CHAPTER XXXV

SAFEGUARDS TO MINORITIES, SCHEDULED CASTES, SCHEDULED TRIBES AND BACKWARD CLASSES

SYNOPSIS

A. GENERAL

India has a composite population, having a number of groups based on religion, language, caste, ethnicity or backwardness, such as, the Scheduled Castes, Scheduled Tribes, Anglo-Indians, Muslims, Parsis, Sikhs, Indian Christians, *etc.*

The minority problem very much influenced and coloured the political life of the country before Independence. The major problem at the time was regarding the Muslim minority and this led to the partition of the country. That diluted, to some extent, the Muslim minority problem, but did not solve completely the minority problem, as such, because a number of other minority groups, as well as a large number of Muslims, are still present in the country.

The framers of the Indian Constitution took care to safeguard the interests of the minorities, to give them a sense of security, to protect them against any discrimination, and to help them to get integrated in the main stream of national life.[1] With this in view, a number of provisions have been incorporated in the Constitution for safeguarding specifically the social, economic and educational interests of minority groups. In addition, certain general constitutional provisions, *e.g.*, Fundamental Rights, protect some of the rights of the minority groups.

The policy of the Constitution is to do away with caste and to strive to create a casteless society. There is thus neither any safeguard to any one specifically based on caste except to the Scheduled Castes, to some extent, nor is there any discrimination against anyone on the basis of caste.

Another policy-objective of the Constitution is to make the government secular. The Constitution does not recognise any religion for any kind of favoured treatment, but treats all religions alike, and protects the cultural or religious practices of all people from state interference.[2] Although under Arts. 15(4) and 16(4),[3] reservations can be made in educational institutions and public services for socially and educationally backward classes, no reservation or special representation has been made for these classes either in the House of the People or in the State Legislative Assemblies.[4]

The Constitution does not define the term 'Minority'. The Constitution uses the term 'minority' only twice. Once in the marginal note to Art. 29, but in the text of the Article the expression used is "Any section of the citizens…. having a distinct language, script or culture of its own…."[5] The emphasis of Art. 29, thus, is on linguistic and cultural minorities. Again, in Art 30, the expression used is

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1. For discussion in the Constituent Assembly, see III *CAD*, 211-314.
Reference may also be made to: MARC GALANTER, Protective Discrimination for Backward Classes in India, 3 *JILI*, 38 (1961), and Competing Equalities: *N. RADHA KRISHNAN*, Reservation to Backward Classes, 13 *Indian Y.B. on Int'I Affairs*, 293 (1964) and Units of Social and Economic Educational Backwardness: Caste and Individual 7 *JILI*, 262 (1965); ILI, *EDUCATIONAL PLANNING* (1967); Imam, Reservation of Seats for Backward Classes in Public Services and Educational Institutions, 8 *JILI* 441 (1966); *ILI*, *MINORITIES AND THE LAW* (1972); *REPORT OF THE COMMITTEE ON UNTOUCHABILITY* (1969).

2. *Supra*, Chs. XXIX and XXX.

3. See, *supra*, Chs. XXII, Sec. C and XXIII, Sec. E.

4. See, *supra*, Chs. II and VI.

5. Ch. XXX, Sec. A, *supra.*

"All minorities, whether based on religion or language…." Art. 30 thus refers to linguistic or religious minorities.[6]

The National Minorities Commission[7] treats Muslims, Christians, Sikhs, Buddhists and Zoroastrians as religious minorities at the national level because their numerical strength as compared with the rest of the Indian citizens is smaller.

(a) FUNDAMENTAL RIGHTS

A wide range of minority rights are covered by the provisions relating to the Fundamental Rights. Arts. 14[8], 15,[9] 16,[10] 25,[11] 26[12] and 29(2)[13] seek to protect them from hostile and discriminatory State action. Arts. 15(2),(4),(5)[14], 16(3),(4),(4A),(4B)[15], 17[16], 23[17] and 25(2)(b)[18] seek to remove social and economic disabilities of the depressed classes of people. Arts. 25 to 30 safeguard religion and culture of minority groups in India.[19]

(b) DIRECTIVE PRINCIPLES

Besides the Fundamental Rights, certain Directive Principles obligate the State to ensure the welfare of certain sections of the people.[20]

Article 46 requires the state to take special care in promoting educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes.[21]

Article 38 requires the state to promote the welfare of the people by securing a social order based on justice.[22]

(c) ELECTIONS

According to Art. 325, there is to be only one general electoral roll and no person is ineligible for being included therein on the ground only of religion, race, caste or sex.[23] Thus, all discrimination is barred in matters of election. Adult suffrage also strengthens the political position of the minorities as the political parties constantly vie with each other to woo them.

The purpose of all the provisions, mentioned above, is to integrate the minorities into one mainstream of national life and thus keep in check the divisive forces which may otherwise be released by the existence of several minority

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6. See, *supra*, Ch. XXX, Sec. B(b).
7. For discussion on the National Minorities Commission, see, Sec. G(e), *infra.*
8. *Supra*, Ch. XXI.
9. *Supra*, Ch. XXII.
10. *Supra*, Ch. XXIII.
11. *Supra*, Ch. XXIX.
12. *Supra*, Ch. XXIX.
13. *Supra*, Ch. XXX.
14. *Supra*, Ch. XXII, Sec. A(b).
15. *Supra*, Ch. XXIII, Sec. D(a).
16. *Supra*, Ch. XXIII, Sec. I.
17. *Supra*, Ch. XXVIII, Sec. A..
18. *Supra*, Chs. XXIX, Sec. B(e).
19. *Supra*, Chs. XXIX and XXX.
20. *Supra*, Ch. XXXIV.
21. *Supra*, Ch. XXXIV, Sec. D.
22. Ch. XXXIV, Sec. D, *supra*.
23. *Supra*, Ch. XIX.

groups. The Constitution while extending safeguards to minorities also seeks to weld and integrate the diverse elements into one political and national life. That is why the system of separate electorates was not adopted and elections to all legislatures are held on the basis of joint electorates.[24]

Besides the above, there are some other constitutional provisions directed towards specific groups of people, and conferring benefits on them.

B. SCHEDULED CASTES

The Constitution treats the Scheduled Castes in India with special favour and affords them with some valuable safeguards. Arts. 14, 15 and 16 of the Constitution confer several benefits of social and economic advancement and empowerment and social equality of status and dignity of person, by providing reservation in government services and in educational institutions for the Scheduled Castes and Schedule Tribes.[25]

The Scheduled Castes are not, strictly speaking, a racial, linguistic or religious minority. They are part and parcel of the Hindu society. They are the depressed sections of the Hindus who have suffered for long under social handicaps and thus need special protection and help for the amelioration of their social, economic and political conditions.

They are known as untouchables or Harijans and constitute nearly 15 per cent of the Indian population. They usually engage themselves in the so-called dirty jobs like tanning and skinning of hides, manufacture of leather goods, sweeping of streets, scavenging, *etc.* Even amongst the Harijans, there are high and low, at the lowest rung of the ladder being the *bhangi*.

The framers of the Constitution were determined to eradicate the scourge of untouchability. With this in view, Art. 17 abolishes untouchability[26] and Art. 25(2)(*b*) provides for opening of Hindu temples to the Harijans.[27] To promote their educational and economic interests, Arts. 15(4) &(5) and 16 provide for reservation of seats for them in educational institutions and in government services.[28]

C. SCHEDULED TRIBES

The Scheduled Tribes [S/T], also known as aborigines, are those backward sections of the Indian population who still observe their tribal ways, their own peculiar customs and cultural norms. The tribal people have remained backward because of the fact that they live in inaccessible forests and hilly regions and have thus been cut off from the main currents of national life.

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24. *Report of the Advisory Committee on Minorities.* Also, ILI, *Minorities*, *supra*, footnote 1, 2004, at 23-25.

25. *S. Nagarajan v. District Collector, Salem,* AIR 1997 SC 935 : (1997) 2 SCC 571.
See, Chs. XXI, XXII and XXIII, *supra.*

26. *Supra*, Ch. XXIII, Sec. I.
The title of the Untouchability (Offences) Act has now been changed to the Protection of Civil Rights Act, 1955.

27. *Supra*, Ch. XXIX, Sec. B(e).

28. *Supra*, Chs. XXII, Sec. C and XXIII Sec. G.

These people are divided into four distinct zones—North, Eastern, Central and Southern. The three main characteristics of these people are their primitive way of living, nomadic habits, love for drink and dance and habitation in remote and inaccessible areas.[29] They constitute nearly 7.5 per cent of the country's total population. The Constitution enjoins to provide facilities and opportunities for development of tribal economic and educational standards.

The Scheduled Tribes also need special provisions for safeguarding their interests. The main problem concerning these people is that their socio-economic conditions be improved at such a pace and in such a way as not to disturb suddenly their social organisation and way of living. The need is to evolve ways and means to gradually adjust the tribal population to changed conditions, and integrate them slowly in the general life of the country without undue and hasty disruption of their way of living.

It has been thought that it may be harmful to the tribal people if they are brought into indiscriminate contact with the outside world. Thus, the Legislatures have been empowered to impose restrictions on the Fundamental Rights guaranteed by Arts. 19(1)(*d*), 19(1)(*e*) and 19(1)(*f*) in the interests of the Scheduled Tribes,[30] in order that movement of people from developed areas to tribal areas may be restricted so that the tribal people are not exploited by outsiders. Laws have, therefore, been enacted prohibiting the entry of non-tribals into the tribal areas without permits, living of non-tribals permanently in tribal areas, and transfer of tribal land to non-tribals. Further, to protect the interests of the tribal people who are simple and less-politically conscious, separate provisions have been made for the administration of the tribal areas.[31] Reservation of seats can also be made for them in educational institutions and government services under Arts. 15(4),(5), 16(4), 41, 46 and 335.[32]

(a) IDENTIFICATION OF S/Cs AND S/Ts

The Constitution does not specify the castes or the tribes which are to be called as the Scheduled Castes or the Scheduled Tribes. It leaves the power to list these castes and tribes to the President, *i.e.*, the Central Executive.

Scheduled Castes, according to Art. 366(24) read with Art. 341, are those castes, races or tribes, or parts thereof, as the President may notify. According to Art. 341(1), the President may by public notification specify what castes, races or tribes, or groups thereof in each State and Union Territory would be regarded as the Scheduled Castes for the purposes of the Constitution in relation to *that* State or Union Territory. Thus, the lists of the Scheduled Castes may vary from State to State and one Union Territory to another.

As regards the States, the President issues the notification after consultation with the Governor of the State concerned.

The purpose of this provision is to avoid disputes as to whether a particular caste, race or tribe should be specified as a Scheduled Caste or not. Only those castes, races or tribes can be characterised as Scheduled Castes which are noti-

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29. *FIRST REPORT OF THE COMMISSIONER FOR SCHEDULED CASTES AND SCHEDULED TRIBES*, 3, 11 (1952).
30. *Supra*, Chs. XXIV, Sec. G and XXXI, Sec. B.
31. Art. 244; *supra*, Ch. IX, Sec. C.
32. *Supra*, Chs. XXII, Sec. C; XXIII, Sec. E; XXXIV, Sec. D and *infra*, this Chapter.

fied in the Presidential Order under Art. 341. To determine whether or not a particular caste, race or tribe is a Scheduled Caste or not in a State, one has to look only at the notification issued by the President under Art. 341.[33]

The Supreme Court has expressed in *Milind*[34] that the words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" have not been used in the ordinary sense of the terms but are used in the sense of the definitions contained in Arts. 366(24) and 366(25). In this view, a caste is a "Scheduled Caste" or a tribe is a "Scheduled Tribe" only if they are included in the President's Orders issued under Arts. 341 and 342.

It has been held that a person belong to S/C in one State cannot be deemed to be so in relation to any other State to which he migrates for the purpose of employment or education. Lists of S/Cs are declared in relation to each State separately.[35]

Under Art. 341(2), however, once the notification is issued by the President under Art. 341(1), any modifications therein, by way either of including or excluding from the list any caste, race or tribe or a part or a group thereof, can be made by Parliament by law and not by a Presidential notification. This means that the entries in the Presidential notification issued under Art. 341(1) have to be taken as final unless altered by Parliament by law.[36] The Constitutional mandate thus is that it is the President who is empowered, in consultation with the Governor of the State, to specify by a public notification the castes, races or tribes or parts or groups within castes, races and tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes in relation to that State.

It is not open to any one to include any caste as coming within the notification on the basis of evidence—oral or documentary—if the caste in question is not specifically mentioned in the notification. It is therefore not possible to give evidence that a particular caste is a Scheduled Caste even though not mentioned in the Presidential Order.[37]

Even the court cannot modify, add or subtract any entry in the Presidential Order. The function of the court is to interpret what an entry in the PO is intended to mean.[37] In *Pankaj*,[38] the Supreme Court has observed :

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33. *K. Adhikanda Patra v. Gandua*, AIR 1983 Ori 89; *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394, at page 409; *State of Maharashtra v. Mana Adim Jamat Mandal*, (2006) 4 SCC 98.

34. *Maharashtra v. Milind*, AIR 2001 SC 393 : (2001) 1 SCC 4.
Also see, footnote 45, *infra.*

35. *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, (1990) 3 SCC 130 : (1990) 2 SCR 843; *MCD v. Veena*, AIR 2001 SC 2749 : (2001) 6 SCC 571 at page 574; *U.P. Public Service Commission v. Sanjay Kumar Singh*, (2003) 7 SCC 657, at page 658 : AIR 2003 SC 3626.

36. *B. Basavalingappa v. D. Munichinappa*, AIR 1965 SC 1269 : (1965) 1 SCR 316. Also, *Parsram v. Shivchand*, AIR 1969 SC 597 : (1969) 1 SCC 20; *Kumari Madhuri Patil v. Addl. Commr., Tribal Development*, AIR 1995 SC 94 : (1994) 6 SCC 241; *K.S. Vijaylakshmi v. Tahsildar, Palakkad*, AIR 2000 Ker. 262; *S. Swvigaradoss v. Zonal Manager, F.C.I.*, AIR 1996 SC 1182 : (1996) 3 SCC 100.

37. *Srish Kumar Choudhury v. State of Tripura*, AIR 1990 SC 991 : 1990 Supp SCC 220. Also see, *Vimal Ghosh v. State of Kerala*, AIR 1997 Ker 237; *State of Maharashtra v. Mana Adim Jamat Mandal*, (2006) 4 SCC 98, at page 102 : AIR 2006 SC 3446.

38. *Pankaj Kumar Saha v. The Sub-Divisional Officer, Islampur*, (1996) AIR SCW 1943 : (1996) 8 SCC 264. Also, *Nityanand Sharma v. State of Bihar*, 1996 AIR SCW 782 : 1996 (3) SCC 576. See also *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar*, (2008) 9 SCC 54.

> "It is now settled law that….the Court is devoid of power to include or exclude from or substitute or declare synonyms to be a Scheduled Caste or Scheduled Tribe."

It is for Parliament to amend the list and include therein, or exclude therefrom, any caste, race or tribe.

The purpose of Art. 341(1) is to avoid all disputes as to whether a particular caste is a Scheduled Caste or not for purposes of the Constitution. It is the President's notification issued under Art. 341(1), which determines whether a particular caste is a Scheduled Caste or not.[39] If a particular caste is not mentioned in the Presidential Order, it cannot be characterised as a Scheduled Caste.[40] Only those castes can be regarded as Scheduled Castes which are notified in the PO made under Art. 341. The Supreme Court has observed as regards the President's power under Art. 341:[41]

> "It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe, but parts of or groups within them would be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and educational backwardness of the race, caste or tribe justifies such specification. In fact, it is well known that before a notification is issued under Art. 341(1), an elaborate enquiry is made and it is as a result of this inquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness in regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and may justify the division of the Sate into convenient and suitable areas for the purpose of issuing the public notification in question."

Similarly, Scheduled Tribes, according to Art. 366(25) read with Art. 342, are those tribes or tribal communities, or parts or groups thereof, as the President my notify. The President may specify under Art. 342(1) by public notification what tribes or tribal communities are to be treated as the Scheduled Tribes with respect to each State and Union Territory. A person belonging to a Scheduled Tribe in one State cannot *ipso facto* claim the same status in another State unless his tribe is declared to be a Scheduled Tribe in relation to that State.[42]

In case of the States, the President issues the notification after consulting the Governor of the State concerned. There is no uniform test for classifying the tribes as the Scheduled Tribes and, therefore, there exist difficulties in determining which tribe can rightly be included in, or excluded from, the schedule of tribes.

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39. *Bhaiyalal v. Harikishan,* AIR 1965 SC 1557, 1560 : (1965) 2 SCR 1557.
40. *Parsram v. Shivchand,* AIR 1969 SC 597 : (1969) 1 SCC 20.
41. *Bhaiyalal v. Harikishan, supra,* footnote 39.
42. *Action Committee v. Union of India,* (1994) 5 SCC 244; *U.P. Public Service Commission v. Sanjay Kumar Singh,* (2003) 7 SCC 657 : AIR 2003 SC 3626; *S. Pushpa v. Sivachanmugavelu,* (2005) 3 SCC 1 : AIR 2005 SC 1038.

Once these lists have been issued by the President, any later additions or subtractions can be made therein only by a law of Parliament and not by a Presidential notification [Art. 342(2)]. Clarifying the position in this regard, the Supreme Court has observed in *State of Maharashtra v. Milind*[43] that the Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part or group of any tribe or tribal community is synonymous to the one mentioned in the order if they are not so specifically mentioned in it. It is also not at all permissible to hold any enquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned entry in the said order.[44]

Under the above-mentioned provisions, the President promulgated a number of orders listing the Scheduled Castes and the Scheduled Tribes, *i.e.*, The Constitution (Scheduled Castes) Order, 1950;[45] The Constitution (Scheduled Tribes) Order, 1950;[41] The Constitution (Scheduled Castes—Part C States) Order, 1951, and The Constitution (Scheduled Tribes—Part C States) Order, 1951.

As stated above, once these orders have been issued by the President, no other authority except Parliament, that too by passing a law, can amend these orders.

These orders did not give entire satisfaction to the people and the Central Government received a number of requests for revision and modification of the lists contained in these orders. The Central Government referred all these requests to the Backward Classes Commission.[46] On the recommendation of the Commission, Parliament modified the Presidential Orders by enacting the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1956.

After the re-organisation of the States on a linguistic basis in 1957,[47] a new Presidential Order was issued under the States' Re-organisation Act. Besides, various other orders have been issued mainly for the Union Territories. The Scheduled Castes & Tribes Orders of 1950 have been further modified by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976.

The Supreme Court has stated in *Ganesh v. State of Maharashtra*[48] : "The notification of the President under Art. 342 of the Constitution, subject to the Scheduled Castes and Scheduled Tribes Act, 1976, is conclusive and final." Similarly "by virtue of Article 341, the Presidential orders made under Clause (1) thereof acquire an overriding status. But for Articles 341 and 342 of the Constitution, it would have been possible for both the Union and the States, to legislate upon, or frame policies, concerning the subject of reservation, vis-`-vis inclusion of Castes/Tribes. The presence of Articles 338, 338A, 341, 342 in the Constitution clearly preclude that".[49]

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43. AIR 2001 SC 393 : (2001) 1 SCC 4.

44. Also see, *B. Basavalingappa v. D. Munichinnappa,* AIR 1965 SC 1269 : (1965) 1 SCR 316; *Sirsh Kumar Choudhury v. State of Tripura,* AIR 1990 SC 991 : 1990 Supp SCC 220; *Nityanand Sharma v. State of Bihar,* AIR 1996 SC 2306 : (1996) 35 SCC 576.

45. *Bhaiya Ram v. Anirudh,* AIR 1971 SC 2533 : (1970) 2 SCC 825; *Dadaji v. Sukdeobabu,* AIR 1980 SC 150 : (1980) 1 SCC 621; *K. Adikanda Patra v. Gandua,* AIR 1983 Ori 89; *Principal, Guntur Medical College v. Y. Panduranga Rao,* AIR 1983 AP 339.

46. See, *infra,* Sec. D.

47. Ch. V, *supra.*

48. AIR 1997 SC 2333 : (1997) 4 SCC 340.

49. *Subhash Chandra v. Delhi Subordinate Services Selection Board,* JT 2009 (10) SC 615, 2009 (11) SCALE 278; *Union of India v. Shantiranjan Sarkar,* (2009) 3 SCC 90.

The Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 regrouped the 59 castes found in the Presidential List into 4 separate groups and allotted them different percentage out of the total reservation made for Scheduled Castes as a class. Striking down the Act as unconstitutional,[50] the Supreme Court said that the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III nor could the principles laid down in *Indra Sawhney case*[51] for sub-classification of Other Backward Classes be applied as a precedent for sub-classification or sub-grouping Scheduled Castes in the Presidential List. If they are one class under the Constitution, any division of these classes of persons based on any consideration would, apart from being violative of Article 14 of the Constitution, amount to tinkering with the Presidential List and therefore be unconstitutional.[52]

In *Subhash Chandra v. Delhi Subordinate Services Selection Board*[53] the Supreme Court clarified that there exists a distinction between State Service and State run institutions including Union Territory Services and Union Territory run institutions on the one hand, and the Central Civil Services and the institutions run by the Central Government on the other. In the case of the former, the reservation whether for admission or appointment in an institution and employment or appointment in the services or posts in a State or Union Territory must be confined to the members of the Scheduled Castes and Scheduled Tribes as notified in the Presidential Orders. But in respect of All India Services, Central Civil Services or admission to an institution run and founded by the Central Government, the members of Scheduled Castes and Scheduled Tribes and other reserved category candidates irrespective of their State for which they have been notified are entitled to the benefits thereof.

Clause 3 of the Scheduled Castes Order, 1950, originally declared that "….no person who professes a religion different from Hindusim" would be deemed to be a member of a Scheduled Caste. This para was substituted by the following para of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956 : "….no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste".

This provision has created some difficulty as is illustrated by *Punjabrao v. Meshram,*[54] The Supreme Court held in the instant case that under cl. 3 of the Order, only a person professing the Hindu or Sikh religion could belong to a Scheduled Caste, and a person who became a Buddhist and declared that he had ceased to be a Hindu could not derive any benefit from the Order. He could not thus contest election from a constituency reserved for members of the Scheduled Castes.

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50. *E.V. Chinnaiah v. State of A.P.,* (2005) 1 SCC 394 : AIR 2005 SC 162.
51. 1992 Supp (3) SCC 217.
52. *E.V. Chinnaiah v. State of A.P.,* (2005) 1 SCC 394, at page 414, 418 : (2006) 10 SCALE 472.
53. JT 2009 (10) SC 615, 2009 (11) SCALE 278: *See also Kavita Khorwal v.The Delhi University:* 154 (2008) DLT 755.
54. AIR 1965 SC 1179 : (1965) 1 SCR 849.
Also see, *S. Rajagopal v. C.M. Armugam,* AIR 1969 SC 101; *Soosai v. Union of India,* AIR 1986 SC 733 : 1985 Supp SCC 590, *supra,* footnote 29.

To undo the effect of this ruling, the Scheduled Castes order, 1950, has been amended by the Constitution (Scheduled Castes) Orders (Amendment) Act, 1990 which adds the word "Buddhist" after "the Sikh" in cl. 3. This means that a scheduled caste person professing the Buddhist religion does not cease to be a scheduled caste.[55] This Amendment shows that change of religion does not alter the social and economic conditions of the Scheduled Castes.

In *Soosai v. Union of India*,[56] the Supreme Court has posed the following important question:

> "Whether a Hindu belonging to a Scheduled Caste retains his caste on conversion to Christianity"?

The question becomes relevant to decide whether certain facilities granted to the Scheduled Castes can be denied to a scheduled caste person on changing his religion from Hinduism to another religion. Will this denial amount to discrimination on the ground of 'religion' only and thus be violative of Arts. 14 and 15(1) of the Constitution?

In *Soosai* the constitutional validity of para 3, mentioned above, was challenged under Art. 14 and Art. 15(I) as being discriminatory on the basis of religion.

In its judgment (delivered by PATHAK, J.), the Court has accepted that "caste was retained on conversion from one religion to another",[57] but the Court has also observed that such an oppressed group of people was part of the Hindu society alone. The Court insisted that to sustain discrimination the petitioner must prove that the disabilities and handicaps suffered from such caste membership in the social order of its origin—Hinduism—continue in their oppressive severity in the new environment of a different religious community as well. In the words of the Court :

> "To establish that paragraph 3 of the Constitution (Scheduled Castes) Order, 1950 discriminates against Christian members of the enumerated castes it must be shown that they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of the Constitution. It is not sufficient to show that the same caste continues after conversion. It is necessary to establish further that the disabilities and handicaps suffered from such caste membership in the social order of its origin—Hinduism continue in their oppressive severity in the new environment of a different religion community"

In the instant case, no authoritative and detailed dealing with the present conditions of Christian society had been placed before the Court. Accordingly, the Court refused to hold that the President acted arbitrarily in the exercise of his judgment in enacting paragraph 3 of the Constitution (Scheduled Castes) Order, 1950.

The Court asserted that it is well established that when violation of Art. 14 or any of its related provisions, is alleged, the burden rests on the petitioner to es-

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55. *Sandipan Bhagwant Thorat v. Ramdas Bandu Athavale*, AIR 2002 Bom 110.
56. AIR 1986 SC 733.
57. *Ibid.*, 735.

tablish by clear and cogent evidence that the state has been guilty of arbitrary discrimination. In the instant case, the petitioner had failed to establish his case.[58]

The Supreme Court has also considered another interesting question: when a member of a Scheduled Caste is converted to Christianity and, thereafter, is re-converted to Hinduism, what is his status? The Court has held that reconversion would not entitle him to be automatically treaded as belonging to his original caste, before conversion; he would belong to his original caste if the members of the caste accept him as a member. The caste is a "social combination of persons governed by its rules and regulations," and it may admit a new member just as it can expel an existing member.[59] The Constitution Bench of the Supreme Court has observed on this point in *Guntur Medical College*[60]:

> "….on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but would become such member if the other members of the caste accept him as a member and admit him within the fold."

The Supreme Court has held that a woman when married to a member of a tribe, after due observance of all formalities and after getting the approval of the elders of the tribe, would be regarded as a member of the tribe to which her husband belongs on the analogy of the wife taking the husband's domicile. In the instant case,[61] the husband belonged to the Munda Tribe. His wife sought to contest for a seat in the Lok Sabha from a reserved tribal constituency. It was argued against her that as she was not a member of the Scheduled Tribe, she was not eligible to contest from the reserved seat. The Supreme Court however ruled that as she was duly married to a person from the Munda Tribe, she acquired membership of that tribe.

However, more recently the Supreme Court has held that[62] a woman belonging to a Forward Class marrying a tribal cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practised by the tribals from time immemorial and accepted by the community of the village as a member of tribal society. Such acceptance must be by a resolution of the village community which must be entered in the Village Register kept for the purpose. In any event the off-spring of such a marriage would be tribal. On the other hand if a non-tribal man marries a tribal woman, their off-spring would not be tribal.[63] Further, conversion of the parents does not automatically affect the tribal status of the child.[64]

A member of a Scheduled Tribe in one State, on migration to another State, does not carry with him the tribal status if his Tribe is not recognised as such in

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58. See also *State of Kerala v. Chandramohanan*, (2004) 3 SCC 429, at page 435 : AIR 2004 SC 1672; *Anjan Kumar v. Union of India*, (2006) 3 SCC 257, at page 265 : AIR 2006 SC 1177. See, Ch. XXI, *supra.*

59. *C.M. Arumugam v. S. Rajagopal*, AIR 1976 SC 939 : (1976) 1 SCC 863.

60. *Guntur Medical College v. Mohan Rao*, AIR 1976 SC 1904 : (1976) 3 SCC 411.
Also see, *W.S.V. Satyanarayana v. Director of Tribal Welfare*, AIR 1997 AP 137.

61. *N.E. Horo v. Jahanara Jaipal Singh*, AIR 1972 SC 1840 : (1972) 1 SCC 771.

62. *Anjan Kumar v. Union of India*, (2006) 3 SCC 257, at page 261 : AIR 2006 SC 1177.

63. *Ibid* at page 261.
Ed: The observations appear to be too generalized and requires reconsideration**.**

64. *Lillykutty v. Scrutiny Committee, SC & ST*, (2005) 8 SCC 283 : AIR 2005 SC 4.

the other State. Each State has its own list of Tribes [see Art. 342].[65] In the instant case,[66] the petitioner belonged to a Scheduled Tribe in Andhra Pradesh. He migrated to Maharashtra where his Tribe was not listed as a Scheduled Tribe. The Supreme Court ruled that be could not be treated as a member of the Schedule Tribe in Maharashtra though he would be one in Andhra Pradesh. The Court ruled that under Art. 342, the Scheduled Tribes are specified in relation to each State and Union Territory and, therefore, a member of a Scheduled Tribe in one State does not carry that status to another State. But when an area dominated by members of the same tribe belonging to the same region has been bifurcated between two States, the members would continue to get the same benefit when the said tribe is recognized in both the States.[67] This interpretation of Art. 342 is in line with the interpretation of Art. 341 as mentioned above.[68]

A person belonging to a forward class cannot claim the status of a S/T by obtaining a false certificate to that effect for purposes of admission to an educational institution.[69]

(b) CONSTITUTIONAL SAFEGUARDS

Under Art. 330, seats are to be reserved for the Scheduled Castes and the Scheduled Tribes in Lok Sabha. Originally, this reservation was to operate for ten years from the commencement of the Constitution. But this duration has been extended continuously since then by 10 years each time. Now, under the Amendment of the Constitution, enacted in 1999, this reservation is to last until January 25, 2010 [Art. 334(a)][70]. It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation.

The reservation for Lok Sabha seats for the Scheduled Castes and Scheduled Tribes has to be made in each State and Union Territory on population basis. The number of Lok Sabha seats reserved in a State or Union Territory for such Castes and Tribes is to bear, as nearly as possible, the same proportion to the total number of seats allotted to that State or Union Territory in the Lok Sabha as the population of the Scheduled Castes and the Scheduled Tribes (excluding the Scheduled Tribes in the autonomous districts of Assam)[71] in the concerned State or the Union Territory bears to the total population of the State or the Union Territory [Art. 330(2)].

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65. *Supra.* See also *Sau Kusum v. State of Maharashtra*, (2009) 2 SCC 109.

66. *Marri Chandra v. Dean, S.G.S. Medical College*, (1990) 3 SCC 130 : (1990) 2 SCR 843.

67. *Sudhakar Vithal Kumbhare v. State of Maharashtra*, (2004) 9 SCC 481, at page 483 : AIR 2004 SC 1036.

68. Also see, *Kumari Madhuri Patil, infra*, footnote 69; *Dudh Nath Prasad v. Union of India*, AIR 2000 SC 525 : (2000) 2 SCC 20; *State of Uttaranchal v. Sidharth Srivastava*, (2003) 9 SCC 336, at page 352 : AIR 2003 SC 4062.

69. *Kumari Madhuri Patil v. Addl. Commr. Tribal Development*, (1994) 6 SCC 241 : 1994 SCC (125) 1349.

70. The Constitution (One Hundred And Ninth Amendment) Bill, 2009, to amend Article 334 of the Constitution by substituting the words "seventy years" for the words "sixty years" is pending.

71. These Tribal Districts of Assam (Schedule VI) are not under regular administration and the tribes therein are excluded from such representation, *supra*, Ch. IX, Sec. C.

Similarly, under Art. 332(1), seats are to be reserved for the Scheduled Castes and the Scheduled Tribes (excluding the tribes in the autonomous districts of Assam)[72] in the State Legislative Assemblies. Under Art. 334(a), this reservation is to operate until January 25, 2010.[73] The seats reserved for such Castes and Tribes in a State Legislative Assembly are to bear, as nearly as possible, the same proportion to the total number of seats in the Assembly as the population of such Castes and Tribes in the State bears to the total State population.[74]

By the 42nd Amendment of the Constitution, the number of seats for the Scheduled Castes and Scheduled Tribes in Lok Sabha and the State Legislative Assemblies were frozen at the level of the 1971 census population figures and this number will not be varied until the first census held after the year 2000.[75] A new Constitutional Amendment has now been passed to freeze the seats in the Lok Sabha and State Legislature, at the 2001 census level until the year 2026.[76]

Article 243-T of the Constitution provides for reservation of seats for the Scheduled Castes, Scheduled Tribes and women in every municipality and further enables the legislature of a State to make provision for reservation of seats in any municipality or offices of the Chairpersons in the municipalities in favour of Backward Class of citizens. It also mandates that the offices of Chairpersons in the municipalities shall be reserved for the Scheduled Castes, Scheduled Tribes and women as the legislature of a State may, by law, provide.

Elections to the reserved seats are held on the basis of a single electoral roll, and each voter in the reserved constituency is entitled to vote. There is no separate electorate. It is not for the Scheduled Castes and the Scheduled Tribes alone to elect their representatives. Thus, to elect a person belonging to such Castes and Tribes to a reserved seat, all the voters in the constituency have a right to vote. This method has been adopted with a view to discourage the differentiation of the Scheduled Castes and the Scheduled Tribes from other people and to gradually integrate them in the main stream of national life. Also, a member of the Scheduled Castes or the Scheduled Tribes is not debarred from contesting a general non-reserved seat.[77]

The fact that reservation of seats in the Legislatures is not on a permanent basis, but is at present provided for a 10 year period at a time, shows that it is envisaged that the Scheduled Castes and the Scheduled Tribes would ultimately assimilate themselves fully in the political and national life of the country so

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72. *Ibid.*

73. The Constitution (Seventy-ninth Amendment) Act, 1999; see, Ch. XLII, *infra*.

74. Special provisions have been made through Arts. 332(4), (5) and (6) for representation of Autonomous Tribal Districts in the Assam Legislature. Each district has seats in the Legislature in proportion to its population with respect to the total State population; Constituencies in an autonomous district do not comprise any area outside the district; none other than a member of a scheduled tribe of an autonomous district is eligible for election to the Assembly from that district. See *Subrata Acharjee v. Union of India*, (2002) 2 SCC 725 for reservation of seats for Scheduled Tribes in the Tripura Legislative Assembly on a basis other than the proportion of population.

75. In 1980, there were 78 *Harijan* and 39 *Adivasi* members in the Lok Sabha and 546 *Harijan* and 291 *Adivasi* members in the Assemblies.

76. See, *supra*, Chs. II and VI; *infra*, Ch. XLII.

77. *V.V. Giri v. D.S. Dora*, AIR 1959 SC 1318 : (1960) 1 SCR 426.See also *Bihari Lal Rada v. Anil Jain (Tinu) :* (2009) 4 SCC 1.
Also, *supra*, Ch. XIX.

much so that there would be no need for any special safeguards for them and that there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel that their interests are secure without any kind of reservation.

(c) CONSIDERATIONS OF EFFICIENCY

The general principle adopted as regards government service is merit, but in case of the Scheduled Castes and the Scheduled Tribes, some relaxation is needed because of their backwardness. Art. 335, therefore, provides that the claims of the members of the Scheduled Castes and the Scheduled Tribes are to be taken into consideration, consistently with the maintenance of efficiency of administration, in making appointments to services and posts in connection with the affairs of the Union or of a State. This provision thus imposes a constitutional obligation on the various governments to take steps to ensure that the claims of members of the Scheduled Castes and Scheduled Tribes are duly considered in making appointments to government services.

In this connection, reference may be made to the discussion under Arts. 16(1) and 16(4).[78] Art. 16(4) is an enabling provision conferring power on the State to make reservation of posts in favour of any backward class of citizens who, in the opinion of the State Government, are not adequately represented in the State services. In this connection, reference may also be made to Art. 46, a Directive Principle.[79]

Article 335 runs follows :

> "The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

Article 335 insists on drawing a balance between reservation of posts for the Scheduled Castes and Scheduled Tribes in government posts and maintenance of efficiency in the administration. Art. 335 makes efficiency in administration of paramount importance. Art. 335 makes efficiency in administration an express constitutional limitation upon the discretion vested in the state while making provisions for adequate representation for the Scheduled Castes and Scheduled Tribes.[80]

As the Supreme Court has stated in *Indra Sawhney*,[81] the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved category.

The Supreme Court has observed in this connection:[82]

> "Art. 335 stipulates that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistent with the

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78. *Supra*, Ch. XXIII, Secs. E and G.
79. *Supra*, Ch. XXXIV, Sec. D.
80. *Ajit Singh II v. State of Punjab,* AIR 1999 SC 3471 : (1999) 7 SCC 209.See also *A.P. Public Service Commission v. Baloji Badhavath,* (2009) 5 SCC 1.
81. *Indra Sawhney I v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *Indra Sowhney II v. Union of India,* AIR 2000 SC 498.
Also see, Ch. XXIII, Sec. G, *supra;* see, *infra*, Sec. E.
82. *Ashutosh Gupta v. State of Rajasthan,* (2002) 4 SCC 34, 40.

> maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the affairs of the Union or of the State. It is thus, apparent that even in the matter of reservation in favour of Scheduled Castes and Scheduled Tribes the founding fathers of the Constitution did make a provision relating to the maintenance of efficiency of administration. In this view of the matter if any statutory provision provides for recruitment of a candidate without bearing in mind the maintenance of efficiency of administration such a provision cannot be sustained, being against the constitutional mandate".

Whether a particular class is adequately represented in the State services or not is a matter which lies within the subjective satisfaction of the concerned government. Although not stated specifically in the Constitution, the same principle of efficiency of administration[83] is to apply to reservation of posts for Other Backward Classes (OBCs) as well.[84]

(d) ADDITIONAL PROVISIONS FOR SCHEDULED TRIBES

The Constitution provides for the appointment of a Minister for Tribal Welfare in each of the States of Bihar, Madhya Pradesh, and Orissa. This Minister can also be put additionally in charge of the welfare of the Scheduled Castes and Backward Classes, or any other work [proviso to Art. 164(1)].[85]

Under Art. 339(1), the President may appoint a Commission at any time, and must appoint it after ten years of the commencement of the Constitution, to report on the welfare of the Scheduled Tribes in the States and the administration of the Scheduled Areas. The Presidential Order appointing the Commission may define its composition, powers and procedure and may make other incidental or ancillary provisions. No such provision has been made in the Constitution as regards the Scheduled Castes.

Article 339(2) empowers the Centre to issue directives to any State giving directions as to the drawing up and execution of schemes specified in the directives to be essential for the welfare of the Scheduled Tribes in the State. Art. 339(2) is supplementary to Art. 275(1)[86] which provides, *inter alia*, that grants-in-aid shall be payable to a State out of the Consolidated Fund of India for purposes of meeting costs of such schemes of developments as the State may undertake with the approval of the Government of India for promoting the welfare of the Scheduled Tribes in that State. Thus, Art. 275(1) furnishes the *raison d'etre* of Art. 339. The Central Government has been given the power to give directions as respects such schemes because it pays the cost thereof.

There are special provisions made for administration of the areas known as the Scheduled Areas [Schedules V & VI to the Constitution] which have already been discussed earlier in this book.[87]

The main problem with the Scheduled Tribes is to improve their socio-economic condition not at a very quick pace, but in such a way as not to do violence to their social organisation and way of life. The need is to evolve ways and means of gradual adjustment of the tribal population to the changed conditions,

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83. *Indra Sawhney v. Union of India*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217.
84. See further under Art. 16. On "OBCs", see, *infra*, Sec. D.
85. *Supra*, Ch. VII; VII CAD, 521.
86. For Art. 275(1), *supra*, Ch. XI, Sec. M.
Also see, Art. 164, *supra*, Ch. VII, Sec. A(ii)(a); *supra*, footnote 85.
87. *Supra*, Ch. IX, Sec. C.

and their slow integration in the general life of the country without undue and hasty disruption of their way of living.

It has been thought that it may be harmful to the tribal people if they are brought in indiscriminate contact with the outside world. Thus, the legislatures have been empowered to impose restrictions on the Fundamental Rights of other citizens guaranteed by Arts. 19(1)(*d*) and 19(1)(*e*) in the interest of the Scheduled Tribes,[88] so that movement of people from the progressive to the tribal areas, may be restricted. Accordingly, to check exploitation of the tribals, many States have enacted laws prohibiting non-tribals into the tribal areas without permits, living of non-tribals permanently in tribal areas and the transfer of tribal land to non-tribals. Reservations can also be made for them in educational institutions and government services under Arts. 15(4),(5) and 16(4).

(e) THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989.

Parliament has enacted the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The underlying purpose of the Act is to prevent the commission of offences of atrocities against the Scheduled Castes and Scheduled Tribes, to establish special courts for the trial of such offences and to provide for the relief and rehabilitation of the victims of such offences.

Section 3(1) of the Act contains a list of such acts as fall within the category of atrocity. These acts have been made punishable with imprisonment for a term of six months to five years and with fine.

Section 3(2) lists certain other acts, such as, giving of false evidence against a member of a Scheduled Caste or a Scheduled Tribe to implicate him in a criminal offence, which have also been made punishable.

Provision has been made [s. 14] for designating special courts for the purpose of providing for speedy trial of offences under the Act. Provision has also been made for imposing collective fines [s. 16].

Provisions of this Act override the provisions of any other Act [s. 20].

Every year the Central Government has to lay on the table of each House of Parliament a report on the measures taken by itself and the State Governments in pursuance of this Act [s. 21(4)].

The State Governments are required to make provision for the economic and social rehabilitation of the victims of atrocities, and provide them legal aid [s. 21].

Reference has already been made to the Protection of Civil Rights Act, 1955.[89]

D. ANGLO-INDIANS

The Constitution contains some special provisions safeguarding the interests of the Anglo-Indian community.

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88. *Supra*, Ch. XXIV, Sec. G.
89. *Supra*, Ch. XXIII, Sec. I.
Also see, *infra*, Sec. E.

Anglo-Indians constitute a religious, social, as well as a linguistic minority. An Anglo-Indian, according to Article 366(2), is a person whose father, or any of whose other male progenitors in the male line, is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only.

The President, if he is of opinion that the Anglo-Indian community is not adequately represented in the Lok Sabha, may nominate thereto not more than two members of the community [Art. 331].[90] Similarly, the Governor of a State, if he is of opinion that the Anglo-Indian community needs representation in the State Legislative Assembly, and is not adequately represented there, may nominate one member of the community to the Assembly [Art. 333].[91]

These provisions were necessary, for, otherwise, being numerically an extremely small community, and being interspersed all over India, the Anglo-Indians could not hope to get any seat in any Legislature through election. The concession shown to the Anglo-Indians by way of providing for their representation in the Lok Sabha and the State Legislative Assemblies is to last for the present up to the 25th January, 2010 [Art. 334(*b*)].

Before Independence, Anglo-Indians were enjoying some special privileges in services in railways, customs, posts and telegraph. It was thought necessary that these concessions be continued for some time more and be withdrawn gradually. Accordingly, Art. 336(1) provided that for two years after the Constitution came into force, appointment of Anglo-Indians to these posts would continue on the same basis as it was before August 14, 1947. Thereafter, there was to be a progressive diminution in the number of posts reserved for them in these services at the rate of 10 per cent every two years. All such reservations came to an end by the 25th January, 1960. However, under Art. 336(2), this reservation was not to bar the appointment of qualified Anglo-Indians on merit to other posts.

Further, before Independence, Anglo-Indian educational institutions were getting special grants. Art. 337 protected these grants for the first three years after the beginning of the Constitution. Thereafter, during each succeeding year, these grants could be reduced by ten per cent as compared to the grants in the preceding three years so that ten years after the commencement of the Constitution, such grants, to the extent to which they were a special concession to the Anglo-Indian community, were to cease. Thus, Art. 337 has now exhausted itself.[92]

E. OTHER BACKWARD CLASSES

Besides the Scheduled Castes and the Scheduled Tribes, there are Other Backward Classes. The Constitution extends some protection to the 'Other Backward Classes [OBCs]' as well as these classes have been neglected for long. The Other Backward Classes are to be found amongst all religious groups—Hindus, Muslims, Christians, *etc.*

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90. Also see, *supra*, Ch. II.
91. Also Art. 170, *supra*, Ch. VI.
92. See, *State of Bombay v. Bombay Education Society,* AIR 1954 SC 561 : (1955) 1 SCR 568; *supra*, Ch. XXX, Sec. C.

Under Art. 15(4), the State is empowered to make any special provision for the advancement of any socially and educationally backward class besides the Scheduled Castes and the Scheduled Tribes.[1] The expression 'special provision, for advancement' has a wide connotation. It may include many things, such as, reservation of seats in educational institutions, financial assistance, scholarships, free housing and so on. Article 15 (5) now enables the State to enact a law relating to the admission of Scheduled Castes, Scheduled Tribes or socially and educationally backward classes of citizens in educational institutions other than the minority educational institutions referred to in Art.30(1).[2] The Central Educational Institutions (Reservation in Admission) Act, 2007 provides for reservation of seats in Central Educational Institutions inter alia for the Other Backward Classes. 'Other Backward Classes' has been defined as "the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government". Presumably having regard to Art. 335, specified institutions of excellence, research institutions and institutions of national and strategic importance have been kept outside the scope of the Act. Under Art. 16(4), the state can make provisions for the reservation of appointments or posts in favour of "any backward class of citizens".[3]

While there exist in the Constitution special provisions for reservation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha and the State Legislative Assemblies [Arts. 330 and 332], and for the representation of the Anglo-Indian Community in these various Houses, there exists no such provision for reservation of seats for socially and educationally Backward Classes in the Lok Sabha and the State Legislative Assemblies.

Again, while under Art. 335, there is a constitutional obligation to consider the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments to services and posts in connection with the affairs of the Centre and the States, there exists no corresponding provision for the Other Backward Classes. However, under Art. 16(4), it is permissible to reserve posts in favour of any backward class of citizens which, in the opinion of the concerned Government, is not adequately represented in the services of the State or the Central Government.[4]

It has been ruled by the Supreme Court that Art. 16(4) must be read along with Art. 335. Though on the express terms of Art. 335, the OBCs are not included therein, even the OBCs are also covered by the thrust of Art. 335.[5] This means that when the State proposes to provide reservation for OBCs, "if it is considered by the appropriate authority that such reservation will adversely affect the efficiency of the administration, then exercise under Art. 16(4) is not permissible". This is the constitutional limitation on the exercise of the enabling power of reservation under Art. 16(4).

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1. *Supra*, Ch. XXII, Sec. C.
2. See *supra* under Education.
3. *Supra*, Ch. XXIII, Sec. D(c) and Sec. E.
4. *Supra*, Ch. XXIII, Sec. D(c) and Sec. E. Besides, reference may also be made to Art. 29, *supra*, Ch. XXX, Sec. A.
5. *Indra Sawhney v. Union of India (I)*, AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *Indra Sawhney v. Union of India, (II)*, AIR 2000 SC 498 : (2000) 1 SCC 168; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : (2008) 5 JT 1; *supra*, footnote 81.

Further, if reservation is to be provided by passing a law by the State Legislature in the subordinate judiciary covered by Arts. 233 and 234,[6] "then the efficiency of the judicial administration will be affected is a matter within the exclusive purview of the High Court which shall have to be consulted". Such consultation is a constitutional obligation before any Act/Rules are made for the purpose.[7] Accordingly, a Bihar Act making reservation in appointment of district and subordinate judge for OBCs was declared unconstitutional by the Supreme Court as the High Court had not been consulted before passing the Act.[8]

A very difficult problem of the day is to identify Other Backward Classes. Generally, socially and educationally backward persons fall within the category of Backward Classes, but even after 50 years of enforcement of the Constitution, it has not been possible to evolve acceptable criteria for the purpose of identifying the OBCs.

It is necessary to state here that the expression "weaker sections" of the people used in Art. 46 is somewhat different from the expression "backward class" of citizens used in Art. 16(4) which is only a part of the weaker sections.[9] The expression "weaker sections" of the people is wider than the expression "backward class" of citizens which is only a part of the "weaker sections".

The expression "weaker sections" connotes all sections of society who are rendered weaker due to various causes. Art. 46 is aimed at promoting their educational and economic interests and protecting them from social injustice and exploitation. This obligation cast on the state is consistent both with the Preamble as well as Art. 38.[10] The term 'backward class" denotes a class which is socially backward and whose educational and economic backwardness is because of its social backwardness. Thus, the expression "backward class" in Art. 16 does not comprise all weaker sections of people but only those which are socially and, therefore, educationally and economically backward.

The Other Backward Classes have not been specified in the Constitution for, at the time of the Constitution-making, not much information was available about them. The Constitution in its various provisions does not even use a single uniform expression, but uses various expressions, to characterise Backward Classes. In Arts. 15(4), 15(5) and 340, the expression used is 'socially and educationally backward classes. In Art. 16(4), the expression used is 'backward' *simpliciter*; in Art. 46, the term used is 'weaker sections of the people'.[11] One of the main criteria for determining socially and educationally backward classes is poverty. Therefore the principle of exclusion of "creamy layer" is necessary.[12]

A person belonging to OBC in one State cannot automatically claim the same status in another State. Each State has its own list of OBCs. The Supreme Court has explained the rationale underlying this rule as follows:[13]

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6. See, *supra*, Ch. VIII, Sec. G(r).
7. *State of Bihar v. BalMukand Sah*, AIR 2000 SC at 1312 : (2000) 4 SCC 640; *supra*, footnote 82.
8. For a detailed discussion on this aspect, see, *supra*, Ch. VIII, Sec. G.
9. *Supra*, for Art. 46, see Ch. XXXIV; for Art. 16(4), see, *supra*, Ch. XXIII.
10. For Art. 38, see, *supra*, Ch. XXXIV.
11. *Supra*, Ch. XXXIV.
12. *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : (2008) 5 JT 1.
13. *Municipal Corp. of Delhi v. Veena*, AIR 2001 SC 2749, at 2750-2751 : (2001) 6 SCC 571.

> "Castes or groups are specified in relation to a given State or Union Territory, which obviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social handicaps suffered by that caste or group in that State. However, it may not be so in another State to which a person belongs thereto goes by migration…."

Thus, a person belonging to OBC on migration from the State of his origin in another state where his caste is not in the OBC list was entitled to the benefits or concessions admissible to the OBCs in his State of origin and Union Government, but not in the State to which he has migrated.

In *Valsamma*,[14] the Court considered the following general question which is relevant to S/Cs, S/Ts and OBCs:

> "Whether a lady marrying a S/C, S/T or OBC citizen or one transplanted by adoption or any other voluntary act, *ipso facto*, becomes entitled to claim reservation under Art. 15(4) or 16(4), as the case may be?"

The Court has answered the question in the negative. The Court has argued that S/Cs, S/Ts and OBCs have suffered social disabilities for long and so they have become "socially, culturally and educationally backward". The object of reservation is to remove these handicaps and to bring them in the mainstream of national life. A person belonging to a forward class has an advantageous start in life; when he or she is transplanted in the backward class by adoption or marriage or conversion, he cannot claim the benefits of reservation either under Art. 15(4) or 16(4), as the case may be. "Acquisition of the status of a S/C etc. by voluntary mobility into these categories would play fraud on the Constitution and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution".

(a) BACKWARD CLASSES COMMISSION

To facilitate the task of identifying the backward classes and laying down criteria for the purpose, Art. 340(1) empowers the President to appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of "socially and educationally backward classes" in India and the difficulties under which they labour.

The Commission may recommend the steps that should be taken by the Central and State Governments to remove their difficulties and improve their condition. The Commission may also make recommendations as to the grants which should be made for the purpose by the Centre or any State, and the conditions subject to which such grants should be made. The Presidential Order appointing the Commission is to define the procedure to be followed by the Commission.

The Commission is to investigate the matters referred to it and present its report to the President setting out the facts as found by it and making its recommendations [Art. 340(2)]. The report of the Commission together with a memorandum setting out the action taken thereon by the Central Government is to be laid before each House of Parliament [Art. 340(3)].

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14. *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011, at 1022 : (1996) 3 SCC 545. Also see, *supra*, Ch. XXII, Sec. C, and Ch. XXIII, Sec. D(c).

(b) FIRST BACKWARD CLASSES COMMISSION

As envisaged by the Constitution, the Backward Classes Commission was appointed by the President in January, 1953, under the Chairmanship of Kaka Kalelkar. The Commission was asked, among other things, to determine the criteria to be adopted for classifying socially and educationally backward classes.

The Commission submitted its report in 1955. The report was not unanimous and disclosed a considerable divergence of opinion among its members and failed to specify any easily discernible objective tests to define "backwardness". The majority of the members of the Commission expressed the view that the position of the individual in the social hierarchy based on caste should determine backwardness.

The Central Government could not accept such a criterion because "the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste."

Besides, while some members in some castes may be characterised as backward "educationally and economically," some may not be so classified. Similarly, among the so-called upper and advanced classes, there are large number of persons who are not less backward educationally and economically, and even among the backward classes some castes are more backward than others. Then, conditions differ from State to State and region to region.

The Commission also suggested certain other criteria to identify backwardness, *e.g.*, lack of general educational advancement among the major sections of a caste or community, inadequate representation in the field of trade, commerce and industry, communities consisting of a large percentage of small landowners with uneconomic holdings, *etc.* The Government's reaction to this was that "these are obviously vague tests, more or less of an individual character, and even if they are accepted they would encompass a large majority of the country's population." And, if the entire community, barring a few exceptions, were thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive attention or adequate assistance, nor would such a dispensation fulfil the conditions laid down in Art. 340 of the Constitution.

The Government of India thus came to the conclusion that further investigation was necessary with a view to devise some positive and workable criteria to specify the socially and educationally backward classes so as to give them adequate assistance and relief in all suitable ways so as to enable them to make up for the leeway of the past and to acquire the normal standards of life prevalent in the country on a systematic and elaborate basis. In the meantime, relief was to be provided to such groups of people to whom disabilities were attached by reasons of environment and occupations considered to be low, and to other classes who, adjudged in the light of reasonable standards, might well be regarded as socially and educationally backward.The task to devise positive and workable critieria to identify backwardness on an all-India basis thus remained incomplete. No indisputable yardstick could be evolved for the purpose. Each State defined backwardness in its own way, and political expediency played some role in this matter. There was thus no uniformity of approach in the country in this respect.

For purposes of Arts. 15(4)[15],(5) and 16(4)[16], it is for the State concerned to list the Backward Classes. The Centre can also list them for purposes of admission into Central educational institutions and Central Services. Even this the Centre was not able to do. The task is an extremely difficult one. Many communities desire to be characterised as backward because of the facilities of admissions and services which are available to such classes, and they thus bring political influence to bear upon the government for being recognised as 'backward'. When a class is designated as backward, then even rich and well educated members of the class claim the privileges available; the more unfortunate members of the class thus get excluded. This is against the best interests of the really backward persons. This frustrates the basic objective of the Constitution, *viz.*, amelioration of the really and factually weak and downtrodden people.

A bulk of case-law has arisen on this point. The courts have been able to instil some rationality in this regard by insisting that for purposes of Arts. 15(4),(5) and 16(4), caste cannot be the sole determinant of backwardness and that other tests like economic, professional, environmental, educational should also be taken into consideration.

The practice to name the castes as 'Backward Classes', without any economic considerations, has two main defects. One, it has a tendency to perpetuate the caste system and, thus, hamper the growth of an egalitarian society. To accept caste as the basis of backwardness, it will lead to legitimisation and perpetuation of the caste system in the country which goes against the secular character of the Indian polity.[17] Also, the traditional caste system is breaking down and is gradually being replaced by contractual relations between individuals.

The future Indian society has undoubtedly to be classless and casteless. It is also not true to assume that all members of a caste are equally socially and educationally backward. Within a backward caste, if no economic considerations are applied, then all the privileges may be utilised by well to do people leaving the poor in the cold. It is, therefore, imperative that the castes as such should not be recognised for purposes of giving assistance. Instead, economic backwardness of classes of people should be the criteria for the purpose.

These considerations have had an impact on the judicial approach concerning characterisation of backward classes so much so that caste cannot be taken as the sole criterion for the purpose and increasing emphasis is being laid on economic factors.[18] Reference may be made here to a few of these judicial pronouncements.

In *Balaji*,[19] the Supreme Court ruled with reference to Art. 15(4), that it may not be irrelevant to take into account 'caste' to determine social backwardness. But it should not be made the "sole dominant test" for the purpose without regard to other relevant factors. It was observed in the instant case that "social backwardness is on the ultimate analysis the result of poverty to a very large extent".

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15. *Supra*, Ch. XXII, Sec. C.
16. *Supra*, Ch. XXIII, Sec. D(c).
17. For discussion on this aspect, see, *supra*, Ch. XXIX, Sec. A.
18. Reference may be made in this connection to the discussion under Arts. 15(4) and 16(4), *supra*, Chs. XXII, Sec. C and XXIII, Sec. D(c).
19. *Balaji v. State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *supra*, Ch. XXII, Sec. C(b).

The Court also emphasized that for purposes of Art. 15(4), the backwardness must be social *and* educational and not *either* social or educational.

In *Rajendran*,[20] the Court accepted classification of backward classes based on 'caste' because the social and educational backwardness of the castes was based on their occupations.

In *P. Sagar*,[21] caste-wise classification was rejected because no other factor except caste was taken into consideration: The Court maintained that in determining whether a particular section forms a class, caste could not be excluded altogether. But in case the caste was made a criterion, proper inquiry or investigation should be conducted by the State Government before listing certain castes as socially and educationally backward.

In *K.S. Jayasree v. State of Kerala*,[22] the Supreme Court upheld a government order listing backward classes but exempting therefrom such families as had an aggregate annual income of Rs. 10,000. The order was challenged by a candidate belonging to the backward class but who was denied the privilege of preferential admission to a medical college because her family income exceeded Rs. 10,000 annually. The Court emphasized that poverty or economic standard is a relevant factor in determining backwardness. Neither caste nor poverty alone could be the sole or dominant test, but both are relevant, to determine backwardness. With the improvement in economic position of a family, social backwardness disappears. To permit these persons to take advantage of the privileges meant for backward persons, is to deprive the real backward poor persons of their chance to make progress.

The question has been elaborately considered by the Supreme Court in *Indra Sawhney I.*[23] For example, PANDIAN, J., has stated that before a conclusion is drawn that a caste is backward, "the existence of circumstances relevant to the formation of opinions is a *sine qua non*. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of statute, or irrelevant and extraneous material, then that opinion is challengeable." Similarly, JEEVAN REDDY, J., has emphasized that opinion in regard to backwardness must be based on relevant material. He went on to observe that under Art. 16(4), reservation is not being made in favour of a 'caste' but a backward class. "Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Art. 16(4)". JEEVAN REDDY, J., further emphasized: "Once backward, always backward is not acceptable." Therefore, if a caste ceases to be backward in course of time, it should be excluded from the list of Backward Classes.

The Supreme Court has observed in *Indra Sawhney II:*[24] "Caste only cannot be the basis for reservation. Reservation can be for a backward class of citizen of a

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20. *P. Rajendran v. State of Madras,* AIR 1968 SC 1012 : (1968) 2 SCR 786; *supra,* Ch. XXII, Sec. C(c).

21. *P. Sagar v. State of Andhra Pradesh,* AIR 1968 SC 1379 : (1968) 3 SCR 595.

22. AIR 1976 SC 2381; *supra,* Ch. XXII, Sec. C(c).

23. *Supra*, Ch. XXIII, Sec. G.
Also see, *Indra Sawhney v. Union of India (II)*, AIR 2000 SC 498, 505 : (2000) 1 SCC 168, *supra*, Ch. XXIII, Sec. G(b).

24. (2000) 1 SCC 168, at 185 : AIR 2000 SC 498; *supra*, Ch. XXIII, *supra,* Ch. XXIII, Sec. G(b).

particular caste. Therefore, from that, the creamy layer and the non-backward class of citizens are to be excluded."

Recently Parliament enacted the Central Educational Institutions (Reservation in Admission) Act, 2006 providing 27 per cent quota to OBCs in institutions for higher education without identifying who could be considered to be an OBC. The Supreme Court in Ashoka Kumar Thakur v. Union of India clarified that if the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.[25]

(c) SECOND BACKWARD CLASSES COMMISSION

The Government of India again appointed the Backward Classes Commission (known as the Mandal Commission after its Chairman B.P. Mandal) under Art. 340 on January 1, 1979, with a view to investigate the conditions of the socially and educationally backward classes within the territory of India. The terms of reference of the Commission were as follows :

(i) to determine the criteria for defining the socially and educationally Backward Classes;

(ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;

(iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in Central and State Governments in favour of Backward Classes.

(iv) to make such recommendations as the Commission thinks proper.

The Commission submitted its report on 31st December, 1980. The Commission was *inter alia* "entrusted with the task of determining the criteria for defining the socially and educationally backward classes in the country." To determine social and educational backwardness, the Commission evolved eleven indicators or criteria, grouped under three broad heads—social, educational and economic.

The Commission looked at the whole question of reservation of quotas for backward classes in recruitment for government services.[26] The Commission held that (besides the Scheduled Castes and the Scheduled Tribes who amount to 22.56% of the total population), 52% of the total Indian population could be characterised as backward and, therefore, 52% of all posts could be reserved for them. The Commission, however, refrained from making such a drastic recommendation in view of the Supreme Court's ruling that the total quantum of reservations under Art. 16(4) should be below 50%.[27] In view of this legal constraint, the Commission was obliged to recommend reservation of 27% only for the Other Backward Classes so that the total reservation for Scheduled Castes, Scheduled Tribes and the Other Backward Classes would amount to a little less than 50%.

The Commission by and large identified castes with backward classes and more or less entirely ignored the economic tests.[28] The Commission also ignored

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25. (2008) 6 SCC 1.

26. *Report* of the Backward Classes Commission 52 (1980).
Reference has been made earlier to the Commission's Report, *supra*, Ch. XXIII.

27. *Supra*, Ch. XXIII.

28. *REPORT OF THE BACKWARD CLASSES COMMISSION*, Chs. IV, V & VII (1980).
Also see, *supra*, Ch. XXIII, Sec. F.

the fact that even among the so-called higher castes, there may be a number of socially and educationally backward people deserving of help. On the whole, the Commission's recommendations have proved to be very controversial.

Subsequent to the Report of the Backward Commission, the question of characterising backward classes again cropped up before the Supreme Court. In *Vasanth Kumar*.[29] The Judges of the Supreme Court expressed a diversity of views in this regard. The only point on which all the Judges were agreed was that 'caste' cannot be the sole determinant of backwardness, but that it is not an irrelevant test and can be taken into account along with other factors. Some of the Judges were in favour of adopting the means-cum-caste test to determine backwardness.

Then, in 1993, in the famous *Indra Sawhney* case, a nine Judge Bench of the Supreme Court considered in depth the question of backwardness and reservation of posts under Art. 16(4). The highlights of this case have already been taken note of.[30] More recently a Constitution Bench considered the same issue of backwardness and reservation in connection with educational institutions where, as noted earlier, the Court held that there can be no definite determination of the number of Other Backward Classes without including economically backward classes[31].

F. LINGUISTIC MINORITIES

At the time of the framing of the Constitution, practically every State was multi-lingual. Therefore, the problem of linguistic minorities loomed large on the horizon as there were linguistic minorities in practically every State. It therefore became incumbent to make provisions to safeguard some of their rights. Accordingly, a few provisions were incorporated in the Constitution to cope with the problems of linguistic minorities. For example, there is the provision in Art. 14 barring discrimination.[32] Arts. 15(1) and 15(2), noted earlier, do not specifically out-law discrimination on the ground of 'language'.[33] Neither do Arts. 15(4) and 16(4) make any special provisions for linguistee minorities, or provide for reservation in services on the basis of language.[34] Arts. 29 and 30 do confer rights on these minorities to conserve their culture and language.[35]

As has already been pointed out,[36] under Art. 345, a State can prescribe a language for carrying on its official work. However, to protect the interests of a linguistic minority in a State,[37] and to give it a sense of participation in State ad-

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29. *K.C. Vasanth Kumar v. State of Karnataka,* AIR 1985 SC 1495. See, *supra*, Ch. XXII, Sec. C,and Ch. XXIII, Sec. F.

30. *Indra Sawhney v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217; *supra,* Ch. XXIII, Sec. G.

31, (2008) 6 SCC 1, at page 601

32. *Supra*, Ch. XXI.

33. *Supra*, Ch. XXII, Sec. A.

34. For Art. 16(4), see Ch. XXIII, Sec. D(c) *supra.*

35. *Supra*, Ch. XXX.

36. *Supra*, Ch. XVI, Sec. B.

37. The Minorities Commission treats those groups as linguistic minorities which have separate languages and which constitute numerically smaller sections of the people in a State. In other words, linguistic minorities are determined on a Statewise basis. It is not necessary that a language should also have a distinct script to be entitled to protection. For Minorities Commission, see, *infra,* Sec. G(e).

ministration, Art. 347 lays down that, on a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desires the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognized throughout that State, or any part thereof, for such purposes as he may specify.[38] The onus to have a language recognised by the President in a State is thus placed on the people concerned.

Another constitutional provision to safeguard the interests of the linguistic minorities is Art. 350. It makes an interesting provision that every person is entitled to submit a representation for redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State as the case may be.[39]

The States Re-organisation Commission submitting its report in 1956 recommended that the Central Government should adopt, in consultation with the States, a clear code to govern the use of different languages at different levels of the State Administration and that effective steps be taken to see that this code is followed.

In the wake of the re-organisation of the States on a linguistic basis in 1956, a number of unilingual States were formed.[40] But this did not solve the problem of linguistic minorities. Even though new States were formed more or less on linguistic basis, each of these States also came to have linguistic minorities as well. Thus, the reorganisation of the States threw up in an acute form the difficult problem of linguistic minorities in practically every State, because while there was one dominant language group, in a State, several small language groups with languages different from the dominant language also came into being.

A linguistic minority is a group of people having mother-tongue different from that of the majority in a State or a part thereof. The Constitution-makers had anticipated some such problem and had, accordingly, made provisions to meet the situation in Arts. 29,[41] 30,[42] 347 and 350, as noted above. But the dimensions of the problem as it emerged after 1956 were much bigger than what the Constitution-makers had envisaged or what the existing Constitutional provisions could adequately cope with. Consequently, two more Articles, 350A and 350B, were added to the Constitution specifically with a view to protect the interests of the linguistic minorities.

There are three basic problems which a linguistic minority group faces in a State. First, the claim of the linguistic groups that education be imparted to their children in their own mother-tongues. Two, there is the problem of use of minority languages in the administration. Three, there is the problem of representation of the linguistec minorities in the State services.

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38. *Ibid.*

39. M.P. JAIN, Constitutional Aspects of the Language Problem in India, *Yearbook of the South Asia Institute, Heidelberg Univ.*, (1967-68), 116-136; *Report of the States' Reorganisation Comm*., 211, 212.
For Art. 350, see, Ch. XVI, *supra.*

40. *Supra*, Ch. V.

41. *Supra*, Ch. XXX, Sec. A.

42. *Supra*, Ch. XXX, Sec. B.

(a) ART. 350A

As regards the problem of education in a minority language, Arts. 29 and 30 as noted earlier, do make some provisions for this purpose. The purpose of Art. 29 is to facilitate inter-State migration of people. If, for example, a few people from Madras were to come and settle down in Bombay, they would constitute a cultural, as well as a linguistic, minority group in Maharashtra, and Art. 29 would protect their culture, language and script in Maharashtra.

Article 29 does not impose any positive obligation on the State to take any action to conserve any culture or language. It merely enables a cultural or linguistic minority to preserve its own culture or language, and bars the State from imposing on it any other language or culture.

Similarly, Art. 30 concedes to the minority the right to establish and administer its own educational institutions. It does not impose any positive obligation on a State to provide facilities for education in a minority language.

The States Re-organisation Commission felt that these provisions were not adequate to meet the newly emerging situation after the linguistic re-organisation of the States. The linguistic minorities may not have the resources required to establish and maintain their own educational institutions. The language of instruction in educational institutions touches, in practice, many vital aspects of an individual's life and constitutes, in fact, the core of the problem of linguistic minorities. The Commission, therefore, suggested that the Constitution be amended so as to cast a positive obligation on the States to provide for facilities at the primary stage for education to the children of such minorities in their mother-tongue and, further, to empower the Central Government to issue appropriate directives for enforcing this obligation on the States.[43] Accordingly, Art. 350A was added to the Constitution.

Art 350A supplements Art. 29 as it directs every State, and every local authority within a State, to endeavour to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to the children of linguistic minorities. The Article also empowers the President to issue such directions to any State as he considers necessary or proper for securing the provision of these facilities.

The Commission was of the opinion that the secondary education would have to be treated differently from the primary education. Accordingly, the Commission did not recommend recognition in the Constitution of the right to have instruction in the mother-tongue at the secondary stage. It however suggested that the Government of India should, in consultation with the State Governments, lay down a clear policy in this area and take more effective steps to implement it.

No special provision has been made in the Constitution in regard to the medium of instruction at the University level. Reference may however be made in this connection to the *Guru Nanak University* case.[44] The Supreme Court has ruled that while a university has a right to provide for the education of the majority in the regional medium, it cannot stifle the language and script of any section of the

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43. *REPORT*, 209-10.

44. *D.A.V. College, Jullundar v. State of Punjab*, AIR 1971 SC 1737 : (1971) 2 SCC 269; *supra*, Ch. X, Sec. G(iii)(d).
Also see, Ch. XXX, Sec. C(j) *supra.*

Indian population. It is does so, then the right of such citizens to conserve their language or script through educational institutions of their own is stifled. A university cannot impede the right of the minorities to conserve their language, script and culture.

(b) GOVERNMENT SERVICES

The States Re-organisation Commission also referred to the question of discrimination indulged in the matter of government services in some States against linguistic minorities by invoking residence qualification. The Commission pointed out that the States have confined entry to their services to permanent residents of the State, the term 'permanent residents' being defined in various ways. The Commission pointed out that the domicile tests in force in some States worked to the disadvantage of the minority groups. The Commission, therefore, suggested the passing of a law by Parliament under Art. 16(3) with a view to liberalise residence requirements for services in the States. Accordingly, the Public Employment (Requirement of Residence) Act, 1957, abolishes all laws prescribing residence as a qualification for State services.[45]

(c) EDUCATIONAL INSTITUTIONS

One kind of discrimination still remains and this has even been upheld by the Supreme Court in *Joshi*,[46] *viz*., use of residence qualification for admission to the State-maintained educational institutions. A requirement that for admission to State medical colleges, an applicant should have studied for 10 years in the educational institutions in the State, has been upheld as not infringing Arts. 19(1)(*d*) and (*e*). These articles ensure residence and movement throughout India but not that every citizen should have all the advantages and privileges available to citizens domiciled or residing in a State. A State can accord some preferential treatment to citizens domiciled or residing therein provided that it is not hit by Art. 14.[47] Recently the Supreme Court has laid down that so far as admissions to postgraduate courses such as MS, MD and the like are concerned, it would be imminently desirable not to provide for any reservation based on residence or institutional preference.[48]

G. APPARATUS TO SUPERVISE SAFEGUARDS

In order to ensure that the safeguards provided to the various groups under the Constitution do not just remain mere paper safeguards but are implemented effectively, the Constitution-makers felt it necessary to set up a machinery to keep a continuous watch and vigilance over the working of these safeguards throughout the country, and also to bring to the notice of the government and the legislature concerned any defects existing in the protection of these various groups.

(a) COMMISSIONER FOR SCHEDULED CASTES AND SCHEDULED TRIBES

Article 338(1) provided for the appointment of a Commissioner for the Scheduled Castes and Scheduled Tribes. He was appointed by the President. His duty

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45. *Supra*, Ch. XXIII.
46. *Supra*, Ch. XXII, Sec. A(a).
47. *Arun Narayan v. State of Karnataka,* AIR 1976 Kant 174.
48. *Ashoka Kumar Thakur v. Union of India,* (2008) 6 SCC 1, at page 624 : (2008) 5 JT 1.

was to investigate all matters relating to the safeguards provided to the Scheduled Castes and the Scheduled Tribes under the Constitution and to report to the President upon the working of those safeguards to the President from time to time. These reports were to be laid before each House of Parliament. (Art. 338(2))

The Commissioner used to make annual reports. The Commissioner used to collect materials for these reports from his own personal observations, information received by him from various State Governments, Government of India and non-official agencies. The Commissioner used to receive a large number of complaints from individuals and non-official agencies relating to injustices against, and harassment of, the Scheduled Castes and the Scheduled Tribes. He investigated these complaints in order to ascertain facts.Although he was all the powers of a civil court for the purposes of such investigation, he was not in fact a court and was not empowered to issue orders like a civil court.[49]

His reports usually dealt with such matters as social disabilities, legislative measures adopted by the various governments for the advancement of the Scheduled Castes and the Scheduled Tribes, representation of these communities in Parliament and State legislatures; administrative set up in the governments to look after the interests of these various classes; reservations made for them in government services; educational facilities granted to the students of these classes by the government; welfare schemes of the State Governments for improving the conditions of the Scheduled Castes, Backward Classes, Scheduled Tribes and Scheduled Areas and grants-in-aid by the Central Government to the State governments for these schemes.

The Commissioner in his reports also reviewed the working of the constitutional safeguards in relation to the Anglo-Indians, and the working of the non-official agencies engaged in the task of helping these communities, and made recommendations and suggestions for the amelioration of the condition of these various classes in his charge.

In brief, the reports of the Commissioner contained valuable information and important source material not only on the working of the various safeguards—constitutional, statutory and administrative—for the Scheduled Castes, Scheduled Tribes and other weaker and backward sections of the population, but also on sociological and economic conditions of these people in the various regions of the country.

In addition to the obligations imposed on the Commissioner under the Constitution, he also came to discharge, by convention, certain other functions, such as, representation of the Union Government on the managing committees of the non-official agencies receiving grants from the Centre; examining accounts of these organisations; advising the Central Government regarding the schemes for development of the Scheduled and Tribal Areas,[50] removal of untouchability and welfare of the Scheduled Tribes and other backward classes,[51] submitted by the State Governments and non-official agencies for grants-in-aid.

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49. All *India Indian Overseas Bank SC and ST Employees Welfare Assocn v. Union of India :* (1996) 6 SCC 606.
50. *Supra*, Ch. IX, Sec. C.
51. *Supra.* Sec. E.

On the whole, the Commissioner was concerned with the amelioration and development of the Scheduled Castes and the Scheduled Tribes, Tribal Areas and their administration, removal of untouchability, *etc.* To maintain a live contact with local conditions, a few Regional Assistant Commissioners functioned throughout the country to assist the Commissioner.[52]

In his report for the year 1957-58, the Commissioner made an extremely valuable suggestion. He stated that backwardness has a tendency to perpetuate itself and become a vested interest and that if the ultimate goal of having a classless and casteless society is to be attained, the lists of Scheduled Castes and Scheduled Tribes would have to be reduced from year to year and replaced in due course by a list based on criteria of income-*cum*-merit. This has not, however, happened so far. In fact, the list originally drawn in 1950 has become longer and longer since then. More and more communities constantly pressurize for inclusion in the list. Logically, with the rising tempo of development activities, one would have expected that some of these communities would by now be ready to be excluded from the list of Scheduled Castes, but, what one actually finds is a reverse process in operation, *viz.*, that of enlargement of the lists as more and more communities want to enjoy the rights and privileges available to these classes.

The Advisory Committee for the revision of the lists of Scheduled Castes and Scheduled Tribes, appointed by the Central Government in 1965, suggested that the more advanced communities in the lists concerned be gradually descheduled and a deadline be fixed when these lists would totally be dispensed with in the interest of complete integration of the Indian population. But it is not expected that any such suggestion will be acted upon in the near future because this is an area where political expediency takes precedence over sagacious action.

In 1968, Parliament appointed a Parliamentary Committee on the Welfare of the Scheduled Castes and Scheduled Tribes and, thus, another concrete step was taken towards strengthening the supervisory mechanism over the working of the safeguards for these people.[53]

The committee consists of 20 members elected from the Lok Sabha, and 10 members elected from the Rajya Sabha. It has been invested with powers to criticise, guide and control the Government of India in the matter of Scheduled Castes and Scheduled Tribes. It considered the reports of the Commissioner of Scheduled Castes and Scheduled Tribes. The committee reports to both Houses of Parliament on the action to be taken by the Government for the welfare of these people.

The committee also goes into the question of their employment in services under the Central Government including the public sector undertakings. The committee could thus go deeper into the major recommendations made by the Commissioner and could assess how far these recommendations had been implemented.

Under Art. 338(3), the Commissioner of Scheduled Castes and Scheduled Tribes also discharged similar functions with respect to such other Backward Classes as the President, on receipt of the report of the Backward Classes Com-

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52. *REPORTS OF THE COMMISSIONER FOR SCHEDULED CASTES AND SCHEDULED TRIBES.*
53. *Supra*, Ch. II, Sec. J(iv).

mission, specified by order. No such classes were ever specified.[54] Further, the Commissioner was also required to discharge similar functions with regard to the Anglo-Indian community as he did with respect to the Scheduled Castes and the Scheduled Tribes.

(b) COMMISSIONER FOR LINGUISTIC MINORITIES

To investigate all matters relating to the safeguards provided for the linguistic minorities under the Constitution, and to report on these matters to the President at such interval as he may direct, Art. 350B, which was added to the Constitution on the suggestion of the States Re-organization Commission,[55] provides for the appointment by the Central Government of the Commissioner for Linguistic Minorities.[56]

The Commissioner at present submits his report annually; these reports are laid before each House of Parliament where they are discussed, and are also sent to the concerned State Governments.

The Commissioner plays a creative role in implementing safeguards to minorities and protecting their interests. However, his role is more of an investigative nature. He is not directly responsible for implementing, or overseeing the progress of implementation of, the safeguards for minorities. That is a weakness of the present system.

In the XIIth report, the Commissioner for Linguistic Minorities suggested a review whether the implementing machinery of the safeguards at the State, district or any other level was adequate or not. It was also suggested by the Commissioner that there should be some central machinery to supervise the implementation of the safeguards.[57]

(c) ZONAL COUNCILS

The Zonal Councils provide another institutional set-up to safeguard the interests of these minorities.[58] The underlying idea is to enable the States in a zone to evolve a common policy regarding these minorities. The question of treatment of these minorities by the States may affect good neighbourliness amongst them. This can, to a large extent, be avoided by mutual discussions amongst them. The Zonal Council provides the forum for this purpose.

(d) NATIONAL COMMISSION FOR SCHEDULED CASTES AND SCHEDULED TRIBES

In course of time, it began to be felt that instead of a special officer (Commissioner of Scheduled Castes and Scheduled Tribes), a more effective arrangement for the purpose would be to have a high level multi-member Commission to guarantee constitutional safeguards for these people. Accordingly, Art. 338 was

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54. *Supra*, Sec. E.
55. *Supra*, Ch. XVI.
56. *Supra*, Sec. E.
For a discussion on the working of the Safeguards to Linguistic Minorities see, *I.L.I.*, *MINORITIES*, *supra*, footnote 1 on 2004.
57. XII *REPORT*, 78 (1971) The 45th Report was presented to the President on February 15, 2009.
58. *Supra*, Ch. XIV, Sec. D.

amended by the Constitution (65th Amendment) Act, 1990,[59] so as to abolish the office of the Commissioner and to provide for the appointment of the National Commission for the Scheduled Castes and Scheduled Tribes [Art. 338(1)]. By a subsequent amendment[60] the Commission was bifurcated into the National Commission for Scheduled Castes [Art. 338] and the National Commission for Scheduled Tribes [Art. 338A].

Each Commission is to consist of a Chairperson, Vice-Chairperson and three other members to be appointed by the President of India. Subject to any law made by Parliament, the conditions of service and tenure of office of these persons is to be determined by rules made by the President [Art. 338(2) and Art. 338A(2)].

The Commissions investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution, or under any other law or under any order of the Government. The Commissions are also to evaluate the working of the safeguards. The Commissions are to inquire into specific complaints with respect to deprivation of any rights and safeguards to these people and to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes as the case may be and to evaluate the progress of their development under the Union and any State [Art. 338(5)(a), (b), (c) and Art. 338A (5) (a),(b),(c)].

The Commissions are to make recommendations as to the measures to be taken by the various Governments for the effective implementation of these safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes [Art. 338(5)(e) and Art. 338A(5)(e)].

In addition, the Commissions are to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes or Scheduled Tribes as the President may, subject to any law made by Parliament, by rule specify [Art. 338(5)(f) and Art. 338A(5) (f)].

The Central and every State Government are required to consult the Commissions on all major policy matters affecting Scheduled Castes and Scheduled Tribes. The Commissions have power to regulate their own procedure [Art. 338(9) and Art. 338A(9)].

The Commissions are to make annual reports to the President. They can also make reports as and when it is necessary. These reports are to be placed before each House of Parliament along with a memorandum by the Government as to the action taken or proposed to be taken on the recommendations made by the Commissions. Any report of the Commissions pertaining to a State Government is to be forwarded to the State Governor and is to be placed before the State Legislature with a government memorandum explaining the action taken or proposed to be taken on these recommendations or the reasons, if any, for the non-acceptance of any of such recommendations [Arts. 338(d), (6), (7), 338A (5)(d),(6), (7)].

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59. See, *infra*, Ch. XLII.
60. The Constitution (Eighty-ninth Amendment) Act, 2003 w.e.f. 19-2-04.

The Commissions have been given power of a civil court trying a suit and, in particular, in respect of such matters as summoning and examination of witnesses, discovery and production of documents [Arts. 338(8), 338(8)].

The Supreme Court has ruled that the Commission has no power to grant injunctions whether temporary or permanent.[61]

The Commissions have several State offices located in different States and Union Territories. These offices serve as the "eyes and ears" of the Commissions as these offices keep the Commissions informed of all important activities, decisions and orders of the State Governments concerning SCs and STs.

The important constitutional safeguards for the SCs and STs are as follows :

Article 46 refers to developmental and protective safeguards;[62] Art. 17,[63] Art. 23, Art. 24,[64] Art. 25(2)(*b*)[65] confer social safeguards; Art. 244,[66] Art. 275(1),[67] Fifth and Sixth Schedules confer economic safeguards, Art. 15(4),(5)[68] Art. 29(1)[69] and Art. 350A[70] refer to educational and cultural safeguards.

Political safeguards are conferred by Arts. 164(1),[71] 330, 332, 334,[72] 371A, 371B, 371C, 371F.[73]

Arts. 16(4), 16(4A), 335 and 320(4) confer service safeguards.[74]

Arts. 338(5)(c) and 338A(5)(c) of the Constitution refer to socio-economic development of the SCs/STs. This is a very important function of the Commissions, which have to keep track of all the major policy decisions, legislative or executive action by the Government of India or any State Government. The Commissions are required to inquire into specific complaints with respect to the deprivation of rights and safeguards of SCs and STs [Arts. 338(5)(b) and 338A(5)(b)].

A number of statutes have been enacted to provide safeguards to SCs/STs. For example, to give effect to Art. 17[75] the Protection of Civil Rights Act, 1955, has been enacted. This Act makes the practice of untouchability as both congnizable and non-compoundable offence and provides for strict punishment for the offences committed under the Act. Under the Act, responsibility is cast on the State Governments to take such measures as may be necessary for ensuring that the rights arising from abolition of untouchability are made available to the persons subjected to any disability arising out of untouchability.

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61. *All India Indian Overseas Bank v. Union of India,* (1996) 6 SCC 606 : (1996) 10 JT 287.
62. Ch. XXXIV, *supra.*
63. Ch. XXIII, Sec. I.
64. Ch. XXVIII, *supra.*
65. Ch. XXIX, Sec. B, *supra.*
66. Ch. IX, Sec. C, *supra.*
67. Ch. XI, Sec. M, *supra.*
68. Ch. XXII, Sec. C, *supra.*
69. Ch. XXX, Sec. A, *supra.*
70. *Supra,* this Chapter, Sec. F(a).
71. *Supra*, Ch. VII.
72. *Supra*, Chs. II, VI, *supra;* Sec. A(c).
73. Ch. IX, *supra.*
74. Chs. XXIII, *supra*; Ch. XXXVI, *infra.*
75. *Supra*, Ch. XXIII, Sec. I, *supra.*

There is also the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Act specifies the atrocities which are made penal under the Act.

The Commissions are concerned with devising ways and means to ensure effective implementation of these Acts. The Commissions collect monthly statistics concerning the offences committed under these Acts.[76] The Commissions make suggestions to the State Governments for effectively dealing with the crimes committed under these Acts. The Commissions are concerned with the education of the children of SCs and STs and make recommendations for strengthening the infrastructure for the purpose.[77]

Another area of interest for the Commissions is economic development of the SCs and STs. For this purpose, the Commissions review the development programmes undertaken by the States for SCs and STs.[78]

(e) NATIONAL COMMISSION FOR MINORITIES

As a further step to safeguard the interests of the religious and linguistic minorities, to preserve the country's secular traditions, to promote national integration and remove any feeling of inequality and discrimination amongst these sections of the people, the Government of India appointed a Minorities' Commission in 1978 under an administrative resolution.[79] The Commission was charged with the function of evaluating the various safeguards provided in the Constitution for the protection of the minorities and in the laws passed by Parliament and the State Legislatures.

The Commission was to make recommendations with a view to ensuring effective implementation and enforcement of all the safeguards and the laws, undertake review of the implementation of the policies pursued by the Central and the State Governments with respect to the minorities and look into specific complaints regarding deprivation of rights and safeguards of the minorities.

The Commission was to conduct studies, research and analysis on the question of avoidance of the discrimination against minorities, suggest appropriate legal and welfare measures in respect of any minority and serve as a national clearing house for information in respect of the conditions of the minorities.

The Commission made periodical reports at prescribed intervals to the Central Government. The Commission submitted an annual report to the President detailing its activities and recommendations. This however did not preclude the Commission from submitting reports to the government at any time it considered necessary on the matters within its scope of its work. The annual report together with a memorandum outlining the action taken on the recommendations, and explaining the reasons for non-acceptance of recommendations, if any, in so far as it related to the Central Government was laid before each House of Parliament. The scope of the Commission's work extended to minorities whether based on religion or language.

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76. See, NATIONAL COMMISSION FOR SCS AND STS, *FOURTH REPORT*, 231-246 (1996-97).
77. *Ibid, 260-264.*
78. *Ibid, 82-117.*
79. Notification issued by the Government of India, dated the 12th January, 1978.

In course of time, the Commission suggested that its position be strengthened by conferring on it statutory powers of enquiry under the Commissions of Inquiry Act, 1952. The Commission also suggested that it be given a constitutional status so that it could function more effectively.[80] Accordingly, Parliament enacted the National Commission for Minorities Act, 1992, to establish the National Commission For Minorities [NCM] on a statutory basis.

An interesting feature of the Act is that it does not define the term 'Minority' but leaves it to the Central Government to notify minorities for the purposes of the Act [s. 2(*c*)].[81]

The Commission consists of a Chairperson, a Vice-Chairperson and five members who are nominated by the Central Government from time to time from amongst persons of eminence, ability and integrity subject to the rider that five members including the chairperson must belong to the minority communities [s. 3]. The Chairperson and every member holds office for three years from the date he assumes office [s. 4]. Under s. 4(2), the Government has power to remove the Chairperson or any member on a few specified grounds, such as, insolvency, moral turpitude, unsoundness of mind, abuse of power, *etc.*

The Central Government also appoints a Secretary to the Commission [s. 5]. The Commission meets as and when necessary [s. 8(1)], has power to regulate its own procedure [s. 8(2)], and enjoys powers of a civil court for purposes of summoning witnesses, receiving evidence on affidavits *etc.* [s. 9(4)].

The Commission discharges the following functions [s. 9] :

(a) evaluate the progress of the development of minorities under the Union and States;

(b) monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures;

(c) make recommendations for the effective implementation of safeguards for the protection of the interests of minorities by the Central government or the State Governments;

(d) look into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matters with the appropriate authorities;

(e) cause studies to be undertaken into problems arising out of any discrimination against minorities and recommend measures for their removal;

(f) conduct studies, research and analysis on the issues relating to socio-economic and educational development of minorities;

(g) suggest appropriate measures in respect of any minority to be undertaken by the Central Government or the State Governments;

(h) make periodical or special reports to the Central Government on any matter pertaining to minorities and in particular difficulties confronted by them; and

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80. THE MINORITIES' COMM., *FOURTH ANNUAL REPORT*, 87, 395 (1983).
For comments on the Commission and some of its recommendations; see *Bharatiya.* Minorities Commission: Constitutional Metamorphosis, (1979) 21 *JILI* 268.

81. This is Act XIX of 1992. The Act has been amended in 1995 by Act XLI of 1995.

(i) any other matter which may be referred to it by the Central Government.

The Central Government is required to lay the recommendations made by the Commission under head (c) above before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Centre. If the Central Government does not accept any of these recommendations, it has to explain the reasons for non-acceptance [s. 9(2)].

If any such recommendation concerns a State Government, the Commission forwards it to that government which follows the same procedure as mentioned above in s. 9(2). The Government lays the recommendation before the State legislature along with an explanatory memorandum [s. 9(3)].

The Central Government makes grants to the Commission for being utilised by it for the purposes of this Act [s. 10]. The salaries and allowances to the Chairperson and members and other staff are paid out of these grants.

The Commission makes an annual report giving an account of its activities [s. 12]. The Central Government lays the report before both Houses of Parliament along with an explanatory memorandum of action taken on the recommendations contained in the annual report and the reasons for the non-acceptance, if any, of such recommendations [s. 12].

Reading ss. 3 and 9 of the Act together, the Supreme Court has observed in *Misbah Alam Shaikh v. State of Maharashtra*:[82]

> "….it is the duty of the Central Government to constitute: a National Commission and it shall be the duty and the responsibility of the National Commission to ensure compliance of the principles and programmes evaluated in section 9 of the Act protecting the interest of the minorities for their development and working of the safeguards provided to them in the Constitution and the law enacted by Parliament as well as the State Legislatures. The object thereby is to integrate them in the national main stream in the united and integrated Bharat providing facilities and opportunities to improve their economic and social status and empowerment."

On the question of minorities, the following observation of Justice H.R. KHANNA in *St. Xavier's*[83] case may be quoted here :

> "India is the most populous country of the world. The people inhabiting this vast land profess different religious and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the Nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on Indian polity and India today represents a synthesis of them all. Our mission is to satisfy every interest and safeguard the interest of all the Minorities to their satisfaction. It is in the context of this background that we should view the provisions of the Constitution contained in Articles 25 to 30. The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities so as to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy."

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82. AIR 1997 SC 1409, 1410 : (1997) 4 SCC 528.
83. *Supra*, Ch. XXX, Sec. C(d).

Minorities Commissions have also been established in several States, *e.g*., Bihar, Andhra Pradesh, Karnataka.

After *T.M.A.Pai*[84] decided that for the purpose of determining the minority the unit will be the state and not the whole of India, an interesting issue was raised before the Supreme Court in *Bal Patil v. Union of India*[85]. The Commission had recommended that Jains should be notified as a minority under section 2(c) of the Act. The question before the court was whether it was for the State Government or the Centre to issue the relevant notification.

The Court said that the power under Section 2(c) of the Act vests in the Central Government which alone, on its own assessment, has to accept or reject the claim of status of minority by a community. The recommendation of the Commission is only advisory and before the Central Government takes decision on claims of Jains as a "minority" under Section 2(c) of the Act, the identification has to be done on a State-wise basis.

However the Court went on to observe that "The power of the Central Government has to be exercised not merely on the advice and recommendation of the Commission but on consideration of the social, cultural and religious conditions of the Jain community in each State. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as a minority."[86] The court introduced a concept of the "creamy layer" which is alien to Art. 30 and in direct conflict with the decision in T.M.A.Pai which held that a minority had to be determined only on the basis of their numbers.

More startlingly the Court said "The Commission instead of encouraging claims from different communities for being added to the list of notified minorities under the Act should suggest ways and means to help to create social conditions where the list of notified minorities is gradually reduced and done away with altogether"[87].

The mandate is contrary to the object of the Act which envisages that the Commission should be for the minorities and not for their elimination.

(f) NATIONAL COMMISSION FOR BACKWARD CLASSES

In the *Indra Sawhney* case,[88] the Supreme Court had directed that an expert body consisting of officials and non-officials be established at the level of the Centre and each State to look into the complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Backward Classes other than the Scheduled Castes and Scheduled Tribes. Accordingly, Parliament has enacted the National Commission for Backward Classes Act, 1993, to establish the National Commission for Backward Classes.

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84. (2002) 8 SCC 481.
85. (2005) 6 SCC 690.
86. *Ibid* at page 698.
87. *Ibid* at page 704.
88. *Supra*, Ch. XXIII, Sec. G.

The function of the Commission is to examine requests for inclusion of any class of citizens as a Backward Class in the lists and hear complaints of over-inclusion or under-inclusion ofany Backward Class in such lists and tender such advice to the Central Government as it deems appropriate [s. 9(1)]. The advice of the Commission shall ordinarily be binding upon the Central Government [s. 9(2)]. Lists of Backward Classes are prepared by the Central Government from time to time for purposes of making provision for the reservation of appointments or posts in favour of the Backward Classes of citizens which, in the opinion of that Government, are not adequately represented in the services under that Government or any other authority under the control of that Government [s. 2(*c*)].

The Central Government revises these lists from time to time. At the expiration of three years from the enforcement of this Act, and after every succeeding period of ten years thereafter, the Government is bound to undertake revision of the lists with a view to excluding therefrom those classes who have ceased to be Backward Classes, or for including in such lists new Backward Classes. While undertaking any such revision, the Central Government is to consult the Commission [s. 11].

The Commission consists of the following members nominated by the Central Government:

(a) a Chairperson, who is or has been a Supreme Court or a High Court Judge;

(b) a social scientist;

(c) two persons having special knowledge in matters relating to Backward Classes; and

(d) a member-secretary, who is or has been an officer of the Central Government in the rank of a Secretary to the Government of India [s. 3].

Every member holds office for a term of three years from the date he assumes office [s. 4].

The Commission meets as and when necessary and has power to regulate its own procedure [s. 8].

While performing its functions, the Commission enjoys powers of a civil court trying a civil suit in respect of such matters as summoning witnesses *etc.* [s. 10].

The Commission submits an annual report of its activities during the year to the Central Government [s. 14]. The Central Government lays the report before both Houses of Parliament along with a memorandum of action taken on the advice tendered by the Commission and the reasons for the non-acceptance of any such advice [s. 15].

Several States have set up State Commssions for Backward Classes after the decision in *Indra Sawhney*. Thus the Kerala State Commission for Backward Classes was constituted under the provisions of the Kerala State Commission for Backward Classes Act, 1993. Similarly The Karnataka Backward Classes Commission has been constituted under the Karnataka State Commission for Backward Classes Act, 1995 The Tamilnadu Backward Classes Commission has been constituted as a permanent body under Article 16(4) read with Article 340 of the Constitution of India under a Government Order in 1993.

H. WOMEN

Women as a class neither belong to a minority group nor are they regarded as forming a Backward Class. India has traditionally been a male dominated society and, therefore, presently women suffer from many social and economic disabilities and handicaps. It thus becomes necessary that such conditions be created, and necessary ameliorative steps be taken, so that women as a class may make progress and are able to shed their disabilities as soon as possible.

The Constitution does not contain many provisions specifically favouring women as such. There is Art. 15(3), reference to which has already been made earlier,[89] which is a provision of permissive nature as it merely says that the state is not prevented from making any special provision for women. Then, there are such general provisions as Arts. 14[90] and 15(2)[91] which outlaw any kind of gender discrimination against women. Art. 21 is also there which can be used to spell out some safeguards for women.[92] The Supreme Court has, in course of time, by its interpretative process of these various constitutional provisions extended some safeguards to women. Reference may be made to a few of these judicial pronouncements.

Recognising that women in India need to be liberated from unjust social political and economic suppression, the Supreme Court has declared in *Bodhisattwa*[93], that rape is a heinous crime against a woman and amounts to violation of the Fundamental Right guaranteed to a woman under Art. 21. The Court has gone further and recognised the right of a rape victim to claim compensation from the offender for violation of his constitutional right to live with human dignity which is guaranteed to her by Art. 21.[94]

The Court has reiterated this view in *Chairman, Rly. Board v. Chandrima Das*,[95] where a Bangladeshi woman was gang raped by a few railway employees at Sealdah Railway Station. The Court awarded compensation to her to the tune of Rs. 10 lakhs for violation of her rights under Art. 21.

In *Visakha*,[96] the Supreme Court has come down heavily on sexual harassment of women at work places and has declared the same to be violation of women's right under Art. 21.

A law providing in favour of male succession to property in the male line was challenged on the premise that the provision was discriminatory and unfair against women and, therefore, *ultra vires* the equality clause in the Constitution. But the Court refused to do so as "this would bring about a chaos in the existing state of law." The Court, however, did recognise the right to livelihood of the immediate female relatives of the last male holder to hold the land till they find an alternative source of livelihood for otherwise they would be rendered desti-

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89. *Supra*, Ch. XXII, Sec. B.
90. *Supra*, Ch. XXI.
91. *Supra*, Ch. XXII, Sec. A(a).
92. *Supra*, Ch. XXVI.
93. *Boodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922 : (1996) 1 SCC 490; *supra*, Ch. XXVI, Sec. J(l).
94. *Visakha*, AIR 1997 SC 3011 : (1997) 6 SCC 241; *supra*, Chs. XXVI, Sec. J(k), XXXIII, Sec. A(p).
95. AIR 2000 SC 988 : (2000) 2 SCC 465; *supra*, Ch. XXVI, Sec. J(l).
96. *Supra*, footnote 94.

tute. [1] Now by reason of an amendment in 2005 to the Hindu Succession Act, 1956 all female heirs have been conferred equal right in the matter of succession and inheritance with that of male heirs.[2]

In *Githa Hariharan*,[3] the Supreme Court has interpreted s. 6(*a*) of the Hindu Minority and Guardianship Act, 1956, as well as s. 19(*b*) of the Guardians and Wards Act, 1890, to mean that when the father is not in actual charge of the affairs of the minor either because of his indifference, or because of an agreement (oral or written) between him and the minor's mother, and the minor is in the exclusive care and custody of the mother, or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as the natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be 'absent' for the purpose of s. 6(*a*) of the HMG Act and s. 19(*b*) of the GW Act.

A woman who is major has the right to go any where and live with anyone she likes without getting married. "This may be regarded immoral by society but it is not illegal. There is a difference between law and morality."[4]

Reference may also be made to *Sarla Mudgal* and *Lily Thomas* discussed earlier.[5]

The Supreme Court has used the Directive Principles contained in Arts. 39(*a*), 39(*d*) and 39(*e*) to confer economic empowerment on women. [6]

NATIONAL COMMISSION FOR WOMEN

To ameliorate the general social condition of the women in the country, Parliament has enacted the National Commission for Women Act, 1990, to establish the National Commission for Women (NCW).

The Commission consists of the following :

(a) a Chairperson, committed to the cause of women;

(b) five members nominated from amongst persons having experience in law, trade unionism, management of an industry, administration, economic development, health, education, social welfare, women's voluntary organisations;

(c) a member-secretary who is either a member of a civil service under the Centre, or an expert in the field of management, sociological movement [s. 3].

All these persons hold office for three years and are appointed by the Central Government [s. 4].

The Commission has power to constitute committees as may be necessary to deal with special issues taken up by the Commission from time to time [s. 8]. The

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1. *Madhu Kishwar v. State of Bihar,* AIR 1996 SC 1864 : (1996) 5 SCC 125; *supra,* Ch. XXXIV, Sec. D(d).
2. See *G. Sekar v. Geetha,* (2009) 6 SCC 99.
3. *Githa Hariharan v. Reserve Bank of India,* AIR 1999 SC 1149 : (1999) 2 SCC 228.
4. *Payal Sharma v. Supdt., Nari Niketan Kalindri Vihar, Agra,* AIR 2001 All 254.
5. Ch. XXXIV, Sec. D(p).
Also see, *Danial Latifi v. Union of India, ibid.*
6. *See John Vallamattom v. Union of India : (2003) 6 SCC 611.Supra,* Ch. XXXIV, Sec. D(t).

Commission has power to regulate its own procedure [s. 9] and has power of a civil court in matters like summoning witnesses [s. 10(4)]. The Commission presents an annual report of its activities [s. 13], which is presented to both Houses of Parliament along with a government memorandum of action taken thereon [s. 14].

The terms of reference of the Commission as laid down in s. 10 of the Act are very comprehensive. The Commission discharges the following functions [s. 10(1)] :

(a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;

(b) present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(c) make in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any State;

(d) review, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislation;

(e) take up the cases of violation of the provisions or the Constitution and of other laws relating to women with the appropriate authorities;

(f) look into complaints and take *suo motu* notice of matters relating to—

(i) deprivation of women's rights;

(ii) non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;

(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women,

and take up the issues arising out of such matters with appropriate authorities;

(g) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal;

(h) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity;

(i) participate and advise on the planning process of socio economic development of women;

(j) evaluate the progress of the development of women under the Union and any State;

(k) inspect or cause to be inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise, and take up with the concerned authorities for remedial action, if found necessary;

(l) fund litigation involving issues affecting a large body of women;

(m) make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil;

(n) any other matter which may be referred to it by the Central Government.

The Central Government is required to lay before the two Houses of Parliament all the reports sent to it by the Commission under (b) above along with a memorandum explaining the action taken or proposed to be taken on the recommendations and the reasons for non-acceptance, if any, of any such recommendations [s. 10(2)].

If a recommendation relates to a State Government, the Commission sends the same to that government which lays the same before the State Legislature along with an explanatory memorandum [s. 10(3)].

The Central Government makes grants to the Commission for being utilised for the purposes of the Act [s. 11].

The salaries and allowances payable to the Chairperson and members of the Commission and its administrative expenses are to be paid out of the grants as mentioned above [s. 6].

While investigating any matter referred to in (a), or sub-cl. (i) of cl. (f), the Commission enjoys all the powers of a civil court trying a suit, such as, summoning of witnesses, receiving evidence on affidavits *etc.*

Section 16 of the Act makes it obligatory on the part of the Central Government to consult the Commission on all major policy matters affecting women.

A reference to the annual report of the Commission for the year 1997-98 throws light on the functioning of the Commission. The Commission has undertaken review of all laws for the protection and empowerment of women. Out of 39 such laws, the Commission has reviewed the following ten laws during the year under review, *viz*., The Commission of Sati (Prevention) Act, 1987; The Medical Termination of Pregnancy Act, 1971; The Child Marriage Restraint Act, 1929; The Family Courts Act, 1984; the Foreign Marriage Act, 1969; The Guardian and Wards Act, 1869; The Indian Succession Act, 1925; The Hindu Marriage Act, 1955; The Indian Penal Code. The Commission has suggested suitable amendments in all these laws with a view to affording better protection to the women. In Chapter III of the Report, the Commission has reviewed cases of violence against women. The Commission has observed in this connection: "Gender-based violence is recognised to-day as a major issue on national human rights agenda."

The Commission views violence against women "as one of the most crucial social mechanisms by which women are forced into a subordinate position."

In Ch. IV, the Commission has surveyed the problem of prostitution and has suggested strict implementation of s. 13 of the Immoral Traffic Prevention Act which provides for appointment of special officers to fight traffickers.

In Ch. V, the Commission has looked into the problems being faced by such groups of women as Scheduled Castes and Scheduled Tribes, mentally ill and handicapped women, widows, minorities. These groups need special attention because "the problems of such women were peculiar to the socio-economic, cultural and situational factors affecting them."

Other issues considered by the Commission in this report are : political participation by women (Ch. VI); women in custody (Ch. VIII); socio-economic development of women (Ch. VII).

The Commission has defined its function as follows:

> "The ultimate objective of the affairs of the Commission is to help enable the women to live a dignified life without distress and with undiscriminated socio-economic status in the society."

More recently, in *Seema v. Ashwani Kumar*, the Commission submitted an affidavit in support of its opinion that non-registration of marriages affects women the most and a law making marriages compulsorily registrable would be of critical importance to various women-related issues such as:

(*a*) Prevention of child marriages and to ensure minimum age of marriage.

(*b*) Prevention of marriages without the consent of the parties.

(*c*) Check illegal bigamy/polygamy.

(*d*) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.

(*e*) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.

(*f*) Deterring men from deserting women after marriage.

(*g*) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.

The Supreme Court[7] accepted the views expressed by the Commission and directed the States and the Central Government to take the necessary steps to effect such a law.

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7. (2006) 2 SCC 578, at page 583 : AIR 2006 SC 1158.