate electorates in areas where they were concentrated in addition to regular votes they would cast as members of general electorate.“[59] The award proclaimed:

> Members of the depressed classes qualify to vote, will vote in general constituency. In view of the fact that for a considerable period those classes would be unlikely by the means alone, to secure adequate representation in the legislature, a number of special seats will be assigned to them...These seats will

[58] Thomas Mathew, Caste and Class Dynamics- Radical Ambedkarite Praxis (1992) p.12.
[59] Marc Galanter, Competing Equalities (Oxford 1984) p.31.

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be tilled by election from special constituencies in which only member of the „depressed classes", electorally qualified, will be entitled to vote. Any person voting in such special constituency will, as stated above, be also entitled to vote in a general constituency. It is intended that these constituencies should be formed in selected areas where the depressed classes are most numerous and that except in Madras, they should not cover the whole area of the province.[60]

3.4 The Poona Pact

Gandhi was opposed to this award.[61] After a month he started a fast unto death to resolve the issue of representation of depressed classes of people in the Assembly. A modern historian writes:

...his (Gandhi"s) friends as well as his opponents wondered why he chose this particular issue for so terrifying a tactic, since it seemed directed more against the untouchables than the British Government. Gandhi considered this issue central to the very survival of Hinduism. However for that reason he was willing to concede more reserved seats to Ambedkar for his party than the British had done. All he asked was that the depressed classes should not think of themselves as members of any religious community but Hinduism."[62] Gandhi openly declared, "I believe that if untouchability is really rooted out it will not only purge Hinduism of a terrible blot but its repercussion will be worldwide. My fight against untouchability is a fight against the impure in humanity."[63]

The mediators between Gandhi and Ambedkar put in all their effort and both of them met at Yervada jail where Gandhi had been a prisoner of the British Government. It was here that he started his „fast unto death" against the separate electorate forDepressed Classes. Now the responsibility of saving the life of Gandhi fell on all sections of Indians. But Ambedkar had a different opinion.

But Gandhi viewed the Award „an attack on Indian unity and nationalism and harmful to both. That time Gandhi had become hero of millions in India and even the

[60] Gwyer and Appadorai, Speeches and Documents on Indian Constitution (London 1921) Vol.1 p.4.
[61] A modern Indian historian alleges that the Communal Award of Prime Minister Mac Donald was aimed at „divide and rule" Bipin Chandra, India"s Struggle for Independence. (New Delhi 1999) p.290
[62] Stanley Wolpert, A New History of India (OUP 1982) p.319-320.
[63] Ibid.

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depressed class leaders like M.C. Raja thought it their duty to save the life of Gandhi. Hence the mediators between Ambedkar and Gandhi actively intervened and at last Ambedkar agreed to meet Gandhi at Yervada prison. After much haggling they reached an agreement.

According to this historic agreement depressed classes would get 147 seats in the provincial councils instead of 71 promised in the Ramsay MacDonald‟s award. The Depressed classes could get 18% of the seats in the Central Assembly also. The British Government accepted this agreement between Ambedkar and Gandhi andincorporated it as an amendment to the Communal Award of the Prime Minister of Britain. Subsequently Gandhi ended the fast and the following week was celebrated as Untouchability Abolition Week.[64] It seems that Gandhi knew the rising political awareness among the backward classes and depressed classes. These developments reflected in the next Constitutional document namely Government of India Act I935.

The Government of India Act 1935 replaced the term „depressed classes‟ with „Scheduled castes‟.[65] Accordingly separate lists of scheduled castes were notified for various provinces in 1936. The Act also defined „scheduled castes‟ as „such castes, races or tribes or groups within castes, races or tribes 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‟. Even though seats in the legislature were reserved both for the „minority‟ communities and for the „depressed classes‟, reservation in the public service was denied to the „depressed classes‟, whereas the minority communities enjoyed „reservation‟ in the public services. The reason stated for this was: “In the present state of general education in these classes the Government of India considers that no useful purpose will be served by reserving for them a definite percentage of vacancies out of the number available for Hindus as a whole, but they hope to ensure that duly qualified candidates from the depressed classes are

[64] Six days after the pact between Ambedkar and Gandhi, the latter started Harijan Sevak Samaj (Servants of the Untouchables Society) and its weekly journal Harijan.
[65] See, The Govt. of India Act 1935. It is to be noted that Gandhi gave the name Harijan (People of God) to the depressed classes. But this name they resented for they consider the term patronizing and condescending. In 1990 the Govt. of India prohibited the use of this word to denote the depressed classes. In fact the term *Harijan* acquired a pejorative meaning among the upper caste people and thus caused a psychological untouchability.

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not deprived of their opportunities of appointment merely because they cannot succeed in open competition.[66]

3.5 Political Strategies of Gandhi and Ambedkar

While Gandhi started Harijan Sevak Samaj to uplift the Depressed Classes, Ambedkar formed the Independent Labour Party (1936) to put pressure on Government for obtaining more resources for the Depressed Classes. Later in 1942 it became All India Depressed Classes Federation. When in I942 Gandhi and the Congress opposed war efforts and started the famous „quit India„ movement, Ambedkar, by contrast supported the British policy and its war efforts. He became a member of Viceroy‟s Executive Council. He used his position in the Government to further the interests of the Depressed Classes. During this time in a „Memorandum‟ he submitted to the Government, he demanded reservations not only in legislative seats but also in education and Government employment. This was perhaps a crucial moment for the Colonial Government and thus his demand was accepted and this became the basis forthe policy of India when it was framing the Constitution. Ambedkar played his card well by cooperating with the Colonial Government and made available some concrete gains for the Depressed Classes. The Independent India could not go back on this commitment of the previous government. It had to recognize these gains and the framers of the Constitution had to evolve a policy of protective discrimination based on this already accepted principle. The pertinent question here is, would the framers ofthe Constitution have incorporated protective discrimination clauses in the basic law ifAmbedkar had not made the British Government recognize the plight of the depressed classes and won for them the valuable concessions from the then Government.

Thus in 1942 the scheduled castes obtained 8.5 per cent reservation in Central services. The framers of the Constitution adopted the policy of reservation as the continuation of the policy that had been followed by the British Government in India. In many Provinces and native States legislations were enacted for uplifting the Depressed Classes.

Thus the socio-political scenario of the thirties of the 20th century was one in which the so-called Depressed Classes had begun to articulate their aspirations and in principle at least the upper class Hindus had to recognize the rights of the Depressed

[66] Gazette of India Part 1 July 7, 1934.

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Classes. In many regions in India the Hindu Temples were opened to depressed Classes people. This was a significant step on the path of the social uplift of the Depressed Classes. And rightly Ambedkar was able to coherent effectively the aspirations of depressed classes and adopt befitting political strategies to make gains for them.

The Maharaja of Travancore issued Temple Entry Proclamation in 1936.[67] In 1938 Madras Presidency enacted Madras Removal of Civil Disabilities Act followed by Bombay Government‟s Bombay Harijan Temple Entry Act, I943 and the United Provinces Removal Social Disabilities Act, I947. Perhaps these initiatives in the form of even legislations paved the way for a silent socio-political revolution and this changing scenario became the backdrop for the discussions of the framers of the Constitution.

3.6 Constituent Assembly of India

At the same time at the pan-Indian stage Constituent Assembly came into existence in December 1946. But the birth of the Constituent Assembly was not without the birth pangs.[68] Though not a sovereign body in the beginning, the Constituent Assembly assumed sovereignty later. Comparing the Constituent Assembly of India with Philadelphia Convention (1787) and to the States-General of France (1789) a scholar Points out that the American and French bodies constituted towards the end of eighteenth century were "articulate only in the general way, while in India a strong political factor had emerged by the time the Constituent Assembly was convened. That was the party system. It is in and through the political parties that the socio economic forces in India had crystallized."[69]

The Constituent Assembly worked for about three years in framing the largest constitution of the world. The ideals, about which the Freedom Movement had spoken, were to be translated into Constitutional provisions. One of them was the

[67] In fact it was the socio-political under currents, which were responsible for this progressive step. The native kings of Travancore always encouraged education and this led to political awareness of the backward classes. They joined with the religious minorities of the State formed Joint Political Congress. Some Powerful backward Classes even threated that they would embrace some other religion like Christianity or Buddhism. The Dewan of the Travancore in tactical move to throw open all Hindu Temples under the Govt management to Hindu of all castes. See Robin Jeffrey, The Decline of Nayar Dominance (London 1976) p.259-260.

[68] S.K. Chaube, Constituent Assembly of India (Calcutta 1986) Chapter III Birth of the Constitutent Assembly. P.30-55

[69] Ibid. at p. 101

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protection of the socially backward communities. The rhetoric of establishing an egalitarian society found its vociferous expression in the words of Nehru.[70] According to Anirudh Prasad, "At that time the issue of reservation was pleaded, explained, accommodated and accepted with the national spirit to assimilate sections of society including the intended beneficiaries of the reservation policy into the main stream of national life."

In the present context of affairs in regard to these unfortunate countrymen of ours who have not had these opportunities in the past, special attempts should be made, of course, in the educational and economic field and even in the political field to see that they have a proper place till they find their own legs to stand upon without the external aid.[71]

3.7 Constitutional Objective

The debate on the resolution moved by Nehru in the Constituent Assembly regarding „aims and objects" that later formed the Preamble of the Constitution, clearly reveal the sentiments of different sections of the people. Even though majority of the member whole heartedly supported the resolution Ambedkar had his own apprehensions. He said:

> . . .I must confess that, coming as the Resolution does for Pundit Jawarharlal Nehru who is reported to be a socialist, this Resolution, although non-controversial is to my mind very disappointing. I should have expected him to go much farther than he has done in that part of the Resolution. As a student of History I should have preferred this part of the Resolution not being embodied at all. When one reads that part of the Resolution, it reminds one of the Declarations of the Rights of Man which was pronounced by the French Constituent Assembly. I think I am right in suggesting that after the lapse of practically 450 years, the Declaration of Rights of Man and the principles which are embodied in it has become part and parcel of our mental make-up. I say they become not only the part and parcel of the mental make-up of modern man in every civilized part of the world, but also in our country which is so

[70] The sixth item in the objective Resolution moved by Nehru in the Constituent Assembly read: "Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes.."
[71] Anirudh Prasad, Reservation, Policy and Practice in India (New Delhi 1991) p.17.

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> Orthodox, so archaic in its thought and its social structure hardly anyone can be found to deny its validity. To repeat it now as I Resolution does, is to say the least, pure pedantry. ..The Resolution suffers from certain other lacuna. I find that this part of the Resolution, although it enunciates certain rights, does not speak of remedies...[72]

Leaders of the Congress party were very articulate in upholding the rights of the Depressed Classes and offer them adequate safeguards for exercising those rights. But doubts were also expressed regarding the effectiveness of these measures.[73] On the one hand a member from Madras criticized separate electorate as an effective safeguard for Scheduled Caste reservation:

> ...Even if the Harijans are given this percentage of votes and this kind of electorate system, the Harijans are in a position to withstand the attractions that they will have to face at the time of elections. So many parties can set up candidates and they can purchase the Harijans and put up any candidate they desire and any candidate can come up in the Assembly, and certainly he may not represent the community though he may get percentage of votes that is desired by this system. As long as the Scheduled Castes, or the Harijans, or by whatever name they may be called, are economic slaves of other people, thereis no meaning demanding either separate electorate or joint electorates or any other kind of electorates with this kind of percentage. Personally speaking I amnot in favour of any kind of reservation in any place whatsoever.[74]

On the other hand a Harijan Member, Nagappa vociferously argued for reservation for the ancient people who had been exploited by those who came later and dominatedthem. Quoting the number of Scheduled caste members and their population in various parts of the country, he tried to focus on the point that „reservation" was essential with regard to Scheduled Castes and Scheduled Tribes.

[72] H.S. Saksena (Ed.), Safeguards for Scheduled Castes and Tribes- Founding Father"s Views (1981) p.3-4.

[73]Marc Galanter went to the extent of saying, "The Constitution sets forth a general programme for the reconstruction of Indian society. In Spite of its length, it is suprisingly undetailed in its treatment of the institution of caste and existing group structure in Indian society." Competing Equalities (1984)

[74] H.S. Saksena (Ed.), Safeguards for Scheduled Castes and Tribes- Founding Father"s Views (1981) p. 173-174.

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Unlike Scheduled Caste representatives, the Scheduled Tribes representativesexpressed their voice of dissent by asserting that they being the original inhabitants need to be treated with dignity. Jaipal Singh from Bihar said:

> ...If there is any group of Indian people that has been shabbily treated, it is my people. They have been disgracefully treated, neglected for the last 6000 years. The history of the Indus valley civilization, a child of which I am, shows quite clearly that it is the new comers-most of you here are intruders as far as I am concerned-it is the new comers who have driven away my people from Indus Valley to the jungle fastness. This Resolution regarding aims and objects,moved by Nehru is not going to teach Adivasis democracy. You cannot teach democracy to the Tribal people; you have to learn democratic ways from them. They are the most democratic people from earth. What my people require is notadequate safeguards as Pandit Jawaharlal Nehru has put it. They require protection from Ministers that is the position today. We do not ask for any special protection. We want to be treated like every other Indian. . .the whole history of my people is one of continued exploitation and dispossession by the non-aboriginals of India punctuated by rebellions and disorder, and yet I take Pandit Jawaharlal Nehru at his word. I take you all at your word that now we are going to start a new chapter, a new chapter of Independent India where there is equality of opportunity, where no one will be neglected. There is no question of caste in my society. We are all equal. Have we not been casually treated by the Cabinet Mission, more than 30 million people completely ignored? It is a matter of political window dressing that today we find six tribalmembers in the Constituent Assembly. How is it? What has the Indian NationalCongress done for our fair representation? Is there going to be any provision in the rules whereby it may be possible to bring in more Adivasis and by AdivasisI mean not only men but women too.

Again he remarked:

> .. . I think there has been juggling of words going on to deceive us. I have heard of resolutions and speeches galore assuring Adivasis of a fair deal. If

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history has to teach me anything at all, I should distrust this Resolution, but I do not.[75]

The discussion went on to the question of representation in the legislature and many expressed hope that the proposed Constitution would guarantee equality and at the same time protect the rights of the depressed classes.

But there are also voices of frustration. For instance *H.J. Kandekar* came with his own experience. He said: "I remind you of the Poona Pact. I place before you the example of my own province. In Central Provinces where we constitute 25 per cent of the population and we are entitled to 28 seats, we are given only 20 seats in pursuance of Poona Pact. When have out eight seats gone?... Harijans cannot tolerate such injustice. They should be given representation according to their numerical strength.[76]

Provision regarding „untouchability" in the draft Constitution was generally welcomed. Eventually the fundamental right of „not being subjected to any discrimination" came to be qualified by the provisions to procure „protective discrimination". According to Nesiah, unlike Martin Luther King. Jr, Ambedkar wasin a position of authority for as the Chairman of the Drafting Committee of the Constitution and Minister of Law, „he was vested with both real and symbolic authority at the highest level'. Hence he was able to intervene effectively for the emancipation of Dalits. According to one member the inclusion of Ambedkar in the cabinet showed that there was a change of heart on the part of the caste Hindus.[77] But later events revealed the fact that it was not really a change of heart, but only a political expediency that made the Congress leadership offer Ambedkar such a position. But the relevant question is whether Ambedkar could or did exercise any realpower.[78] It would be safer to say that his skill as a lawyer was utilized by the then Congress Government.

[75] H.S. Saksena, Safeguards for Scheduled Castes and Tribes- Founding Father"s Views (1981) p.7-8.
[76] Ibid p.13
[77] Ibid p. 150. "The very inclusion of Dr. Ambedkar in the present Dominion Cabinet is a change of heart of the caste Hindu that the Harijan are not anymore to be neglected." Shri V.I. Muniswamy Pillai(Madras general)
[78] K.V. Rao, Parliamentary Democracy of India: A Critical Commentary (New Delhi 2nd Ed.) p.12 "My reading of the Constitution makes me feel that is inappropriate to call Dr. Ambedkar „the father of the Constitution". If any people are entitled to be called so, they are Nehru and Patel, but I would like to call them the presiding Deities, the sources of ideas of the Constitution- the real makers of theConstitution. I would like to attribute fatherhood to them as well as member of the Drafting Committee in common, but would not like to single out Dr. Ambedkar for his honour. We may call him, more

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3.8 Discussion on the Report on Minority Rights

Report on the Minority Rights, based on which the discussion on political safeguard of the depressed classes was carried on. Sardar Vallabhbhai Patel, who presented the Report said in conclusion:

On the whole this report is the result of careful sifting of facts on both sides. One thing I wish to point out. Apart from representation in the Legislature and the reservation of seats according to population, a provision has been made allowing the minorities to contest any general seat also. There was much controversy about it, both in theAdvisory Committee and in the Minorities Committee; but it has been passed by a majority. There was also another point which was a matter of controversy and thatwas on behalf of the Muslim League and a section of the Scheduled Castes. The point was raised that a certain percentage of votes should be considered necessary for a successful candidate. This was a matter of controversy and amongst the Scheduled Castes themselves a very large majority sent me a representation yesterday saying they were against this. But in the Advisory Committee it was discussed and It was thrown out by a large majority.[79]

Speaking on the Report P.S. Deshmukh said that the report was highly satisfactory; but at the same time he voiced the fear that the so called majority might be marginalized. He said:

> I am content that no minority is going to try any more to deprive others of what legitimately belongs to them. For many years past it was the majority that has been tyrannized. Unfortunately, the so-called majority is dumb and deaf and although many of us try always to speak in their name, I have no hesitation in stating that we have completely failed in translating our words into action. . .I, therefore, urge that at least when the minorities are content to have only their fair share of power in the Cabinets and a reasonable proportion in Government Services, our rulers will pay some more attention to the oppressed and neglected rural population which has even under the sacred name of the Congress has been more undone than assisted ...Let this be borne in mind in

appropriately, the „mother‟ of the Constitution and I am not using it in deprecating or jocular sense. Dr. Ambedkar had to bear, in fact, other‟s ideas and nature them bring them out as his own and this he did remarkably well.

[79] H.S. Saksena, Safeguards for Scheduled Castes and Tribes- Founding Father‟s Views (1981) p.148.

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distributing power and posts among the various Hindu Communities and let the policy of the „Devil -take the hindmost" cease, at least from now. [80]

On the other hand members from depressed classes, like S. Nagappa and Jaipal Singh, demanded representation in proportion to their population and representation in cabinets too. With regard to reservation of seats in parliament and state legislatures, originally the Constitution proposed a time limit of ten years. Though this was not agreeable to the Scheduled Castes, they accepted the advice of the political masters. For instance in the words of a member: We almost all Harijan members of this House sat together and Honourable Pandit Nehru was kind enough to explain to us that in ourown interests this will be the best thing. According to his advice we have come to a decision on this point. After all this is a question that has to be reopened by Parliament. If after ten years our position happens to be the same as it is today, then, itis open to the Parliament either to renew it or abolish it.

But even in the same Constituent Assembly speaking on the minority report, Mahavir Tyagi was highly critical. He observed that giving reservation would not benefit even the so-called Scheduled Castes. In fact Parliament considered this question from time to time and extended the period of reservation in legislature.[81]

3.9 Constitutional Provision for Protective Discrimination

As the Preamble of the Constitution envisions achieving equality is *sine qua non* of a democratic polity, the Constitution of indie has incorporated provisions, both general and specific, for this purpose „Equality as a right" is envisaged in the Constitution

[80] Ibid p. 149-150.

[81] The period has been extended from time to time by means of Constitutional Amendments. The Constitution (Seventy Ninth Amendment) Act, 1999, Sec 2, provided for the special representation to cease after sixty year (from the Commencement of the Constitution). Amendment of Art 334: In Art 334 of the Constitution, for the words "fifty years", the words "sixty years" shall be substituted. It means that the reservation of Seat for the SCs and STs would continue upto 2010. See, Art 334 of the Constitution of India

Art. 334 Reservation of seats and special representation to cease after sixty years:- Nothwithstanding anything in the forgoing provisions of this part, the provisions of the Constitution relating to-

(a) the reservation of seats for the SCs and the STs in the House of the People and in the Legislative Assemblies of the State; and
(b) the representation of the Anglo-Indian community in the House of the people and in the Legislative Assemblies of the States by nomination,

shall cease to have effect on the expriation of the period of sixty years from the commencement of this Constitution:

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case

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under Article 14, 15 and 16, whereas „equality as a policy" is implied in thoseprovisions that ensure reservation for the socially and economically backward class ofpeople, which inevitably includes scheduled castes and scheduled tribes. The right to be treated with respect and conc0ern as anyone else is implied in Article 17 and alsoin The Protection of Civil Rights Act, 1955. To a certain extent Abolition of Titles in Article 18 also emphasizes equality among citizens. Articles 25 to 28 confer certain rights relating to freedom of religion on all persons in India. As per Article 46 directs the State to take steps to protect educational and economic interests of the weaker sections and in particular, of Scheduled Castes and Scheduled Tribes.

The Universal Adult Franchise adopted by the Constitution also goes to show that the Indian Union is committed to political equality. The Specific provisions are made for safeguarding the rights and interests of Scheduled Castes end Scheduled Tribes as well as other backward classes. Articles 15 (2), (3) and (4) and Clause (3), (4), (4A) and (4B) of Article 16 that come under Part III titled Fundamental Rights and Articles 330 to 342.

Every fundamental right guaranteed by the Constitution is qualified by certain restrictions. The „right" is for the individual citizen; but the unbridled right might bring more harm than good. Hence to protect the social interests, restrictions on the rights of the individual do become essential.

Obviously when this balancing is done the court must look into the question of what is „societal interests". It does not mean equal status of the citizens alone, because the „equal status" to a significant extent, especially in an industrialized society, depends on the „economic equality". A meaningful economic equality could be achieved only with the development of economy. The latter is possible only when people are given opportunity to develop their inherent talents. But unfortunately this fact, is forgotten and „protection" has come to mean only providing government jobs, which are comparatively less productive. Hence it is expedient that a new thinking is needed in this area.

During the debate in the Constituent Assembly it was generally agreed that sufficient protection for the backward communities was to be given. The attitude of the Christian leaders was not in favour of reservation *per se*. Anirudh Prasad comments:

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Raj Kumari Amrit Kaur, a Christian opposed both reservations of seats and weightage for any community. She had reasons to argue so *first*, in her opinion there was no reason to believe why the interests of any individual or community would not be safe in the hands good persons irrespective of their religion. *Second*, privileges and safeguards really weaken those who demand them. *Third*, reservation or weightage was wrong in principle and when it was given on the ground of religion, it was doublywrong, for all religions stood for brotherhood of man and none for separatism. In her opinion reservation and special privileges would lead to the fragmentation of the Indian Union. [82]

However the framers of the Constitution did not heed to such warnings. Even leaders like Nehru had apprehension regarding reservation. He observed:

> There is a great danger, whether you deal with an individual or group or community, of giving certain props to that community which give it a false sense of strength which does not belong to it, and when they are removed, suddenly make the community weak. A nation ultimately ought to stand on its own feet. So long as it relies on some external prop, it is not strong. It is weak. So these external props, as I might call them, that is reservation of seats and therest-may possibly be helpful occasionally in the case of backward groups, but they produce a false sense of strength, and ultimately, therefore, they are not sonearly as important as real educational, cultural and economic advance which gives them inner strength to face any difficulty or any opponent.[83]

Another danger that lurks behind reservation is that it consolidates the scheduled castes and the members of the caste do not want any removal of caste identity. The ramifications of reservation goes further that most of the educated young persons, who cannot find government employment because of the fact that they belong to the „upper caste", try to emigrate and thereby they cause „brain drain" in the country. Having no vision to foresee such consequences the Constituent Assembly eventually made a compromise mainly because of political compulsions.

[82] Anirudh Prasad, Reservation, Policy and Practice in India (New Delhi 1991) p.112.
[83] See Nehru: The First Sixty Years (Ed.) Dorothy Norman. Asia Publishing House, (1965) p.400.

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3.10 Reservation in Kerala State

The history before the formation of Kerala would reveal the fact the fight for „rights" was a combined effort of the communities other than the dominant ones. And the political movement that was to translate this aspiration too reflected it in the form of Joint Political Congress. Hence to treat the question of evolution of reservation in the case of SCs and STs on the one hand and OBCs on the other in separate streams would be repetitive. Moreover the issue of reservation with regard to SCs and STs hadnot become controversial. There were only a few questions as to which communities were to be included in the Scheduled Castes Lists and whether a particular Community was to be included in the list of Scheduled Tribes. For instance as one scholar puts: Looking at the progress achieved in implementing reservation, it couldbe safely concluded that the Constitutional mandate in this regard is scrupulously respected in political representation both at the national and state level. But withregard to representation of Scheduled Castes in administration and admission in educational institutions, trends are often contradictory between the all India pattern and that of Kerala. While at the central level SCs are grossly underrepresented in both fields, Kerala Pattern shows satisfactory results in many respects though some gray area are still noticed. [84]

On 1st of November 1956 the State of Kerala came into existence as I result of the formation of linguistic states and necessary order regarding reservation was issued in 1957.[85] Along with this the exemption given in the qualifying test to the Scheduled castes and Scheduled Tribes was extended by an order dated 27 June 1958.

3.11 Kumara Pillai Commission

In I965 the Kerala Government had been reserving seats in Medical, Engineering (including Polytechnics) Agricultural, Veterinary colleges and in Arts and Science Colleges for students of Backward Class, Scheduled Castes and Scheduled Tribes. Against the reservation Orders of the Government writ petitions were filed in the High

[84] J. Prabhash, Affirmative action and Social Change (2001) p.87

[85] See Justice KK Narendran Commission Report 2000. In the erstwhile State of Travancore and Cochin Backward classes were entitled for reservation of post in govt Services from 1936 onwards. In the erstwhile Malabar District, which now forms part of Kerala also, Backward classes were having reservation for appointments in govt services. But the position was different as far as Central Govt services were concerned. In the State of North India also Backward classes were not having the benefit of reservation for appointment in govt services.

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Court and the Court allowed the petitions. Though an appeal was filed, the Division Bench too allowed the petitions with a few exceptions. However the Court directed the Government to set in motion a fact finding enquiry so that appropriate Orders could be issued on an objective basis. The Court also suggested a probable time limit, „Before the beginning of the academic year 1965-1966". In pursuance of this direction of the Court, the Government appointed a Commission under the Chairmanship of Kumara Pillai and with three members other than the Chairman and a member Secretary. The Commission came into existence on 8th July 1964.

The terms of reference were: *first* to enquire into the social and educational conditions of the people and report on what sections of people other than Scheduled castes and Scheduled Tribes should be treated as backward for reserving seats in the higher educational institutions and *second* to recommend the quantum of such reservation and the period during which it may remain in force.

The Commission submitted its report on the last day of 1965[86]. Based on its recommendations the Government issued Orders in May 1966. A salient feature of the report was that the very first recommendation suggested economic criterion along with caste or community for determining backwardness. The report said, "Only citizens who are members of families, which have an aggregate income (i.e. income ofall members of the family from all sources taken together) of less than Rs. 4200 per annum and which belong to the caste and communities mentioned in Appendix VIII constitute socially and educationally backward classes for the purpose of Art. 15 (4) ..." In issuing Order based on the recommendation, the Government changed the amount of annual income of the family to Rs. 6000. Reservation based on regions is also recommended. The fourth recommendation said, "In the Medical, Engineering (including Polytechnics) Agriculture and Veterinary Colleges 20% of the general seats may be allocated between the Malabar area and the T .C. area in the ratio of 5:8 on the basis of merit."

The Government accepted the above recommendation. It also accepted the recommendation that untitled reserve seats must go to open merit pool. The reservation was recommended for ten years beginning from the academic year 1966-67. The report also proposed financial help to the students of backward classes.

[86] See Kumara Pillai Commission Report 1965.

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3.12 Nettur Commission

For deciding the question of backwardness and also the quantum of reservation to be made for the backward classes the Government of Kerala constituted a Commission in 1967 subsequent to the decision of the Kerala High Court in *V.Hariharan Pillai vs . State of Kerala*[87]. In the beginning it was a committee of which *Nettur P. Damodaran* was the chairman. In February I968 the committee was redesigned as a Commission. The terms of reference to the Commission are:

(a) What are the main factors, which lead to backwardness of citizens?

(b) What should be the basis for classifying sections of people into backward and non-backward?

(C) In the light of answers to (a) and (b) above, what classes of citizens in the State should be treated as backward for the purpose of Art 16(4) of the constitution and which of such classes are not adequately represented in the services under the State and,

(d) What should be the quantum of reservation and the period for which it is to remain in force so far as the reservation of 40% to "other backward classes" is concerned?

At that time 50% of the appointments in the public services were set apart for open competition on the basis of merit. In the rest 50%, 10% was set apart for Scheduled Castes and Scheduled Tribes and 40% for other „backward classes". The Government of Kerala asked the commission not to include the matter of SCs and STs and the terms of reference was to be confined to "40% to other backward Classes". This may be because of the fact that there was, as it has already been pointed out, not much dispute regarding reservation to the Scheduled Castes and Scheduled Tribes. More controversy one may find with regard to the determination of the groups that constitute Other Backward Classes (OBCs).[88]

The factors leading to backwardness, the basis of classifying people into „backward" and „non-backward" and the Classes of people who are not adequately represented are one of the items included in the terms of reference. Thus the Commission went into

[87] AIR 1968, Kerala 42.
[88] Since the Publication of the Mandal Commission Report and subsequent judgement in the Indra Sawhney case „backwardness" has come under judicial srcunity.

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the question of „backwardness" and made certain concrete and reasonable recommendations.

In the course of determining the factors responsible for backwardness, theCommission observes that conditions vary from State to State. After analysing variouscase laws and the speech made by Dr. Ambedkar in the constituent assembly, the report enumerates the factors that must be present to determine „backwardness".According to the findings of the Commission, test of residence or habitation, test of occupation, test of caste, test of education, economic test, test of appropriation of appointments and test of social backwardness due to historical reasons. In conclusion the Commission states:

> [Thus], the Supreme Court and High Court of Kerala have both used the term „social backwardness" as meaning „economic backwardness" and „social backwardness due to historical reasons of caste, occupational stigma etc". Therefore it is clear that the expression „socially and educationally backward" used by the Supreme Court and the use of the term „socially, educationally and economically" used by the High Court of Kerala is one and the same. This construction recognizes the factual existence of classes of citizens who are backward „educationally", „economically" and „socially due to historical reasons". We have already adopted the economic test, as one of the tests for backwardness. It is therefore not necessary to include „poverty" again as a constituent social backwardness due to historical reasons. Thus, the all-round retardation due to the practice of caste till the recent past, backwardness due to the vestiges of caste in the present, backwardness due to the occupational stigma, purdah, aversion of Muslims till recently, to education through the medium of English, other social taboos resulting in social backwardness will be the constituents of „social backwardness due to historical reasons". We would therefore suggest that social backwardness due to historical reasons may be one of the four tests. (Emphasis supplied) [89]

[89] Nettur Commission Report p.80-81.

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3.13 Echo of Indra Sawhney Decision in Kerala and Challenge to Kerala Act 16 of 1995

In the post *Indra Sawhney*[90] period the Central Government appointed Justice R N Prasad Committee in accordance with the direction given by the Supreme Court to fix the criteria for exclusion of creamy layer from the Backward Classes. In the Judgment the Supreme Court had made it clear that the State Governments were also to take steps for exclusion of creamy layer among the backward classes from the benefits of reservation under Article 16(4) for the appointments in the state government service Some States acted promptly and fixed the criteria for exclusion.

The State of Kerala did not do anything in the matter for a few years. This led to the initiation of contempt of court proceedings against the Chief Secretary to the Government of Kerala and the then Chief Secretary was directed to appear before the Supreme Court. There after the State Government passed *the Kerala State Backward Classes, (Reservation of Appointments of posts in the services under the state) Act 16 of 1995* declaring that having regard to known facts in existence in the State of Kerala there are no socially advanced sections in any Backward Classes who have acquired the capacity to compete with forward classes, that the Backward Classes in the state were not adequately represented in the services under the state and they would continue to be entitled for reservation under clause (4) of Art 16 of the Constitution.

The Nair Service Society and others challenged the validity of the Kerala Act 16 of 1995 before the Supreme Court. The Court requested the Chief Justice, High Court of Kerala to appoint a retired Judge of the High Court to be Chairman of a High level Committee to collect necessary information regarding the creamy layer and forward its report to the Supreme Court within three months. Subsequently Justice K.J. Joseph Committee came into existence. It submitted its report on 27-5-1997 to the Supreme Court. The Court jointly heard the contempt matter and writ petitions challenging the validity of the Kerala Act. The Supreme Court declared that the provisions of sections 3, 4 and 6 of the Kerala Act are unconstitutional. The SC also held that the guidelines and criteria fixed by Justice Joseph Committee are reasonable so far as the state of Kerala is concerned. Consequently the SC accepted Justice Joseph Committee report

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[90] Indra Swahney vs. Union of India, AIR 1992 SC 477.

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in to subject to the addition of the communities and sub castes as pointed out in the affidavit of the State.

The Supreme Court further directed the State of Kerala to find out the „creamy layer" and exclude it from the purview of „backward class". For that purpose suitableprovision should be made. Until that time the recommendations of Justice K.J. Joseph Committee should apply. Finally the Court said:

> Any fresh alternative provision that may be made by the State of Kerala, it is needless to say will be subject to such further decision of this Court in case the validity thereof is questioned.
>
> In the event of alternative provisions being made by the State of Kerala is either by executive order or by legislative measures or by way of Rules, no Court shall entertain any challenge thereto, and all proceedings in relation thereto shall have to be taken out only in this Court.

Regarding the stand taken by the State of Kerala, Supreme Court was highly critical. The callous indifference shown by the State Government in implementing the decision of the apex Court, in fact, amounts to contempt of Court. Yet the Hon"ble Supreme Court was gracious enough to adopt a lenient view. In this context it would only be appropriate to quote the words of the Court:

> On account of the inaction of the State of Kerala in spite of in action of extensions of time in implementing Indra Sawhney ...in appointing commission to identify the creamy layer, this Court felt "vexed" and issued contempt notice on 20-3-1995. Pursuant to that notice on 10-07-1995 the State of Kerala filed an affidavit that it had already passed the Kerala Act 11 of 1993 on 17-4-1993 appointing a Commission, which could go into this issue but that the said Commission stated that it had no jurisdiction to go into the question of „creamy layer" as per the provisions in that Act of 1993. The affidavit then stated that the matter was referred again to the Commission on 13-10-1993; a meeting took place on 10-5-1994 that the Commission again refused to identify the creamy layer, that a Bill was then contemplated to amend Kerala Act 11 of 1993 to confer powers on the said Commission to go into this issue as well,

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that in the meantime, the State constituted the Justice Khalid Committee on 8-7-1995.

In our Opinion, these events were set out in the above affidavit filed by the Chief Secretary only to ward off any penal action for contempt of this Court. The above explanation was naturally found to be wholly unsatisfactory and thisCourt held, in its order dated 10-7-1995 that the State of Kerala represented by its Chief Secretary had acted in "willful disobedience" of the orders of this Court and that it had committed contempt of Court. This Court granted time till11-9-1995 to the State of Kerala to purge itself of the contempt. It appears that there was then a cabinet meeting on 13-7-1993 and thereafter it was decided on14-7-1995 that a Standing Committee should go into the question but that instead, it was Suddenly decided on 27-7-1995 that the "existing system be continued". Then Act 16 of 1995 was passed on 31-8-1995 to give effect to that decision. The Act received the assent of the Governor on 2-9-1995 and became effective retrospectively from 2-10-1992, thus allowing the existing reservation to continue in full force. In effect no creamy layer was identified. As per sub-clause (a) of Sec.3 of the Act it was declared that in view of „knownfacts" the legislature was of the view that "no section of any backward Class in the State of Kerala who had acquired capacity „to compete with" the forward classes." As per Cl. (b) it was stated that Backward Classes were not still adequately represented in the public services of the State. Section 4, therefore, continued the 1958 scenario of Backward Classes without excluding the creamy layer and S. 6 spoke of retrospective validation. [91]

The observations of the Court truly reflected the lack of political will on the part of the Kerala Government to identify the creamy layer among the backward Classes forthese Classes command a considerable chunk of ballots. Thus the fear of losing „vote bank" made the ruling conglomerate find excuses if not adopt enduring silence. The delaying tactics adopted by the Legislature as well as Executive pushed the Executive to the dangerous brink of contempt of Court.[92] Subsequently a Commission was

[91] Indra Swahney vs. Union of India, AIR 2000 SC 498 (512).
[92] Another dangerous tendency this might encourage is that people might lose their respect for the judiciary. People may think that if the govt itself could defy the Court"s verdict, why they could not do that.

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appointed to into the question of „creamy layer‟ first and then that of adequacy of representation of backward Classes in the services of the government.

3.14 Narendran Commission (S)

This Commission that was appointed on 13th January 2000 might be called the First Narendran Commission, because there was another Narendran Commission that was appointed for studying and reporting on the adequacy or otherwise of representation of the Backward classes in the services of the State Government, Public Sector Undertakings, Autonomous Bodies and Institutions under the State Government including Universities, on 11th February 2000.

It seems that the Commission was satisfied with the response it received from the public. In the words the response was „tremendous‟. The Commission also said, "A perusal of the various representations makes it clear that not only the Backward Classes but some of the members of the forward classes also have made their valuable suggestions". In the opinion of the Commission, therefore, the question of reservation is of „considerable importance to all sections of the people in the State‟.[93]

But at the same time the bureaucrats did not view this question of considerable importance to the public with the much seriousness that it deserved. The Commission wrote to the Chief Secretary to the Government of Kerala to make available a community-wise list of officers in the Government Secretariat. A request was also made to furnish similar lists of officers in the offices of the Heads of Departmentsfrom the rank of section officers to the Heads of Departments. In the words of the Commission, "For reasons not known the Chief Secretary to Government is also keeping quiet."[94]

In paragraph 10.2 the Commission refers to caste system as a prelude to assessing social backwardness. According to the Commission „nobility attached to an occupation decided the caste in the past and it continues to h certain extent. But in the past it was the „Brahminical‟ doctrines am decided the 'nobility' of a vocation and made it more or less „hereditary‟. The impact of Westernization unfortunately did not permeate the lower rungs of different societies in India. Since the adoption of Indian

[93] Report of the Justice KK Narendran Commission, 11th April 2000, para. 11.6.
[94] This is not an isolated case. The Civil service in India has a general tendency of lethargy, indifference, sometimes even arrogance and it never realizes the meaning of the word „public service‟.

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Constitution, „caste" stands abolished legally and officially. Yet in one way or other it has to be reckoned with when the policy of reservation is discussed. There is tendency to get oneself into a lower caste group so that the benefit of reservation could be obtained. Thus even the Court invited to discuss caste.

In *Kerala Pattikajathi Samrakshana Samithy vs. State of Kerala*[95] this conflict of interests could be clearly seen. The anomaly in emphasizing the phrase „socially and educationally backward" and the importance of the „economic" factor are being revealed when the Commission observes, It goes without saying that in any recommendation the Commission is to make the Commission cannot ignore their existing social and economic conditions and the special features of the Other Backward Classes in the State. The 20th Century is over and we are already on the threshold of the 21st century. In the 20th century especially in the last half of that century revolutionary changes were witnessed by the whole society in the State. The social advancement made was tremendous and it cannot be said that the Backward Classes in the State were not also benefited by this. The economic conditions also improved and more and more people who were under the poverty line could bebrought above the line. All these developments in a way very much improved the living conditions of the Backward Classes who form the majority of the population in the State. Though the vast majority of the Backward Classes are yet to attain the capacity to compete with the forward Classes in all walks of life, the number among them who are in a position to compete the forward classes has increased to some extent. [96]

In paragraph 1.2 the Report says "that restrictions imposed on the Backward Classes should not be such that they are denied the legitimate rights that they have to get into the Government service and partake in the power sharing that is essential to make democracy really meaningful" It seems that the Commission is under the impression that the mere acquiring of government office is the means to achieve meaningful democracy. In which case all, if not, the majority of the citizens will have to occupy a position in the governmental establishment. Democracy and its effective functioning depend on the legislature elected by the enlightened electorate end an executive (of which the civil service is a part) dedicated to „public service" and an independent

[95] ILR (Kerala Series) 1995 (3) p.3-41.
[96] Report of the Justice KK Narendran Commission, 11th April 2000, para. 11.2.

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Judiciary. The Commission itself has had the bitter experience of lack of cooperation from the part of the bureaucracy when it did not care to respond to Commission‟s requests.

Moreover the Second Narendran Commission has discovered that the Backward Classes have acquired such a share in the Governmental service, which has gone beyond the quota if not reached the quota level. With regard to determining the lower limit to the income of the parents whose wards are to be excluded from the protective umbrella, the Commission says, "Considering all aspects of the matter theCommission is of the view that the gross annual income has to be fixed at Rs.3,00,000/-….[97] It would have been better if the Commission had linked the determining of the income limit to money value, so that there could be automatic alterations in accordance with the changing value of rupee.

The Commission‟s helplessness is revealed in Para 14. In some States like Karnataka, there is a division within the backward classes as Backward, more Backward and the most Backward. As there is no such division in Kerala, the most backward classes do not benefit when the vacancies are fewer in number. Conceding this argument, the Commission goes on to say.

But the division of these communities on the basis can be made only on the basis of their present representation in the services. This can be ascertained only on the basis of reliable data. A division not on the basis of data may prove to be harmful to some of these communities. The abolition of quota system and make all Backward Classes to compete for the 40 per-cent seats put in a pool may also prove to be equally counterproductive. It goes without saying that the more advanced sections among the Backward Classes will have a monopoly as the more backward among the Backward Classes will not be in a position to compete with them. But the Commission is not making any recommendation on this point for want of reliable data. (Emphasis added).

In Para 15.1 the Commission comes to the conclusion that "A considerable number of posts and that too in the higher grade are still kept out of the purview of reservation. Not only that a good number of Corporations and Public Undertakings are yet to be brought under reservation." Again the Commission is unable to offer any specific number or percentage of posts to be reserved. Moreover the Commission has not taken

[97] Ibid para 11.6.

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into consideration the change in the policy of the Union Government since it signed the World Trade Organization Agreement. Hence international norms both on efficiency of the personnel and appointments on the basis of „equal opportunity" have to be considered. It is a sad fact that the Commission is silent on this aspect.

The Commission has dealt with the inordinate delay caused by bureaucratic indifference it recommends: "At any rate the certificate should be issued within ten days of the receipt of the application and if in case the certificate is to be refused the refusal also should be communicated to the applicant within the same time limit." Thus the present position with regard to reservation for the Other Backward Communities (OBC) is that those parents whose income exceeds Rs. 300, 000/per annum cannot claim the reservation rights for their wards.

However, the vote-bank politics has been to the fore in the move of the Government to include religious minorities among the "backward". Susan Bayly comments: "In October I994 the Kerala State Government decided to include the state"s entire Muslim population in the OBC category, thus making them eligible for employment reservations and other benefits. To do this the Government adopted the simple device of classifying all Kerala Muslims as Mappilas, that is, as members of the one named non-Hindu „community' that had originally been placed on OBC register.[98]

The Report of the second Narendran Commission came to light on 9" November 2001. This Report presents a thorough study of the communal representation in the administrative hierarchy. The Commission held fifty-one sittings and three sittings were held in the cities of Kozhicode, Kochi and Thiruvananthapuram. The inordinate delay in collecting data is indeed unjustifiable these days when technology in communication has made long strides. This indeed is a reflection on the efficiency of the administration. The Report says:

> On the expiry of the last date specified by the Commission (31-12-2000) for receipt of data from Government and Public Service Commission, the matter was reviewed by the Commission. The data received from Secretaries till then covered only about twenty per-cent of the employees. Some of the Secretaries to Government had written to the Commission seeking extension of time for collecting the data. Data from Public Service Commission also got delayed. It

[98] Susan Bayly, Caste, Society and Politics in India, (OUP 2000) p. 305.

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> was therefore obvious that, in spite of the best efforts of the Commission and cooperation from the Secretaries to Government, work would not be completed by 10-2-2001 when the first six months extension would run out. Hence ...the Commission sought extension for six more months...[99]

On the other hand there was tremendous response from the public. Manyorganizations and individuals of upper classes too approached the Commission to articulate their studied opinion. There was an anonymous representation that describedthe claim of the Backward Classes as farce." Statistical inaccuracies, ignorance
„consolidated fund" and „budget" and demanding representation for hitherto unknown backward communities are some of the interesting aspects of the public response elicited by the Commission.

In the final analysis as it has been pointed out at the outset of the discussion Kerala cannot be said to be a problem State with regard to the implementation of the reservation policy. Reservation for the socially and educationally backward communities has been accepted principle since the thirties of twentieth century in the Travancore area and the Malabar area, which was part of the erstwhile Madras Province, also had rules regarding Communal representation.[100] Thus it can be safely remarked that the public in Kerala has internalized the policy of reservation based to a certain extent on the principle of equity. That was why there was little political reaction subsequent to „declaration of reservation policy" based on MandalCommission Report by the Central Government. It is left to the future political decision makers to formulate policies when the impact of liberalized economy in the form of privatization, is felt.

[99] Justice Narendran Commission Report dated 9th November 2011, p. 4.
[100] Champakam Dorairajan vs. State of Madras, AIR 1951 SC 226

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CHAPTER- 4

LEGAL MECHANICS OF RESERVATION

The „legal mechanics of reservation‟ is given the meaning of the existing legal provisions to protect the interests of the communities and groups of people whose interests need protection. These provisions could be classified into: (a) Constitutional, (b) Statutory and (c) those that are derived from Subordinate legislations like rules, regulations, orders, notifications and directions. The subordinate legislations are the creations of the executive. The subordinate legislations are based on the broader principles set out in the parent Act.

The Constitution of India under Art 141 gives the final authority to the Supreme Court to declare what is the law of the land. It means that the Court by its interpretation could ensure justice. Thus Court also plays important part in shaping the legal mechanics of reservation. The Court may give directions and occasionally even goes to the extent of making judicial Legislation.

4.1 Constitutional Provisions

On January 26, 1950, India ended its "Dominion" status, become a republic, and put in effect its new constitution. With an entire section dedicated to "Fundamental Rights," the Indian Constitution prohibits any discrimination based on religion, race, caste, sex, and place of birth under Art15(1).

The Preamble of the Constitution of India envisions „equality‟ and „justice‟ as the goals. „Justice‟ is qualified by the words social, economic and political. Among these political justice has been achieved, seemingly at least, by the adoption of universal adult franchise. But economic justice and social justice have remained a mirage. The Forty Second Amendment to the Constitution added two terms, „socialist‟ and „secular‟ to the Preamble. Socialism implies economic justice and secularism implies social justice. Often the policy of reservation has been viewed as a means to achieve social justice.

Though the Constitution envisages „equality‟ as the basic principle, for obviousreasons it was considered desirable to have „protective discrimination‟ as a policy to

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safeguard the interests of the marginalized sections of the polity. In other words it could be said that „equality" as a right for all citizens is guaranteed by Art 14, 15 and 16 whereas „equality" as a constructive policy has been incorporated in Arts 15(4) and , 16(4)(5). This could be discerned from the wording of the provision. The subclauses[101] empower the state to make laws in order to protect the interest of the communities who have been suppressed in the past. Hence once they achieve social equality and economic sufficiency the need for discrimination disappears for the discrimination is only „protective". In fact the policy reflected in Art. 15(4) were inserted by the First Amendment to the Constitution. It was a restatement of the policyof the Government and the restatement was necessitated by judgment in *State of Madras v. Champakam Dorairajan*[102]. The fact that the judgment went against the policy of the Government might have been the reason for such a restatement of policy through Constitutional Amendment. The political expediency behind the Amendment was reflected in the words of Nehru: "The House (Lower House of the Parliament) knows very well and there is no need for hush it up, that this particular matter in this particular shape arose because of certain happenings in Madras."[103]

But incorporating an apparently transient policy in the basic law of the land has its ramifications; because the Government may have to change the policies in accordance with the changing times and consequently the changing societal equations. But the basic law, that is, the Constitution is to be comparatively permanent. Thus the policy that ought to change in accordance with the changing times, when inserted in the basiclaw of the land has an adverse effect too. A few sections of people, at least, would liketo remain as backward to get the benefits of preferential treatment and consequently this will lead to the perpetuation of social backwardness of castes.

Art 29 and 30 imagine protection of minorities. As per the Arts give only cultural and educational rights to the minorities and hence do not have any direct link to the question of „reservation". A similar policy could be seen in Art 46 also, but this Art

[101] Art 15(4) – Nothing in this article or in clause (2) of art 29 shall prevent the state from making any special provision for the advancement of any social and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.
Art 16(4)- Nothing in this article shall prevent the State from making any provisions for the reservations of appointment or posts in favour of any backward classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
[102] AIR 1951 SC 226
[103] Parliament Debates, Vol XII- XIII (Part II), col. 9615.

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comes under Directive Principles of State Policy and hence not justiciable, although it could inspire the judges so inclined to receive some direction in interpreting law.

Art 330 to 342, Part XVI of the Constitution contains special provisions relating to certain classes. Here the basic law provides for the reservation of seats in the legislature for certain classes of people. It is only commonplace to say that to be meaningful democracy must have a broader representation of the people concerned.As decision-makers of the country, the members of the legislatures enjoy much power and privilege. Obviously the reservation for seats in the legislature becomes essential for the weaker sections for their voice to be heard and to make their participation in law making effective. Therefore it was only natural that the makers of our constitutionwanted to incorporate the necessary provisions for the reservation of seats for SCs andSTs and certain other weaker sections. Art 330 reserves seats in Parliament and Art 332 provides reservation of seats in the Legislative Assemblies of the States. Originally such reservations were only for ten years; but as years went by Parliament through Constitutional Amendments extended the period.[104] Art 335 says. *"Theclaims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to the services and posts it connection with the affairsof the Union or of a State."* it is interesting because no mechanism was provided to measure the impact of reservation upon the efficiency of administration.

Arts 341 and 342 of the Constitution empower the President to notify through a list the caste, race or tribe any State or Union Territory. Only the groups enlisted can claim the reservation benefits. At the same time Parliament has the power to include or exclude any caste or group of people in or from the list. Parliament shall do this by passing a law.

The Constitution does not define other Backward Classes. However, in pursuance of the judgment of Supreme Court in *Indra Sawhney"s* case, the Govt in enacted the National Commission for Backward Classes (NCBC) Act, 1993. As per sec 2 of the NCBC Act, „Backward Classes" means such backward classes of citizens, other than the Scheduled Castes and Scheduled Tribes as may be specified by the Central

[104] The Constitution (Seventy Ninth Amendment) Act, 1995: Amendment of Art 334: In Art 334 of the Constitution, for the words "fifty years", the words "sixty years" shall be substituted.

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Government in the lists. Art 342-A related to socially and educationally backward classes the President may with respect to any States or Union Territory, after constitution with the Governor thereof, by public notification. Parliament may be law include in or exclude from the Central list of socially and educationally backward classes specified in a notification issued under clause (1) of art 342-A.

Several safeguards accompany these provisions for reservation. *First,* the Constitution originally required the reservation of seat in the Lok Sabha and State Legislature to end after 10 years, but after the Constitution 79th amendment the time limit has recently been extended to 2010. *Secondly,* regarding the reservation of job, Art 335 of the Constitution mandates that the "claims of the members of the SCs and STs shall betaken into consideration, consistently with the maintenance of efficiency ofadministration." *Fourth and finally,* a National Commission for Scheduled Caste (Art 338), Scheduled Tribes (Art 338A) and Backward Classes (Art 338B) was created to investigate, monitor, advise, and evaluate the progress of the SCs, STs and OBCs under the schemes aimed at the socio-economic development of these groups.

The Constitution (Amendment) Act, 1993 that empower the State Legislatures to make law regarding the establishment of LSGIs. The Constitutional amendment has also made it mandatory the reservation of seats for scheduled Castes and Scheduled Tribes and their women. A recent development is the Constitution (103rd Amendment)Act, 2019 that empowers clause (6) enables the State to provide for reservation in appointments or posts in favour of any economically weaker sections of citizens up to a maximum of 10 percentages of the posts in addition to the existing reservation.[105]

4.2 State Legislations

It was a case from the former Madras State that caused the first Amendment to the Constitution.[106] Again the present state of Tamil Nadu is the first state to enact a statute in this regard. The Tamil Nadu Government enacted legislation namely *Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seat in Educational Institutions and of appointments or posts in the Services under the State) in I993* and the President of India gave his assent on 19th July of the same year after consulting leaders of almost all political parties. Again in compliance with the

[105] Vide the Constitution (103rd Amendment) Act, 2019 dated 12.01.2019
[106] State of Madras vs. Champakam Dorairajan, AIR 1968 SC 1012

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request from the Tamil Nadu Government, the said Act was brought within thepurview of the Ninth Schedule of the Constitution and thereby the Court was deprivedof its jurisdiction. The aim of the legislation is to continue 69 per cent reservation for the aforementioned communities. The immediate provocation for the Tamil Nadu Government to bring such legislation was a writ petition filed before the Madras High Court regarding the percentage of reserved seats in the admission to educational institutions.

In this regard *Madhya Pradesh Public Service Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes (Amendment) Act 1995* is noteworthy. Kerala State has also had its share of legislation.

4.3 Subordinate Legislations

Constitutional provisions ought to be translated into administrative action to achieve the socio-economic equality. The subordinate legislation consisting of a heavy bulk of „orders" „notifications" and „instructions' would be a suitable subject for a serious study in the realm of Administrative Law. It is common knowledge that the object of these legislations is to carry out the policy laid down by the relevant provisions in the Constitution. Between 1950 and 1991 for instance there were a dozen Constitution Orders. The Central Government issues separate orders for each state. The main objective of these Orders is to identify the SCs and STs and make necessary legal procedures thereof. This gives power to the concerned government to adopt such policy as to cater to the needs of communities, whose votes are a deciding factor in elections to Parliament and other various State Legislatures. The lists of Scheduled castes and Scheduled Tribes originally promulgated as part of the Constitution have been modified, amended and supplemented from time to time. In most cases the driving force behind these changes in law is political expediency.

The subordinate legislations namely the Official Memos (M0) issued are said to be often not in favour of the aggrieved communities. For instance the Committee on the Welfare of Scheduled Castes and Scheduled Tribes observed:

The Committee note with concern that the bureaucracy. i.e.. Secretary, Joint Secretary, Director/Dy. Secretary of DOP&T ignored the relevant portion of thejudgment, which is logical and reasonable to the Dalits and Tribes. Thus the

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Bureaucracy of the DOP&T adopted a policy of ignoring those parts of the judgment which appear to be beneficial and reasonable and just to SCs/STs but highlighting and implementing only those portions of judgments which are detrimental to the interests of SCs/S,,Ts. The Committee consider that the attitude and action of the bureaucracy is torturous and atrocious to the Government servants belonging to the weaker sections of society viz. SCs and STs, which has caused immense harm to their service career. The Committee therefore recommends that steps should be taken to prosecute the officers concerned viz., Secretary, Joint Secretary, Director/ Dy. Secretary underSection 4 of Chapter II of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, apart from taking appropriate departmental penal action against them.[107]

Again the Committee goes on to delineate how the present bureaucratic set up is biased against the reservation policy. For instance it is pointed out that even Constitutional mandates are being violated. Art 338 provides that the Union and every State shall consult the National Commission for SCs and STs on all major policy matters affecting Scheduled castes and Scheduled Tribes. In accordance with the original Art 338 of the Constitution the Government of India appointed a Special Officer for Scheduled Castes and Scheduled Tribes. But instead of working as an effective monitoring agency, it remained a mere bureaucratic body.

But the DOP&T did not do this because the DOP&T felt that such consultation would serve no purpose.[108] In another place the Committee records: The Committee observed that the deliberations that took place in the Lok Sabha on 4-8-1998 throw light on the working of the DOP&T bureaucrats. Shri. Ram Vilas Paswan, who happens to be a former Minister for Railways in the Cabinet headed by PM Shri Deva Gowda and Shri lnder Kumar Gujral had mentioned in the Lok Sabha that he knew when he was in Government, how permanent bureaucracy dilutes the things and when Government become weak, bureaucracy become stronger and as a result any step proposed by the Government remains undecided. He further mentioned very specifically that the then Cabinet Secretary was against Scheduled castes and Scheduled Tribes...[109]

[107] Sixteenth Report of the Committee on the welfare of SCs and STs (2001-2002) submitted to Lok Sabha on 27th August 2001.
[108] Ibid
[109] ibid

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The Committee, then, expresses its apprehension about what might happen to the policy of reservation at the stage of implementation, whit Night be sabotaged by the biased bureaucracy.

Article 338 provides for the appointment of a Commission for the purpose of investigating and monitoring of all matters relating to safeguards provided for the SCs and STs other duty of the Commission is to inquire into specific complaints with respect to their deprivation of rights and safeguards.

This Art originally provided for the appointment of a special officer for the SCs and STs. Accordingly a special officer designated as the Commissioner was appointed in November 1950. After 15 yrs the Commissioner had 17 regional officers located in various States. Assistant Commissioner headed these regional officers and they were re-designated as Deputy Commissioners. In 1967 the restricting was carried out and five zonal offices under the control of the newly created Directorate General ofBackward classes Welfare in the Department of Social Welfare.

The policy of the Government of India can be discerned from various resolutions adopted by the MHA and DP and Administrative reform. The policy, generally, is to provide many concession in favour of candidates belonging to SCs and STs and OBCs Relaxation of upper age limit, of standards of suitability in direct recruitment, reservation of general pool Residential accommodation, Fee exemption for examination/selection, Traveling allowance to SCs and STs called for interview/ written tests, permission to write direct to Commissioner for SCs and STs, Institutional training for SCs and STs Employees are some of the privileges accorded to the aggrieved communities

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CHAPTER- 5

SCOPE OF RESERVATION SYSTEM IN INDIA

5.1 Reservation in Promotion

Reservation to the member of the Scheduled Caste and the Scheduled Tribes shall be provided in the matter of promotion when promotion made:

(a) through Limited Departmental Competitive Examination in Group B, Group C and Group D post;
(b) by section from Group B post to a Group A post or in Group B, Group C and Group D; and
(c) by non-selection in Group A, Group B, Group C and Group D posts.

Reservation in all the above cases shall be given at the rate of 15 per cent forScheduled Castes and 7.5 per cent for the Scheduled Tribes. However, reservation in promotion is not given in the grades in which the element of direct recruitment, if any,exceeds 75 per cent.[110]

5.2 Reservation for Persons with Disabilities (PwD)

Accordance with the provision of Right of Persons with Disabilities Act, 2016, reservation has been granted to physically handicapped persons i.e. persons suffering from-

(a) blindness and low vision,
(b) deaf and hard of hearing,
(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy,
(d) autism, intellectual disability, specific learning disability and mental illness,
(e) multiple disabilities from amongst (a) to (d) above, including deaf-blindness.

The minimum degree of disability in order for a person to be eligible for any concession/ benefits is 40%. In case of direct recruitment, 4% of the total vacancies to

[110] MHAs (Department of Personnel & Administrative Reforms), O.M. No. 27/2/71-Estt.(SCT), dt.

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27.11.1972 and O.M. No. 10/41/73- Estt.(SC), dt. 20.7.1974.

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be filled by direct recruitment in the cadre strength in each Group A, B and C shall be reserved for persons with disabilities.

5.3 Reservation for Ex- Servicemen

Before understand the concept and policy of reservation for Ex-servicemen to understand the meaning and definition of ex-servicemen.

5.3.1 Definition

According to the Ex-service (Re-employment in Central Services and Posts) Rules, 1979, as amended from time to time, defines an ex-serviceman as a person-

(i) who has served in any rank whether as combatant or non-combatant in Regular Army, Navy and Air Force of the Indian Union, and
   (a) who either has been retired or relieved or discharged from such service whether at his own request or being relieved by the employer after earning hisor her pension; or
   (b) who has been relieved from such service on medical grounds attribute to military service or circumstances beyond his control and awarded medical or other disability pension; or
   (c) who has been released from such service as a result of reduction in establishment;

(ii) who has been released from such service after completing the specific period of engagement, otherwise than at his own request or by way of dismissal, or discharge on account of misconduct or inefficiency and has been given a gratuity;and includes personnel of the Territorial Army, namely, pension holders for continuous embodied service or broken spells of qualifying service; or

(iii) personnel of Army Postal service who are part of Regular Army and retired from the Army Postal Service without reversion to their parent service with pension, or are released from the Army Postal Service on medical grounds attributable to or aggravated by military service or circumstances beyond their control and awarded medical or other disability pension; or

(iv) personnel, who were on deputation in Army Postal Service for more than six months prior to 14th April, 1967; or

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(v) Gallantry award winners of the Armed Forces including personnel of Territorial Army; or

(vi) Ex-recruits boarded out or relived on medical ground and granted medical disability person.[111]

These rules shall apply to all the Central Civil Service and posts of group C and D and the posts up to the level of Assistant Commadant in all para-military forces.

5.3.2 Reservation of Vacancies

(i) Ten Per cent of the vacancies in the posts up to of level of the Assistant Commandant in all para-military forces; Ten per cent of the vacancies in Group C posts; and (ii) Twenty per cent of the vacancies in Group D posts, including permanent vacancies filed initially on a temporary basic and temporary which are likely to be made permanent or are likely to continue for three months and more, to befilled by direct recruitment in ant year shall be reserved for being filled by ex- servicemen.

The SCs and STs and OBCs candidates selected against the vacancies reserved for ex-servicemen shall be adjusted against vacancies reserved for SCs, STs and OBCs, respectively:

Provided that if the SC or the ST or the OBC ex-servicemen is selected against the vacancy reserved for ex-servicemen and vacancy reserved for the SC or the ST pr the OBC, as the case may be, is not available vacancy reserved for the SC or the ST or the OBC, as the case may be.

If there is an increase in the reservation for ex-servicemen the additional vacancies that becomes available are to be utilised first for the appointment of disabled ex-servicemen and if all such vacancies are not utilised, they shall then be made available to the other ex-servicemen. No vacancy reserved for ex-servicemen in a post to be filled otherwise than on the appointing authority by any general candidate until and unless the said authority:

(i) Has obtained a "Non availability Certificate" from the employment exchange

[111] D.P. & A.R., Notification No. 39016/10/79- Esstt.(C), dated 15.12.1979 and O.M. No. 36034/5/85-Estt.(SCT), dated 14.04.1987.

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(ii) Has verified the non-availability of a suitable candidate by reference to the Director General Resettlement and recorded a certificate to that effect; and

(iii) Has obtained approval of the Central Government.

In case of recruitment to the vacancy reserved for Ex-servicemen in the Central Para-Military Forces, the reserved vacancy remained unfilled due to non-availability of eligible or qualified candidates the same shall be filled by candidates from non-ex-servicemen category.

5.4 Reservation of Seat in Local Self Government Institutions (LSGIs)

The LSGIs regime envisaged in the Constitution (Seventy Third and Seventy Four Amendment) Act 1992 has given rise to legislation regarding Panchayat Raj at the village level and Nagar Palika at the urban level. This is significant in the sense that one, the object of participatory democracy demands that people at the village level should understand the intricacies of democratic mechanism. Here too the Scheduled Castes and STs are given the benefit of reservation. According to Art 243D provides that there shall be reservation of seats for SCs and STs in every Panchayat and number of seats so reserved shall bear as nearly as may be, the same population of SCs or STs in that Panchayat area to the total population of that area and such seat may be allotted area to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat. In clause (2)(3) and (4) of Art 234D provides that for the reservation of seats for SCs and STs women as well as for other women. In Art234D (5) provides that the State Legislature is empowered to make provisions for women Chairpersons in Panchayat. But these reservations are interlinked with Art334 that specifies the time limit for the reservation in the Legislative bodies.

5.5 Reservation for Economically Weaker Sections

At scenario, the economically weaker section of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who areeconomically more privileged. The benefits of existing reservation under clause (4) and (5) of art (15) and clause (4) of art 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.

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The DPSP contained in art 46 of the Constitution enjoins that the state shall promote with special care the educational and economic interest of the weaker sections of the people, and, in particular, of the SCs and STs and shall protect them from social injustice and all forms of exploitation. The Constitution (93th Amendment) Act, 2005,clause (5) was inserted in art 15 which enables the State to make special provision for the advancement of any socially and STs, in relation to their admission in higher educational institutions. Similarly, clause (4) of art 16 enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequatelyrepresented in the service under the State. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of art 46, and to ensure that economically weaker sections of citizens get a fair chance of receiving higher education and participation in employment is the service of the State, it has been decide to amend the Constitution of India.

5.5.1 Constitutional Amendment

Accordingly, the Constitution (103rd Amendment) Act, 2019 provides for reservation for the economically weaker sections of society in higher educational institutional, including private institutions whether aided or unaided by the State other than the minority educational institutions referred to in art 30 and also provides for reservation for them in posts in initial appointment in services under the State.

10% reservation would be provided for EWSs in central government posts and services and would be effective in respect of all direct Recruitment vacancies to be notified on or after 01.02.2019. Person who are not covered under the existing schemes of reservation for the SCs, STs, and OBCs and whose family has gross annual income below Rs.8 lac are to be identified as EWSs for the benefit of reservation. However, persons whose family owns or possesses any of the following assets shall be excluded from being identified as EWSs irrespective of the family income;

(i) 5 acres of Agricultural Land and above;
(ii) Residential flat of 1000 sq. ft. and above;
(iii) Residential plot of 100 sq. yards and above in notified municipalities;

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(iv) Residential plot of 200 sq. yards and above in areas other than the notified municipalities.

The income and assets of the families would be required to be certified by an officer not below the rank of Tehsildar in the States/UTs. The Officer who issues the certificate would do the same after carefully verifying all relevant documents following due process as prescribed by respective State/UT.[112]

[112] DOPT &T, O.M. NO. 36039/1/2019- Estt. (Res), dated 19.01.2019.

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CHAPTER- 6

JUDICIAL CREATIVITY TOWARDS RATIONALISATION OF RESERVATION

One of the important objectives stated in the Preamble of the Constitution „social justice". The Court is expected to interpret law in such a way that this avowed objective could be made a reality. *Justice V.R. Krishna lyer* emphasizes this aspect of Judicial Activism when he says:

> "A pragmatic approach to social justice compels us to interpret constitutional provisions liberally with a view to see that effective policing of the corridors of power is carried out by the court until other Ombudsman arrangements are made. Court's function, of course, is limited to testing whether administrative action has been fair and free from the taint unreasonableness and has substantially complied with the procedural norms set for it by the rules of public administration and that the action of the administration is not *mala fide*."[113]

Reservation is mainly in the area of admissions in educational institutions,[114] employment in government services[115] and seats in the legislature. Regarding reservation of seats in the legislatures including union parliament, there is practically no dispute. Moreover this reservation is only for Scheduled Castes and Scheduled Tribes and originally this reservation was only for 15 years but it has been extended till 2010 through amendments to the Constitution.[116] Other Backward Classes (OBC) do not enjoy any reservation of seats in the legislature. But in the sphere of education and government services OBCs do enjoy reservation. In some States like Kerala, OBCs have become a dominant force in the bureaucracy. Thus the transience of backwardness has given rise to clash of interests both at the political and legal levels.

[113] Champakam Doraiajan vs State of Madras, AIR 1951 SC 226.
[114] General Manager Southern Railway vs Rangachari, AIR 1962 SC 36.
[115] Prem Prakash vs UOI, AIR 1984 SC 1831.
[116] The period has been extended from time to time by means of Constitutional Amendments. The Constitution (Seventy Ninth Amendment) Act, 1999, Sec 2, provided for the special representation to cease after sixty year (from the Commencement of the Constitution). . It means that the reservation of Seat for the SCs and STs would continue upto 2010.

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In this chapter we are emphasis on the cases that came before the supreme court of India have been discussed and analysed to get a clear picture of the nature of judicial activism vis-a-vis social justice. For the convenience of analysis cases have been grouped into four categories viz., education, employment and promotion.

6.1 Education

In *State of Madras vs. Champakam Dorairajan*,[117] the Court was unwilling to uphold the validity of the Communal Government Order of Madras Government, for the impugned Order went against the principle of „equality before law' enshrined in the Constitution. There were two similar cases of admission to the Medical College and to the Engineering College.[118] According to Justice SR. Das,

The Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by a legislative or executive act or order except to the extent provided in the appropriate article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the chapter of fundamental rights. In our opinion that is the correct way in which the provisions found in Part III and IV, have to be understood...However so long as there is no infringement of any fundamental right to the extent conferred by provision in Part III there can be no objection to the state acting in accordance with the directive principles set out in part IV, but subject again to the legislative and executive powers and limitations conferred on the state under different provisions of the Constitution.[119]

The Court‟s verdict was nullified by the legislative action, for the Parliament came with an amendment to the Constitution and introduced Clause 4 to Article 15. This amendment is described as „a crushing response to that challenge (the decision of the Court).[120] This indeed marked a portentous trend of the beginning of a subtle conflict between Legislature and Judiciary.[121] In *CR Srinivasan vs. State of Madras;*[122] the Court rejected the caste as the only criterion for reservation. This judgment also reflected the spirit of „equality‟ as envisaged in Art 14. In a similar view Andhra High

[117] AIR 1968 SC 1012
[118] AIR 1980 SC 1975
[119] AIR 1989 SC 139
[120] AIR 1994 SC 1528
[121] AIR 1996 SC 351
[122] AIR 1997 SC 1095

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Court held[123] that any provision that prohibits backward classes to compete with others was held to be violative of Art 15 and 29(2)(b). It was also directed that a minimum percentage for reservation be fixed.

In *M. R. Balaji and others vs. State of Mysore and others*[124] the Court was trying to keep a just balance between the conflicting interests of those who would like to haveas much reservation as possible and those might lose their chance even if they are the deserving ones. The issue in this case is about the admission to the Medical course. "According to the petitioners, but for the reservations made by the impugned order, they would have been entitled to the admission in the respective colleges for which they had applied." The impugned Order was issued on 31-07-1962 and it reserved seats-for candidates belonging to the backward classes whose average of studentpopulation was the same or just below State average. This resulted in 68 per cent of seats available for admissions to the Engineering and Medical Colleges and to the other technical institutions is reserved for backward classes, more backward classes, Scheduled Castes and Scheduled Tribes. The classification of the socially backward classes of citizens made by the State, proceeds on the consideration only of their castes without regard to other factors, which are undoubtedly relevant. It was argued that this might lead to a virtual reservation for nearly 90 per cent of the population, which might come under different categories of backwardness. This would be at the expense of those classes of people whose members may perform well but may not get an opportunity.

After analyzing facts and probing the legal nuances, the Court came to the conclusion that caste alone could not be the criterion for backwardness. The Court also observed that reservation should not go beyond 50 per cent. The Court said:

> When it is said about an executive action that it is a fraud on the Constitution it does not necessarily mean that the action is actuated by mala fides. An executive action which is patently and plainly outside the limits of Constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State‟s authority. if, on the other hand, the executive action does not patently or overtly transgress the authority conferred on it by

[123] AIR 2000 SC 450
[124] AIR 1963 SC 649

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> the Constitution, but the transgression is covert and latent, the said action is struck down as being fraud on the relevant constitutional power. . .We have already noticed that the impugned order in the present case has categorized the Backward classes on the sole basis of caste which, in our opinion, is not permitted by Art (15)(4) and we have also held that the reservation of 68 per cent made by the impugned order is plainly inconsistent with the concept of special provision authorized by art 15 (4). Therefore it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Article 15 (4).

In *Chiralekha vs. State of Mysore*[125] the Supreme Court gave some leeway to caste by saying that caste could be considered as one of the relevant factors in determining social and educational backwardness. But at the same time it was made clear that the terms „caste" and „class" are not synonymous. The Court observed:

We do not intend to lay down any inflexible rule for the Government to follow. The laying down of criteria for ascertainment of social and educational backwardness of a class is complex problem depending upon many circumstances, which may vary from State to State and even from place to place in a State. But what we intend to emphasize is that under no circumstance 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 Art. 15 (4), it does not vitiate the classification if it satisfied other tests.

In *P. Rajendran v. State of Madras* [126] the Supreme Court upheld the ratio in Hariharan Pillai"s case. The question was whether caste could be considered the sole criterion for determining socially and educationally backward classes. The Courtobserved that if the caste as a whole was socially and educationally backward reservation could be made in favor of such caste within the meaning of Article 15(4). The Court also struck down district-wise distribution of seats in the Medical Colleges on the basis of population in each district to the total population of the State. This could not be permitted under Article 14. But at the same time in *Nishi Maglu vs. Sate*

[125] 1996 (9) JT (SC) 320
[126] (1974) 1 SCC 87, AIR 1974 SC 532

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of J & K[127] the classification of „social castes" made with reference to the nature of occupations and the classification based on areas adjoining actual line of control and „bad pockets in Jammu and Kashmir being really backward areas" and residents of these areas being socially and educationally backward were valid.

In *A. Periya Karuppan v. State of Tamil Nadu*[128] was indeed a landmark case in respect of the issue of reservation. The candidates challenged the unit-wise selection of Medical Colleges including the reservation for backward classes. Another significant question was the determination of backwardness on the sole basis of caste. Hegde J. observed that „a caste has always been recognized as a class". The learned Judge perhaps was not aware of the consequences of such observations. The pertinent question, here is, will it help abolish caste. The question whether 41% reservation for Scheduled Castes, Scheduled Tribes and Other Backward classes could be valid. The apex Court declared that the unit-wise reservation for SCs, STs and OBCs was violative of Arts 14 and 15. But the classification of backward classes on the basis of caste was held to be within Article 15 (4). The Court also observed that 41% reservation was not excessive. Commenting on this aspect of the judgment Anirudh Prasad (1991) writes: "*Rajendran, Balaram and Periya Karuppan* appear to present a „retreat" from judicial efforts to search secular and rational criterion."[129]

The Bombay High Court held that the proportion of population of backward classes, SCs and STs to the total population of the state being the basis for determining the quantum of reservation, valid and reasonable, The provision for the carry forward of vacant reserved seats of the one of the sub-groups of backward class to that of the other sub-group was held to be valid.[130] The adoption of criteria of income and occupation for identifying backward classes was not against Article 15(4) and 16(4). Notification to this effect was held valid by the High Court in *G.N. Guidigar v. State of Mysore.*[131]

[127] (1996) 7 SCC 512, 1996 AIR SCW 2248
[128] AIR 1971 SC 2303, By 77th Amendment (1995) Art 16(4a) was introduced and 85th Amendment (2000) added the phrase „in matter of promotion, with consequential seniority".
[129] AIR 1997 SC 1451
[130] AIR 1997 SC 303
[131] AIR 1997 SC 2133

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In *Subash Chandra v. State of U.P,*[132] the Allahabad High Court held that people of rural areas, hill area and Uttarakand division belong to socially and educationally backward classes under Article 15(4) but the same court in *Dilip Kumar v. State of U. P.*[133] held that the number of candidates from reserved areas appearing in the Pre-medial test and also the shortage of Higher secondary schools in that area were not adequate reasons for classifying all the residents of that area as belonging to educationally backward.

In *State of A.P. vs US. V. Balaram*[134] the Supreme Court heard three appeals together. The State of A.P. was the first appellant. The appeals were directed against thejudgment of the High Court of Andhra Pradesh that struck down Rule 9 in the Rules relating to the selection of candidates for admission to the Government MedicalColleges. One aspect of the impugned Rules was about reservation of seats in the professional colleges, for Backward Classes. Incidentally the conclusions arrived at bythe Backward Classes Commission of Andhra Pradesh was also challenged. Observation of the Supreme Court in this regard is significant. "In fact the Commission has categorically stated that the information received from various schools showed that the percentage of education was slightly higher than the State average in respect of some small groups, but in view of the fact that their living conditions were deplorably poor, the slightly higher percentage of literacy should not operate to their disadvantage." Indirectly at least the Court has acknowledged the economic factor in backwardness. The Court in this regard has said:

> No doubt our attention was drawn to a decision of the Kerala High Court, which has held that reservation is irrespective of some of the candidates belonging to the backward classes getting admission on their own merit. The Andhra Pradesh High Court has taken a slightly different view. If a situation arises wherein the candidates belonging to the groups included in the list of Backward Classes, are able to obtain more seats on the basis of their own merit, we can only state that it is the duty of the Government to review the question of further reservation of seats for such groups. This has to be emphasised because the Government should not act on the basis that once a

[132] AIR 1998 SC 1767
[133] AIR 2000 SC 1296
[134] AIR 1973 ALL 295

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class is considered as a Backward Class it should not continue to be backward for all time. (Emphasis added) If once a class appears to have reached a stage of progress, from which it could be safely inferred that no further protection is necessary, the State will do well to review such instances and suitably revise the list of Backward Classes. In fact it was noticed by this Court inAIR 1971 SC 2303[135] that candidates of Backward Classes had secured nearly50 per cent of seats in general pool. On this ground this Court did not holdthat further reservation made for Backward Classes is invalid. On the other hand it was held:

"The fact that the candidates of Backward Classes have secured about 50 per cent of the seats in general pool does show that time has come for a *de novo* comprehensive examination of the question. It must be remembered that the Government"s decision in this regard is Open to judicial review."

The question in *Aarti Gupta v. State of Punjab*[136], whether the Government could make relaxation in mark for the Scheduled Caste and Scheduled Tribe candidates. According to the first notification of the Punjab Government SC/ST candidates had to secure only 35 per cent of marks in the competitive exam to qualify for medical admission. Yet for 100 reserved seats only 32 qualified. The general candidates claimed those reserved seats. However the Government issued a notification reducing the minimum percentage to 25. This was challenged by the general candidates before the High Court, which dismissed the petition. Hence they approached the Supreme Court.

The Supreme Court rejected the argument that the Medical Council of India prescribed 40% as the minimum and Universities could not reduce it further. But the Court did not accept the argument. Citing earlier decisions, the Court observed that how the selection has to be made out of the eligible candidates is a matter, which depends upon circumstances prevailing in a particular state. In an earlier case *M.P. vs. Nivedita Jain*[137] the State Government fully deleted the prescription of the percentage of marks in the selection examination. Though the case was worse than the presentone the Court upheld the Government decision. Here too therefore the Court upheld

[135] A. Periya Karuppan v. State of Tamil Nadu
[136] AIR 1988 SC 481
[137] AIR 1972 SC 2381

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the Order of the Government, which was in favour of reservation that could not be encroached upon by general candidates.

In *State Punjab vs. Dayanand Medical College and Hospital,*[138] it was held that though in a sense the Medical Council of India could also be a „State" for certain purposes, such a body would not be suited to make the necessary reservation in respect of socially and educationally backward classes in terms of Art. 15 (4) because of the need or the necessity for prescription, taking into account several considerationssuch as different levels of social, economic and educational development of the State or different regions in the State. Such considerations arise in the context of Art 16 as well. It is well known that the States often do appoint Backward Classes Commission to identify the socially and educationally backward classes of India, though in the context of fixing the standards and the extent of backward classes and the manner in which their backwardness have to be ameliorated. These vital aspects of policy necessitated equally by great public and general importance can be properly appreciated by the Government, Central or State, rather than the Medical Count to which the difference in standards have to be maintained between the general category and the reserved category must be left to Medical Council of India. Thus, proper balance will have to be struck both by the Medical Council of India and by the Government, Central and State exercise of their respective powers. The MedicalCouncil of India, a creature of a statute, cannot be ascribed with such powers toreduce the State Governments to nothing on and in respect of areas over which the States have constitutional mandate and goal assigned to them to be performed.

In *Dr. Sadhana Devi v. State of U.P.*[139], the Government of U.P. issued a circular dispensing with the requirement of minimum mark for the admission to Postgraduate course in Medicine for the Scheduled Castes and Scheduled Tribes candidates. The Supreme Court held:

The importance of merit being the only criterion for admission to postgraduate medical courses viz. MD, MS and the like was also emphasized in *Dr. Pradeep Jain v.Union of India.(I984) 3 SCC 654: (AIR 1980 SC 1420)*.

[138] AIR 1988 SC 481
[139] AIR 1995 SC 1421

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> But this line of inquiry need not detain us here in this case because the case of the petitioners is not that there should be no reservation for the candidates belonging to the three special categories mentioned hereinabove at the post-graduate level. Their contention is that candidates belonging to the three special categories must be able to secure the minimum qualifying marks in the admission tests in order to gain admission to post-graduate medical courses. If they fail to secure even the minimum qualifying marks, then the seats reserved for them should not be allowed to go waste but should be made available to the candidates belonging to general category. This contention must be upheld. Otherwise,to borrow the language used in *Dr. Jagdish Saran case, (AIR I980 SC 820),* this will be a "national loss."
>
> Before we part with this case, we may refer to another judgment of this Court in, *Mohan Bir Singh Chawla v. Punjab University. Chandigarh, 1996 (9) SCALE 351*, in which it was observed after a review of the case law "the higher you go, in any discipline, lesser should be the reservations of whatever kind."

In that view of the matter, this writ petition succeeds. The decision contained in the letter dated 31-8-1995 addressed by the Principal Secretary. UP Government to the Director General, Medical Education and Training, Uttar Pradesh directing that there shall be no minimum qualifying marks for Scheduled Castes/Scheduled Tribes/Other Backward Classes candidates in the written examination for admission to postgraduate and diploma courses is quashed. It is directed that if the seats reserved for SC/SC/OBC candidates cannot be filled up on account of failure of the candidates belonging to these categories to obtain the minimum qualifying marks, then such seatsshould be made available to the candidates belonging to the general category.

Admission to Medical Colleges again became an issue in *Rajiv Mittal vs. Maharshi Dayanand University.*[140] There were 49 seats in the open category and 11 seats for reserved category for M.B.B.S. at Rohtak Medical College. In the first counselling there were a few vacant seats in the general category and hence second and third counselling were held and candidate with serial number 60 was admitted. Sunil Yadav

[140] AIR 1996 SC 1378

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who belonged to the backward community came with the rank of 62 in the merit list. There was again one seat vacant in the general category. As candidates with 61, 62, 63, 64, and 65 did not join the general candidate with 66th rank was offered the seat.

The High Court, allowed the writ petition filed by respondent No. 3 as it held that it was "settled principle of law that a candidate from the reserved class, if is entitled to get admission to a course of his own merit in the general list, he must be treated on hismerit and not accommodated against the reserved vacancy". lt thereupon came to the conclusion that Sunil Yadav should have been adjusted against the one seat in the general category which had been offered to the appellant at the time of second counselling and that the reserved seat, which would be so vacating by Sunil Yadav, should be offered and admission granted to respondent No.3.

But the Supreme Court did not agree with the findings of the High Court. The apex Court observed: On behalf of the appellant, it has been contended that the High Court could not direct that Sunil Yadav should be considered as having been given the general category seat in the second counselling when he had already secured admission in the first counselling in the reserved category. On the other hand, the respondents have relied on the judgment of the High Court and in particular Note 2 of the Information Brochure and contended that Sunil Yadav could only be adjusted against the open category seat and he could not be considered for the reserved category. In our opinion, the High Court erred in allowing the writ petition and directing that the admission, which had been granted to the appellant, should be cancelled. The system of counselling for the purpose of granting admission to the various medical colleges in the State is now regarded as most equitable one where options are given of various seats to the students in accordance with their overall meritposition in the combined entrance examination, which examination is competitive in nature. ..

An appropriate analogy of this system is that of a booking Chan for a dramatic performance, which has to take place in the future. The people standing in the queue reserve or book their seats out of those, which are available according to their preference. Once the chart fills up the booking closes. Only sometimes, if tickets are returned they may be reissued. But once the dramatic performance starts no one is allowed to enter. Just as counselling for seats to medical colleges must stop once the

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courses of study commence. The Court, thus, set aside the judgment of the High Court, the result of which would be that the writ petition filed before the High Court would stand dismissed.

In *Dr. Preethi Srivastava vs State of M. P.*[141] the Supreme Court considered six petitions together. The issue was whether there could be provisions for reservation of seats in Specialty and super specialty courses in Medicine. The State of U.P. fixed the cut off percentage of 20 per cent marks for reserved candidates as against 45 per cent for the general candidates. The State of M.P. fixed 20% for Scheduled Castes and 15 per cent for Scheduled Tribes and 40% for other backward Classes. According to the Court "The disparity of qualifying marks being 20 per cent for the reserved category and 45 per cent for general category is too great a disparity to sustain public interest atthe level of post graduate medical training and education."

In *K. Duraisamy and another, v. State of T.N. and others*[142] the Government Order that provided 50 per cent quota for in-service and 50 per cent for non-service candidates for admission in the specialty and super specialty courses in Medicine was challenged. The Court held the Order valid. According to the Court „quota" and „reservation" are different concepts. Therefore the matter does not come under Article 15 (4).

A case came before the Supreme Court where a similar notification of the Punjab Government was challenged. In *State of Punjab v. Dayanand Medical College and Hospital*[143] the impugned notification fixed the quota of 60 per cent for in-service candidates and 40 per cent for non-service. The Court held the notification valid. But the Court observed that with regard to marks in the tests the State could not make any relaxation.

But the apex Court would quash any unreasonable fixing of quota. This happened in the case *A.I.I.M.S. Students Union vs. A.I. I.M.S.*[144] the rule regarding admission to Post-Graduate Course in AIMS was based on the quota of Institutional reservation of 33 per cent coupled with 50 per cent reservation discipline-wise. This was held super reservation and hence it infringed the equality principle of Art 14.

[141] AIR 1997 SC 1120
[142] AIR 1998 SC 680
[143] AIR 2001 SC 3006
[144] AIR 2001 SC 717

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6.2 Employment

Probably, the first case where Constitutional provision for „protective discrimination' for weaker sections, was tested on the touchstone of fundamental Right of equality of treatment, is the one concerning „equality of opportunity in employment". This was *B. Venkitaramana vs. State of Madras*[145] where the aggrieved party namely a Brahmin candidate for the post of Munsif approached the Court for he was alleged to have been discriminated against by the Public Service Commission. The Supreme Court held that this discrimination was illegal and unconstitutional. He suffered from this discriminatory treatment because of the rules of reservation envisaged in the Communal G.O. of the government of Madras. The Court observed:

> For instance the petitioner may be far better qualified than a Muslim on Christian or a non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment, as is conceded by the learned Advocate-General of Madras, but, nevertheless he cannot expect to get any of these posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the post reserved for the other communities, although he may have far better qualifications than those possessed by members falling within thosecategories, is brought about only because he is a Brahmin and does notbelong to any of those categories. This ineligibility created by the Communal
> G.O. does not appear us to be sanctioned by Art 16(4) and is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Art I6 (1) and (2). The Communal G.O., in our Opinion, is repugnant to the provisions of Art 16 and is as such void and illegal.

Again the Court in this case directed the government to "consider and dispose of the petitioner"s application for the post after taking it on file on its merits and without applying the rule of communal rotation."

The central issue in *Prem Prakash and others v. UOI*[146] is the refusal of appointment to certain Scheduled Caste candidates because of lack of reserved vacancies. They had to be accommodated. In January 1980 the Delhi High Court held an examination for

[145] AIR 1951 SC 229
[146] AIR 1984 SC 1831

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recruiting officers to the Delhi Judicial Service. It was stated that out of 16 vacancies 2 were reserved for Scheduled castes and 1 for Scheduled Tribes. In addition there were two carry forward vacancies for members of Scheduled Tribe. If Scheduled caste candidates were not available they might be transferred as reserved vacancies for Scheduled Caste candidates. After the written examination and viva voce test only 11 candidates passed. Seven out of these 11 had competed for open seats while four had competed for seats reserved for the Scheduled Castes. In normal course vacancies, which are intended to be filled by holding an examination in any particular year are filled from amongst candidates who had appeared for that examination. But the matter was made complicated by the fact that two Scheduled caste candidates who had passed the tests in 1979 and had not been appointed due mainly to the official error, were accommodated in 1980 vacancies as a result of the writ petition they had tiled. But in doing justice to them (and delayed justice for that matter) justice was denied to the Scheduled caste candidates who passed the tests in 1980. The apex Court observed:

> The error from which the calculation of the High Court suffers is that the number of vacancies available for the Scheduled caste candidates was fixed according to the number of candidates who qualified for the general seats. The counter-affidavit states expressly that the availability of vacancies for reserved category was determined on the basis that only seven candidates had qualified for the general seats. This according to us is neither justified by the Rules and administrative instructions nor indeed does such a method of fixation of reserved vacancies disclose any acceptable basis. 16 vacancies were advertised in the first instance out of which 11 were for general candidates and 5 for reserved candidates. Administration is not found to fillall the vacancies, which are advertised. But the availability of vacancies for the reserved categories cannot be made to depend upon the accidental circumstances of how many candidates have qualified for general seats. In thefirst place that would be contrary to the instructions...Secondly such a methodwill lead to the absurd and undesirable consequence that no candidate of the reserved category will be appointed at all if only one or two candidates from general category qualify in the examination.

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In *P.Rajendran v. State of Madras*[147] the Supreme Court upheld the ratio in *Hariharan Pillai*. The question was whether caste could be considered the sole criterion for determining socially and educationally backward classes. The Court observed that if the caste as a whole was socially and educationally backward reservation could be made in favor of such caste within the meaning of Art 15(4). The Court also struck down district-wise distribution of seats in the Medical Colleges on the basis of population in each district to the total population of the State. This could not be permitted under Art 14. But at the same time in *Nishi Maghu v. State of J & K*[148] the classification of „social castes" made with reference to the nature of occupations and the classification based on areas adjoining actual line of control and „bad pockets in Jammu and Kashmir being really backward areas and residents of these areas being socially and educationally backward were valid.

In *P and T Scheduled caste/Tribe Employees Welfare Association (Regd:) v. UOI*[149] the Court held that this order deprived the right of the Scheduled Caste/ Scheduled Tribes for they had been enjoying the advantages of „protective discrimination". This also violated the equality clause of the Constitution. Persons belonging to the Scheduled Castes and the Scheduled Tribes in other Departments were enjoyingsimilar advantage and only the employees of P. and T. Department had been deprived of it. The Court observed that it could not issue a writ on this matter for Art 16 (4) wasonly an enabling provision. Justice Venkataramaiah pointed out the significance of Art 46 of the Constitution. It provides that the State shall 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 shall protect them from social injustice and all forms of exploitation.

In *State* of *U.P. vs . Dr. Dina Nath Shukla*[150] the question whether Faculty wise and/or Discipline wise reservation is ultra vires. The confusion was mainly in the advertisement. The Court observed that if the subject wise is adopted in each service or post in each cadre in each faculty, discipline, speciality or super-specialty, it not only be clear to the candidates who seek recruitment but also there would be no overlapping in application of the rule of reservation to the service or posts as specified

[147] (1974) 1 SCC 87
[148] 1996 AIR SCW 2248
[149] AIR 1989 SC 139
[150] AIR 1997 SC 1095

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and made applicable by the relevant Act...lf there is any single post of professor or Reader or Lecturer in each faculty, discipline, speciality or super-speciality, which can‟t be reserved for reserved candidates, it should be clubbed and roster applied and be made available to the reserved candidates in terms of the Section 3 (5) of U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act (4 of 1994). The Court said such an interpretation would sub serve and elongate Constitutional objective and public policy of socio-economic justice...mandated and envisaged in Arts 335 and 16(4) read with Arts 14 and 16 (1), Preamble, Art 38 and 46 and all other cognate provisions.

In *S.R. Murthy vs. State of Karnataka*[151] the question is promotion in single promotional post. In the Government Polytechnic in Karnataka though the appellant was the senior most person eligible for promotion, he was not promoted because in accordance with the roster point a Scheduled caste candidate was to be appointed and thus a junior person got promoted. Citing previous decisions the Supreme Court held that the application for the purpose of promotion was not permissible.

The above decision was reiterated in *Union of India v. Brij Lal Thakur*[152] .The post of E.C.G. Technician in the Grade became vacant on November 30, 1993 in the Central Hospital, Northern Railway due to retirement of the incumbent. For promotion of Theater Assistants to the said post, trade test was conducted in which Smt. Prakash Kaur belonging to Scheduled Castes and two others were called. The vacancy to be filled up was reserved for Scheduled Castes in a carry forward post as per the rotation of the roster. In the trade test Smt. Prakash Kaur was found suitable and she was accordingly promoted as E.C.G. Technician w.e.f. December 9, I994. The respondent an unsuccessful candidate filed O.A. in the Tribunal contending that since the post of E.C.G. Technician is the solitary post, reservation as per roster is unconstitutional, as it would lead to 100% reservation. The contention found favour with the Tribunal. Accordingly, it set aside the appointment by promotion of Smt. Prakash Kaur and gave direction to treat it as unreserved post and to consider the case of the respondent for appointment to the post according to Rules. The controversy is no longer res integra. The Court in *Union of India vs. Madhav s/o Gajanan Chaubal,*[153] by a Bench

[151] AIR 2000 SC 450
[152] AIR 1997 SC 2101
[153] AIR 1997 SC 3074

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of three-Judges considered the entire case law following the Constitution Bench judgment in *A. R. Choudhury vs. Union of India*[154], *Commr. of Commercial Taxes vs. D. Sethu Madhava Rao,*[155] *Venkateswarlu vs. Govt. of A .P.*[156] and *State of Bihar vs. Bageshwarki Prasad*[157] it was held that "even though there is a single post, if the Government have applied the rule of rotation and roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidate belonging to the reserved categories at the point on which they were eligible to be considered, such a rule is not violative of Arts 14 and 16(1)". In that case the post of Secretary in the National Savings Scheme Service was a single point post to which 40 point roster was maintained to the vacancy in the said post. When the Scheduled Tribes candidate was selected for promotion on the basis of the rule of rotation, it was held by the Tribunal that the promotion was violative of Arts 14 and 16(1). Reversing that order it was held that:

> Thus, the Government has adhered to the rule of rotation to a single post and the 40 point roster to the single post was applied and the vacancy reserved for the Scheduled castes and Scheduled Tribes as and when had arisen, was sought to be filled up, when the candidates were available. Thus, we hold that the roster point No. 4 in the vacancy of the Secretary reserved for the Scheduled Tribes was valid and constitutional. When the officer available and was eligible to be considered, he was entitled to be considered in accordance with the rules and be promoted as Secretary. The Tribunal, therefore, was not right in directing that the rule of rotation to the single post could not be applied. It is brought to our notice that the original promotee died pending the proceedings and, therefore, as and whenvacancy arises as per rule of rotation as per roster the same would be filled up in accordance with law.

In *Jatinder Pal Singh v. State of Punjab,*[158] the single post reservation was again challenged. Reversing the decision of the High Court, the Supreme Court reiterated its earlier stand that a single post could be reserved.

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154 AIR 1974 SC 532
155 AIR 1996 SC 1915
156 (1996) 5 SCC 167
157 (1995) 1 SCC 432
158 AIR 2000 SC 609

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The Supreme Court has categorically held in „Mandal case" that a person, whobelongs to a backward class and who becomes member of IAS, IPS or any other All India Service, his children cannot avail the benefit of reservation. The States of Bihar and Uttar Pradesh have added further conditions such as salary of rupees ten thousand or more per men sum, the wife or husband to be graduate and one of them owning a house in an urban area. So far as the professionals are concerned, an income of Rs. 10 lakhs per annum has been fixed as the criterion. It is further provided that the wife or husband is at least a graduate and the family owns immovable property of the value ofat least rupees twenty lakhs. Similarly, the criteria regarding traders, industrialists, agriculturists and others is wholly arbitrary apart from being contrary to the guidelines laid down by Supreme Court in „Mandal case".

Multiple conditions have been provided in all the categories. With almost everycategory the conditions like the „spouse" being a graduate and holding property in urban area, are attached. These conditions have no nexus with the object sought to be achieved. Since the conditions are not severable the two criteria as a whole have to be struck-down. Thus the criteria laid down by Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995 and S. 3(b) of the UP. Public Services Reservation of Scheduled Castes and Scheduled Tribes and Other Backward Classes Act, 1994, for identification of "creamy-layer", would be violative of Art 16(4), wholly arbitrary violative of Article 14 and against the law laid down by Supreme Court in „Mandal case". Thus the Division bench declared that the creamy layer formula of both the states as invalid for being against the norms indicated by the Court in *Mandal case*.

Though the Government appointed a Commission to determine „creamy layer", it went on to amend the Constitution so that reservation could be made available to the concerned communities in promotion also.[159]

Sometimes the executive makes rules in such a way that this sabotage the spirit of reservation. A case in point is *Scheduled Castes and Scheduled Tribes Officer Welfare Council v. State of U.P.*[160] The issue was the validity of the memo prescribing norms for promotion in State Medical Health Department. It was alleged that Department

[159] AIR 1992 SC 477
[160] AIR 1997 SC 1451

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relaxed the criteria only when general candidates were to be promoted. Separate list of candidates as per roster was not prepared. Moreover it increased the minimum length of services for promotion and the selection would be subject to efficiency test. The Court held that the impugned Memo was issued mala fide to deprive SC/ST candidates of their chance of promotion. Hence the Memo was quashed. The Supreme Court reiterated that the application of roster for single post cadre an appointment to carry forward rule is valid and constitutional with a view to give adequate representation in public service to the reserved category candidates, the opportunity given to them is not violative of Arts 14 and 16(1).

In *P.G .Institute of Medical Education and Research etc., v. K.L. Narasimhan*[161] the Supreme Court held that reservation to single post, applying the rule of roster, was constitutionally valid. To another question whether Court could give direction to throw open the reserved vacancies to the general candidates by a writ of mandamus, the Court expressed its inability to do so. The Court has observed that it cannot give mandamus to disobey the Constitution and the principle of reservation enshrined in Article 15(4) and 16(4). The Court is not competent to direct authorities to disobey theconstitutional mandate. It would be manifestly illegal to seek a mandamus or a direction and the Court would not be justified to issue such mandamus or direction to the appropriate Government to de-reserve the vacancy.

The Supreme Court has observed that the fusion of posts are constitutional and permissible and also that the rules of rotation and roster are to be applied. The advertisements are required to be issued so that the reserved and the general category candidates would apply for the consideration of their claims for recruitment in accordance therewith and sub serve the socio-economic justice as envisaged in and mandated by Art 14 and 16(1) 16(4), 38, 46, 335, Preamble and other cognate provisions.

In *P.G. Institute of Medical Education and Research Chandigarh vs. Faculty Association*[162] Reversing many previous decisions the Supreme Court declared that a single post could not be reserved. The Court observed:

[161] AIR 1997 SC 3687
[162] AIR 1998 SC 1767

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We...approve the view taken in Chakradhar"s case that there cannot be any reservation in a single post cadre and we do not approve the reasoning in *Madhav"s case* (1997 AIR SCW 3113), Brij Lal Thakur"s case and *Bageswari Prasad"s case* (1995 Supp (1) SCC 432) upholding reservation in a single post cadre either directly or by device of rotation of roster point. Accordingly, the impugned decision in the case of PostGraduate Institute of Medical Education and Research cannot also be sustained. The Review Petition made in Civil Appeal No. 3175 of l997 in the case of Post-Graduate Institute of Medical Education and Research, Chandigarh, is therefore, allowed and the judgment dated May 2, 1997 passed in Civil Appeal No. 3175 of 1997 is set aside.

6.3 Promotion

In *MG. Badappanavar v. State of Karnataka*[163] the issue was conferring seniority after promotions between the general candidates and the reserved candidates. In the instant case the initial recruitment of general candidates and the reserved candidates was as junior engineers and the next promotion was to the post of Assistant Executive Engineer and then to that of Executive Engineer. Beyond Executive Engineer"s post there is no roster operating. That is up to level three, that is, up to the post of Executive Engineer there is roster according to which the candidates are promoted. The appellants were along with the respondents recruited as junior engineers. The reserved candidates thereafter got promotion as per roster points up to the third level (Executive Engineer). In the meanwhile general candidates got promotion as perseniority or selection and reached level 3. By the time the reserved candidates were at level 3. But the reserved candidates were promoted to level 4 as if they were senior to general candidates. This was done considering the fact the reserve candidates reached the category of Executive Engineers earlier than the general candidates. In accordance with earlier decisions of the Court if by the date when the reserved candidates were promoted as superintending Engineers, the general candidates had already reached the said by normal promotion system, then the general candidates must be treated as seniors as Executive Engineers to the reserved candidates. The general candidates had a right under Article 14 and 16 to be considered for promotion as Superintending Engineers as seniors. This was not done. This has to be corrected. Seniority of the general candidates has to be restored.

[163] 2001 (2) SCC 666

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Another landmark case is *T. Devadasan v. Union of India,*[164] where a modified rule of the Union government was challenged on the ground that it was unconstitutional. The rule as modified in 1955 provided that 17 1/2 per cent of the total vacancies in a year would be reserved for being filled from amongst candidates belonging to Scheduled castes and tribes. It further provided that if in any year suitable can did dates were not available from amongst such classes the reserved posts would be de-reserved, filled by candidates from other classes and a corresponding number of posts could be carried forward to the next year. If in the subsequent year the same thing happened, the posts unfilled by the candidates from the Scheduled castes and Tribes could be carried forward to the third year. In the third year the number of posts to be filled from amongst the candidates of Scheduled Castes and Tribes would thus be 17 1/2 per cent of the total vacancies to be filled in that year plus the total unfilled vacancies which had been carried forward from the two previous years. The rule thug permitted a perpetual „carry forward" of unfilled vacancies in the two years preceding the year of recruitment. This resulted in more than 50 per cent reservation. In 1961 out of 45 vacancies actually filled 29 went to the Scheduled caste and Tribe candidates thus raising reservation to 64 per cent.

The Court did not say that the carry forward rule *per se* was bad, but it held that the carry forward rule as modified in 1955 was bad and must be struck down as invalid and unconstitutional.

The Court observed: If the reservation is so excessive that it practically denies a reasonable opportunity for the employment to members of other communities the position may well be different and it would be open then for a member of a more advanced class to complain that he has been denied equality by the State. (Emphasis added). It seems that the Hon"ble Court was trying to placate the wounded feelings of the other communities.

The important aspect of the case is whether „equality before law" and prohibition of discriminatory treatment laid down by the basic law (Constitution) of the land are more fundamental or less fundamental than the exception to prohibition ofdiscrimination or validating „protective discrimination" envisaged in Art 16 (4)? Between these two a balance is to be struck. The balancing of interests in such issues

[164] AIR 1964 SC 179

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does have different ramifications. The first question is concerned with the political aspect of it.

The Supreme Court gave a favourable in the case of reservation of selection posts in the railway service in *Rangachari v. G.M. Southern Railways.*[165] The Supreme Court held that the very term „Backward Classes" included Scheduled castes and Scheduled Tribes. The Count interpreted Art 16(4) thus: Art 16(4) clearly shows that the power conferred by it can be exercised in cases where the State is of the opinion that any backward class of citizens is not adequately represented in the service under it. In other words opinion formed by the State that the representation available to thebackward class of citizens in any of the services is inadequate is a condition precedent for the exercise of the power conferred by Art 16(4) and so the power to make reservation as contemplated by Art l6 (4) can be exercised only to make the inadequate representation in the services adequate. If that be so both "appointments" and "posts" to which the operative part of Art 16 (4) refers and in respect of which the power to make reservation has been conferred on the State must necessarily be appointments and posts in the services. It would be illogical and unreasonable to assume that for making the representation Adequate in the services under the State a power should be given to the State to reserve posts outside the cadre of services Againthe Court went on to elaborate:

The condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of socially and educationally backward classes requires not onlythat they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context of expression „adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature appointments held and soit involves not merely the numerical test but also the qualitative one.

Thus the Court arrived at the conclusion that; .. .and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving proportionately higher percentage of appointments at the initial stage.

[165] AIR 1965 SC 1430

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In *B.N. Tiwari v. Union of India*[166] was about the „carry forward" rule. The carry forward rule, which has been discussed in Devadasan is again challenged in this case. The petitioner was Assistant in Grade IV of the Central Secretariat Service. The next post, which he could expect was that of Section Officer. Recruitment is made in the following manner:

(i) 50 per cent by direct recruitment from those who obtain lower ranks in the Indian administrative Service, etc., examinations.

(ii) 25 per cent by promotion from Grade IV on the basis of a Departmental examination held at intervals by the Union Public Service Commission. And

(iii) 25 per cent by promotion from Grade IV on the basis of seniority-cum-fitness.

In the meanwhile there were many cases on reservation that came before various High Courts. The judgments in general, were against such subdivisions within backward classes. *Ramakrishna Singh v. State of Mysore (1960)*[167], on the ground that the subdivision restricts on the number of places each of the protected groups can compete for. If carried to its logical conclusion, this principle prevents separate reservations for Scheduled castes, Scheduled Tribes and other backward classes.

For the first time promotion vis-a-vis reservation became the central issue in *P. K. More vs. UOI.* The Andhra High Court held that as the scope of Art 16(l) was wide enough to incorporate both the appointments and promotions so was the Art l6(4). Thus the Article 16(4) could be applied in cases of promotion also.

But with regard to sub-groups within the backward classes, the court held that the prohibition of each sub-group of backward classes from competing with other groups was unconstitutional. It was because this would abridge the right of the backward classes under Art 29(2). The provisions of Art 15(l) cannot support it. Art 16(4) could be applied both to the appointment and to promotions was reiterated in *Mohindar v. State of U. P.*

The judicial decision in *S.A.Partha v. State of Mysore*[168] introduced certain flexibility in the judicial approach to reservation. It was held that that those who are getting a

[166] AIR 1965 SC 1430
[167] AIR 1960 Kant 338
[168] AIR 1961 MYS 220

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certain percentage of reservation, as Scheduled castes and Other Backward Classes (OBCs) could not ask for more seats than those included in the reservation policy. However the reservations for this section should not be in the nature of compartmentalization, but on the basis of guaranteed minimum. Another issue in this case was whether it was constitutional to transfer the unfilled seats meant for Scheduled Castes and Scheduled Tribes to OBCs under Article 15 (l) and 29 (2). The Court held that such transfers are unconstitutional.

The apex court categorically stated that the reservations under Articlel6 (4) could cover both initial appointments and promotions. Moreover it also held that the reservation could be provided both prospectively and retrospectively. Retrospective operation of law, which is only rarely resorted to, has been adopted in the case of reservation. In spite of this decision of the apex count, the Railway Trade Unions continued their actions against reservations in promotions. Again the Court was of the Opinion that inadequacy of representation posited by Article 16 (4) may refer to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The Court said, "In the context the expression „adequately represented" imports the consideration 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." But there is no data available to show that any qualitative has been made in the light of the principle set forth in *Rangachari.*

In *Hariharan Pillai vs. State of Kerala*[169] , the Kerala HC justified the reservation of seats in Kerala Judicial Service where classification was made on the basis of caste because of backwardness by and large of the members of that caste; the dominant criterion was not caste but the backwardness. Subsequent to this the Government of Kerala appointed a Commission to go into the questions regarding the method of determining backwardness and the basis of classification into backward and non-backward classes and also the quantum of reservation.

In *R.K. Sabharwal v. State of Punjab*[170], it was decided that when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from

[169] AIR 1968 KERALA 42
[170] AIR 1995 SC 1371

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among the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts.

The Court observed: We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100-point roster, l4 posts at various roster-points are filled from amongst the Scheduled Castes/ Scheduled Tribes candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by December 31, 1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Back ward Classes would claim l6 per cent share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100posts the reserve categories would be holding 24 posts there by increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are to be filled by the same category of persons whose retirement etc. caused vacancies then the balance between the reserve category an: the general category shall always be maintained. We make it clear that in the event of non-availability of a reserve candidate at the roster-point it would be open to the State Government to carry forward the point in a just and fair manner.

We, therefore, find considerable force in the second point raised by the learnedcounsel for the petitioners. We, however, direct that the interpretation given by us to the working of the roster and our findings on this point shall be operative prospectively.

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CHAPTER- 7

JUDICIAL BALANCING OF THE CONFLICTING INTERESTS

In 19th century registered the highest number of cases regarding the question of reservation. They were mainly concerned with services/posts in the Government.Finally the political development in the early nineties led to the landmark case that finally tried to settle the legal issues.

7.1 The Background

It all started with the *Mandal Commission Report*[171] that had not been acted upon for a long time and the government headed by V.P.Singh decided to provide reservation for backward classes. The Second Backward Class Commission was constituted on December 20, 1978, B.P.Mandal, M.P. headed it. Apart from Mandal, there were five other members of whom S.S.Gill was the Member-Secretary. The terms of reference were: one, to determine the criteria for defining the socially and educationally backward classes, two, to recommend steps to be taken for the advancement of the classes of people so identified and three, to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of suchbackward classes of citizens which are not adequately represented in public services both under the Union or any State and four, to present a report to the President regarding the above questions and make recommendations. The Commission may also examine the recommendations of the First Backward Commission and considerations that stood in the way of the acceptance of its recommendations by Government.

The Commission presented the Report on December 31, 1980, but no action was taken on that. In 1989 V.P. Singh became the Prime Minister of a non-Congress Government and subsequently an O.M. was issued that 27 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for Socially and Educationally Backward Classes. Consequently there was a backlash, which formed the background for this case. The central issue in the case is not the Mandal Commission Report. What was called upon to decide, was the Government‟s Order dated August 13, 1990 reserving 27 per cent of the seats in the government services

[171] Report of the (Second) Backward Commission, 1980 (Mandal Commission Report)

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based on the recommendations of the Mandal Commission. This Order was to come to effect on August 7, 1990. This reservation is in addition to those already reserved for Scheduled Castes and Scheduled Tribes. Moreover the number of SBEC candidates recruited on merit in open competition was not to be counted in the 27 per cent. This reservation was to be implemented in all Central Government Departments and offices and public sector undertakings; including nationalized banks and financial institutions run by the Government. The decision of the Government created a social tension and political chaos that caused serious questions of law and order. The agitation against the proposed reservation by the students forced the Government to clarify that it hadno intention to implement the recommendation in the sphere of education.

Writ petitions were filed as PIL in the Supreme Court. At first the Court refused to interfere on the ground that the matter was a political one. In spite of the fact that the Court appealed to the nation that the matter was adjudicated upon and everybody"s right would be worked out, the situation did not improve. Thereupon the Supreme Court Bar association moved a petition before a five Judge Bench. Subsequently the Court stayed the operation of the O.M. dated August 13, 1990 till final adjudication. In the meanwhile the process of identification of castes for locating the SEBCs was to continue.

But the political fallout became so serious that Supreme Court Bar Association came forward with a petition to hear the case regarding the O.M. issued by the Government for reserving 27 per cent seats in the government services for the SEBCs. And the Supreme Court advanced the date of hearing the petition. Subsequently the five-judge Bench of the Supreme Court stayed the Operation of the O.M. dated 13 August 1990. In the meanwhile there was a significant change in the political front. With the fall of V.P.Singh government at the center followed by the general election and the formation of a new government, the Court sought to know the clear stand of the new government on the issue. The Government submitted that it would modify the August 13, 1990 O.M. "by (i) introducing the economic criterion in the grant of reservation by giving preference to the poorer sections of the SEBCs in the 27 per cent quota and
(ii) and reserving another 10 per cent of the vacancies in the civil services for Other Economically Backward Sections ..." The constitutionality of this O.M. was also challenged. The Government failed in fixing economic criteria and hence the Court declined to vacate the stay for implementation of Memorandum.

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The Court tried to answer many complex questions. Its intervention and balancing the conflicting interests and finally introducing the concept of „creamy layer" as a guideline for the executive to act upon, all converge in this landmark case. The indifference shown by the state governments in implementing the judgments led to *Indra Swahney* and the Court was visibly active.

The case is considered to be a landmark case in the judicial history of reservational justice. Justice Sawant pointed out the political nature of the ease in his observation:

> In a legal system where the Courts are vested with the power of judicial review on occasions issues with social, political and economic overtones come up for consideration. They are commonly known as political questions. Some of them are of transient importance while others have portentous consequences for generations to come. More often than not such issues are emotionally hyper charged and raise a storm of controversy in the society. Reason and rationalism become the tint casualties, and sentiments run high. The Courts have, however, as a part of their obligatory duty, to decide them. While dealing with them the Courts have to raise the issues above the contemporary dust and din, and examine them dispassionately, keeping in view, the long-term interests of the society as a whole. Such problems cannot always be answered by the strictrules of logic. Social realities, which have their own logic, have also their role to play in resolving them. The present is an issue of the kind.[172]

7.2 The Petitions

As many as 46 Writ Petitions were filed. The apex Court decided to hear all the petitions together. On the side of the Petitioners Sixty-one advocates and seven persons appeared. On the side of the respondents eighty-six advocates of whom sixty nine to presented the Union and various States and seventeen represented a private party. Fourteen main issues were framed and the Hon"ble Judges went into these questions in detail end the nine-Judge bench took decisions and made observations on the constitutionality, validity and enforceability of the O.M. dated August 13, 1990. The majority of six judges made the final decision while three expressed their dissenting opinion.

[172] Indra Swahney vs. Union of India, AIR 1992 SC 477

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7.3 The Issues

The issues framed by the Court covered a wider area of Reservation Policy and hence it needs to be quoted:[173]

1. (a) Whether the „provision" contemplated by Art 16(4) must necessarily be made by the legislative wing of the State?

   (b) If the answer to clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Art 309?

2. (a) Whether clause (4) of the Art 16 is an expectation to clause (1) of Art 16.

   (b) Whether clause (4) of the article 16 is exhaustive of the special provisions that can be made in favour of backward class of citizens? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes and groups?

3. (a) What does the expression „backward class of citizens" in Article 16(4) mean?
   (b) Whether the backward classes can be identified on the basis and with reference to caste alone?
   (c) Whether the backwardness in Article 16(4) should be both social and educational?
   (d)Whether the „means test" can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?

   (e) Whether a class, to be designated as a backward class, should be situated similarly to the SC/STs?

   (f) Adequacy of representation in the services under the State.

4. (a) Whether backward classes can be identified only exclusively with reference to economic criteria?

   (b) Whether criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes?

[173] Ibid

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5. Whether backward classes can be further categorized into backward and more backward categories?

6. To what extent can reservation be made?

   (a) Whether the 50 per cent enunciated in *Balaji* [1963 Supp 1 SCR 439] is a binding rule of caution or rule of prudence?

   (b) Whether the 50 per cent rule, if any, is confined to reservation made under clause (4) of Art 16 or whether it takes in all types of reservations that can be provided under Art 16?

   (c) Further while applying 50 per cent rule, if any, whether a year should be taken as a unit or whether the total strength of the cadre should be looked to?

   (d) Whether *Devadasan* [(1964) 4 SCR 680] was correctly decided?

7. Whether Article 16 permits reservations being provided in them of promotions?

8. Whether reservations are anti-meritarian? To what extent are Art 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?

9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?

10. Whether distinction made in the second memorandum between "poor sections" of the backward classes and others permissible under Article 16?

11. Whether the reservation of 10 per cent of the posts in favour of „other economically backward sections of the people who are not covered by any of the existing schemes of reservations" made by the Office Memorandum dated 25-9-1991 permissible under Art 16?

12. The concept of positive action and positive discrimination.

13. Desirability of a permanent statutory body to examine the complaints of over-inclusion/under-inclusion.

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14. Should the matter go back to the Constitution Bench to go into the defects of the Mandal Commission Report?

The observations of the Judges to the questions formed from the submissions in the Writ Petitions could be summarized thus. Having analyzed the judgments made on cases pertaining to reservation in the past, Pandian J observed that even with executiveorder reservation could be made. Most Judges agreed with this and held accordingly. But it is submitted that the Hon‟ble Justices have not given much attention to the question. The reservation being a very important policy matter it should not be left to the executive, which for all practical purpose means „bureaucracy‟. Moreover it is the legislature which is the proper body a formulate policies. Debates in legislature would be helpful in making the backward class people aware of what is happening to their privilege. In a country where transparency in administration has not become a reality entrusting the policy implementation with the bureaucracy is nothing but important. According to Justice as the expression „other authorities‟ include all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Some of the local bodies and some of the statutory corporations may have their own legislative wings. In such a situation it would be unreasonable and inappropriate to insist that reservation in all these services should be provided by Parliament/legislature. But there was a word of caution from *Sawant J* who said, Reservation by executive Order may not be invalid but since it was being made for thefirst time in services under the Union propriety demanded that it should have been laidbefore parliament not only to lay down healthy convention but also to consider the change in social, economic and political conditions of the country as nearly ten years had elapsed from the date of submissions of the Report, a period considered for evaluation if the reservation may be continued or not.

Next issue is the enforceability of an executive order that makes a provision under Art 16(4). Here too almost all judges agreed upon the efficacy of the executive order and that such a provision is effective the moment it is made. The question whether clause (4) of Article 16 is an exception to clause (1) is an interesting one. Four Justices including Chief Justice Kania stated clearly that Clause (4) is not an exception to Clause (1) of Article 16. They further said “Yet it must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of

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socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other." But the justices did not go into the question of how long should the court go on balancing in this way. Again is it proper to consider that the clause (4) is only transient in nature and hence should have a time limit.

On the other hand Thommen J. describes Art 16(4) as „enabling provision conferring discretionary power on the State; an ameliorative harmonization of conflicting norms to stretch to the utmost extent the frontiers of equality; an emphatic assertion of equality between equals and inequality between unequal"s so as to achieve the maximum degree of qualitative and relative equality by means of affirmative action even to the point of reservation. It is in the nature of an exception or a proviso to the general rule of equality. The Supreme Court has generally treated clause (4) as an exception or a proviso to the general rule of equality enshrined in Art 16. He also gives a warning, „Clause (4) seen in whatever color, is a very potent weapon which causes lasting ill effects and damage unless justly and appropriately used."

Kuidip Singh J. describes it as a special provision. Justice Sahai too clarifies Article 16(4) as enabling provision. „Art 16 (1) is a fundamental right of a citizen whereas Art 16 (4) is an obligation of the State. The former is enforceable in a court of law, whereas the latter is "not constitutional compulsion" but an enabling provision."

To the question whether Art 16 (4) is exhaustive of the concept of reservations in favor of backward classes, Kania CJ and Venkitachaliah, Ahmadi and Jeevan Reddi, JJ replied affirmatively. „Therefore, where the State finds it necessary-for the purpose of giving full effect to the provisions of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under clause (4) itself. Sawant J, in a separate judgment voiced more or less the same opinion. But Thomman J. struck a different note when he said, „Preferences without reservation may be adopted in favour of the chosen classes of citizens by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation of age or other minimum requirements. Such preferences can be extended to all disadvantaged classes of citizens, whether or not they are victims of prior discrimination." (Emphasis added). He included people like the handicapped. Sahai J focuses on another aspect of Clause (4) with whom Kuldip Singh J agreed. In the words of Sahai J. „Extension of reservation to new categories

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under Articles 15 (4) and 16 (4) beyond the 50 per cent rule laid down in Balaji and Devadasan, such as to government nominees, political sufferers, defence personnel, sportsmen, children of MISA and DISIR detenues, etc. under the cover of reasonable classification is a constitutional distortion and cannot be legitimately and legally accepted as valid.‟

The question 3 (a) which seeks the meaning of „backward class of citizens‟ in Art 16 (4) is a significant one. Kania CJ and Venkitachaiiah, Ahmadi and Jeevan Reddi, JJ relying on previous judgments in this regard said, „The Opinions of the Supreme Court in *Venkitaramana, Rajendran, Periyakaruppan and Vasanth,* emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognize that in the Indian context, lower castes are and to be treated as backward classes. *Rajendran and VasanthKumar* constitute important milestones on the road to recognition of relevance and significance of caste in the context of Art 16 (4) and Art 15 (4)3 The caste-class orotundity continues to haunt the judgments. As further clarification it was stated, Hence from the use of the word “class” in art 16 (4), it cannot be concluded either that “class” is antithetical to “caste” or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens.

To the question whether the „backwardness referred to in Article 16 (4) should be both social and educational, Kania CJ and Venkitachaliah, Ahmadi and Jeevan Reddi, JJ answered that backwardness in Art 15 (4) and in Art 16 (4) are different. They said “Though Article 340 employs the expression „socially and educationally backward classes‟ and yet the expression does not find a place in article 16 (4)”. The reason is obvious: “backward class of citizens in Art 16 (4) takes in the Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus certain classes which may not qualify for Art 15 (4) may qualify for Art 16 (4) as backward class of citizens.‟ The Justices accepted the fact that “The accent in Article 16 (4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter- twined in the Indian context.” Thomman, J. in his dissenting judgment says that „the backward class mentioned in Article 16 (4) is a synonym for the classes mentioned in Article 15 (4). But Kuldip Singh could not agree with this. He observes, “The expression „backward „in the context of Art 16 (4) is entirely different than the expression „socially and educationally backward class in Art 15 (4). When these two articles of Constitution in

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juxtaposition-enacted in consecutive years use markedly different phraseology, well established canons of interpretation dictate that such meanings should be assigned to the words as are indicated by the difference in phraseology...Also what is to be identified under Art 16 (4) is not the „backward class" but a „class of citizens" which is inadequately represented in the State service. . .The judgments of this Court wherein it is assumed that the two expressions in Art 15 (4) and Art 16 (4) mean the same thing do not lay down correct law."

The issue of means-test is discussed as an answer to question 3 (d) According to *Kania CJ and Venkitachaliah, Ahmadi and Jeevan Reddi, JJ,* means test signifies imposition of an income limit. It is for the purpose of excluding persons (from the backward class) whose income is above the said limit and is often referred to as the „creamy-layer" argument. The justices consider this to be a test for proper and more appropriate identification of a class. *Sawant, Thomman, Kuidip Singh, and Sahai JJ*. concur with this test. But the dissenting opinion comes from. His argument was that only after 42 years of the commencement of the Constitution the Government was taking steps to implement the scheme of reservation for OBCs under Article 16 (4). Another objection to creamy layer test is that the impugned OM does not speak about any creamy layer test. He says:

It cannot be said by any stretch of imagination that the Government was not aware of some few individuals having come both socially and educationally above the general average and entered in the All India Services or any other civil services. Despite the above fact, the Government has accepted the listed groups of SEBCs as annexed to the Report and it has not thought prudent to eliminate those individuals. Therefore in such circumstances, it is doubtful whether the judicial supremacy can work in the broad area of social policy or in the great vortex of ideological and philosophical decisions directing the exclusion of any section of people from the accepted list of OBCs. . .Therefore when this Court is not called upon to lay a test or give any guideline as to who all are to be eliminated from the listed groups of the Report, there is no necessity to lay any test much less „creamy layer" test.

To the question (e) whether a class, to be designated as a backward class, should be situated similarly to the SC/STs? *Kania CJ and Venkitachaiiah, Ahmadi and Jeevan Reddi, JJ* answered in the negative. Only *Thomman J.* strikes a dissent. With regard to

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adequacy of representation Kania CJ and Venkitachaiiah, Ahmadi and Jeevan Reddi, JJ are of the opinion that the State could assert from the facts or it may gather necessary material through a Commission/Committee, person or authority. In his dissenting judgment Kuldip Sing, J. says:

The insertion of „backward" at a later stage did not change the intention with which the original draft article 10 (3) was brought into existence. Dr. Ambedkar nowhere stated that reservations were meant for backward classes. In his speech (CAD, Vol. 7, pp 701-702) he was not referring to backward or non-backward communities, he was only referring to the communities, which were dominating the public services and those, which were not permitted to enter the said services...So the reservation under Art 16 (4) is not meant for backward classes „but for backward sections of the classes, which are not adequately represented in the Stateservices.

To the question whether backward classes can be identified only exclusively with reference to economic criteria, *Kania CJ and Venkitachaliah, Ahmadi and Jeevan Reddi, JJ* answer in the negative, but in the dissenting judgment Kuldip Singh J asserts that a backward class for the purpose of Article 16 (4) can be identified solely on the basis of economic criterion.

The fifth issue is whether a backward class can be further divided into backward and more backward. The majority opinion is that as there is no legal bar doing so, State may categorize. Sahai J. does not agree with this observation for according to him „since the Constitution treats all citizens alike for purposes of employment except those who fall under Art 16 (4) any further classification or grouping for reservation would be constitutionally invalid."

Majority view regarding the percentage of reservation is that Art 16 (1) and 16 (4) have to be harmonized for both aims at one thing namely „equality". Thus by 27 per cent reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled castes and Scheduled Tribes, it comes to a total of 49.5 per cent.

On the carry forward rule, which was struck down in Devadasan the majority opines: The constitutionality of the carry forward rule was questioned in Devadasan on the

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ground that it resulted in violation of 50 per cent limit rule laid down in Balaji. The rule itself was struck down as on facts on 29 out of 45 seats appointments were made to SC/STs. But on its own reasoning, the decision in so far as it strikes down the ruleis not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50 per cent .. .It is wrong to presume that always reservations would exceed 50 per cent as a necessary and the only consequence of the carry forward rule. When it does tend to in any subsequent year the authoritiesimplementing the carry forward rule should ensure that it shall not result in reservation beyond 50 per cent in any given year. In his dissenting judgment Pandian,J "the percentage of reservation at the maximum of 50 per cent is neither based on scientific data nor on any established and agreed formula. In fact Article 16 (4) itself does not limit the power of Government in making the reservation to any maximum percentage; but it depends upon the quantum of adequate representation required inthe services."

On reservation in promotions Kania CJ and Venkitachaliah, and Jeevan Reddi JJ, observe that the question as such does not arise because the impugned Memorandums do not provide for reservation in promotions. And Ahmadi J does not express any opinion at all. But Kania CJ and Venkitachaliah, and Jeevan Reddi opine that reference to the larger Bench was made with a view to "finally settle the legal positionrelating to reservations". And they are of the view that Article 16 (4) is confined to initial appointment and it cannot extend to promotions. Overruling Rangachari it is stated:

> It is true that Rangachari has been the law for more than 30 years and that attempts to reopen the issue were repelled in Karmachari Sangh. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in Rangachari to the extent it holds that Art 16 (4) permits even in promotion, is not sustainable in principle and ought to depart from. However taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made; whether on temporary, officiating or regular/permanent basis.

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In this regard the logical reasoning of Sahai, J is revealing. According to him constitutional sanction is to reserve for backward class of persons. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against the other.

7.4 Reservation for Poorer Sections

The tenth question was whether there could be a classification of „poorer sections" among backward classes under Art 16. The issue that emerges from the second Memorandum issued by the Government on 25th September 1991 is that whether distinction made in this Memorandum between the „poorer" sections among the backward and others could be justified under Art 16. Such poorer sections are eligible to get „preference" in reservation appointments. *Kania CJ and Venkitachaliah, Ahmadi and Jeevan Reddi, JJ* observed that the Government should notify which classes among the several designated other backward classes are more backward for the purpose of this clause and the apportionment of reserved vacancies/posts among the „backward" and „more backward". On such notification, the clause will become operational. The Court by a majority held that though the criteria for finding out „poorer" had not been evolved; it was obvious that the basis intended was economic. This according Court could not be sustained for it was not permissible under the Constitution. And the Court decided the eleventh issue of permissibility of the OM by observing that the OM was constitutionally invalid and accordingly being struck down.

The impugned O.M. contained provision for reservation of 10 per cent of the posts in favour of „other economically backward sections" who are not covered by any existing schemes of the reservations. The issue here was whether it is permissible under Art 16. This classification according to Kania CJ and Venkitachaliah, Ahmadi and Jeevan Reddi, JJ did not come under either Article 16(1) or article 16(4). They observed, "Reservation of 10 per cent of the vacancies among open competition candidates on the basis of income/property holding means exclusion of those above the demarcating line from those 10 per cent seats. This is not constitutionally permissible. No bar can be created for a citizen from being considered for an appointment to an office under the State solely on the basis of his income or property holding." But Kuldip Singh, J

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was of the opinion that Government of India could make reservations solely based on economic criterion by a separate order.

7.5 Positive Actions and Positive Discrimination

Question twelve dealt with the jurisprudential questions of Positive Action and Positive discrimination. The majority judgment took note of the argument of Dr. Rajeev Dhavan and observed:

> Dr. Rajeev Dhavan describes Art 15 (4) as a provision envisaging programmes of positive action and Art 16 (4) as a provision warranting programmes of positive discrimination. 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 Art 15
> (4) just as reservations can be provided in services under Art 16 (4). If so, it would not be correct to confine Article 15 (4) to programmes of positive action alone. Art 15 (4) is wider than Art 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented there under (in addition to reservations) to improve the conditions of SEBCs, Scheduled Castes and Scheduled Tribes, whereas Article 16 (4) speaks only of one type ofremedial measure, namely, reservation of appointments/posts.

Next issue is the desirability of a permanent statutory body to examine the complaints of over-inclusion/under-inclusion. In this regard the considered view of the Court was that there ought to be a permanent body in the nature of a Commission or Tribunal, to which complaints of Wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. It should have the power to examine the complaints of the said nature and pass appropriate orders.

7.6 On Mandal Commission Report

The last question was whether the matter should go back to Constitution Bench to go into the defects of the Mandal Commission Report. In answering the above question the Court at the outset itself pointed out that each and every defect, if any, in the working and Report of the Mandal Commission does not automatically vitiate the impugned Office Memorandums. Then the Court observed that there were three

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factors to be kept in mind: (a) The Mandal Commission Report had not been accepted fully by the Government. The issue before the Court was not the validity of the Mandal Commission Report but the validity of the impugned O.M. (b) The appointment of Commission to go into the question of Backward Classes was not necessary because even without a Commission the Government could have specified the OBCs on the basis of material as it might have had before. It could not be said thatthe criteria evolved by the Mandal Commission for identifying OBCs were irrelevant. In many States there have been reservations for OBCs, but only the Central Government had not implemented this kind of reservation. Finally the constitution of a permanent Commission to examine complaints would obviate the need for any such scrutiny by the Supreme Court. The Court also did not find it necessary to deal with the Mandal Commission Report. Partly concurring Pandian J. that all SEBCs brought in the list of the Mandal Commission Report should be given equal opportunity under the 27 per cent reservation in Central Government Services. He was also not in favour of 10 per cent reservation for poorer section of people for its unconstitutionality. Thomman and Kuldip Singh JJ dissented. Thomman J could not find any proper application of mind in the impugned O.M. He wanted the Government to reconsider the question of reservation under Art 16 (4). Kuldip Singh J in his dissenting judgmentconsidered the Mandal Commission Report s identification of 3743 castes as beneficiary unconstitutional, invalid and could not be acted upon. According to him the identification violated Article 16 (4). The Commission did not determine the backward sections of the classes who are inadequately represented in the State services. The Commission did not go into the question of desirability or otherwise of making provision for the reservation of appointments or tests in public services. The Hon‟ble Justice came down severely on the Mandal Commission Report by commenting that „out of the sources for preparation of the list of Backward Castes the socio-educational field survey was an eye-wash.‟ Again he remarked that

„Substitution Caste for Class in Article 16 (4) amounts to re-writing the Article. He further said that the application of caste criterion to non-Hindus is anti-secular and against the basic features of the Constitution. Moreover the Mandal Commission relied on the census 60 years old that is the census of 1931.Hence the basic calculationis illogical, absurd and against fair play. The Commission itself had admitted that the essential data before it was woefully inadequate and sketchy. In his dissenting judgment Sahai J pointed out that the Commissions are only fact-finding bodies. The

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Constitutional responsibility of reserving posts rests with the Government. Unfortunately neither in 1990 nor in 1991 this duty was discharged constitutionally or even legally. It is the duty of the Government to go into the mistakes, if any, of the Commission. The Government should examine these things before issuing any order. "If the Government failed to discharge its duty then the exercise of power stands vitiated."

7.7 Law Declared by The Supreme Court

The main judgment gave „Directions to the Government of indie, State Governments and administrations of Union Territories. Herein lies the creativity of the Court in balancing the interests and ultimately upholding the spirit of the Constitution.

The Court had directed the Governments that they should within four months constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over inclusion and under-inclusion in the listsof Other Backward classes of citizens. The advice tendered by such body should ordinarily be binding upon the Government. Secondly, the Court asked the Government of India specify the bases, applying relevant and requisite socio- economic criteria to exclude socially advanced persons/sections („Creamy layer") from Other Backward Classes. The impugned OM should also be subject to exclusion of creamy layer. This direction is not fully applicable to the State Governments because some States had already implemented the reservation for Other Backward Classes. But those states must also evolve the said criteria within six months. Thus they must also exclude the creamy layer. Any objection regarding the criteria evolved or equitable distribution of benefits of reservation should be agitated only before the Supreme Court.

The direction given by the apex Court was not complied with in time by the Government of Kerala. This led to *Indra Sawhney II*. A sizeable section of the Other Backward Classes in Kerala would come under the creamy layer. Perhaps it was the vote-bank politics and its compulsions made Kerala do nothing on the directions givenin *Indra Sawhney I*.

The Supreme Court pronounced certain important decisions: *First*, the identification of social and educational backwardness on the basis of caste was held constitutional.

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Second, it was declared that reservation based on the economic criterion alone was not permissible under the Art 15(4). Under this Article the classification as backward and most backward was permissible. *Third,* the total reservations in the government jobs under backward classes should not cross the prescribed limit of 50 per cent . However when the reservations on the basis of caste were to be provided, it should be given subject to the exclusion of creamy layer, which was to be determined by a permanent Commission to be set by the Government for this purpose. *Four,* reservations in certain technical and super-specialty areas were not permitted under the provision of Art 15(4). *Five,* the Court gave a significant verdict that the reservations were only permissible in case of initial appointments and would not be permitted to promotions and finally the Court also put forward a new doctrine of creamy layer. This doctrine is aimed at finding out the creamy layer or the upper crust of the backward class and excluding the same from the domain of beneficiaries.

7.8 Post-Indra Sawhney Scenario

Based on the direction of the Supreme Court, the Union Government constituted an expert committee under the Chairmanship of a retired Judge of Patna High Court Ramanandan Prasad. Based on this Committee‟s recommendations, the Union Government issued an Official Memo (O.M.). The States too have the authority to formulate their own criteria for detecting the „creamy layer‟ in the respective states. Each State has to formulate norms to determine upper crest of the backward classes so that upper crest could be disconnected from the rest of the backward classes. But often such formulation in the form of subordinate 1egisiation has been challenged.

The constitutionality of the criteria formulated by the Bihar and UP. Governments for determining the „creamy layer‟ was challenged in *Ashok Kumar Thakur v. State of Bihar and others*[174] through a writ petition. Two subordinate legislations, namely *Bihar Reservation of Vacancies in Posts and Services (for Schedule castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995 and UP. Public Services Reservation of Schedule castes, Scheduled Tribes and Other Backward Classes Act, 1994* were challenged.

Even though the Supreme Court gave the clear verdict that reservation in promotion is unconstitutional, the post-Indra Sawhney state of affairs does show that the subtle

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conflict between politically dominated executive and constitutionally committed judiciary has not ended.

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CHAPTER- 8

CONCLUSION & SUGGESTIONS

One of the socio-political problems that have been troubling the Indian polity is the question of bringing the traditionally backward sections of the people into the main stream of social life. Unfortunately communities in India exhibit a hierarchical structure cemented by a sort of religious belief that has held on to their social psyche and also by an economic sanctum of feudalism based on that hierarchy. This is popularly known as caste, peculiar to Indian society. This social structure has baffled the British rulers too. The issue of caste thus became a serious subject along with a broader issue of ending colonial rule. Since the beginning of 19th century the depressed classes began to organize themselves to demand social dignity and political power.

The British rulers gave some concession to these sections and put them into two categories namely, SCs and STs. When the Indian Union became a Republic with a democratic Constitution, this concession had to be continued and the Constitution itself guaranteed this. But the Constitution went further and empowered the State to make laws for giving such preferential treatment not only to the SCs and STs incorporated in the Government of India Act 1935, but also to OBCs that are socially and educationally backward. This preferential treatment is known as reservation.

After democracy ushered in, the bureaucracy exercised invisible but effective power mainly because it had inherited a power complex from the civil service of the Colonial days. The members of the bureaucracy were mostly from the upper class. The depressed class had only little opportunity to be educated in English. These two factors were combined in such a way that it had been difficult to get their cooperation in implementing the policy of protective discrimination.

In the pre-Independence period itself a few princely States like Travancore and Mysore and Provinces like Madras were able to become aware of the need for special treatment to the depressed classes. In Madras, particularly, *Justice Party*, the first organized

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political party, came to power in 1920 and protective discrimination was

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given the legal form, namely, Communal G.O. that later came to effect the First Amendment to the Constitution.

In the post-Constitutional period this policy underwent many acid tests, due mainly to, the lack of cooperation from the Executive wing. Bureaucracy used to close their eyes to democratic values and indifferent about implementing the constitutional objectives with enjoyment would often overlook the fact that the Preamble of the Constitution has proclaimed the objectives of the Republic and the most important ones among them were Equality and Justice.

The Constitution empowers the State to make law to reserve seats in educational institutions, government services and legislatures. But with regard to legislatures there is a time limit for this reservation, although this limit has been extended through Constitutional Amendments from time to time. Regarding reservation in other two spheres it looks as if this were to go ad infinitum.

There is an argument that „efficiency" should be given priority in the appointments to the posts in Government services and in support Article 335 is cited. Efficiency depends upon education and training. Unfortunately the depressed classes have not had appropriate access to this. Mere reserving of seats in the educational institutionsor giving scholarships are unlikely to make human resource efficient. What is needed is restructuring the educational system itself, both in its syllabus and infrastructure. Without providing proper education reserving posts in the Government service.

The policy of reservation as found in the Constitution of India could better be stated thus: Reservation has been made in favour of four classes of people namely:

1. Women and children belonging to all sections of society and all levels of society regardless of class, caste, race, religion etc. [Article 15(3)].
2. The socially and educationally backward classes [Article 15(4)]
3. The Scheduled Castes and Scheduled Tribes [Article 15(4), 16(4) and (4A), 332]
4. The Economically weaker Sections for general category [Article 16(6)] and

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5. The „weaker section," which include SCs and STs also [Article 46]. But much controversy has arisen in the area of reservation of seats in educational institutions, which comes under Art 15(4) and reservation of posts in government services, which comes under Art 16(4). Hence this study focuses the preferential treatment envisaged in these Articles. From the analysis of cases attracting these Articles, it could be safely assumed that many disputes have arisen regarding reservation of posts and incidentally reservation in promotions in posts.

The political parties that dominate the Legislative Wing of the Government are often motivated to hold the vote banks and satisfy their demands and the Executive wing, as has been already pointed out, show apathy towards the policy of protective discrimination. Consequently citizens are driven to seek justice from the Court. Thus happens on Judiciary a greater responsibility of realizing the Constitutional objective of social justice and thus the judicial process, in reservation related disputes, becomes an important aspect of study.

Judicial creativity in translating the policy into reality through a justice delivery system has been discussed from a jurisprudential angle. The cases relating to reservation have been examined to trace the general trend revealed by the Count in thepast five decades. The epoch making case of *Indra Sawhney* stands as an excellent example for how Judiciary has saved the nation from a political turmoil and how has Judiciary balanced the conflicting interests in a judicious manner, casting away the initial apathy that had been generated mainly because the issue had been politically hyper charged.

The evolution of reservational jurisprudence it could be safely surmised that Judiciary in the initial stages went by the rule book, giving due weight to the principle of equality [Art 14] and following a method of literal interpretation the Court went against reservation in the first couple of cases. This paved the way for the Parliament to amend the Constitution for the first time in this regard. But in late sixties, there was some kind of rethinking on the part of the Judiciary and backwardness due mainly to caste came to be recognized. Moreover in *Vasanth Kumar Chinnappa Reddy, J* went to the extent of saying that "...no one will think of describing Brahmins anywhere in the land as socially and educationally backward, however poor they might be." There

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is some truth in it because of the social stigma attached to „the lower castes" the feeling of inferiority in them by itself might create social problems.

Mainly three trends could be seen in the judicial pronouncements:

(a) In *Balaji* and *Chitralekha* the Court adopted secular, scientific and rational criteria. The limit of reservation was fixed at fifty percent and caste played only an insignificant role in determining backwardness.

(b) But when the Court came to decide *Rajendran, Sagar and Periyakaruppan* caste was to be considered important and finally

(c) In *N. M. Thomas* and *Akhil Barathiya Soshit Karmachari Sangh* caste was restored to a significant place and promotion posts could also be reserved. This led one scholar to describe the phenomenon as „judicial gerrymandering". Another eminent lawyer rightly commented that "new ideas are added without old ideas being discarded" and "law does not evolve in the Supreme Court, it meanders." The reason for this meandering seems to be that there is a subtle conflict going on between the two wings of the State namely the Political Executive and the Judiciary. Whenever, the Judiciary comes out with a decision, which the Political executive might not relish, the latter resorts to amending the Constitution. This indeed is a limitation that Judiciary has to take note of. Therefore can one say that Judiciary has been displaying activism? If the term „activism" in this context were to mean that the judiciary should interpret law in keeping with the spirit Constitution enshrined in the Preamble as "Justice social, economic and political", one might be tempted to say that by and large judiciary has tried to be active, of course, within the parameters set by the Constitution and the limitations imposed by Constitutional practices. This trend could be seen in the *post-Indra Sawhney* period also.

A study of *Indra Sawhney* is warranted because this could be described as a truly landmark case where the Supreme Court displayed activism especially in balancing various interests. In fact the court was hesitant at first to deal with an issue, which was politically sensitive. But once the political executive failed to resolve the issue and thereby leading the country into political turmoil and social tension, the court decided to go into the question. Obviously it did not confine itself to the impugned O.M; instead it went beyond and wanted to resolve issues related to reservation for Other

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Backward Classes. „What is backwardness? How to identify the backward class? These are some of the very important questions the Court tried to answer. Though the Court took a cautious step in the *Indra Sawhney* case, in the face of public opinion, which was expressed violently, compelled it to consider and introduce the „creamy layer" standard to eliminate the elite group within the backward classes.

Thus it may be safely concluded that Judiciary did really become active when such an active role was expected of it. Here may be found the concern of the judiciary for the welfare of the nation at large. Whenever the executive fails or takes a wrong step, the judiciary is urged to intervene. And that is what happened in post-Mandal period.

The court refused to consider „caste" as the sole criterion, for the goal of the Constitution is to establish a casteless society. This put an end to the existing ambiguity regarding whether caste could be taken as the sole criterion for measuring backwardness. But the Court conceded that „caste" could be one of the factors in deciding backwardness. Palkhivala went to the extent of saying that the Court was trying to revive casteism, which the Constitution emphatically intended to end. Yet it could not be overlooked that the majority judgment leans more towards the economic criterion.

The court accepted the economic criterion as valid in determining backwardness. Incidentally it was the Nettur Commission appointed by the Kerala State that suggested the economic criteria for determining backwardness in 1968. And in 1992in Indra Sawhney the SC introduced the doctrine of „creamy layer" so that those individuals among the backward communities who no longer suffer from social and educational backwardness could be identified and set apart from the truly backward segments of society.

This might be one of the reasons why the Supreme Court"s directive in Indra Sawhney did not at first produce any sharp reaction in the state nor any reaction from the administration in Kerala. This trend could be perceived generally in south Indiabecause in North India riots broke out in the aftermath of Government"s decision to implement Mandal Commission"s recommendation. It goes to prove that there is a higher degree of political education among the people especially among the socially and educationally backward classes in the South and the upper classes in South Indian States have been able to internalize the need for reservation.

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The cases analyzed in the study reveals a fact that the reservation policy is not administered in the proper manner. Any Report from the National Commission for SCs, STs and OBCs would vouch for this. National Commission itself has not proved to be an effective mechanism, because of the lack of cooperation of the administration.

It is rather absorbing to note how the present legal mechanism of reservation is shoddily put to use. Often the policy of reservation is carried out through Official Memos and Official Letters. This could be easily inferred from the cases because in most of the cases the impugned law is an executive Order. As subordinate legislation or delegated legislation is also to be considered law the Court also accepts it as law. And in all cases pertaining to reservation, the Court considered Official Memos as law. But it is submitted that a serious policy matter like reservation should not be left to the bureaucracy to tinker with. For instance had V.P. Singh‟s Government put forward a bill based on Mandal Commission Report, there would have been enough room for the members of Parliament to voice their opinion. The Press would have discussed it at length. A democratic debate would have mitigated the wrath of the upper class student community. Therefore resorting to the short cut route of executive orders, and avoiding Parliamentary debate is not in keeping with the best tradition of democracy.

Another significant issue is the process of identifying classes of people as Scheduled or Backward. Regarding SCs and STs it is the President who has the power to notify whether a group of people would come under the respective Schedules. In a vast country like India where multi-ethnicity is the trademark one group of people may be depressed class in one region but the same class may not belong to depressed classesin another region. Therefore the power to determine the status of the classes should be left to the State Governments.

Reservation of opportunities for the SCs and STs and Other Backward Classes, though made with the objective of creating an democratic society, has generated SocialPolitical and Legal problems. How the concept of equality is to be translated into a political reality for the better functioning of democracy is a puzzling question. And thesame time the social impact of reservation has caused many areas of conflict. Instead of acting as a catalyst in eradicating inequality by uplifting the previously socially

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backward, the policy of reservation coupled with the parliamentary system of democracy, has indirectly encouraged modal divisions of caste in transforming themselves into solid pressure group bargaining for political fovours, if not political power.

In India social inequalities have been inbuilt into life on traditional beliefs. TheWestern historians began to treat these beliefs as part of a religion, which later cameto be called Hinduism, a word of Persian origin. However these beliefs have stronger roots in the philosophy of the peoples of the sub-continent. This has produced psychological complexes of „superiority" and „inferiority" among the traditional groups. Offering them proper education could have removed this socio-psychological syndrome.

The Constitution by one of its Directive Principles enjoins the State to offer compulsory education to all up to the age of fourteen. Besides education has been treated as an industry to be regulated and this has led to the over-politicization of education. Instead of developing one"s personality by providing means to improve one"s talents, education has got commercialized. Obviously the depressed Classes being economically poor find themselves victims of the changing scenario. For them education has become both unaffordable and uneconomic. And unfortunately theover-politicization divides people on party lines. The social psychology of division of people that has the basis on caste is now being reflected on the social psychology of political parties. There is no wonder that castes have come to organize politicalparties.

The economic equality, which goes a long way in ensuring social equality, has also more or less similar fate. When the Constitution was accompanied in, it spoke about social and economic justice and in 1975 „socialism" was added to its Preamble. But the economic development has not been on the desirable lines. The main features are the „protected economy" and the „mixed economy" in which public sector enjoyed prestige. In the public sector units „reservation" has been adopted often without givingdue weight to efficiency in governance. An important goal of governance ought to have been production of wealth. All other policies ought to be subservient to it. But unfortunately sharing the existing resources became the prime motive. This aggravated an unhealthy competition among the various groups in the society. This

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coupled with the electoral politics that aims at making majority in parliament and in various State Assemblies made the competition manipulative one, leading the groups to consolidate so that they would be strong enough to bargain for power. The systemof reservation is to be understood with this backdrop.

The identification of backward class too poses many a problem. There are mainly three aspects of backwardness: social, economic and educational. To quantify the backwardness certain parameters are to be formulated. Here comes the importance of the doctrine of creamy layer. Yet there are certain other factors that are also to be considered. Each State in Indian Union exhibits different rate of educational level, economic progress and social stratification. Perhaps that is why the states have been given the authority to decide the backwardness of the classes with regard to Other Backward Classes.

The proclaimed object of the policy of reservation is to achieve the meaningfulequality among the people. The success of democracy too depends on realizing this desideratum. The ideal of equality cannot be fully achieved. It is the feeling of „being equal" and the recognition that one naturally gets in a society. This feeling, if it were inculcated would go a long way in removing social backwardness. But here too the State has not succeeded. There must be sufficient reasons for the failure and some of the reasons have been brought to light in the discussions in the study. The legislative wing and the executive wing of the government have to bear the bulk of the blame for the failure, whereas the judicial wing has tried to solve the complicated issue by making timely intervention and balancing of conflicting interests. Besides the legislative and executive wings do not emphasize the efficiency of the administration, whereas the judiciary at times wakes to the expediency of observing Constitutional stipulation regarding efficiency of the administration.

The present study has tried to probe into how the legislature, executive and finally judiciary have viewed this issue and how judiciary tries to find out a solution by its active intervention. In this context it would be relevant to point out that the legislative and executive branches in India have the power and responsibility. The Constitution of India has empowered the Judiciary to declare finally what law is. Therefore judicial pronouncements become significant and the doctrine of „creamy layer" is a concrete contribution in this direction. The doctrine of „creamy layer" attempts to wean the so-

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called backward classes off the „protective provisions" of the constitution, which only perpetuates the societal taxonomy of castes at the expense of a meaningful democracy. The doctrine of creamy layer tries to prescribe a pecuniary parameter to probe the degree of backwardness and thereby the more advanced among the formerly backwardcould be eliminated from the relief umbrella of „protective discrimination". This is in keeping with the Spirit of the Preamble of the Constitution, which speaks about „economic justice" and „socialism".

Suggestions

1. The Government should come forward to set up an Ombudsman like mechanism for hearing the complaints of depressed class people. Such an institution should have village level offices too. Moreover instead of making it more formal and legal, it would be better that such tribunals should be presided over by a team of persons not only from the legal field but also from other walks of life.
2. Education should be structured in such a way that the depressed classes should get enough opportunity to develop their talents and personality. Possibility of reserving a percentage of seats in high fee schools for promising children from poor families may be considered. The entire cost of their education in such schoolsmay be borne by the State. Primary education, in keeping with the spirit of the Directive Principles of State Policy, should be made available to the children of the depressed classes. It would be better if the educational curriculum were structured in such a way to develop traditional skills and knowledge.
3. The value and relevance of any policy will be judged only by the results it produces. Hence a monitoring Agency to assess the progress made each year in realizing the objectives of the policy of reservation should also be set up.
4. India needs people for growth and development but reservation is adding undeserving candidates as well. So I think reservation system should be demolished and if the government really wants to uplift the underprivileged sections of the society then a well-balanced policies should be formulated. First of all such sections of the society should be clearly identified that need development and financial aids. Then to uplift them free education, or incentives and financial assistance should be provided. Once done let them face the competition, true competition. Make them capable, show them the right path and infuse a fighting spirit in them as no one is against healthy competition.

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5. The creamy layer among the backward classes must be excluded with a progressive reduction in the percentage of reservation.
6. There must be some independent committee to review of the decision made by any government declaring the list of backward classes.
7. Creating conditions for the advancement of the backward classes through literacy and poverty, educational and economic improvement programmes rather than substituting such programs by mere reservations from which in any case only a selected few are to be benefited and not the bulk of backward classes.
8. Persons getting benefits of reservations through corrupt practices must be dealt severely. Acquisition of false caste certificates is made a cognizable offence punishable with imprisonment up to 2nd years and fine.
9. It is an ultimate goal of having a casteless and classless society is to be attained, the lists of SCs and STs would have to be reduced from year to year and replaced in due course by a list based on criterion of income-cum-merit. The unfortunate trend of expanding the list obviously under communal pressure is not a healthy sign. A bold step is arresting this trend in the need of time such is mandate of the constitution and imperative for building an egalitarian society.
10. Reservation contained in Art 15(4) and 16 (4) of the Constitution of India being exceptions should not be permanent and should be restricted to only one generation. This will ensure the benefit of reservation to those who are genuinely needy.

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