



**WEAKER SECTIONS OF SOCIETY
AND THE CONSTITUTION:
A SOCIO-LEGAL ANALYSIS**

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

IN

LAW

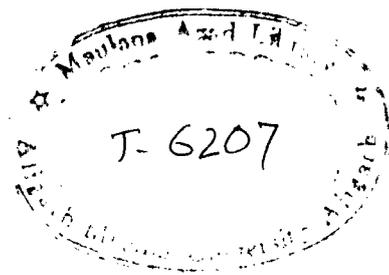
BY

AKHLAQ AHMAD

READER

DEPARTMENT OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)

2003



T6207

CONTENTS

AKNOWLEDGEMENT

Chapter – I 01 - 21

INTRODUCTION

Chapter – II 22 - 77

SOCIO-ECONOMIC JUSTICE: GENESIS AND DEVELOPMENT

- A. AN OVERVIEW
- B. THE CONCEPT OF JUSTICE – SOCIAL, POLITICAL & ECONOMIC
- C. SOCIAL COMPARTMENTALIZATION IN INDIA
 - i. Socio-Religious Permutation
 - ii. Lingua-Cultural Permutation
 - iii. Ethno-Racial Permutation
- D. DEMOCRATIC NORMS AND REALITIES: A CONSTITUTIONAL PRESPECTIVE
- E. EGALITARIAN NORMS
 - i. In England
 - ii. In U.N. Charter
 - iii. In India

Chapter – III 78 - 112

PRINCIPLES OF EQUALITY: DIMENSIONS AND DEVICES

- A. AN OVERVIEW
- B. NOTION OF EQUALITY IN ENGLAND
- C. NOTION OF EQUALITY IN U.N. CHARTER

D. NOTION OF EQUALITY IN INDIA

Chapter – IV

113 –159

SOCIO-POLITICAL JUSTICE TO THE WEAKER CLASSES

A. AN OVERVIEW

B. GENESIS OF THE SOICO-POLITICAL JUSTICE

- i. Simon Commission: The British Policy
- ii. The Communal Award: Divide and Rule Policy

C. THE DELIMITATION LAW ITS ROLE AND WORKING

- i. Election Commission Rules Thereunder
- ii. Rotation of the Reserved Constituencies
- iii. The Concept of Double Membership Constituency

D. THE RESERVATION OF SEATS: AN UNPRECEDENTED STEP

- i. Reservation Criteria
- ii. Reservation: Extent and Scope
- iii. SCs, STs and OBCs: Special Measures Under the Constitution

Chapter – V

160-213

SOCIO-ECONOMIC POLICIES AND CONSTITUTIONAL WISDOM OF NON-DISCRIMINATION

A. ANOVERVIEW

B. RIGHT TO EQUALITY: DIMENSIONS

- i. Equality Before Law
- ii. Equal Protection of Laws
 - (a). Province of Article 15(1)
 - (b). Province of Article 16(1)

C. FROM EQUALITARIANISM TO EGALITARIANISM

- i. Article 15(4)
- ii. Article 16(4)

Chapter – VI

214-305

PHILOSOPHY AND WISDOM OF PROTECTIVE DISCRIMINATION UNDER THE CONSTITUTION VIZ-A-VIZ JUDICIAL DICTA

A. AN OVERVIEW

B. CONCEPT OF PROTECTIVE DISCRIMINATION

C. CONSTITUTIONAL CLASSIFICATION FOR PREFERENTIAL TREATMENT

- (a). Scheduled Castes
- (b). Scheduled Tribes
- (c). Backward Classes

D. PROTECTIVE DISCRIMINATION AND JUDICIAL ACTION

1. Identification of Scheduled Castes and Scheduled Tribes
2. Determination of “Backward Classes” and Judicial Response

(a). Criteria for Backwardness

- (i). Caste Criteria
- (ii). Poverty or Economic Criteria

(b). Article 15(4) and 16(4)-Compatibility and Judicial Treatment

- (i). Article 16(4) – Exception, proviso or instance of Article 16(1)?
- (ii). Whether Article 16(1) Permits Reservation?

E. LIMITATION AND LAXITIES

- (i). Limitation on Reservation
- (ii). Backward and More Backward Classification
- (iii). Concept of Creamy Layer

CONCLUSION AND SUGGESTIONS	306-328
ANNEXURE – I	329-337
ANNEXURE – II	338-340
ANNEXURE – III	341-343
TABLE OF CASES	344-349
BIBLIOGRAPHY	350-358

ACKNOWLEDGEMENT

Prostration and Praise to Allah, the most benevolent and most merciful whose grace and blessings have enabled me to complete this study in its present form.

I express my gratitude to **Prof. Mohd Isahque Qureshi**, Dean and Chairman, Faculty of Law, Aligarh Muslim University, Aligarh for his help and support in completing this research endeavour.

I acknowledge the services rendered by my learned colleague **Prof. Saleem Akhtar**, Ex-Dean and Chairman, Faculty of Law, Aligarh Muslim University, Aligarh, during the course of this study.

I am grateful to all the teachers of the Faculty of Law and well-wishers for their good wishes and appreciate the cooperation extended by the Library Staff.

I put to record my encomiums and sense of elation to my family members whose help and support proved to be a bedrock during the course of this study.

And finally, I appreciate the immaculate and able typing work performed by **Mr. Mohd Yaseen Khan**.


(AKHLAQ AHMAD) *

CHAPTER - I

INTRODUCTION

A democratic ideal of justice must rest on the three foundations of equality, liberty and ultimate control of government by the people. It is, however, far from easy to give these concepts a specific content. Democracy is certainly based on the ideal of equality, but no democratic state has seriously attempted to translate this ideal into the absolute equality of all. There are numerous inevitable inequalities of function and status, between adults and infants between sane persons and insane, between civilians and military, between private citizens and officials. We can still not formulate the principle of equality in more specific terms than Aristotle who said that justice meant the equal treatment of those who are equal before the law. We can give to this apparent tautology a more concrete meaning by saying that a democratic ideal of justice demands that inequalities shall be inequalities of function and service but shall not be derived from distinctions based on race, religion, or other personal attributes.¹

This means that a judiciary as independent from interference by the executive as is possible, given the interlocking of state functions and the human factor in the judicial function, is an essential of the democratic ideal of justice. But it is impossible to lay down a generally accepted rule

either as to the substance of these rights or as to the manner of their protection. The Declaration of Rights, adopted in 1948 by the United Nations, is vastly different from the Bill of Rights embodied in the American Constitution. The Australian Constitution contains no individual rights other than the guarantee of religious freedom and perhaps – though this is still very much open to doubt – a protection of the individual from the restriction of free inter-state trade by state regulation (section-92). British law knows of no guarantees of individual rights other than the limited guarantees of personal freedom in the Bill of Rights of 1688 and the Habeas Corpus Acts. Some additional protection for individuals is provided by the procedures established under the European Convention on Human Rights and Fundamental Freedom. In one type of democracy, a written constitution, which it is normally very difficult to alter, formulates and at the same time petrifies the meaning of the rule of law in a manner binding upon legislative and executive alike.²

The state acts first as a protector. This is its traditional function, and classical liberal thought regards it as the only legitimate function of the state. Older British and American decisions reflect this conception in describing defence, foreign affairs police and the administration of justice as the legitimate functions of the state.³ To this may be added a limited taxing power confined to the efficient discharge of these functions. These

are the traditional spheres of state sovereignty, and consequently, it is in this field that the inequalities which detract from the rule of law in Dicey's sense are most evident, though Dicey consistently attempted to belittle them for the sake of his principle.⁴

The State functions as arbiter between different groups in society. The term 'collectivist' state is often used loosely. A social-service state need not be collectivist. It can be a parental or dictatorial state, dispensing social welfare among the citizens while forbidding them to engage in any autonomous collectivist association, like Nazi Germany or Fascist Italy or Franco's Spain. On the other hand, the state may take complete responsibility for all group activities going on within its borders, while regarding their quasi-autonomous organization as convenient and necessary from an administrative and managerial point of view.⁵

The harsh reality is that the independent India had to inherit a complex caste problem. The wise founding-fathers of our Constitution knew it well that in free India any discrimination and exploitation by any section of society against any other sections could not be justified either morally or legally. So it was realized that the Colonialism of the higher caste must be ended through the Constitution. It is in this background that it became indispensable for them to adopt a policy of compensatory discrimination as an equalizer to those who were too weak socially and

economically in the case ridden society. They were quite aware that these masses had suffered social injustice too long and been separated by the poverty curtain too strong that if peaceful transformation of the nation into an egalitarian policy were not achieved, chaos, upsurge and massive disruptions would destroy the peaceful progress which is freedom's tryst with Indian destiny.⁶ Thus, the architects of our National Charter rightly considered the reservation in the various spheres of the life as one of the potential means of reducing inequalities. Special concessions have been made to these castes in terms of reservation of seats in the legislative, educational institutions, and government services and in terms of pecuniary benefits.

The primary objective of the Constitution framers was that this backward and suppressed segment of Indian population should be emancipated at the accelerated pace to catch them up with the overall pace of national development. Unfortunately, Indian social system has for centuries perpetrated social and economic injustices by the so-called higher castes on the lower castes who have been systematically denied equal chance in the opportunities and facilities of the larger society. They have always been set apart from the mainstream of the national life and remained socially oppressed, economically condemned to live the life of penury and educationally coerced to learn the family-trade or occupation

and to take education set out for each caste and class by society. They were in a very real sense marginal men or outsiders to Indian system, they lived in communities but were not of it.⁷

The philosophy of reservation in fact envelops policies to safeguard the interests of historically disadvantaged classes of the people. It has a note of inter-generational justice a class is compensated for loss incurred by that class in earlier generation which resulted into present disadvantaged position.⁸ It aims at accomplishing the object of historical restitution or reparation to offset the systematic and cumulative deprivations suffered by the lower castes in the past.⁹ Though it entails a systematic departure from the norms of equality, i.e. merit, yet there are different justifications of these departures anti-discrimination, the general welfare and historical separation.¹⁰ It is perhaps with this objective in mind that T. Chinniah, during the Constituent Assembly Debates, strongly dared to establish his claim that reservation must continue for 150 years for the strong argument that it had been the period during which opportunities had been denied to the Scheduled Castes in India.¹¹ That is why the *lex suprema* solemnly declares that the State shall take positive steps to remove or eliminate existing social inequalities by special measures and protect them from social injustices and all forms of exploitation. This is justified because unequal characteristics of human

beings are not as a result of innate superiority or inferiority but of unequal environment into which men are born and must live. If the inequality in their environment is removed or eliminated there will be greater chance to attain a stage of real and effective equality.¹²

It is quite imperative to stress and impress upon that the reservation for Scheduled Castes, Scheduled Tribes and Backward Classes in an exceptional and temporary measure designed to be used for the purpose of mitigation of the inequalities between communities. It is at all a device to consolidate and protect a group's separate integrity.¹³ The period of reservation has been repeatedly extended five times but unfortunately still it is being felt that the inequalities, social, political and economic have not yet been removed and that they need this reservation for some time more so that their conditions are ameliorated and they are enabled to come on par with the rest of the nation. The truth remains that even today the lower layers of the weaker sections of people are where they were two centuries ago baring a few have monopolized all the benefits designed for the weaker sections of the society. The general opinion is that the benefits of reservation policy by and large have been snatched away by the top creamy layer of the Scheduled Castes and Scheduled Tribes and Backward Classes. Thus keeping the weakest of the

weak always weak and leaving the fortunate layers to consume the whole booty.

In this conspectus, it is developing towards social disequilibria instead of functioning as an instrument of social engineering. The device of reservation has virtually become a tool of aggrandizement in the hands of politically dominant people, who always try to strike political bargain to retain the political privilege even at the cost of deserving. All this sad state of affairs has given birth to a new classes like pro-reservationists and anti-reservationists. The distrust between the reservationists and anti-reservationists will certainly have serious repercussions and ramifications on our social structure and fabric which is already pregnant with many other serious problems and issues. Therefore it is incumbent upon to examine the impact of reservation policy on the weaker sections of the Indian society and see whether these poor brethren have really reaped the benefits of the reservations mechanism in the light of Constitutional philosophy, which envisioned an egalitarian society of preambulatory concept thereof.

Therefore, the researcher has undertaken the present study with the objective to see that to what extent the beneficiaries of reservation policy have been benefited in the light of the Constitutional commitment and guaranties therefor. An attempt has been made in the present study to

assess the impact of various measures adopted for the welfare of the weaker sections of the people. It is also an endeavour to examine the political, social and economic aspects of reservation policy and its impact. Moreover, special attention has been given to see as to how far the traditional caste-system has undergone a qualitative change.

The Constitution of India in its Preamble avers two basic principles i.e. "equity" and "Social democracy", as such the policy of protective discrimination obviously is against the basic norms of the Constitution. But the framers of the Constitution as inevitable necessity in view of the past social history of India considered these contradictory provisions.

The Constitution of any country or nation is primarily made to shape and reform the society of that country. Our Constitution has also been made for this purpose, which envisages constructing a society wherein every individual is able to get his needs and maintain a uniform social standard. Every individual is treated at an equal level, their interests are protected to build themselves and provide an opportunity to participate in nation building programme. No one is left behind to achieve this aim. This is only possible when opportunities are made available to all persons without any consideration based on caste, creed, race, language or religion.

Looking at the social history of India it may not be possible to strictly adhere to these constitutional parameters. Since ages India has remained to be a society of various races, tribes, communities and caste with each group following a separate religion language or culture, a breakthrough to achieve the goal of equality is therefore, to face major challenges. Socio-religious, geographical and ethnic factors are believed to be main reasons for the formation of social stratifications. In the social working each group is identified with supersensibility of one's religion, language, culture etc., and as such develops a prejudicial approach against one another. In this process not only an integrated social development is prevented, but a feeling of inequality is generated among the people of different castes and religions.

A more sharp and sensitive feeling of inequality existed in Hindi social system ever since Hindu society came to be vertically divided into four divisions i.e. Vernas or castes. In this caste ridden social structure, each division treated the other caste with a spirit of separation. Each division alienated the other, both materially and religiously. An undying prejudicial feeling in the social relation developed with separate religious view. Since the whole society is vertically divided, the upper classes dominated the lower, and the lower most was oppressed by all the three upper castes. Not only this oppressed class was dominated but was

excluded from the social life only to be assigned the low graded menial work. This class continued to serve the upper classes and in the course of time came to be divided into two classes named as scheduled castes and scheduled tribes. They were left much behind from the society in every respect viz, educationally, socially and economically because of their total alienation from the society and denial to enjoy the facilities of life.

Along with this class another section of society became the victim of feudal way of life. It can be identified as socially and economically backward class of persons. This class was exploited at the powerful hands of the feudally ridden dominant section of the society who were big land holders or zamindars. The feudal class availed their services in the way they liked and even without paying them adequately for the services. So strong was the domination over them that they could not withstand these forces but to accept them. They were also not able to avail of any opportunity to ameliorate their social and economic conditions and thus remained backward. In this category, people of all communities and castes are included as they are the economic sufferers because of the poor economical conditions they were forced into and out of which they could never come to the standard of other economically classes.

The cumulative effect of the social stratification, the division of Hindu society into four compartments and feudalism, led to the

disintegration of Indian society to perpetuate inequality in all the spheres of social life and social relations. Moreover, British Government took advantage of this situation and rigidly enforced the sources of inequality in order to consolidate its power.

It is a social fact that the upper class constantly took advantage from a large chunk of society by exploiting them in the name of religion to serve the needs of a feudal agricultural society. They had their economic interest in maintaining the status quo by keeping them uneducated and allowing them to subsist with a limited economic resource which was starkly enough for their survival.

SELECTION OF THE AREA:

All men are created equal. In order to make the right to equality meaningful and purposeful, the Founding Fathers of the Indian Constitution made number of provisions to ameliorate the socio-economic conditions of Backward Class besides the Schedule Castes and Scheduled Tribes so as to bring them to a level comparable with the advanced sections of our society. The Framers of the Constitution were well aware about the miserable and apathetic living conditions of this section which has remained segregated from national and social currents and has been economically oppressed for centuries. Consequently they

resolved in the preamble to secure to all citizens justice-social, economic and political, equality of status and opportunity and to promote among them fraternity assuring the dignity of the individual.

In a caste-ridden, socially and economically unbalanced society, the doctrine of social equality ensuring socio-economic justice would be meaningful if protective discrimination in the form of reservation is given as an equalizer to those who are too weak-socially, educationally and economically. It tries to achieve equality in fact by giving preferential treatment to these classes, so that they join the main stream of national life. This is a policy devised for social reconstruction and to build a casteless and classless society and seeks the elimination of the existing inequalities by positive measures. It is a strategy developed as an aggressive response to the pervasive disparities of status and opportunity among Indian citizens.

The undignified social status and sub human living conditions leave an indelible impression that their forlorn hopes for equality in every sphere of life are only a myth rather a reality. It is verily believed, rightly too, that the one and only peerless way and indeed a most important and promising way to achieve the equal status and equal opportunity is only by means of Constitutional justice so that all the citizens of this country

irrespective of their religion race, caste, sex, place of birth or any of them may achieve the goal of an egalitarian society.

The Supreme Court of India has handed down a series of landmark judgements in relation to social justice by interpreting the Constitutional provisions upholding the cherished values of the Constitution and thereby had often shaped the course of the national stream of social and economic justice. Notwithstanding a catena of expository decisions with interpretive semantics the naked truth is that on stretch of light or no ray of hope of attaining the equality of status of opportunity is visible.

After the judgement of Mandal Case, providing 27% reservations in the Central Services and public sector undertaking to Other Backward Classes as per the recommendations of the Mandal Commission Report has created tension between meritarian principle and the compensatory principle (principle of redress). The recent political extension of policy of reservation at centre level for the first time to newer groups on the bases of 'Caste' has created a lot of social tension. Many castes that have been left out of this protective net have started claiming that they are in no way economically socially and educationally better than those preferred on the basis of Mandal Commission Report. In the 50 years of constitutional experience in India in the post independence era, their position has also not improved under the conditions of scarcity.

In the original draft of the Constitution of India the Article 15 did not have sub clause (4) in its scheme. It is a later insertion by the Constitution (First Amendment) Act, 1951. On the other hand clause (4) of Article 16 is an original provision of the Constitution of India. Therefore, it appears from a micro examination of both the provisions that there is a noble and solemn mandate which have been caste upon the state under Article 340 of the Constitution of India wherefrom the mandate of clause (4) has been taken and added to the Article 15 of the Constitution. But judicial establishment at the highest level has not interpreted the Article 15(4) and 16(4) in the light of Article 340 of the Constitution. Consequently, it has created a dichotomy, which still remains to be obliterated by a judicial dictum.

The package of reservations aims at removing the socio-legal disabilities of certain specified groups to facilitate their equal participation in the national mainstream, and to protect them against social injustice and exploitation. The entire mechanism of protective discrimination has been designed by Founding Fathers of our Constitution to be used as an engine of social engineering. Reservation are meant for correcting historical injustice and finally bring out equality among all castes and communities. The basic postulate is that

unprivileged is brought on at par with his fortunate fellow-brethren and then leave and then leave him alone to fend for himself.

The reservation policy requires urgent restructuring so that the downtrodden get assimilated in the national mainstream. What is required therefore; is not to scrap the policy but to make it judicious. The major thrust at the moment should be to help the downtrodden on the economic basis. The fact that the benefits of reservation for 50 years have not been able to ameliorate the lot of the SCs and STs and other Backward Classes.

An attempt has been in this work to study and analyses the Constitutional provisions relating to reservations in the light of political, social and economic conditions of the masses. There is a vast gap between judicial approach to the problem and ground realities. It has tried to examine these pronouncements in their overall context and in doing so has made certain practical suggestions to make the policy more viable, effective and result-oriented.

METHODOLOGY

The research methodology and employment thereof is an inevitable aspect of a research endeavour. The realization of hypothesis can only be attained through research methodology in systematic, scientific and pragmatic manner. Primarily, the present study is a

doctrinal research work wherefor anthropological studies, constitutional philosophy and mandate constituent assembly debates, cases Laws, Reports of Commissions, thematic contributions on the subject published in various books, magazines, newspapers and journals have extensively been consulted and discussed. Consequently, the formulations envisioned in the hypothesis have been realized.

THE PRESENTATION OF STUDY

The presentation of research study is an intellectual adumbration and accomplishment of the hypothesis. The present study has been completed in six chapter dealing with different aspects of the research topic, which have been presented as under:

The **Chapter-I** has been captioned as “**Introduction**” whereunder entire gamut of the research formulation has been introduced, cajoled and collated.

The **Chapter-II** has been designated as “**Socio-Economic Justice : Genesis and Development**”. The normative framework of justice has been visited de nova while discussing the various permutations and dialectics of justice based on social hierarchy, democratic norms and realities. It is the notion of justice in its different manifestations social, economic and political – which directs our attention to the fairness and

reasonableness of the rules, principles and standards that are the component parts of the normative edifice, formal social structure and institutional legal arrangements and their worth in terms of their contribution to human happiness and the building egalitarian societies and civilizations. Therefore, socio-economic justice and its genesis concept and development has been pondered over and analysed while taking into account the social compartmentalization in India in its various colours and connotations.

The Chapter – III has been discussed as “**Principles of Equality: Dimensions and Devices**” Primarily, equality is a polymorphous concept which carries a number of different meanings. Its reference under the instant study is transnational. It includes in its scope the equality of legal treatment, equality of political participation, equality of opportunity and equality of basic human needs and how these notions of equality have been contextualised and reflected in the Constitutional philosophy of India wherein it is still eclipsed by a social segregation which has necessitated its critical examination under the present study. Equality is a very vital principle of social justice. One of the distinctive and pervasive features of Indian society is the division into castes. Thus, independent India embraced equality as a cardinal virtue against a background of elaborate, valued and clearly perceived inequalities. Equality in action

and reality with all its concomitant notions in and under different national jurisdictions and organizations of multilateral character has been put to test in this chapter.

The Chapter –IV has been pursued as “Socio-Political Justice to the Weaker Classes” whereunder the object of justice in a land of social hierarchy like India have been examined. The main object of the framers of the Constitution was to ensure social, educational, economic and political equality amongst the peoples. An equitable social order through the rule of law securing to We, the People of India socio-political justice by an inter play of fundamental rights and the directive principles of state policy has been analysed in the instant chapter in the light of historical retrospect and post modern developments *inter-alia* constitutional dicta of reservation mechanism which has moved political democracy to social democracy. Socio-Political justice to the weaker section of the people and empowerment thereof through reservation of constituencies with all its ramifications have been examined in an era of political sabre-rattling

The Chapter – V has been delineated as “Socio-Economic Policies And Constitutional Wisdom of Non-Discrimination” whereunder constitutional imperatives of non-discriminations viz-a-viz socio-economic policies pursued by the governmental establishment have been examined. Equality conceives that all who are alike in the eyes of

the law be treated in a fashion determined by law. The validity of a law is made subject to the requirement that equal persons and equality situations must be treated equally or at least similarly if they are in fact equal or similar under the prevalent standards of justice. Thus, present chapter deals with Articles 15(4) and 16 (4) in the light of contemporary social metamorphosis dictated by a movement from equalitarianism to egalitarianism. The implementation of constitutional wisdom of non-discrimination through socio-economic policies formulated by the governments while taking into consideration all lego-historical dimensions has been elaborately examined.

The Chapter – VI has been evolved as “*Philosophy And Wisdom of Protective Discrimination Under the Constitution VIZ –A-VIZ Judicial Dicta*” whereunder the concept of protective discrimination based on classification for preferential treatment and emerging jurisprudence thereon have been analysed, examined and evaluated. The concept of creamy layer has given a new dimension to the entire philosophy of compensatory jurisprudence because it is the identification and determination of backward classes, scheduled caste and scheduled tribes and backwardness which have impelled the human wisdom to find true happiness wedded to a welfare state. The reservation and its continuation is *res nova* and therefore requires pragmatization in a nation-

state which claims equality, social justice and human rights. The whole philosophy of and wisdom of protective discrimination are based upon social justice which seeks to promote equality of opportunity various walks of life. This chapter deals with concept of protective discrimination which in itself highlights the causes of backwardness and need of its elimination. The question of identification of backward classes of citizens other than Scheduled Caste and Scheduled Tribes led to divergent judicial approaches since the expression “backward class” has not been defined in the Constitution. Even the judicial journey under taken from Balaji to Mandal – II has not been adequately sufficient to eliminate these perennial cleavages in the socio-political set-up of the country. In this conspectus, an attempt has been made to address these issues in this chapter in a cogent, convincing and conceived manner.

The “Conclusion and Suggestions have discussed and evaluated the entire constitutional and governmental wherewithal in the realization of an utopian state. Some plausible and pragmatic suggestions have been put forward to improve upon the existing conditions of the disadvantaged groups and sections of the people.

NOTES AND REFERENCES

1. W.Friedmann, "Law in Changing Society," Sweet & Maxwell Ltd. U.K. 1972, p.503
2. Ibid
3. Ohio v. Helvering, 292 U.S. 360 (1934); Coomber v. Berks Justices (1883) 9 App. Cas.61.
4. Supra note 1.
5. Supra note 1.
6. V. R. Krishna Iyer, quoted in Anirudh, Social Engineering and Constitutional Protection of Weaker Sections in India (1980), p. 9
7. T.K. Oomen, "Scheduled Castes and Scheduled Tribes," in S.C> Dube (Edited). India Since Independence : Social Repair on India (1977), p. 155
8. Marc Galanter, Competing Equalities : Law and the Backward Classes in India (984), p. 1
9. Ibid
10. Anirudh Prasad, Reservation Policy and Practice in India : A Means to an End (1991) p. 39
11. C.A.D. Vol. VII, p. 690
12. Anthony Lester and Geoffery Bindmain, Race and Law : Law and Society (1972), p. 74
13. Supra note 6.

CHAPTER - II

SOCIO-ECONOMIC JUSTICE : GENESIS AND DEVELOPMENT

A. AN OVERVIEW:

It is a universally acknowledged and historically established fact that in a democratic system of governance, the political freedom is of no avail and becomes meaningless in the absence of full-fledged and complete socio-economic freedom. The socio-economic freedom, in nutshell, seeks to provide the common people, especially people belonging to socially and economically backward class including religious minorities, access to the economic justice as well as active participation with their reserved share in the national social upliftment scheme run through government and non-government organizations. The instant political philosophy of the national leaders finds expression in the preamble of the constitution, which is of course national solemn legal document. The preambulatory message of socio-economic justice has been translated into several Articles dealing with the different facet in Part III and IV of the Constitution containing, respectively, fundamental rights of the citizens and directive principles of state policy. Granville Austin' has described both of them as conscience of our Constitution. It can well be said that the directive principles prescribe the goal to be attained and fundamental rights lay down the means by which that goal is to be achieved. In fact one cannot exist without the other. The state is required to take positive action by protecting the minimum of individual's rights and by reducing the number of those whose share of utilities of life fall below the minimum

level. This objective could be achieved by making improvement of socio-economic conditions of the weaker sections of the society.

The Directive Principles of State Policies aims to at bringing about a non-violent socio economic and political uprising. Under the Scheme of Directive Principles, the Indian Constitution wish to introduce broad based structural change in our society. The Constitution visualizes that society as a whole and every member of the society should have enough and equal opportunity of participation in the governance of the country in a true democratic form of the government.

B. THE CONCEPT OF JUSTICE – SOCIAL, POLITICAL AND ECONOMIC

The idea of socio-economic justice finds full expression in the fundamental provisions of draft constitution in the name of fundamental rights and directive principles jointly. The concept of social and economic justice in the constitution originated by the thought that political freedom is impaired by the absence of social justice and without providing full protection to the social and economic rights, the constitutional guarantees known as classical individual liberties, such as rights to equality, liberty of person and freedom of speech and association, may lose much of their value. This close association between political freedom and social justice has become a common concept since the French Revolution. However, this concept is not new to the Indian social evolution. In the fourth century Kautilya's Arthshastra mentioned a specific injunction to the effect that "the King shall provide the orphan, the dying the infirm, the afflicted socially

was guaranteed to everyone and of all occupations; maintenance of health and fitness for work of all citizens; securing living wage for every worker. The report was presented to the British but nothing concrete came out of the Report.

The historic session of Lahore 1929, of which Jawahar Lal Nehru was made the president passed a resolution declaring Purana Swaraj to be the Congress objective. The report of the committee listed a few political rights indicating thereby the general natural rights to be incorporated in the constitution. It emphasized the theme of socio-economic reconstruction when it declared:

“The great poverty and misery of the Indian people are due to not only foreign exploitation in India but also due to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order, therefore, to remove this poverty and misery and to ameliorate the economic condition of mass. It is essential to make revolutionary changes in the present economic and social structure of society and to remove gross inequalities.”³

The Indian constitution is the supreme law of land that has provided us a sovereign, Democratic Republic, Committed to the concept of a welfare state based on egalitarian values in which people are masters through their representatives in parliament responsible for democratic government in the country. The draft Constitution was the result of the collective efforts of galaxy of great leaders, legal scholars and luminaries in the Constituent Assembly such as Jawahar Lal Nehru, Rajendra Prasad, Sardar Patel. B.R. Ambedkar, Sir Alladi

Krishnaswami Ayyer etc. who successfully created the document under the stewardship of Dr. B.R. Ambedkar as Chairman of drafting Committee. The law of the land was finally adopted on 26th November 1949 and came into force on 26th the January 1950 which marked the beginning of new era in the history of India. Handing over the historic document Dr. B.R. Ambedkar said.”

“If we wish to maintain democracy not merely inform, but also in fact, what we must do ? ...we must hold fast to constitutional methods of achieving our socio-economic objectives where constitutional methods are open, there can be no justification for unconstitutional methods. These methods are nothing but the grammar of anarchy, and sooner we abandon, the better for us.”⁴

In the year 1946 a Constituent Assembly was constituted which set-up a draft committee⁵ to prepare draft of a constitution for the emerging free India. On the meeting of the Constituent Assembly, the aim to bring about social change and to reshape the society on the principal of socio-economic equality, found its manifestation in objective Resolution moved by Pandit Jawahar Lal Nehru which said:

“Where in shall be guaranteed and secured to all the people of India Justice; social, economic political, equality of status of opportunity before the law, freedom of thought expression, belief, faith, worship, vocation and action subject to law and public morality.”⁶

The Objective Resolution laid down the foundation of India's Constitution, which purported to be an instrument of social change.

The framers of the Constitution declared India as a Sovereign Democratic Republic⁷ and the Preamble secures to all the citizens:

JUSTICE- social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the (unity and integrity of the nation).

The first objective of the Constitution as stated in the Preamble is to secure justice, social, economic, and political, the basis of which is the Rule of Law. The second is defined as 'Liberty' --- Liberty of thought, expression, belief faith and worship. This is the basis of secular democracy. The third objective is of 'equality of status and opportunity' based on Gandhian ideology and socialism, who persistently opposed untouchability and caste system. Although Gandhiji did not join. Constituent Assembly but his basic teachings like the abolition of untouchability, equality of women, the importance of village panchayats and rural cottage industry were incorporated in the constitution. The fourth objective is "Fraternity assuring the dignity of the individual and the unity and integrity of the nation" which is again an embodiment of Gandhian idealism.

The Preamble is the key that reflects the principle and spirit of the whole Constitution. The provisions enacted in the Constitution are to secure the objects enshrined in the Preamble i.e. to achieve the goal of equality : Social equality, economic equality, equality in opportunities, equality in status and human dignity. There are,

therefore, a number of Articles⁸ enacted in the chapters of Fundamental Rights and Directive Principles of State Policy which secure to every citizen social, economic and political equality, liberty of thought, expression, belief, faith and worship. In order to consolidate 'equality' some of the anti-social practices such as 'untouchability' was abolished⁹ and its practice in any form is forbidden and prohibited a colonial and feudal practice the conferment of any title of personal distinction except a military or academic distinction.¹⁰ Thus, the Constitution treats every individual equal, places religion on equal footing and prevents discrimination both in public and private sectors. The Constitution can, therefore, be said to have been framed on the principle of equality of status and opportunity on the foundation of secular and democratic theories. The founding fathers set up new ideals before us which are inscribed in our Constitution. Since the enforcement¹¹ of our constitution we have been in one way or the other deeply interested in preparing ourselves for a new India with its aim of economic and cultural progress. Looking at the social history of India we find that there has always been a sharp consciousness of caste, race, colour, in different kinds of human relationship. Moreover, the entire development of the social structure of Indian society seems to have grown out of the initial basis of caste. Caste feeling divided the Indian society into caste groups and assumed dominant role in their respective religious groups based on their respective ideology. Caste acquired a unique feature of Hindu social system. In the caste system people are ascribed group membership and status by birth rather than by their individual characteristics. Caste system is a close system and the boundaries of caste are maintained and defined as far as possible --- Caste system indicates social stratification and pluralism. Ghurye observes that "In the caste bound society the amount of community

feeling must have been restricted and that citizens owed moral allegiances to their caste first, rather than to the community as a whole.¹² This not only retards social development but altogether ignores the healthy social standard of justice, fair play, equity and universal brotherhood. The aims of the Constitution are, therefore, in constant conflict with the social facts putting strong resistance in the way of equality, unity and national integration.

Therefore aspect of caste system which is spiritually oriented and the whole Hindu society is linked with this spiritual dimension i.e. the vertical divisions¹³ of society into four varnas or castes. The social working of which is identified to be vertically processed downward dominated and governed by the top superiors. In this process an integrated social development prevented and the base of this structure crumbled under the increasing domination of the upper classes. The lower strata was not only dominated but religiously excluded from the social life and was denied the necessities which deserve to be called the basic needs of life. This class in our social system is designated as scheduled castes and scheduled tribe. Because of total alienation they remained socially, educationally and economically much behind the rest of the society.

Besides these classes, who are social sufferers for historical and spiritual reasons there is a large chunk in our society who, because of poverty could not catch the common social standard. Moreover, they were also denied the educational and economic opportunities and consequently a sizeable majority of Indian population has remained backward since many hundred years. They are socially and educationally backward too. This led to perpetuate social and economic

inequality and exploitation. For this section it was not possible withstand the forces exception of willfully accept the domination of upper classes of the society.

The framers of the Constitution were well aware of this historical social background that perpetuated inequality had prevented an integrated social development. To bring them to the level of the society and to eradicate these social evils and provide opportunities of growth and development to every citizens and section of society besides their adoption of the principles of equality, justice and fraternity in the Preamble of the Constitution as its main objects they had strong conviction that the principle of equality would not be able to ensure the removal of inequality unless these classes of people are provided extra facilities even at the cost of equality, and as such special provisions were incorporated in the Constitution which cover almost all the area where these classes have to be protected and given special help. Under the provisions enacted in the Constitution, preferential treatment has been allowed.

Article 15(4) and 16(4) of the Constitution are the provisions under which protective measures can be adopted in order to improve the educational and economic conditions of scheduled caste and tribe and other backward classes and as such policy of reservation of 'seats' and posts in educational and government services occupies an important place. The main object of reservation is to bring about a social change through a process of reducing educational and economic disparities. But it has been realized that there are, no doubt enormous difficulties in carrying on the policy of 'reservation' and particularly on *the extension of the benefits of reservation to other besides schedule*

castes and scheduled tribes. On this issue several cases of anti-reservation violence were reported from different parts of India mainly from Bihar and Gujarat. These instances of violence and unrest show that the implementation of the constitutional theory to do away with the inequality and injustice and also to provide legal means for the rapid upliftment of the depressed class of society came into direct conflict with the deeply entrenched norms of society. These are the root causes of social problems. How and to what extent the policy of reservation permitted under the Constitution has attained success in implementation of the constitutional provisions has been analysed through the court decisions and the recommendations of the Commissions find discussion in the pages to follow.

C. SOCIAL COMPARTMENTLISATION IN INDIA

Indian society is characterized by its long age stratification. Stratification emerges from different social values and survives so long the social values are not changed. Each strata can identified by its rigid social and religious practices. The rigidity in such practices is responsible for the continuance of social structure and external conflict. But in spite of it, Indian society is continuing without any obvious or vigorous conflict and is therefore very unique in these two respects – social diversities and continuity. The Constitution of India, after the Independence, has been framed on the line of modern political and social theories. It is designed to tie them all as one nation and thwarts regionalism as well as check the disintegrating forces, resulting from diversity based on language, race, religion and the like.

The Constitutional concept of unity and integrity is embodied in secularism, equality, social justice and equality of status in every sphere of human development and realisation therefore is jettisoned by a welter of factors which are responsible for the formation of social stratification. The purpose is to evaluate the dominating social forces and realities. These forces are currently the disturbing factors in the corporate life of Indian people, which seek to retard the constitutional growth and functioning.

(i). Socio – Religious Permutation

Indian society, in the strict sense, is not, and has never been, one society. The people are divided not only in so many religious communities, Hindus, Muslims, Sikhs, Christians, Parsis and others, each following its own religious code of conduct, but their social laws and customs are also different from each other. Moreover, among the Hindus, Muslim and Christians, there are further sub-divisions into various sections, each following particular different patterns of religious norms and social customs. Religious views and social customs are obviously the main elements for identifications of the Indian people. Therefore, when an attempt is made to review the social life of the Indian people, religious aspect cannot be excluded. Religion, although deals with man's relation to his God but it affects almost all the faculties of man. It puts its imprints upon the laws, philosophy, outlook, art, architecture, and literary activities of a man upon almost everything that he does.

A brief account of important religions and their numerical order and also their distribution in India are given as under:

The bulk of India's population consists of Hindus i.e. 83 per cent.¹⁴ The Supreme Court of India in *Yagnapurushadasi Vs Muldas*,¹⁵ observed;

“We find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, Hindu religion does not claim anyone Prophet, it does not worship any one God, it does not subscribe to pay one dogma, it does not believe in any one philosophic concept, it does not follow any one set of religious rites or performances, in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.”

Hinduism has neither evolved at one instance nor by one Prophet. There is no founder of Hinduism. Hindu religion is sometimes described as ‘Sanatan’ that is without a beginning. However, Hinduism, grew as a concept of Dharma (religion) and since its inception that is, from ancient culture of Dravidian to the present time, has been subjected to reform from time to time. Great and spiritual personalities like Mahavira, Chaitanya, Kabir, Tulsidas, Raja Ram Mohan Rai, Vivekananda, Swami Dayananda appeared and devoted their lives to bring about reforms. Hindu religion has developed in various stages.

The first stage was of Vedic periods which being about 1500 BC.¹⁶ During this period four Vedas were compiled which are (i) Rigveda, (ii) Samveda, (iii) Yajurveda, and (iv) Atharveda: They were all the compilation of Mantaras rendered by Rishis and religious

scholars of ancient India. The oldest and the most important of the Vedas is the Rigveda. It embodies socio-religious rules on which the Hindu religion is based.

The second period is known as the epic or puranic period. It was during this period between 600 BC and 200 AD that the great epics of Hindus, the Mahabharata and the Ramayana, were composed by Ved Vyas and Rishi Valmiki respectively. It was during this time that the two new schools of religious thoughts i.e. Buddhism and Jainism arose in north-eastern India. It is in this period that Hindu philosophy thoughts were thoroughly studied and commentaries on the Vedas, known as the Upanishads, were written. There are almost two hundred Upanishads. The Bhagwat Gita, considered to be the greatest piece of Hindu religious writing, is a chapter in the story of the Mahabharata.

According to Rigveda, which is the oldest of all Vedas and is a Code of socio-religious conduct, Hindus are divided into four Varanas or four castes – Brahmans, Kshatriyas, Vaishyas and Shudras, the authority on which this view rests is the statement in Purushasukta in the Rigveda that the Brahman emerged from the head, the Kshatriya from the arms, the Vaishya from the waist and shudras from the feet of God.¹⁷ This division led to the formation of a distinct stratification of Hindus, Brahman being on the top and shudras at the bottom. Even since this division came to be recognized, it is continuing as a basic concept of Hindu religion.

Verna or caste is the distinguishing feature of Hindu religion and its impact on the society has ever been felt. The sense of caste superiority created barriers, separation and inequality among the Hindu

community. With the division based on religious concept, the social and professional diversities automatically came to be operative in the Hindu society. Lower class Hindus were being subjugated and denied the rights and facilities of life and were treated almost as inhuman beings. On the social plans they were kept away from the mainstream only to be considered as untouchables. The Constitution of India no doubt embodies provisions to ameliorate their social, educational and economic conditions but because of the attitude of the high caste Hindus, the lower class people are not able to themselves of those provisions and feel increasingly subjugated and harassed from time to time.

Muslim, the second largest community account for 61.42 million population in 1971. they represented 11.20 per cent of the total population. The Union Territory of Laccadive, Minicoy and Amindive Islands (94.37) and Jammu and Kashmir (65.85) were predominantly Muslim populated areas. The States where the proportion of Muslim exceeds national average of 11.21 are Assam 24.56, West Bengal 20.46 Kerala 19.50, Uttar Pradesh 15.48 and Bihar 13.48, Sikkim has the lowest proportion of the community.¹⁸

Christianity influenced Hinduism and through their missionary work were able to convert large number of the low caste Hindus to Christianity. Like their co-religionist i.e. Hindu and Muslims, they are also divided into many denominations, Roman Catholic, Syrian, and protestants. Christians come third in order of numerical strength with 14.23 million or 2.60 per cent of the total population of the country. The Union Territory of Mizoram and Nagaland show high proportion of the Christian population in the country – 86.90 and 56.76

respectively. Meghalaya has 46.98 per cent followed by Goa, Daman and Diu with 31.77 per cent and Andaman and Nicobar Islands 26.35 per cent, Manipur 26.03 per cent, Kerala 21.05 per cent, Pondicherry 8.76 per cent, Tamil Nadu 5.75 per cent, Andhra Pradesh 4.19 per cent and Assam 2.61 per cent, indicate appreciable proportion of the Christians.¹⁹

The fourth major religion in the country is Sikhism, constituting 10.38 million and forms 1.89 per cent of the total population. The high concentration of Sikhs is in Punjab 60.22 and Chandigarh 24.45. The Union Territory of Delhi 7.16 and Haryana 6.29, Jammu & Kashmir 2.29, Rajasthan 1.33 and Himachal Pradesh 1.30 also have sizable Sikh population.²⁰

Sikhism was founded by Guru Nanak, who was born near Lahore in 1469 A.D.²¹ He prescribed no caste rules or ceremonial observances and indeed condemned them as unnecessary and even harmful. Guru Nanak died in 1538 A.D.²² His teachings were carried on by ten Gurus²³ in succession. Guru Gobind Singh (1675-1708 A.D.)²⁴ was the tenth and the last Guru, who is regarded as the founder of modern Sikhism.

Out of the eight different religions that are practiced in India, Buddhism is one. Although Buddhism originated in India there are now very few followers of this religion. The followers of this religion outside India are large in number. In India there are only 3.87 million Buddhists,²⁵ majority of whom are mostly converts from the low castes Hindus called as neo-Buddhist. To these neo-Buddhists their religion

provides them refuge from social subjugation and a chance to avoid friction in adjustment with their co-religionists.

As a matter of fact, Lord Buddha did not start an altogether new religion, he only tried to reform the existing one.²⁶ He gave a new and simple definition of Vedic religion which could be understood and followed by all people. Vedic religion had made the Hindu religion very complicated by various rituals, rites, yajanas and caste system. The teaching of Buddha cut across the barriers of castes, creed and status. The Brahmins and Sramanas were treated alike by the Buddha.²⁷ He taught to do good to fellow-beings and practice compassion. The teaching of Buddha in a sense is the forerunner of the modern concept of human equality, social justice and universal brotherhood. Buddhism rejected the authority of Vedas, and broke away from the caste system. The Buddha stressed that true Brahmin is not one who is born in the Brahmin family but he who behaves as Brahmin. "The station of Brahmin, he says, is not due to birth but to abhorrence of the world and its pleasure". Buddha preached the oneness of mankind and there was no ban against the admission of any class or castes in the Buddhist fraternity.²⁸

The preaching of Buddha, which had started around 598 BC, which continued for seven hundred years, was accepted as a new faith more by the people abroad than in India. There are the followers of Buddhism in greater number in China, Sri Lanka, Burma and Tibet in comparison to India. In India Buddhist were only 3.87 million in 1971 and ranked fifth in the country, constituting 0.71 per cent of the total population, Maharashtra has over 86 per cent of the total Buddhist population of the country, though they constitute only 6.74 per cent of

the state population.²⁹ They are mostly converts from the lower castes or untouchables in Hindus.

There are other religions as well but their adherents are few in number such as Zoroastrians or Parsis as they are known in India. The central feature of their religion is worship of fire which is regarded as the earthly symbol of the great deity. The bulk of them are found in Bombay. Their importance is due to the fact that they are one of the most prosperous people in the country and control some of the biggest industrial enterprises. There are some Jews also but their numerical strength is still less. Jews are also mostly found in Bombay or in Cochin.

The aforesaid discussion shows that India is a land of many religions. On the basis of religious and social practices distinct stratification is made and each section defends its religious freedom, its cultural and social values. As a result of this there are wide gaps between one section of people and the other. One section excludes the other on the social and religious lane. This feature was further highlighted by feudal way of life and strengthened by Britishers for their won administrative advantages and consolidating their rule. This situation fostered narrow considerations and precluded the Indians to form an integrated society or develop a sense of nationhood. Consequently, parochialism, regionalism and communalism were entrenched in the Indian people. To overcome all these problems the constitution endeavors to diminish the affect of divisive forces and also gives recognition to past religious heritage. The Constitution provides a well balanced solution by retaining religious, social and cultural heritage and by doing away the past wrongs done by religious or social

practices. The Constitution attempts to solve the problems by opting a way which infuses the spirit of secularism, and tolerance. It is designed to bring unity in diversity.

(ii) Lingua-Cultural Permutation

Looking into the history of India, we find that India came into contact with various peoples and cultures. The social cultural and linguistic life of India shows that it has always been multi-lingual. Its impact has been so great that India virtually came to be divided in linguistic basis. The impact of language and its consequences are revealed further when a constitutional study is made with reference to its origin, impact and the attitude of people towards other languages.

The language and dialects, which are spoken by Indians, are numerous and it is very difficult to count them. However, Grierson, in his Linguistic Survey of India, says that approximately 872 different language and dialects are spoken in India.³⁰ He records 179 languages as distinct from dialects.³¹ These languages and dialects have grown through the ages along with religion and culture, and in the course of their development they have built up synoptic spirit and boundaries. The State Re-Organisation Committee appointed in 1956, pointed out in its report that:

“One of the major facts of India’s political evolution during the last hundred years has been the growth of regional languages. They have, during this period, developed into rich and powerful vehicles of expression creating a sense of unity among those speaking them. In view of the fact that these languages are spoken in well-

defined areas, often with historical background, the demand for unification of such areas to form separate states has gained momentum.³²

Looking into the literature of medieval history, we find that scholars have described the existence of many languages. Abul Fazal, writes in *Ain-e-Akbari* :

“Throughout the wide extent of Hindustan, many are dialects that are spoken, and the diversities of those that do not exclude a common inter-intelligibility, are innumerable. Those forms of speech that are not understood one of another are the dialects of Delhi (Western Hindu), Bengal (Bengali), Multan (Lahnada), Marwar (Western Rajasthan), Gujrat (Gujrati), Telengana (Telgu), Marahatta (Maratti), Krnataka (Kenarese), Sind (Sindhi), Afghan of Shal (Pasto), Beluchistan (Belochi), and Kashmir (Kashmiri).³³

Except Tamil, he gives a complete catalogue of Indian languages, which are all confined to regions and differ from one another. Although there was no obvious conflict among them on linguistic basis, they were identified by their region and language. There has always been diversity in Indian people from the remote past. Being regionally and sentimentally attached to their language and dialects, a sense of superiority on the basis of language prevailed among them, and instances are numerous when language was the source of conflict.

With the development of democratic trends in India after independence efforts were made through the Constitution to replace ‘old values by new ones’. The existence of different language and

cultures was recognized to the extent that various provisions,³⁴ under which all the languages and cultures could be safeguarded, were enacted in the Constitution. The primary object of these provisions was to bring unity in the nation by guaranteeing cultural and educational rights to the minorities and, on the other hand, linguistic autonomy to the States by recognizing 15 languages specified in the Eighth Schedule.³⁵ Under these provisions of the Constitution these languages are treated equally. Provisions have also been made for the preservation and promotion of language and culture of the Indian population as a whole on the principle of equality.

But the diversity on the basis of language and culture continues and people of some states have demanded separate state on linguistic basis. Such trends, disastrous as they are to the spirit of the Constitution and the concept of national unity have been discouraged. As the 'caste', religion and culture are the sources of friction, so is the case with language. The Constitution, therefore, in various provisions of Fundamental Rights, lays down that 'on the basis of language no person should be discriminated. A principle of equality, economic justice and social status of all persons have been given more importance over any other practice or sentiments sustained by Indian people from the remote past by reinterpreting the constitutional provisions in the context of modern values and aims.

Cultural characteristic is also an important factor to identify Indian people. The history of Indian civilization bears testimony to the fact that the cultural, moral and social life and social organization were all deeply influenced by religion in ancient past. Culture of any society or nation is a key-note of its level of civilization and thoughts.

It is an image of its various characteristic features. Since the Indian population is an amalgam of various races and tribes, both native and foreign, present different way of life, spiritual belief, thought, language and habits and in the course of time all developed their own culture and each became a complex fabric of Indian culture. However, sharp cultural diversities are distinctly visible among Indians. Adherence to different cultures, language and way of life is not only sentimental but it acts as a source of friction in social relation.

The history of culture of India begins with the culture of Harappan Civilization.³⁶ Although recent field researches, both in India and Pakistan have pushed back the antiquity of Indian Civilization beyond the recorded cultural history, still it remains a fact that Harappan (Indus Valley Civilization) is the landmark of Indian Culture.³⁷ In spite of the long gap from Harappan days to this day, almost all essential elements of that mighty culture are still visible in one way or the other in defused form in the present Indian society.³⁸ The Indus Valley Society was cosmopolitan as deduced from the anthropological researches that not less than four different faces can be identified in the region – the Proto Austroloid, Mongolism, Medeteranian and Alpine. All these races were different in physical characters and they all would have contributed in their own way to the homogeneous growth of that culture and religion.³⁹

The religion of Harappan people included worship of mother goddess as seen at Mohanjodaro and Harappa and some sort of worship as revealed at kalibangan⁴⁰ and phallus worship as well as that of trees and snakes in various parts of this country.⁴¹ From the point of view of contribution of each individual race to the complex fabric of Indian

culture, a clear stratification and level of civilization is found in the Indian society. It is generally presumed that the race which came first had less opportunity to improve its culture because of the domination of the race that followed. With the coming of new races, one after the other, the level of culture and civilization improve. From this point of view the race that came last is better placed, than those who came first. But raciologists claim that culture differences are determined by differential racial heredity and equipment.

The superior race can create superior culture, have superior wishes and can be said to be creators of civilization⁴² for example, the Dravidians who are regarded by historians as the first inheritors of land build up a strong culture which was replaced by Aryans who followed them. A drastic cultural fusion took place and the Aryans superimposed their culture through Vedas so as to maintain their cultural superiority over other races.⁴³ We might say that the first great cultural synthesis and fusion took place between the coming Aryans and the Dravidians and out of this synthesis and fusion grew the Indian culture which has distinctive element of both.

This brief description of the development of Indian culture shows that Indian culture today is a mosaic of different cultures. This led to cultural diversity, a sense of superiority, separation, and regionalism in the minds of Indian people. This aspect of cultural affinity and sensitivity come in the way of constitutional spirit, when it tries to bring the Indian into a close unity. The Constitution does not envisage to destroy different cultures but offers a procedure to narrow down the gaps among the people of different cultures. The aim is to generate a sense of cohesion and closeness among the Indian people. A

historical review of Indian cultures and social life indicates that this problem of cultural disparity and social disintegration prompted various religious philosophers and social reformers to take up the task of uniting the Indians and abolishing the social distinction. Their attempts, however, could not bring positive results because of the vigorous impact of early socio-religious practices which exercise their influence over to this day. The Constitution of India undertakes this massive task to uproot such socio-religious practices which apart from constantly disturbing the social life of our country create great problems for the states to carry on socio-economic programmes on the principle of equality as embodied in Article 14 of our Constitution. The role of judiciary in this regard has been very significant by making quick responses to such problems and by narrowing down the cultural disparity and social prejudices.

(iii) Ethno-Racial Permutation

Indian population is racially very mixed. Since time immemorial numerous races have found their way into the subcontinent through gaps in the North-Western ranges of Himalayas. The country was large enough to absorb all those who entered her gate. Anthropologists and sociologists undertook the determination of racial elements in the India's population and classification. The first attempt of this kind was made by Sir Herbert Risley, whose work was published in 1882.⁴⁴ He distinguishes seven distinct types of racial elements in India, based upon the considerations of language, history, geography as well as purely genetic factors. Risley's classification of Indian races under seven heads.⁴⁵ was – (1) Dravidian (2) Mongoloid, (3) Mongolo-

Dravidian, (4) Arya Dravidian, (5) Deytho-Dravidian, (6) Indo-Aryan, and (7) Turko-Dravidian.

The work of Rislely was further carried on by J.H. Hutton⁴⁶ under the directorship of Dr. Biraja S. Guha,⁴⁷ Hutton developed a classification that postulated a series of invasion of Indian and categorized Indian races under four heads i.e. (1) Negrito, (2) Australoid, (3) Australoids (traces), (4) Mongoloids Negrito (traces), and (5) Alpines.⁴⁸

According to Guha the population of India consists of six main races and nine sub-types which are as under,⁴⁹

1. The Negrito
2. The Proto-Austroloid
3. The Mongoloid, consisting of
 - i. Palae – Mongoloids of (a) long-headed and (b) broad-headed types
 - ii. Tibeto-Mongoloids
4. The Mediterranean, comprising—
 - i. Palae - Mediterranean
 - ii. Mediterranean, and
 - iii. the so-called oriental type
5. The Western Breachycephals, consisting of –
 - i. The Alpinoid
 - ii. The Dinaric, and
 - iii. The Armenoid
6. The Nordic

These six races with their nine sub-types are so distributed that the most primitive and earlier of them are today found in most unattractive habitat, while the later, superior and advanced races occupy the real productive heartland of the country. Those elements of the older and primitive races were soon subjugated by the advanced races and were being exploited by the latter. Thus, the older races came to occupy the lower rung of the society and it became the vested interest of the advance race to perpetuate the vertical stratification of the society. The socio-economic discrimination, which has been so rampant and still exists in the Indian society, is because of this racial stratification.

Thus it can be concluded that right from the dawn of the Indian proto-history, certain races who now constitute the racial and social substratum of society have been exploited and discriminated against, and social and economic justice have been denied to them. This social behaviour became rigid, moreover the western concept of democracy and social justice were alien to the Indian way of thinking. No the Constitution tries to do away with the injustice and provides a legal framework for the rapid upliftment of the depressed and exploited classes of the society.

D. DEMOCRATIC NORMS & REALITIES: A CONSTITUTIONAL PERSPECTIVE

The most famous dictum of Abraham Lincoln,⁵⁰ which embodies the principle and essential of democracy is – “A Government of the people, by the people and for the people”. It is most familiar of all the known definitions of democracy. Although, Lincoln did not originate it. He modified a definition given by Theodore Pesker, an

abolitionist preacher, who had earlier said “Democracy is a Government of all the People, by all the people, for all the people”. Lincoln dropped the word “all” from the three places.⁵¹ In a vast country like India, it would be impossible for all the people to take part in government or to hold office by turns. There cannot be direct democracy. That is why Rousseau rejected it as a system except for very tiny states. “Rousseau is adamant on the point that a representative system is not democratic, because one’s will can never be represented by another”.⁵²

Today, the people’s representatives in the name of the people and for the people must inevitably govern democracy. The people who are governed have to remain content with a small quantity or right in the shape of a vote exercised every five years. But this is not the whole parameter of the concept of democracy. Democracy, according to modern writers, means many things and its meaning is continuously assimilating modern theories and principle developing by conducting researchers into the system and practical knowledge. As McIver says, “Democracy is not a way of governing, whether by majority or otherwise but primarily a way of determining who shall govern, and broadly, to what ends”.⁵³ Democracy is way of life, and it must maintain human dignity, equality and Rule of Law. It requires strong public opinion, independence and fearlessness in the Press. When there is “independent curiosity, close inquiry”, free constructive criticism, and the Government is kept in check, democracy exists not only as a form of Government, but also as a state of society.⁵⁴

Democracy is one of the three types adopted in the formulation of a Government. The others being Monarchy and Aristocracy.

Aristotle classified modern states into three classes – Monarchies, Aristocracies, and Democracies, corresponding to the exercise of governmental power by a single person, by some definite order, a few in number, or by the majority of the people themselves either directly or through representations chosen by them.⁵⁵

Democracies are of different kinds and so the world is divided into various of its sorts i.e. direct democracy, representative democracy, Parliamentary democracy or Presidential democracy. The Great Britain, India and U.S.A represent the Parliamentary and Presidential democracies. There are other forms of democracies also like People's Democracy, Basic Democracy and Guided Democracy. The word 'democracy' has become a fashionable word and is in currency whatever be the form of Government. The Government may be a rank dictatorship or it may be plain communism but it is called a democracy.⁵⁶

A democratic state for its proper function must follow certain requirements. Among many others, following four are important in this respect – firstly, a democracy is set up by the authority of the general people to give expression to the general will or in other words democracy is a state where authority at all levels proceeds from the people and is controlled by them. It must, therefore, ensure dignity of men; equality and Rule of Law that distinguishes it from authoritarian rule. Secondly, representation should be by the best persons available though it is difficult to make a correct choice due to "Party system". Prof. Ross believes that party system of government is often destructive of the choice of the rights candidate. The choice is hardly that of the

voter who is under party discipline. Leaders of the party nominate the candidates and all members of the party must vote for them.⁵⁷

Thirdly, a free election is essential for a good government. A government is a representation of people, which is only possible through election. The responsibility of making a good government in any democracy falls on the people and that is only possible through election. Fourthly, there should be an independent authority to judge and decide election disputes as well as the exercise of the governmental powers. The doctrine of “judicial review” thus assumes significance in the democracies. Without the authority of court, free and frank elections, and also the election activities like discussions, party meetings and propaganda cannot make much headway.

The opposition, which is formed by a party defeated at the elections to secure the required majority in order to form a government plays very important role in keeping the ruling party within its election manifesto, as well as, to govern the state according to the rule of law. A responsible opposition has always-corrective role to play in democratic system. With all these good aspects of democracy there are certain chances and reasons for the failure of democracy. Many causes for the breakdown of democracy had been noted in recent years. The few are noted as under:

Concentration of power in a particular organ of the state is a great danger to democracy. In representative democracies of power gets centralized in the representative body then because of the size of the body it becomes unwieldy. Power is best exercised when a single person makes the decision and this is the reason why in the United

State the entire democratic process is geared to select a President, who to four years guides the nation and practically makes all the vital decisions.

The concentration of power results into autocracy and whatever be the form of government, if carries to excess immediately provokes a reaction. Acton⁵⁸ says that monarchy hardens into despotism, aristocracy contracts into oligarchy and democracy expands into supremacy of numbers. When government becomes intolerant of criticism they begin to move away from the true democratic instincts. If they manage to deliver the goods all goes well, but when they cease to do this, clichés about liberty, freedom, equally opportunity and equal rights begin to be heard and appear attractive.⁵⁹

Legislation carried to excess is yet another danger, for it makes the common man desperate.⁶⁰ The recent example of excessive legislation in 1976-77 makes it obvious when Indian Parliament introduced many amendments in the Constitution and enacted laws aimed at curbing the rights and liberties of individual. The Parliament was in a sense involved in satisfying the needs of the government without giving any heed to democratic principles or traditions. This resulted into mass provocation and the then Congress Government led by Late Mrs. Indira Gandhi, was totally defeated by Janata Party at the hustings in 1977.

Democracy is a government of compromise and survives on everyday consciousness. This is a sort of contract for a fixed term between the peoples and political parties to govern them. Any political party having definite political programme and standing is entitled to

seek the consent of the people. Abraham Lincoln gave the right clue when he said that no man is good enough to govern another without the other's consent.⁶¹ The Government is the manifestation of consent obtained by a party in majority. Democracy, thus, is a total discipline and a political equation between public and government. The government always endeavors for the general welfare, safeguard liberty and help create conditions for the social, educational and religious freedoms, along with the other legitimate demands. If the Government is not run for the benefit of common man and he loses faith in it, the democracy is deemed to be a failure. Democracy, thus, is the resultant of manifold and diverse activities. Functionally, democracy is a proximate solution for many a difficult problems. The principle of democracy includes these basic concepts. However, the foremost essential value of democracy is the recognition of individual personality whose development potentials are safeguarded as individual rights.⁶² These values and the principles of democracy are the foundation upon which the modern constitutions operate.

The democratic system of government does not have very deep roots in Asia. Though it is claimed that in Ancient India, and elsewhere there were the beginning of democratic institutions and ideas.⁶³ The Government of States by the elected representatives of the people is a modern institution, which developed mainly in Europe and America. Besides, it is only in our time that democracy has come to include the totality of the people in the machinery of government and in the exercise of power. The great European State themselves reached that stage of full democracy only by slow and measured steps but in Asia the prestige of this form of government is so great, and the democratic idea is so much cherished that following the victory of the democratic

nation over Fascism, every country which became newly independent accepted at once the principle of a full-fledged democracy.

India readily accepted the democratic principle as the basis of governmental functions on acquiring independence in 1947. Before independence the Britishers ruled India. Besides the reign of Britishers of over two hundred years the Moghul rulers governed India for about seven hundred years. During this long period the Indian people lived in an atmosphere devoid of any thought or action about the government much less about the concept of Rule of Law. The whole society was divided on the basis of social values and status, which led to the prevalence of separatism and prejudicial approach between each other. These practices became more rigid by feudal norms due to which authoritarianism of British Government was enhanced to the extent of basic values particularly of equality of status and opportunity and justice. Democracy, as we have noted from the preceding discussion is the embodiment of human dignity, liberty, maintenance of rights, justice and equality of opportunity and status, which distinguish it from authoritarian rule.

Another social problem, which is of more serious nature was that India, had always group or institutionalized socio-religious segments in her social structure. Each segment was identified by religion, culture, region, language, caste and sub-castes. Each group on the basis of their distinctive features alienated the other group and developed a prejudicial approach against each other. In this social and political environment an integrated social development ever suffered a set back. It was due to this disunity and hostility of various groups against each other that the British Raj succeeded in consolidating its

powers in India and ruled for more than two centuries. The policy of 'divide and rule',⁶⁴ adopted by the British Government fully highlights Indian's political disunity. The grant of separate electorate for the representation in legislature based on religious consideration (Muslim, Sikh and Christian), backward classes and schedule caste was aimed to keep these communities divided and hostile with each other.⁶⁵ In view of such social and historical experiences, political leaders after the independence, seriously struggled to adopt such a principle one which the whole edifice of the Constitution could be built up and all the evils could be banished out of the society so that in future each individual could live in dignity, with sentiments of brotherhood, nationalism, and freedom of thought, equality of status and is able to avail opportunity equally.

The multi-racial, multi-religious and multi-lingual Indian society and furthered the issues of exploitation which were fought on social, economic, and political planes by the Indian leaders in their struggle for emancipation against an alien rule. The political struggle of Indian leaders culminated into the passing of the Indian Independence Act in 1947, it is the land-mark in the constitutional history of India for it brought a great change. A new sovereign state was born on August 15, 1947. No doubt the objective of freedom struggle was attained but the objective was not freedom only, it was 'swaraj' or freedom from social restrictions and disunity. The Karanchi Session of the Congress in 1933 had already defined it thus :

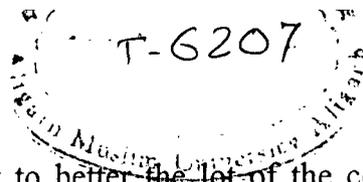
“In order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions.”⁶⁶

Soon after acquiring independence the first important step was to frame the Constitution for the people of independent India. The Constitution was framed by Constituent Assembly. Pandit Jawaharlal Nehru speaking on the Resolution regarding the aims and objects before the Constituent Assembly observed :

“the first task of this Assembly is to free India through a new Constitution to feed the starving people and clothes to naked masses, and give every Indian fullest opportunity to develop himself according to his capacity.”⁶⁷

The Constituent Assembly started its work from its first meeting on December 9, 1946, under an atmosphere of limitation. But it had become clear from the political developments outside the Assembly, that the decision for the partition of India has already been outlived. In spite of the problems, which arose due to non-participation of the Muslim League, the Congress went ahead with its programme of business. One of the first task to which the Constituent Assembly addressed itself was the formulation of the objectives and the guiding principles that were to be the basis of the Constitution and reflect the democratic spirit of the constitution.

The Indian National Congress during its course of activities had been stressing that no Constitution should be imposed by any outside authority and no Constitution, which did not sustain the sovereignty of the Indian people, would be acceptable to the country. The objective of freedom was always equated with the realization that it would be the responsibility of free India, with a Constitution based on democratic traditions, to bring about a just social and economic order, to remove



poverty and ignorance and generally to better the lot of the common man. These primary responsibilities were emphasized in the “objective resolution” which was drafted by Pandit Nehru and moved by him in the Assembly on December 13, 1946.⁶⁸ The Resolution, which was moved by Nehru in an inspiring speech, be later adopted as the Preamble of the Constitution. The ‘Resolution’ covered eight pledges but for the purposes of this work two are being written, (1) The Constituent Assembly declared its firm and solemn resolve to proclaim India as an ‘Indian Sovereign Republic’ and to draw up for her future governance a Constitution; (2) wherein shall be guaranteed and secured to all the people of India, Justice, social, economical and political, equality of status, or opportunity, and before the law, freedom of thought, expression, belief, worship, vocation, association and action, subject to law and public morality.⁶⁹ The resolution was debated on December 13, 16, 17, 18, and 19, 1946, with most of the Speakers enthusiastically supporting it.⁷⁰ The Assembly accepted the suggestion to embody the objective resolution in the Preamble. But some basic modifications in the early draft of the Preamble i.e. ‘Resolution’ were felt necessary in view of the British Government’s intention⁷¹ to partition the country into two dominions of India and Pakistan.

The original draft of the Preamble was considered by the Drafting Committee at a number of its meetings in the light of the changed political situation resulting from partition. The Drafting Committee felt that the Preamble should be restricted to defining the essential features of the new State and its basic socio-political objectives and that the other matters dealt within the resolution could be more appropriately provided for in the substantive parts of the Constitution. Accordingly, the Preamble was modified and ‘Indian

Sovereign Republic' was replaced by 'Sovereign Democratic Republic' and a new clause about 'fraternity' was added as in the opinion of the Committee, the need for fraternal concord and good-will in India was never greater than that time and this particular aim of the Constitution required to be emphasized through a special mention in the Preamble.⁷²

The sentiments expressed in the Preamble were those described by Jawaharlal Nehru in the 'Objective Resolution' which he moved in the Constituent Assembly adopted unanimously.⁷³ But Nehru's resolution had itself the manifestation of the ambitions of Mahatama Gandhi which he once expressed to a newspaper correspondent, while going to London to attend the Second Round Table Conference in 1931. Gandhiji's ideas for his new India are worth reproducing here “:

“I shall strive for a Constitution, which will release India from all thralldom and patronage and give her, it need be, the right to sin. I shall work for an India, in which the poorest shall feel that it is their country in whose making they have an effective voice, an India in which there shall be no high class and low class of people; an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the course of intoxicating drinks and drugs. Women shall enjoy the same right as men. Since we shall be at peace with all the rest of the world, neither exploiting nor being exploited, we should have the smallest army imaginable. All interests not in conflict with the interests of the dumb millions will be scrupulously respected, whether foreign or indigenious. Personally, I hate distinction between foreign and indigenious. This is the India of my dreams.”⁷⁴

Mahatama Gandhi's ambitions and ideas in fact found expression in the Preamble as well as in other detailed provisions of the Constitution.

India has chosen the democratic pattern of the government and republican form is just unavoidable and therefore the citizens elect the head of the State who governs the State as its President. The other important elements of the preamble are the main objectives of the State, which stand on the foundation of the democratic principles of justice, liberty, equality and fraternity.

Justice. In common sense, means 'giving according to law or popular opinion'. Justice is not only done for the good of the person to whom it is dispensed but the aim of individual justice is common good or welfare of the society. It embraces, as the Preamble proclaims, the entire social, economic and political sphere of human activity.

The terms 'liberty' and 'equality' are both used in the Preamble. Both are complementary to one another. Liberty is a safeguard of the individual against those who rule them.⁷⁵ Democracy is the first requirement for liberty as without democracy there cannot be liberty.⁷⁶ Liberty is our comprehensive notion and therefore, it signifies not only the absence of arbitrary restraint on the freedom of individual action but also the creation of conditions which provide essential ingredients necessary for the fullest development of the personality of the individual. Since in a State the governing class, which exerts power, is tempted to abuse the power the State has to work out ways and means to protect the governed. In India Muslims, Christians, and other minorities have to protect from the majority who assumes power to

rule, as groups enable them to maintain their identity. Freedom, therefore, does not mean individual freedom only but it involves also the freedom of groups, racial, religious, cultural and linguistic and the like.

Equality, is proclaimed by a French revolutionary in three words, 'Men are born and remain free and equal in rights. Social distinctions are based only upon public utility'. Equality therefore, should remain there in the society in its natural form. If it is touched for social motives, values, values of different dimensions would crop up and society would be divided according to those values.

Ours is a country where for historical reason never has been equality. The present concept of equality, which is a foreign one, has been brought into our laws and life by the framers of our Constitution in a conscious and ambitious way in order to emancipate common man and give a crushing blow at all forms of exploitation practiced to perpetuate inequality. The Constitution provides conditions through which the arbitrariness and favouritism are done away with for the over all development of man in the street and the citizens' rights and offices are shared on the basis of equality and brotherhood.

The provisions enacted in the Constitution are to promote the objectives embodied in the Preamble. Therefore, a number of articles enacted in the Chapters of Fundamental Rights and Directive Principles of State Policy that secure to every citizen equality – social⁷⁷ economic⁷⁸ and political,⁷⁹ liberty of thought and expression,⁸⁰ belief, faith and worship.⁸¹ In order to consolidate 'equality', the social evil of 'untouchability',⁸² is abolished and its practice in any form is

forbidden. To promote equality the conferment of any title of personal distinction except a military or academic distinction is prohibited.⁸³ The Constitution thus, treats every individual equal, places every religion on equal footing and prevents discrimination both in private and public sectors. But the constitutional principles are often seen clashing with the social practices on various grounds such as race, language, cultural and religion. These grounds have always been the factors of identification of various classes, groups and castes in the Indian society and have shown strong resistance in the way of unity and national integration. It is a historical fact that Indian polity provides unique example of social diversity not found anywhere in the world. It is due to these diversities, that one finds social stratification. The Indian society has been operating since time immemorial, on the basis of this social stratification, which has nurtured prejudices and thwarted attempts for unity among various classes. The Constitution attempts to do away with this rigid and long established social stratification and feeling of diversity on the basis of race, culture, language, religion and region. The Constitution in fact offers a solution for inequality, caste consciousness and regional prejudices, by preserving cultural heritage of people professing different faiths following different customs and speaking different languages. The Constitution attempts to achieve 'unity in diversity' by promoting mutual respect and toleration, trust and good-will, sacrifice and service to humanity.

In the beginning there are always possibilities of the constitutional principles being overshadowed by racial, cultural and socio-economic considerations. Moreover, it is not desirable to blow up traditional values by revolutionary change, as there are apprehensive

that other sharper issues may crop up. A change in society is brought out by a change in ideology and personality by offering simple, clear and rational models of both law and moral. Another reason for delay in transformation of Indian society is that the constitutional principles of equality, rule of law, democracy, secularism all are of western model and have been introduced in India for the first time after independence which lack appreciation in its right respective That was perhaps the reason that Mahatama Gandhi never used the word democracy as he knew that the vast majority of Indian People were incapable of understanding the meaning of democracy. Instead of democracy he used the phrases such as 'Ramraj' or 'swaraj'⁸⁴ which also has a religious fervour. He considered these phrases to be best suited in the context of socio-religious society and to arouse the sentiments of Indian people. He wanted his message to be understood by every one and prevail everywhere and hence never attempted to use any foreign doctrine or principle.

Accordingly, constitutional principles based n western model and transplanted in India are bound to be checked by the age long traditional thinking and socio-religious practices. But this does not mean that the constitution is a weak document. The Constitution was framed to redesign the Indian society, to reform social life, to remove economic disparities, and to check the exploitation of man by man for material gains in the name of caste and classes. It embodies outstanding constitutional principles based upon the doctrines of rule of law and socialism and make it a workable source to adjust such conflicting interests that may arise between the citizens or between the citizens or between the citizen and state. Apparently one may find that the Constitution contains such provisions as run counter to the theme of

equality but in essence these are meant to provide special facilities to those weak and backward entities in the society who have suffered due to socio-religious prejudices and also on account of economic inequities. Because of the absence of a policy of social justice. These provisions disclose the avowed policy of improving the social, educational and economic standard of a sizeable majority of India's teeming millions, but at times the efforts get themselves into direct clash with the vested interests leading to sharp social and political conflicts.

E. EGALITARIAN NORMS

These are few terms in political science and law which have had so long a life and as important a role to play in the making of modern history as the idea of equality. From the start equality was a subject approached from several different points of view. In time these differences crystallized into three distinct concepts which are known as Liberal, conservative and Socialist – belonging to the nineteenth century.⁸⁵ The liberal concept of equality may be traced to the belief of certain stoic philosophers in the universality of human reason. The conservative concept of equality may be found as early as Plato's Republic, where the demand for equality is said to be derived from the promptings of envy and the call for the leveling of all distinction in society. In socialist concept of equality, the essential elements were to design a new breed of society with emphasis on equal status and opportunity.⁸⁶

At first these three concepts of equality appeared in religious terms, and towards the end of eighteenth century they acquired certain

distinct concepts, which rested almost on secular philosophic premises. In the nineteenth century the three concepts got into conflict with one another and it became easy to identify each point of view. The socialist camp was mainly composed of those who believed 'collectivism' to be the true expression of equality. The liberals wanted to extend the principle of equal freedom to more and more areas. By the middle of nineteenth century liberals questioned whether the doctrine of *laissez faire* served or inhibited 'equal freedom'. Those who shared the *conservative view of equality proposed a variety of alterations to the leveling tendency and suggested efforts to modify democracy*. By the end of the 19th century the three camps were superseded by political philosophy based on scientific analysis and the philosophic discussion of equality reached the point of utter disappearance. Philosophic liberalism because liberal, political economy, the conservative impulse passed into historical sociology and psychology, and scientific socialism virtually displaced the more speculative versions.

The brief discussion sketched so far shows the stages through which 'equality' passed in different ages with different nations, and there is still the possibility of it to run through more stages, with different meanings in future. An English historian suggests that 'in the course of history equality seemed to have been extended gradually from the sphere of ethics to that of law, then religious belief, politics, and society and finally in the twentieth century to economics.'⁸⁷

Towards the end of nineteenth century American Constitution was framed i.e. 1879 and during its infancy, 'equality' was the first subject of controversy among the American intellectuals. The American founding fathers wrote in the Declaration of Independence

the words. 'all men are created equal, they are endowed by their creator with certain unalienable rights" such as "life, liberty and the pursuit of happiness". But this did not prevent later generations of Americans from developing conflicting interpretations, when the issue of equality became the subject of profound moral and political disagreement over slavery. The principle of Equality did not occur in any constitutions, drafted by several states except the state of Virginia, which framed a declaration of rights known as the Virginia Declaration of Human Rights in 1776. But after the Declaration of Rights of Man and Citizen by National Assembly of France followed by French Revolution in 1789, the principles of equality and other inalienable rights drove the Americans to demand for their place in their Constitution too. As Prof. Robert Harris observed that the Declaration of Independence succinctly and eloquently summarized the major elements of western democratic thought which gave birth to the American Revolution.⁸⁸ Equality was a consistent theme in the works of those men who made the major contributions to western political theory upto the time of the Revolution. The writings of John Locke particularly influenced the men who led the American Revolution. The concept of equality of men was an important part of Lock's theories of the social compact and natural law, which influenced in the re-making of American Constitution by adding amendments on the principle of equality. Madison one of the most distinguished architect of American Constitution, pledged himself to help secure every amendment that would give satisfaction and was not harmful.⁸⁹ in effect the constitution was amended and the Ten Amendments that are known as Bill of Rights were added to Constitution in 1791.⁹⁰ The most important part of the Fifth Amendment provided that no person would be deprived of his life liberty or property without due process of law. Due process of

law was guaranteed debates or an opposing vote and Madison conceived this to be the most valuable amendment in the whole list. The Fourteenth Amendment to the Constitution provides:

“No State Shall deny to any person within its jurisdiction the equal protection of the law”.

This constitution guarantee was added to protect individuals against state action. Schwartz has said, “the Fourteenth Amendment was the most important of the *post bellum* addition to the Constitution themselves, the first change in the organic text in over sixty years”.⁹¹ The thirteenth Amendment abolished slavery; the Fifteenth Amendment gave the emancipated race the right of suffrage.

In American Constitutional Landscape the clauses – the “due process clause”, the “equal protection clause” and the Fourteenth Amendment have completely transformed the constitutional structure. The Fourteenth Amendment rather than the original Bill of Rights covers a vast majority of cases brought to vindicate individual rights. In the landmark case of *Brown V Beard of Education*.⁹² the ‘separate but equal’ doctrine was overruled and ‘segregation rules’, violative of the ‘equal protection’ guarantee. This decision has caused a social revolution by its enduring impact. In the field of political rights, the key decision was *Baker V Carr*⁹³, which ruled that the federal courts were competent to entertain an action challenging legislative apportionments as contrary to the equal protection clause.

In addition to racial and political equality, the Supreme Court has moved to ensure equality in criminal justice⁹⁴ with the instrumentality of Fourteenth Amendment. In many cases the

Fourteenth Amendment's requirement of due process has been held to demand adherence by the States to most of the rights guaranteed in the Bill of Rights. These included the right to a jury trial,⁹⁵ confrontation of witnesses,⁹⁶ speedy trials,⁹⁷ and that against self incrimination,⁹⁸ with the result, Fourteenth Amendment was deemed to include all the specific rights safeguarded by the Bill of Rights.⁹⁹ Fourteenth Amendment, as Schwartz, observes, therefore, emerged out to be a great unifying theme, interpreted by the Supreme Court, I matters of equality as between races, between citizens, between rich and poor, between prosecutor and defendant.¹⁰⁰

(i). In England

In England, the principle of equality is contained in one of the canons of English Constitution that is, Rule of Law as enunciated by Prof. A.V. Dicey. Dicey gave to the Rule of Law three meanings.¹⁰¹ It means, in the first places, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the Government. Further, a man may be punished for breach of law, but he can be punished for nothing else,¹⁰² The second meaning is of "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts".¹⁰³ In this sense the rule of law conveys that no man is above the law; that officials like private citizens are under a duty to obey the same law and that there are no administrative courts to which claims are referred by the citizens against the state or its officials.¹⁰⁴

Dicey further elaborating it said that “with us every official from the Prime Minister down to a constable or collector or taxes. I under the same responsibility for every act done without any legal justification as any other citizen.”¹⁰⁵ Today in England all are subject to law and thus in the eye of law everyone is treated as equal. Finally, the rule of law means that the constitution is the result of the ordinary law of the land.

Going back to the first meaning the supremacy of law in England has resulted from the concept that there was a universal law which ruled the world. Bracton writing in the first half of the Thirteenth century deduced from this theory the proposition that rulers were subject to law. This theory created an historical dispute between the Crown and the Parliament in the middle Ages. Coke and his followers fought for the supremacy of Parliament.¹⁰⁶ Medieval Lawyers never denied the wide scope of the royal prerogative, but the king could do certain things in certain ways.¹⁰⁷ It was not until the seventeenth century that Parliament established its supremacy. Fortescue C.J., writing in the reign of Henry VI, had applied what later became the two major principles of the Constitution, Rule of Law and the Supreme Court of Parliament, and relied upon the ‘Rule of Law’ to justify the constitution that taxation could not be imposed without the consent of the Parliament. The rule of law meant the supremacy of all parts of the law of England, both enacted. The supremacy of the law together with the Bill of Rights in 1689.¹⁰⁸ In England, therefore, the birth of modern democracy was due to the protest against the absolutism of an autocratic executive. The English people in their fight for freedom against autocracy agreed with the establishment of the supremacy of law and the Parliament as the sole source of that law.

The Bill of Rights is an important landmark in the history of constitutional government of England. It is a triumph of Parliament over the claim of the king's to rule by prerogatives. The Magna Carta, which contained for the first time, the concept of equality and the Bill of Rights and the supremacy of Parliament are the foundation on which the whole structure of the government is based and individual liberty is secured.

(ii). In U.N. Charter

United Nations being an international organization obviously designed to embrace innumerable activities of international nature. Of these, the two of vital significance in the present context of international problems are first, "the welfare of mankind", and secondly, "maintenance of peace and security in the community of nations". The United Nation was prompted to tackle these two problems with a fresh zeal, after the second world was during Hitler pursued the policy of extermination of Jews on racial ground. Racial discrimination is most dangerous evil for it not only denies freedom and equality to members of certain groups, but it develops into genocide, worst of all its forms.

Beside, the protest against the barbarities during the second world was, the other factors were the fast changes in the political face of the world brought about in the name of the right of the peoples to self-determination. The de-colonization which began with India, was not merely the signal for widespread towards the emancipation of peoples, of peoples, but it also enabled the newly independent States to

become member of the United Nations as equal with older or more powerful states. Such are the main factors common to mankind as a whole, which have worked, in favour general evolution of human rights towards a greater goal of liberty and equality. Impelled by these factors the United Nations, in pursuance of one of the commands of its Charter, appointed Commission on Human Rights.¹⁰⁹

The Commission on Human Rights was obviously designed to provide a common standard to protect and respect human beings and recognize their inalienable rights without distinction as to race, caste, and language. The Commission after discussion and debates presented a draft of the Universal Declaration of Human Rights which was adopted and approved by the Committee of the General Assembly in 1948. Article 1 of Declaration of Human Rights reads as follows:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Introducing the Declaration to the plenary session of the General Assembly Mr. Charles Malik (Lebanon), the Chairman of the Third Committee, which prepared the draft, recalled that the members of the United Nations had already solemnly pledged themselves, under the Charter, to promote respect for human rights and fundamental freedoms, but that it was the first time that human rights and fundamental freedoms had been set forth in detail. Hence every Government knew, at present, to what extent exactly it had pledged itself, and every citizen could protest to his government, if the latter did not fulfill its obligation. The Declaration would thereafter provide a

useful means of criticism and would help to bring about changes in present legal practice.¹¹⁰

Mrs. Roosevelt stressed that the Declaration was first and foremost a declaration of the basic principles to serve as a common standard for all nations. It might become the Magna Carta of all mankind. Mrs. Roosevelt thought that its proclamation by the General Assembly would be of importance, comparable to the 1789 (French) Declaration of the Rights of Man, the proclamation of the rights of man in the Declaration of Independence of the United States of America, and similar declarations made in other countries.¹¹¹ When the General Assembly approved the Declaration unanimously, the President of the General Assembly, Mr. Evatt of Australia, stated that the adoption of the Declaration by a big majority without direct opposition was a remarkable achievement. It is a step forward in a great evolutionary process. He added that this document was backed by the authority of the body of opinion of the United Nations as a whole and millions of peoples, men, women and children, all over the world would turn to it for help, guidance and inspiration.¹¹²

The Declaration has been applied constantly in the practice of United Nations and even States. The Declaration was relied on by the General Assembly in several resolutions relating to the treatment of people of Indian and Pakistani origin in South Africa,¹¹³ and in other related issues. Gradually, the United Nations succeeded in enforcing more vigorously the obligations of member states to observe Human Rights and fundamental freedoms, and almost all members have accepted this extension of United States powers in this area. In a relatively short period, the Universal Declaration of Human Rights has

thus become a part of the constitutional law of the world community and together with the Charter of the United Nation, it has acquired a place of world law higher than all other international legal norms and domestic laws. Today, therefore, there is no state in the world, which has not adopted the principle of equality for its government. The significant thing is that even the States, which were traditionally monarchial like Nepal, Japan had to modify their monarchial systems, radically enough to permit their governments to function on the basis of principle of equality and democracy.

(iii). In India

Equality principle in India was in fact adopted after the independence and is contained in the Constitution framed therefore. In India, besides the problem of equality before the la, discrimination and social segregation on the basis of caste existed and denial of opportunities in education and employment was prevalent. To comprehend these issued separate provisions were enacted in detail besides the guarantee of 'equality' in Article 14 in general term. The quality principles include rights contained in provisions 14 to 18. Besides these, the constituent has also other provisions which embody the concept of equality, such as Article 325 secures to all citizens irrespective of religion, race, caste or sex, a right subject to other conditions enumerated in Article 326 to contest election o either Houses of Parliament or other Houses of Legislature of a State.

Equality principle in the modern age has exerted an enduring influence upon the traditional pattern of an unequal society. The equality movement is thrashing out the distinctions, diversities,

economic imbalance and social intolerance. That society deserves to be called good and balanced in which social relations are organized on the principle of equality, and where opportunities are available to all equally and justice prevails. In the words of Prof. Laski, “the idea of equality, so regarded, seems to me inescapably connected with freedom. For equality, so regarded, seems, in the first place, to mean the organization of opportunities, and, in the second place, it means that no man’s opportunities are sacrificed to the claims of another. The idea of equality, in a word, is such an organization of opportunity that no man’s personality suffers frustration to the private benefit of others. He is given his chance that he may use his freedom to experiment with his powers. He knows that in his effort to attain happiness no barriers impede him differently from their incidence upon others. He may not in his objective, but, at least, he cannot claim that society has so weighed the scale against him as to assure his defeat.”¹¹⁴

In India there is a mosaic of races, religions, languages, cultures and social norms, which have generated an unspoken rivalry and antagonism in the life style of the people and has severely affected the formation of integrated society. The Constitution has attempted to clinch all these problems by incorporating the principle of equality, as explained by Laski to foster a fellow feeling.

NOTES AND REFERENCES

1. B. Shiva Rao; The Framing of Indian Constitution : Select Documents; p.320, (1967)
2. Report of Motilal Nehru Committee, 89-90 (1928)
3. Shariful Hasan, "Supreme Court; Fundamental Rights and Directive Principles", p. 23. (1981)
4. C.A.D. Vol. II, pp.332-333
5. Drafting Committee was appointed by a Resolution passed by the Constituent Assembly on August 29, 1947, C.A.D. Vol. VII, p 31.
6. Objective Resolution – Pandit Nehru moved the resolution in the Constituent Assembly, constituted under the Government of India Act, 1935 and started its business from December 9, 1946, B. Shiva Rao, The Framing of India's constitution, p. 76.
7. "Socialist Secular" were added by the Constitution (Forty Second Amendment) Act, 1971. Now it reads "Sovereign Socialist Secular Democratic Republic" w.e.f. 03.01.1977.
8. Article 14, 15, 16, 19, 25, 46, and 325
9. Article 17.
10. Article 18.
11. January 26, 1950.
12. G.S. Ghurye, Caste and Race in India at 4.
13. The orthodox Hindu view is that society has been divinely ordained on the basis of four castes, Brahmanas, Kshatriyas, Vaishyas and Shudras and the spiritual view (Rig Veda) is that Brahman emerged from the head, the Kshatriyas from arms the Vaishyas from the waist and Shudras from the feet of God – K.M. Pennikker, Hindu Society at Cross Raods p. 6.
14. Census Commission Officer, New Delhi, reported in The Hindustan Times, Nov. 4, 1980, according to Census 1981, it is 86 per cent. Under Article 25, Explanation II Constitution of India. Buddhist, Jains, Sikhs are construed as Hindus. That makes 87 per cent of India's population as Hindus. According to latest Census Report of

1981, total population of India is 685, 184, 692 (685 million), consisting Hindus 82.7%, Muslims 11.2%, Christians 2.6% and Sikh 1.9%.

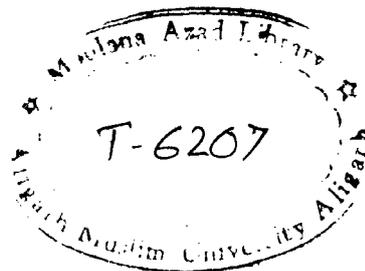
15. A.I.R. 1966 SC 1119.
16. S. Abid Husain, Indian Culture (1963) 4 and 6.
17. K.M. Pennikkar, Hindu Society at Cross Roads, p. 6.
18. Census Commission of India Report, 1971, p. 90-92
19. Ibid.
20. Ibid
21. Maurice A Canney, An Encyclopedia of Religions p. 324.
22. Ibid.
23. The Sikh Gurdwaras Act defines a Sikh as 'one who believes in the ten Gurus and the Granth Sahib.
24. Supra note. 17.
25. Supra note. 8.
26. S. Radhakrishnan, Religion and Culture p. 129.
27. Ibid p. 131.
28. Rachakamal Mukerjee : A History of Indian Civilization (1956) pp. 178-79
29. Supra note. 8
30. G.A. Grierson: Linguistic Survey of India, Vol. I, Part I, p. 26.
31. Ibid p. 28.
32. Report of the state Reorganization Commission 1956.
33. Jarrett's Translation, 111, p. 119 quoted in Grierson's Linguistic Survey of India.
34. Article 29, 30, 347, 350, 350A, 350B, and 351.
35. Eighth Scheduled (Article 344(1) and 351 long ways contained are :
(1) Assamese, (2) Bengali, (3) Gujarati,(4) Hindi, (5) Kannada, (6)

- Kashmiri, (7) Malyalam, (8) Marathi, (9) Oriya, (10) Punjabi, (11) Sanskrit, (12) Sindhi, (13) Tamil, (14) Telgu, and (15) Urdu.
36. F.R. & Bridget Allchin, *The Birth of Indian Civilization* Penguin Series, Middlesex.
 37. Poschall, *International Seminar on Harappan Civilization*.
 38. John Marshall, *Indus Valley Civilization Vol. I* (1935), p. 68
 39. Radhakamal Mukerjee, *A History of Indian Civilization* p. 130.
 40. B.B. Lal, *Indian Archeology since Independence*.
 41. *Supra* n. 35 p. 124.
 42. D.N. Majumdar : *Races and Cultures of India* (1961) p. 11.
 43. *Supra* n. 35 p. 84
 44. R.B. Dixon, *the Racial History of Man*, p. 257.
 45. "The Racial Affinities of the People of India," Census Commissioner, *Census of India, 1931, Part 3. Ethnographical*, Delhi, Manager of Publications, 1933 (Passim).
 46. J.H. Hutton succeeded Risley, Director of Ethnographical Survey of India, New Delhi.
 47. B.S. Guha, *Racial Affinities of the Peoples of India in the Census of India for 1931, Vol. I, Part III* (1935), p. 45
 48. Robert J. and Beatrice D. Miller, *The Peoples of India* (paper material). University of Wisconsin, Madison, Wisconsin, USA.
 49. B.S. Guha, *Racial Elements in the Population* p. 8.
 50. *President of U.S.A. (1861-63)*.
 51. M. Hidayatullah, *Democracy in India and the Judicial Process* p. 16-17.
 52. Leslie Lipson, *The Democratic Civilization* p. 43.
 53. McIver, *The Web of Government* p. 198.
 54. *Supra* Note 47 p. 18.
 55. G.W. Keton, *The Elementary Principles of Jurisprudence* p. 37.

56. Mayo, *Democratic Theory* p. 21.
57. J.F.S. Ross, *Representative Democracy* p. 9.
58. Acton, *Essay on Freedom and Power* (Thomas & Hudson) p. 71.
59. *Supra* note 47 p. 24.
60. *Ibid*
61. *Ibid*
62. V.S. Deshpande, *People and the Constitution*, *Journal of Indian Law Institute*, Vol. XVI, No.1, p. 1.
63. Dr. Radha Krishnan, "Democracy in the Indian Traditions but not the Western parliamentary Brand", Park and Tinker, *Leadership and Political Institution in India*, ed. 1960 p. 11.
64. *The Minto-Morley Reforms*, A.B. Keith, *A constitutional History of India* p. 228-32.
65. *Ibid*.
66. D.N. Banerjee, *Constitutional Rights and Duties in India* p. 156.
67. C.A.D. Vol. III, p. 296.
68. B.Shiva Rao, *The Framing of India's Constitution* p. 121.
69. C.A.D. Vol. I, p. 59.
70. *Supra* note 64 p. 124.
71. Lord Mountbatten's Plan of June 3, 1947. See for details *Constitutional Documents* by Munshi, K.M. p. 193-98.
72. *Draft Constitution Select Documents III*, 6 p. 510.
73. *Supra* note 65 p. 24-27.
74. Reproduce from M.V. Pylee, *Constitutional Government in India* p. 151.
75. Harold J. Laski, *Liberty in the Modern State* p. 64.
76. *Ibid* p. 65.
77. Article 15(1), (2).

78. Article 16(1).
79. Article 325.
80. Article 19.
81. Article 25.
82. Article 17.
83. Article 18.
84. 'Swaraj' means Home Rule, 'Hind Swaraj' or Indian Home Rule, written originally in Gujrati in the return Voyage from London to South Africa in 1908, D.P. Mukerjee, *Diversities* p. 207.
85. Sanford A. Lack off, *Equality in Political Philosophy* p. 8.
86. *Ibid.*
87. D. Thomson, *Equality* (1994) Cambridge, England p. 147.
88. R.J. Harris, *The Quest for Equality* (1960) p. 2.
89. Brand Irving, *The Bill of Rights* p. 41.
90. *Ibid* p. 64-5.
91. Barnard Schwartz, *The Fourteenth Amendment, Centinal Vol.* p. 30
92. 347 U.S. 489 (1954).
93. 369 U.S. 186 (1962)
94. *Griffin v. Illinois* 351, U.S. 12, 17 (1958).
95. *Duncan v. Louisiana* 391 U.S. 145 (1968).
96. *Pointer v. Texas*, 380 U.S. 400 (1965).
97. *Kolpfer v. North Carolina*, 383 U.S. 213 (1967).
98. *Mallov v. Hogan*, 378 U.S. 1 (1964)
99. *Supra* note 87.
100. *Ibid* p. 34.

101. A.V. Dicey, Introduction to the Study of the Law of the Constitution, 9th ed. With Introduction by E.C.S. Wade (1939) Macmillan.
102. Ibid p. 202.
103. Ibid p. 202-203
104. Dicey contrasted Rule of Law with Droit Administrative France and misconceived it to be unsuited for English Legal System but latter accepted.
105. Supra note 97 p. 193.
106. Ibid p. 80.
107. Wade and Phillips, Constitutional Law p. 49.
108. Ibid p. 49-50.
109. The Commission was consisted of the members who were great jurists, diplomats, and libertarians like Mrs. Eleanor Roosevelt (America and Chairman of the Commission), Rene Cassin (France), Charles Malik (Lebanon) Late P.C. Chun (China), Dr. Alexi Poulou (Russia).
110. B. John Louis, the Universal Declaration of Human Rights A Common Standard of Achievement, Article published in Horizons of Freedom, Institute of Constitutional and parliamentary Studies, New Delhi Publication p. 7.
111. Ibid.
112. Ibid p. 8.
113. Ibid.
114. Herald J. Laski, Liberty in the Modern State, p. 53.



CHAPTER -III

PRINCIPLES OF EQUALITY : DIMENSIONS AND DEVICES

A. AN OVERVIEW

Equality is the only true and central premise from which constructive ideas can radiate freely and be operated without prejudice.¹ Equality springs from a divine dictate which is available in every system of temporal authority pervading all the geo-political demarcations in the world. Since the inception of humanity on this planet, movements were initiated, struggles were spearheaded and battles were fought for accomplishing and realizing a World Human Order founded upon the principles of equality such as equality of status and of opportunity in every civil society wedded to a desiderata of justice – social, economic and political; liberty- of thought, expression belief, faith and worship; fraternity, human rights with all the manifestations of human dignity backed by rule of law. Hinduism, Christianity and Islam presented an order of equality, which is distinct from each other in letter and spirit. However, Hinduism has presented such a social compartmentalization of humanity, which is alien to the basic principles of equality and human rights.

Islam not only recognizes absolute equality between men and women irrespective of any distinction of colour, race or nationality but makes it an important and significant principle, a reality. The Almighty God has laid down in the Holy Quran:

“O mankind. We have created you from a male
 And female. And we set you up as nations and
 Tribes so that you may be able to recognize each
 Other” (49:13)

In other words, all human beings are brothers to one another. They all are the descendants from one father and one mother and the division of human beings into nations, races, groups and tribes is for the sake of distinction, so that people of one race or tribe may meet and be acquainted with the people belonging to another race or tribe and cooperate with one another.

This division of the human race is neither meant for one nation to take pride in its superiority over other nor is it meant for one nation to treat another with contempt or disgrace, or regard them as a mean and degraded race and usurp their rights. The Almighty God has laid down in Sura Al-Hujrat:

“Indeed the noblest among you before God are
 the most heedful of you”. (49:13)

In other words the superiority of one man over another is only on the basis of God-Consciousness, purity of character and high morals, and not on the basis of colour, race, language or nationality and even this superiority based on piety and pure assume airs of superiority and pure conduct does not justify that such people should play lord assume airs of superiority over other human being. Assuming airs of superiority is in itself a reprehensible vice which no God-fearing and pious man can ever dream of perpetrating. Nor does the righteous have more privileged rights

over others, because this runs counters to human equality, which has been laid down in the beginning of this verse as a general principle. From the moral point of view, goodness and virtue is in all cases better than vice and evil.

This has been exemplified by the Prophet (PBUH) in one of his sayings thus:

“No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man, or the black man any superiority over the white man. You are all the Children of Adam, and Adam was created from clay.” (Sahih Muslim: English Translation)

In this manner Islam established equality for the entire human race and struck at the very root of all distinctions based on colour, race, language or nationality. According to Islam, God has given man this right of equality as a birthright. Therefore no man should be discriminated against on the ground of the colour of his skin, his place of birth, the race or the nation in which he was born. Today, a number of non-Muslim thinkers, who are free from blind prejudice, openly admit that no other religion or way of life has solved this problem with the some degree of success with which Islam has done so.

B. THE NOTION OF EQUALITY IN ENGLAND

Hath not a Jew eyes ?

Hath not a Jew hands,
 Organs, dimensions, senses, affections, passions,
 Fed with the same food,
 Hurt with the same weapons,
 Subject to the same diseases,
 Healed by the same means,
 Warmed and cooled by the same winter and summer,
 As a Christian is ?
 If you prick us, do we not laugh ?
 If you poison us, do we not die ?
 And if you wrong us, shall we not revenge ?

These couplets² supra make it crystal clear that in every society including English society principles of equality have been accepted and flourished in all its manifestations and instances. In the same view Dr. Sir Mohammad Allama Iqbal³ siad :

Sultan and slave in single file stood side by side,
 then no servant was nor master, nothing did
 them divide.

The spirit of equality is axiomatic and abundant in the couplet supra and establishes a concept of egalitarianism. In a civil society on this colourful planet, the concept of equality is pervading all the geo-political

entities. Magna Carta is often cited as one of the early documents upholding principles of equality and human rights in crude forms although this opinion however, has been contradicted. Davidson says:

“While Magna Carta (1215) is often erroneously seen as the origins of the liberties of English citizens (it was in reality, simply a compromise on the distribution of powers between king John and his nobles, the language of which later assumed the wider significance which is attributed to it today), it is was not until the Bill of Rights (1689) that rules directed towards the protection of individuals rights or liberties emerged. But even the development must be seen in context. The Bill of Rights, which is described in its long title as “an Act Declaring the Rights and liberties of the Subject and setting the Succession of the Crown,” was the outcome of the seventeenth century struggle of Parliament against the arbitrary rule of the Stuart monarchs.”

Ever since the beginning of civilized life in a political society, the shortcomings and tyranny of ruling powers have led people to seek higher laws. The concept of a higher law binding human authorities was evolved and it came to be asserted that here were certain rights anterior to society. These were superior to rights created by human authorities, were universally applicable to people of all ages in all regions, and are believed to have existed prior to the development of political societies. These

rights were mere ideologies and there was no agreed catalogue of them and no machinery for their enforcement until they were codified into national conditions, as a judicially enforceable Bill of Rights.⁴ From the very beginning of human history, man struggled for his existence against nature and his fellow men. The concept of the survival of the “highest caused conflicts among human beings that paved the way for the framing of rules and regulations for the safeguard of the weaker sections.

Before considering the development of equality it is necessary to consider the beginning of inequalities in the social relationships of men. Without the development of just inequalities the demand and struggle for equality can not arise. For millions of years human race lived in primitive communist societies, without any social inequality. In such societies, private property was absent and people lived a simple life. But gradually, with the development of forces of production, private property emerged and together with this, society was divided into unequal classes and this gave birth to inequalities. Inequalities of different kinds and degrees emerged with the division of society into the property owners and the propertyless.⁵

In the ancient period, in Greek philosophy, two different traditions emerged. One, represented by Plato and Aristotle, supported inequality; and the other – represented by Pericles, the Sophists, Antiphon, Lycophoron, Euripides and the Stoics—supported equality among men. But during that period the issue of equality near became a fundamental one and women and slaves were regarded as inferior by birth. Plato classified men into men of gold, silver and iron and the Greeks were regarded superior to other races. Aristotle justified slavery and maintained the superiority of masters over-slaves.⁶

During the ancient period, Stoic philosophers (Zeno, Cicero and Seneca) gave the idea of universal brotherhood and citizenship which was based on natural law and reason and which corresponds to the modern idea of equality. They opposed slavery and pleaded for natural equality among men. The revolutionary struggle for equality during the Roman period was waged under the leadership of Spartacus, the great leader of slaves, and the blood drenched sword of Spartacus gave the battle cry that the blood of all men is of the same colour. Two centuries before Christ, another leader of slaves, Aristonicus declared the establishment of "The State of Equals."⁷ So in the ancient period the struggles for equality took place, but equality in the modern sense of the term was missing.

During the medieval period Christianity raised the voice for equality in the beginning but soon it got converted into equality before God. The Church had long since recognized the equality of all men; but this equality was to be realized in heaven.⁸ During this period feudalism emerged in Europe and unequal rules of aristocracy developed. Under feudalism social inequality was consolidated by law, all of society was divided into estates: the clergy was the first estate: The nobility the second; and all the other people, the third one. The first two estates had all the rights, the third estate had only duties.⁹ Thus, during the medieval period social inequalities got legal recognition and legal privileges available to clergy and aristocrats were widely extolled. Against these legal privileges based on birth emerged the modern concept of equality before law.

The concept of equality was backed by rationalism and enlightenment of the 18th century especially in England and France; the

emerging capitalist class raised a voice of protest against the special privileges of aristocracy and demanded legal, social and political equality. “the powerful and recently encircled middle classes, especially in England and France, were anxious to achieve social and political equality with nobility ---Reason and faith both showed men to be identical at birth, if they were now unlike, the cause must be sought in something outside them – their environment.”¹⁰ Equality before law, and equality by birth were the main features of this demand for equality. It was associated with social justice and “it is only since the eighteenth century that these inequalities (in wealth, prestige and power) have become widely questioned and criticized from the standpoint of social justice.”¹¹ Various thinkers of enlightenment, like D. Diderot, Alembert, Montesquieu, Rousseau, Voltaire, Babeuf, Hume, Hutcheson, Ferguson, Adam Smith, Gibbon, Bentham, Shaftesbury, Beccaria, Pétion and Verri, raised the voice for equality. Rousseau in his essay, “Discourse on the Origin of Inequality”, 1754, strongly pleaded for equality and maintained that inequality have emerged due to the rise of private property and civilization. Liberal Condorcet and revolutionary Babeuf emphasized the economic aspects of equality.¹² The great American and French Revolutions raised slogans of liberty, equality and fraternity. These slogans were hardly realised in practice. Even when French National Convention proclaimed “natural equality of people” it did so half-heartedly. The Haitian Negroes demanded emancipation from slavery and in reply French Republic sent several expeditions to quell the rebellions slaves who demanded neither more nor less than equality.

However, the 18th century concept of equality was that of legal and political equality – abolition of special privileges – rather than of economic and social equality. “The special characteristic of the class

system in France and Germany had been, in fact, that inequality was not primarily economic, but juristic, and that, in spite of gross disparities of wealth, it rested on difference, not merely of income, but of legal status.”¹³ Thus, the issue in France was not economic equality, it was only the uniformity of legal rights, and the French movement for equality set the new aristocracy of wealth on a footing of parity with the old aristocracy of land.

It was in the 18th century mainly that the voice for legal and political equality was raised. But in the 19th century the emerging working class raised a more vigorous demand for socio-economic equality. Because of the development of capitalism in the 19th century, economic disparities increased and the demand for economic equality and justice came from many quarters. Humanists, utopian socialist, Marxists and positive liberals raised the demand for economic equality.

The 20th century witnessed many revolutionary struggles for equality. Various movements of the black people against the white race developed and black people won their rights for equality of opportunity and equal treatment in all socio-economic affairs.

The quarantine of equality before the law is an aspect of what A.V. Dicey calls the “rule of law” in England.¹⁴ It means that none is above the law and every person, whatever be his rank and howsoever high he may be, is subject to the jurisdiction of ordinary courts. Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without

distinctions of race, religion, wealth, social status or political influence.¹⁵ Thus, Dceian doctrine of rule of law contains three main attributes of equality i.e. firstly; absence of arbitrary power and supremacy of the law, secondly; equality before the law be there and thirdly; the constitution is the result of ordinary law of the land.

C. THE NOTION OF EQUALITY UNDER U.N. CHARTER

The experience of the League of Nations greatly helped in the formation of the United Nations and buying down its charter. In the course of time, the United Nations evolved into the most important organization the world so far has, and with its 180 nations membership at present, it is truly universal in character. Like the league of Nations, the United Nations is also the result of war, i.e. the Second World War. While the war still continuing, attempts had been started by the Allied nations to have an international organization, which should be devoid of the weaknesses of the league and should place the international peace and security on the firmer footing. The first step in this direction was the "Declaration of St. James Palace, London of June 12, 1941, in which the exiled governments of Greece, Belgium, erstwhile Czechoslovakia, Luxembourg, the Netherlands, Norway, Poland and Yugoslavia and the representatives of Britain Canada, Australia, New Zealand, South Africa and General De Gualle of Frances participated and expressed their desire to establish peace. It was soon followed by the "Atlantic Charter" of August 14, 1941, between the British Prime Minister Winston Churchill, and Franklin Roosevelt, the President of the United States, in which they undertook to end Nazism and subscribed the "principles of equality" of nations, universal peace and collective cooperations.¹⁶

There were 26 nations including the United States, Great Britain, erstwhile Soviet Union and China which signed the "United Nations Declaration" on January 1, 1942, and, for the first time, used the words "United Nations." States also pledged for cooperation amongst themselves, and not to enter into treaty relationship with the enemy. It was, however, the "Moscow Declaration" of October 30, 1943, between the governments of the United States, Britain, Soviet Union and China that emphasized the need for establishing a world organization based on the principle of sovereign equality of States, which should be open to all peace-loving nations and be able international peace and security. The Tehran Conference of December 1, 1943, between Churchill, Roosevelt and Stalin further emphasised the urgent need for the establishment of such an international organization. In 1944, at Dumbarton Oaks, four powers met and Draft Proposals for such an organization were prepared by China, Great Britain, United States and the Soviet Union. The proposed organization was given the name of "The United Nations", which was to have four principal organs: The General Assembly, the Security Council, The Economic and Social Council (ECOSOC) and Secretariat. However, there were no clear cut proposals on the future of the Permanent Court of International Justice, the mandate system of the League of Nations (Art.22) and the initial membership of the organization.¹⁷ The Yalta conference of February 11, 1945, between Great Britain, United States and the Soviet Union finally decided to convene a general conference of about 50 nations to consider the constitution of the proposed world organization based on the Dumbarton Oaks Proposal, to be held on April 25, 1945, at Yalta, the voting procedure and arrangements of the proposed Security Council was also agreed between the three participating nations.

The final shape to the proposed Charter was given at the San Francisco, attended by 51 nations, and held between April 25, to 26 June, 1945. The conference succeeded in adopting the Charter of the United Nations with 111 Articles, along with the Statute of the ICJ, though serious differences arose over the voting procedure in the Security Council and the “Veto” power of the permanent members. The Dumbarton Oaks proposal was adopted on this aspect after making certain significant changes.¹⁸ The Charter was signed on June 26, 1945. The Charter was to come into existence only after the ratification of the five permanent members, namely, China, France, United Kingdom, United States and Soviet Union along with ratification by a majority of other signatory States (Art.110(3)). After the fulfillment of the requirement, the Charter become operative from October 24, 1945, and the General Assembly held its first session on January 10, 1946.

Article 1 of the Charter sets out the purpose of the United Nations. The first and the foremost purpose of the United Nations is “to maintain international peace and security” and to that end “to make effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means ---adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”¹⁹

The additional purposes are as follows:

1. To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of the peoples;²⁰

2. To achieve international cooperation in economic, social, cultural or humanitarian matters;²¹
3. To promote and encourage respect for human rights and fundamental freedoms for all;
4. To be a centre for harmonizing international actions in the attainment of these ends.²²

These general objective of the United Nations are quite wide in scope and ambit which bind the organization and its members to direct their actions in the attainment of these purposes.

Article 2 of the Charter sets out the principles on which the United Nations is based, They are as under:

1. The principle of sovereign equality of all its members;
2. The principle of good faith to be followed by all members to fulfill their obligations;
3. The principle to settle their disputes by peaceful means;
4. The principle to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State;
5. The principle to give every assistance to the United Nations in any action it takes in accordance with the Charter;
6. The principle to refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action;
7. The principle to ensure that State which are not members of the United Nations, act in accordance with these principles for the maintenance of international peace and security; and

8. The principle of non-intervention.

The general Assembly is one among the working organs of the United Nations (U.N.). It consists of the representative of all member State. The Assembly can discuss any matter within the scope of the charter and any matter relating to peace and security brought to its attention.

One of the important organs²³ of U.N. is economic and Social Council (ECOSOC). It has been establish to handle international economic, social, cultural, health and other ancillary and incidental maters. The main functions of the ECOSOC may briefly be summarized as under :

1. To make or initiate studies and reports with respect to international economic, social, cultural educational, health and related matters;²⁴
2. To recommend measures to promote respect for the human rights and observance of human rights and fundamental freedom;²⁵
3. To prepare draft conventions for the submission to the General Assembly with respect to matters falling within its competence.²⁶
4. To call international conferences on matters falling within its competence.²⁷

It also coordinates the activities of the specialized agencies of the UN. It functions through 12 commissions – international and regional. The ECOSOC has three sessional committees – the economic, social and coordination committees. The ECOSOC has set-up the Commission on Human Rights in 1946.²⁸ Both the ECOSOC and the HRC adopted a

report to the ECOSOC on the important question of the implementation of the Charter.²⁹

Of late, various governments in the world countries have urged the Secretary General to exercise his powers in the field of human rights. Besides, the policy making organs, the ECOSOC, the General Assembly and the Commission on Human Rights have also stressed the importance of the role of the Secretary General in the field of human rights. Much concern is being shown on the violation of human rights and how they are to be treated. The ECOSOC's resolution 75 provides the exact rules to be followed by the Secretariat in dealing with the matters related to human rights and their violations. The resolution underwent many amendments from time to time. As such in 1967, to examine the actual communications received. The HRC recommended a new revolutionary course, which was approved by the ECOSOC. That is the famous prevention of Discrimination and the Protection of Minorities. In 1967, the ECOSOC recommended for the establishment of a UN Rights.³⁰ The ECOSOC also strives to strengthen international co-operation and to achieve it, the ECOSOC brings to the knowledge of the organs concerned by furnishing technical assistance. The ECOSOC is the controlling agency of the Covenants on Economic, social and cultural rights.

It may now be asked to what extent, so far, are principles of equality and human rights and fundamental freedoms internationally protected under the United Nations Order? The answer to this question is that these rights and freedoms are safeguarded, though imperfectly, under the scheme of the Organisation. The Charter imposes an obligation on member states to preserve these rights. It also obligates the organization

to take reasonable and effective measures to protect these rights and freedoms.

D. THE NOTION OF EQUALITY IN INDIA

Equality is a very vital principle of social justice. While it is a boon to the poor, the oppressed and the downtrodden, the rich and prosperous section of the society dreads it, because it can be stretched beyond the limits of justice. As Hobhouse has observed:

“Justice is a name to which every knee will bow. Equality is a word which many fear and detest.”

The problem of equality has baffled political thinkers and social reformers from the earliest time. Aristotle defined equality as treating equals equally and unequal unequally. The modern idea of equality on the contrary focuses attention on its substantive aspect and seeks correction of inequalities in so far as they are unjust and alterable according to prevailing social consciousness. The French declaration of the rights of man and citizen envisioned:

“Men are born and remain free and equal in rights. Social distinctions can be based only public utility.”

Law is the expression of the general will. It must be the same for all whether it protects or punishes. All citizens, being equal in its eyes, are equally eligible to all public dignities, places and employments

according to their capacities and without any other distinctions than that of their virtues and talents. More formal equality is not enough for oppressed and exploited sections of the society which not only need to protection but in substance it requires removal of unjust and oppressive conditions which are capable of alteration. The principles of equality demands that we may concede to only such discrimination as is based on rational grounds. What is rational depends on the level of prevailing social consciousness.

Indian society has been described as a “compartmental” society; within it a vast number of groups maintain distinct and diverse styles of life. The system by which these groups are related and mutually accommodated is so complex as to defy general description.³¹ However, to understand the principles of equality and its dimensions and their setting the legal developments, it is also necessary to sketch some of the principle features of India’s social order and its recent history.

One of the distinctive and pervasive features of Indian society is the division into castes. The word caste is not an indigenous Indian term but a graft via English (from the Portuguese “Casta”). It is used to correspond to several Indian terms, but has no exact equivalent in Indian language.³² Caste in the narrower sense applies primarily to the Hindus, who make up 85% of India’s population. Many features of caste are also formal among non-Hindu groups, and the term “Caste” as used here applies to these groups as well as to Hindus. There are exceptions to almost any statement that can be made about caste, but only the most prominent exceptions will be noted here. The term “Caste” itself has a variety of meanings. It takes on different shadings in the context of village locality, region, and nation.³³

To begin with, a caste may be taken to mean a “Jati” ---an endogamous group bearing a common name and claiming a common origin, membership in which is hereditary. Limited to one or mere traditional occupations, imposing on its members certain obligations, and restrictions in matters of social intercourse and having a more or less determinate position in a hierarchical scale of ranks.³⁴ It has been estimated that there are 2,000 or 3,000 such castes (or sub castes, as they are sometimes called) in present day India.³⁵ Although most castes have a traditional occupation, in only a few ---especially the skilled artisans ---is it followed by most members to day. In many cases, caste tradition precludes entry into certain occupations, while the network of caste ties provides access to others. The caste is held together by ties of kinship, by a cycle of group observances, by bonds of mutual assistance and support, and finally by the powers of the groups to exact obedience to its rules.³⁶

Therefore, independent India embraced equality as a cardinal virtue against a background of elaborate, valued and clearly perceived inequalities. Her constitutional policies to offset these proceeded from an awareness of the entrenched and cumulative nature of group inequalities.³⁷ The result has been an array of programmes that can be addressed collectively as a “policy of compensatory discrimination. “Which is being pursued with remarkable persistence and generosity but without vigor and effectiveness.

The compensatory discrimination ³⁸ policies entail systematic departure from norms of equality (such as merit, evenhandedness, and indifference to ascriptive characteristics). These departures are justified in several ways: first, preferential treatment may be viewed as needed

assurance of personal fairness, a guarantee against the persistence of discrimination in subtle and indirect forms. Second, such policies are justified in terms of beneficial results that they will presumably promote: integration, use of neglected talents, more equitable distribution, etc. With these two --- the anti-discrimination theme and the general welfare theme—is entwined a notion of historical restitution or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past. These multiple justifications point to the complexities of pursuing such a policy and of assessing its performance.³⁹

India's policy of compensatory discrimination is composed of an array of preferential schemes. These programmes are authorized by constitutional provisions that permit departure from formal equality for the purpose of favouring specified groups.⁴⁰ The benefits of "compensatory discrimination" are extended to a wide array of groups. There are three major classes. First, there are these castes designated as Scheduled Castes on the basis of their "untouchability." They number nearly 80 million (14.6 percent of population) according to the 1971 Census. Second, there are the Scheduled Tribes who are distinguished by their tribal culture and physical isolation and many of whom are residents of specially protected Scheduled Areas. They number more than 38 million (6.9 percent of the population in 1971). Third, there are the "Backward Classes (or, as they are sometimes called, "other Backward classes") a heterogeneous category, varying greatly from state to state, comprised for the most part of castes (and some non-Hindu communities) low in the traditional social hierarchy, but not as low as the Scheduled castes. Also included among the Other Backward Classes are a few tribal and nomadic groups, as well as converts to non-Hindu religions from the Scheduled Castes and in some areas the notified Tribes. It has been

estimated,⁴¹ that here were approximately 60 million persons under the Other Backward Classes population at that time (64 millions). Today the portion of the population designated under this heading is probably larger.

The equality clauses in the Constitution have been incorporated in various Articles from 14 to 18. All these articles have to play a vital role. Even in American Constitution, amendments 4 and 14 provided full-fledged equality among the public at large although a little was realized in implementation of these equality provisions in America. Then the following provision was added:

“No state shall deny to any person within its jurisdiction the equal protection of the laws.”

‘Equal protection of the laws’ is a phrase born with the Fourteenth Amendment, the first specific recognition dictum of the Declaration of Independence that “all men are treated equal,” which was effectively used in the antislavery campaign, had a somewhat different import. Charles Sumner came closer to the equal protection notion with his phrase “equality before the law” which he developed in 1849 in contending before the Massachusetts Supreme Court that separate public School for black children would be unconstitutional. Later, he sought to get the principle of equal rights into the constitution by way of the thirteenth Amendment.⁴²

Within a decade the Supreme Court⁴³ in America decided that Congress had been completely wrong on both these points. In the Civil Rights Cases of 1883, they drafted the Fourteenth Amendment and which

had provided for its enforcement by major enactments in 1871 and 1875, had not understood the amendment or congressional power under it. By means of what system Harlan in his dissenting opinion called “a subtle and ingenious verbal criticism,” the court proceeded to sacrifice “the substance and spirit of the Amendment. The defeat of the Harlan position meant that Congress was stripped of any power to correct or to punish individual discriminatory action. In other words, Congress was limited to the correcting of affirmative state action. The Civil Rights Act was not a corrective legislation. It was “primary and direct.” It was a code of conduct which ignored state legislation, and assumed that the matter is one that belongs to the domain of national regulation.”⁴⁴

The due process and equal protection concepts are closely related. The development of the due process clause was even more portentous. As a limit on substantive legislation, it developed into a freewheeling, open-ended doctrine, which judges used to “circumscribe” legislative choices in the name of newly, articulate values that looked clear support in constitutional text and history. The battle of strict constitution was fought and lost in 1819.⁴⁵ The battle for judicial activism was fought and won even earlier in 1803.⁴⁶ The best modern defence of the activist role is to be found in Justice Stone’s famous “*Carolene Products Co.*” which defined three ⁴⁷ situations in which judges should curb their normal deference towards legislatures and subject legislative action to a “More searching judicial inquiry.” These three situations were as under:

- i. When legislation appears on its face to violate a those of the Bill of Rights;

- ii. Where legislation restricts those political processes that ordinarily can be relied on to prevent undesirable legislation; and
- iii. Where “prejudice against discrete and insular minorities tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.

The idea of “fundamental right” as a justification for protective judicial activism can be traced to *Skinner V Oklahoma*.⁴⁸ The case involved a state habitual criminal sterilization act, under which persons convicted two or more times of felonies involving moral turpitude could be rendered sexually sterilized. Court disagreed with the law on ground of fundamental right of equality.

In India, hence, Article 14 is a mixed provision of American and English, one phrase “equality before law” has been taken from English law” and other phrase “equal protection of laws” from American Law. Thus, Article 14 uses expression to make the concept of equal treatment binding principles of State action. Both clauses guarantee to the people the same thing. The right to equality finds place in the report drawn up by Motilal Nehru as Chairman of the Committee appointed to determine principles of the Constitution for India in 1928. The Karachi Resolution, March, 1931 reiterated, *inter-alia*, this right in the resolution on fundamental rights and economic and social change.⁴⁹ Patanjali Shastri, C.J.⁵⁰ has aptly observed that second expression is a corollary of the first. Equality before law is a negative concept while the equal protection of law is a positive one. The Supreme Court in *Keshvanand Bharti V State of Kerala*⁵¹ through Justice Jagmohan Reddy has clearly discerned concept. Hence, the doctrine of equality must be interpreted in broad

sense, so that the principles of equality, rule of law, human rights and social justice can easily be enforced under the broly of equality clauses and all the confrontations may be avoided for once and all.

In *Vishewar Nath V Income Tax Commissioner*,⁵² it has been upheld that in all democratic setup, the concept of equality is supreme and without observing it, no democratic government can function. Actually, the enforcement and application of concept of equality depend upon trinity of time, place, and circumstances. The deviations and divagations are possible due to change of time, place and circumstances. Supreme Court has also taken this kind of stand in the case of *Kedarnath Gejoria V State of West Bengal*.⁵³ The court was of the view, that article 14 does not rule out classification for purposes of legislation. This power is not without limitation. The classification must not be arbitrary. It must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made.

The Article 14 has come p for interpretation and adjudication before the Supreme Court in a catena of cases. These pronouncements have established certain important principles which further elucidate the scope of permissible classification. These may be stated as under.⁵⁴

1. a law may be constitutional even though it relates to a single individual if, on account of some special circumstance, or reasons applicable to him may be treated as a class by himself.
2. There is always a presumption in favour of the constitutionality of an enactment.
3. it must be presumed that the legislature understand and correctly appreciates the need of its own people.

4. The legislature is free to regulate and recognize the harm and may confine its restoration to those cases where the need is deemed to be clearest.
5. to presume the constitutionality of an enactment, the court may take into consideration matters of common knowledge, common report, history etc.
6. a classification need not be scientifically perfect or logically complete.
7. the validity of a rule has to be judged by assessing its over all effect and not by picking up exceptional cases.

The category of cases and ratio thereunder which are important and evolved, developed and nourished the concept of equality may be quoted so follows:

- a. Special circumstances may validly justify "single persons laws."⁵⁵
- b. Classification of special court may be valid if it is reasonable.⁵⁶
- c. Classification based on race and denial to innocent person of equal right of opportunity is unconstitutional. Classification based on language is valid.⁵⁷
- d. Classification of morality is not elevant.⁵⁸
- e. Classification of fixing a date- It can always be dubbed as arbitrary even if no particular reasons forthcoming.⁵⁹
- f. Article 14 is to be understood in the light of Directive principles of state policy.⁶⁰
- g. Supreme Court's direction to the state to pay to all the pensioners whether retired before January 1980 or thereafter the benefit of new rules of pensions.⁶¹

- h. Classification based on educational qualification is valid.⁶²
- i. Classification based on historical and geographical reasons is valid.⁶³

Hence, it is submitted that in a secular country like India, we have to secure justice social, economic and political with liberty of thoughts, expression, faith and worship, equality of status, opportunity and fraternity assuring a dignity of the individual and the unity of the nation. Thus, these provisions have been added to maintain equality in furtherance to the object of Constitution itself. There were many kinds of discriminations on ground of religion, caste, race etc. at the time of commencement of the constitution. For instance, there were separate wells in villages for schedule castes and Tribes. Their entry to public shops, market and restaurants was prohibited. Their entry to other places of public resort and even to temples was prohibited although they were Hindus.⁶⁴ There is nothing wrong between Article 14,15 and 17. These provisions have been enacted for the advancement of socially and educationally backward classes so that the principles of equality, human rights and social justice could be upheld.

Article 16 is another branch of the great tree of the concept of equality. It applies the universal principle that there should be equality of opportunity for all citizens in matters relating to public employment to any office of the state. And there should not be any discrimination on ground of religion, castes, race, sex and residence. Two decisions⁶⁵ of Supreme Court have operated a new yardstick for determining the concept of equality in public employment. The first case was with regard to reservation of jobs to Scheduled Castes and Scheduled Tribes. The provisions were upheld and various arguments for alleged discrimination

were struck down. The other case was with regard to legibility for recruitment of airhostesses and their service conditions. Several service conditions were struck down to maintain the human rights and to secure the social justice to the members of weaker sex of the society at large. A classification of employees can, therefore, be made for first identifying and then distinguishing members of one class from those of another.

In the case of *State of Kerala V N.S. Thomas*,⁶⁶ it was observed that classification, however, is fraught with the danger that it may produce artificial inequalities and, therefore, the right to classify is hedged in with salient restraints or else the guarantee of equality, will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial difference which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. But sub-section 4 of Article 16 enshrines the principle of promotion to socially backward to secure social justice, to Scheduled castes and tribes and to other weaker sections of the society. It amounts to reasonable classification. In the case of *Balaji V State of Mysore*, it was propounded that reservation of more than half seats for being filled from members of backward classes was unconstitutional and invalid.

In the case of *P. Devdason V Union of India*⁶⁸ it was provided that the carry forward rule is unconstitutional and if no suitable candidate from weaker section is available then these posts should be filled up from the general candidates and then reservation should not be carried

forward next year for recruitment. Article 16(4) does not mean that the reservation should be provided ignoring the efficiency and merit.

In the case of *State of Kerala V N.M. Thoms*⁶⁹ it was observed that it must not be overlooked that efficacy and efficiency of administration is of paramount importance and that it would be unwise, retrograde and impermissible to have any reservation at the cost of administrative efficiency and efficacy.

The contextualisation of principle of equality in Indian perspective would not be complete unless the relationship between fundamental rights and directive principles of state policy in our constitutional order is understood, appreciation and extolled. Justice P.N. Bhagwati in the case of *Minerva Mills V Union of India* 70 in the following lines has aptly explained this relationship:

“The genus of both is to be found in the freedom struggle which the people of India waged against the British rule. The leaders realized the supreme importance of the political and civil rights of the individual because they knew from their experience of the repression under the British rule that these rights are absolutely essential for dignity of men but at the same time they were conscious that in the socio-economic conditions that were prevalent in the country only as small fraction of the people would be able to enjoy these rights. There were millions of the people who were steeped in the poverty

and destitution and for them these civil and political rights had no meaning. It was realized that to the large majority of the people who are living almost under sub-human existence and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty would sound an empty words banded about only in the drawing of bridge and well-to-do and the only solution for making these rights meaningful to them was to remake the material conditions in a new social order where socio-economic justice will inform all institutions in public life so that the preconditions of fundamental liberties for all, may be secured. The national leaders, therefore, laid the greatest stress on the necessity of insurance and economic justice.”

This is a re-statement of views of the members of the Constitutional Assembly who envisioned an India of and wedded to the principles of equality and rule of law. Even Franklin Roosevelt, way back in the year 1944, urged that:

“Basic essential to peace is a decent standard of living for all individual men and women and children in all nations. Freedom from fear is eternally linked with freedom from want---

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men. People who are hungry and out of a job are the stuff of which dictatorships are made."⁷¹

In the same view Justice V.R. Krishnan Iyer has sanctified the basis of equality in the lines below:

"Economic foundations of human rights have always been emphasized as emerging from faith in the dignity of man and equality among men and women without which civil and political rights are but balderdash."⁷²

Now, it is a basic precept of a just legal system that we should compensate those who are not responsible for what has happened to them. Moreover, members of the Dalit community lack access to land because of the practices of discrimination that others have unleashed upon them. They may have been, for example, born into a Dalit household that has been systematically denied access to any resource to the basic conditions that make a life of dignity possible.⁷³ The reasons for their poverty and lack of social status lie outside their control.

This, we make the move from formal to substantive equality, from equalitarianism to egalitarianism. And it is this feature of equality that makes it a desirable principle for any society claiming to be an egalitarian democracy. Therefore, we accept the principle of historical compensation or reservation as an integral feature of our polity. However, historical compensation is fraught with three ⁷⁴ problem, all of which have come to

bedevil contemporary societies, particularly India. First, there is always the danger that the concept will be hijacked both by political groups and by political parties for various purposes, notably for inclusion in reservation by the former and consolidation of vote banks by the later. The problem here is that the concept of reservation has been stripped of its normative concerns and has acquired hue and colour only in terms of political strategy. And that political strategies can prove profoundly amoral has been repeatedly shown by our recent history, particularly the history of electoral politics. The transformation of reservation from a politically normative concept to pragmatic politics carries its own problems, of which the main one is that society loses confidence in the normative desirability of preferential policies. They become both contentions and a cause for some resentment. The second problem is that our society has come to be overcome by what is known as the “cult of the victim.” In fact, most of us are somewhat dumbfounded by the eagerness with which communities at this point need to be attended to, narratives of victimization can be easily appropriated by any group to argue that it has been swindled by history. Third, therefore, the concept of justice is reduced to juggling between particular interests. And in a parallel process, the holders of power as they juggle between competing claims of victimization. In effect, the politics of reservation has bestowed enormous power on the state to divide people, align certain of these groups with power structures, and neutralize the claims of those who should be heard. It has simply aided the holders and potential holders of power to forge political constituencies in ways that have nothing to do with the normative claim of preferential treatment.

It is axiomatic from the on going discourses on the principles of equality that equality is a human entitlement since time immemorial, it is

inherent, and it is inalienable. Every human struggle, every human movement, every human culture and every human inquisition has always been in quest of equality in every period of human history. Rule of law in England, peace under U.N. Charter and equality clauses in the constitution of India are the manifestations of equality principles. The classifications, if any, have been made on reasonable ground must not only be reasonable to maintain the harmonious relations between fundamental rights and directive principles of equality with all its dimensions, human rights and social justice as enshrined in the Preamble to the Constitution of India. The fundamental rights of equality principles must be enforced while keeping in view the mandate and constitutional obligations provided under part fourth of the Constitution.

Although, fifty years ago at the time of the framing the constitution, there was genuine shame among the upper castes at the way the Scheduled Castes had been treated for thousands of years. For that reason, special privilege were enshrined for them in the Constitution. That goodwill the Scheduled Castes commanded, that concern for their welfare, has now eroded. It is sad to say but it must be said that poverty is big business. There is much money to be made, much power to be required by being active on poverty issues. That makes poverty a resources; removing it a loss of capital. So, for India's politicians Scheduled Castes votes are valuable but not their welfare. All Scheduled Castes and other weaker sections will enjoy social mobility when they are treated not as a caste but as people on the basis of the principles of equality, rule of law, human rights and social justice.

NOTES AND REFERENCES

1. Mervyn Peake (1911-68), British novelist, TITUS GROMAN, "The Sir Goes Down,"
2. William Shakespeare, "The Merchant of Venice," 111:1.
3. Shikwa & Jawab –e-Shikwa (complaint and Answer) Iqbal's Dialogue with Allah.
4. Durga Das Basu, "Human Rights in Constitutional Law" (Prentice-Hall of India, New Delhi, 1994). pp.5-6.
5. M.P. Jain, "Political Theory," A.G. Publications, Delhi. 1989, pp. 383-385.
6. Ibid
7. Ibid
8. S. Leacock, "Our Heritage of Liberty," (London, 1943) p. 37.
9. G. Shahnazgrov, "Socialism and Equality," (Moscow) p. 15.
10. Crame Brinton, "Equality in Encyclopedia of Social Sciences (1931) Vol. V p. 577.
11. T. Rees, Equality (London) 1971, p.28.
12. Condorcet, Progress of the human Mind (1794); For Babenf see P. Buonarroti, Buonarroti's Hisotry of Babenf's Conspiracy of Equals (London, 1936) p. 139.
13. Ibid.
14. Dicey, 'Law of Constitution,' p.203, (10th Edition).
15. Dr. Jennings – Law of the Constitution, p. 48-49 (3rd Edition)
16. S.K. Verma, "An Introduction to Public International Law." Prentice Hall of India Ptd, New Delhi, 1998, p. 430-432.

17. Ibid.
18. Ibid.
19. Ibid.
20. Article 1 (1), U.N. Charter.
21. Article 1 (2), U.N. Charter.
22. Article 1(4), U.N. Charter.
23. Chapter X. U.N. Charter.
24. Article 62 (1), U.N. Charter.
25. Article 62 (2), U.N. Charter.
26. Article 62 (3), U.N. Charter.
27. Article 62 (4), U.N. Charter.
28. Article 68 of U.N. Charter
29. N. Jayapalan,, "Human Rights," Atlantic Publication and Distributors 2000, pp. 62-63.
30. Ibid.
31. Marc Galanter,"Competing Equalities." Oxford University Press, New Delhi, 1984, p.7.
32. Ibid.
33. Ibid.
34. Mandelbanm, 1970 and Arroptt, 1955.
35. Ghurye 1969 : 27 (2000); Hutton 1961 : 2 (3000).
36. Supra note 31. p.8.
37. The phrases "compensatory discrimination," "protective discrimination, have been need interchangeably.

38. Marc Galanter, " Law and Society in Modern India," Oxford University Press, New Delhi, 1997, p. 185.
39. Ibid.
40. Ibid.
41. Gokulesh Sharma, "Human Rights and Social Justice," Deep & Deep publications, New Delhi, 1998, p. 143.
42. Civil Rights Cases (1803).
43. Ibid p. 145.
44. McCulloch V Maryland (1803).
45. Marbury V Madison (1803).
46. Justice Stebe in Carolene Product Co. Case.
47. (1942)
48. Chakravarty and Bhattacharya, "Congress in Evolution, (1940), p. 28.
49. State of West Bharti's V Anwar Ali Sarkar, AIR 1952, SC 75.
50. Keshvanand Bharti's V State of Kerala, 1973 SCC 225.
51. AIR 1959 SC 149.
52. AIR 1953 SC 404.
53. Supra note 42 p. 148.
54. Chiranjit Lal Chaudhary V Union of India, AIR 1951 SC p. 41.
55. Dwarika Prasad V State of U.P. AIR 1954 SC 224.
56. Moti Ram V State of M.P., AIR 1978 SC 1594.
57. R.K. Garg V Union of India, AIR 1981 SC 2138.
58. D.C. Ganri V State of Kerala, AIR 1980 SC 271.
59. Indra Sawhaney V Union of India, AIR 1993 SC 130.

60. D.S. Nakara V Union of India, AIR, 1983 SC 130.
61. Ram Krishna V Justice Tendulkar, AIR 1958 SC 538.
62. State of Rajasthan V Manohar Singh, AIR 1954 SC 297.
63. Supra note 42 p. 154.
64. A.B.S.K.S. V Union of India AIR 1981 SC. P. 298., Air India V Nargess Meerza, AIR 1981 SC p. 282.
65. AIR 1976 SC 490.
66. AIR 1963 SC 649.
67. AIR 1964 SC 179.
68. AIR 1976 SC 490.
69. AIR 1980 SC 1789.
70. Wathere Laueur & Barry Rubin (Edited),” Human Rights Reader,” p. 313.
71. V.R. Krishna Iyer, “Human Rights in India, “ Eastern Law House, New Delhi, 1999, p. 217.
72. Neera Chandhoke, “Rethinking Reservation,” The Hindu Nov. 4, 1999.
73. Ibid.

CHAPTER -IV

SOCIO-POLITICAL JUSTICE TO THE WEAKER CLASSES

A. AN OVERVIEW

The constitution of India through the various principles laid down in it covers all most every aspect of life. The main object of the framers of the constitution was to ensure social, educational economic & political equality amongst the peoples.¹ Though the constitution aims to create the impartial treatment to all citizens but even then a large portion of citizens are far behind to the advanced segment of the society.

The citizens who are behind in the race of development basically belong to the Scheduled Cast, Scheduled Tribes and Backward classes. The different provisions are given in the constitution especially Art. 15(4) & 16(4) are there to protect their educational, economic and political interest by according them a preferential treatment in above-mentioned fields. The word socialism brought into the preamble and its sweep was elaborately considered by the apex court in several judgements that the meaning of the word socialism in the preamble of the constitution was expressly brought in to establish an egalitarian social order through the rule of law as its basic structure and means to crystallize a social state securing to its people socio-economic & political justice by interplay of Fundamental Rights and the Directive Principles.² Dr. B.R. Ambedkar in his closing speech on the draft Constitution on 25th Nov. 1949 stated “What we must do is not to be attained with mere political democracy; we must make out

political democracy a social democracy as well. Political democracy cannot last long unless there lies on the basis of it a social democracy.³

Social democracy means a way of life which recognizes liberty, equality, fraternity as principles of life considering the historical perspective confronting the framers of the Constitution in drafting the constitution, it was stated that one of the important objective to be translated into action was to take special care of the backward classes and the members of scheduled caste and scheduled tribes by bringing them to the fore through pragmatic approach and providing adequate opportunities for their amelioration and development. The main objective was to provide social & political justice to them in its true spirit.

B. GENESIS OF THE SOCIO-POLITICAL JUSTICE

Historically, what stated as social upliftment measures for the down-trodden amongst Hindus in some princely States gradually developed into foundation of various association in different States encouraged by the social demonstration of backwardness for claiming preferential treatment injected in the society by communal representation. Consequently, Mahatama Gandhi adopted the outcasts of the system as “Children of God” but took long years to shed his advocacy of the “Varna System” scheme. In the same manner C. Rajgopalachari, who spearheaded the Dalits temple entry movement sponsored an educational experiment that seemed to promote the system of hereditary occupations and thus elicited a strong protest in his home state.

“It is easier to give power but difficult to give wisdom”. Dr. B.R. Ambedkar quoted this Burke’s thought in the Constituent

Assembly Debate and exhorted let us prove by our conduct that we have not only the power but also the wisdom to carry with us all sectors of the country which is bound to lead us to unity, integrity, stability and prosperity. In pre-Independence India the Acts of 1909, 1919, & 1935 introduced separate electorate system for Muslims, Sikhs, Christians, Anglo-Indians and Scheduled Caste. But this system was against the equality and national unity and was rejected and a concept of universal adult franchise was developed in national interest with reservation for Scheduled Caste and Scheduled Tribes only under Article 330, 332, 334, 335, 338 and 339 of the Indian constitution.

The Constitutional history of India discloses that the history of representation of the depressed classes in the Indian legislature is of recent origin. It appears that the Government of India Act, 1858, 1861, and 1892 did not bring any relief whatsoever to the Scheduled Castes and Scheduled Tribes. They never figured anywhere nor was there anyone to put them on the map of political representation. They were so far unheard and unsung.⁵ The depressed classes again did not find any representation nor any safeguard in the Government of India Act, 1909. But the peoples were not satisfied with the arrangements made under abovementioned enactments.

It was, however, for the first time in the political history of India in 1917 that the move to give representation to Scheduled Caste in Indian legislature was initiated by some of the associations such as Panchama-Kavli Abhivarthi-Abhimana Sangha a Madras presidency untouchable association.⁶ After the famous declaration in the House of commons on Aug. 20, 1917, Montague, the then secretary of State for India came to India to study the different shades of political opinion. All sort of organizations, all sorts of interest, all sorts of demands

gushed forth among them, appeared before him in Nov. and December 1917, the demand of giving representation to the depressed classes in the Indian legislatures. The result was that Franchise Committee (Southborough Committee) 1918-19 recommended for each provincial council the nomination from depressed classes.⁷ Sir C. Shankaran Nair said, "The Non-Brahmans and the depressed classes have awakened to a sense of their political helplessness and to their wretched condition, and no longer content to rely upon the Government which has left them in longer content to rely upon the Government which has left them in this condition for the past hundred years, claims powerful voice, in the determination of their future. It is enough to say that they want half the members of all the Executive councils, including the viceroy's to be Indians, and an elected majority in all the legislative councils, without the checks provided by the Grand Committees and state councils, their interest being adequately protected by what is called communal representation."⁸

The impact of the statement made by Sir, C.Shankaran Nair in a minute dissent to First Dispatch on Indian Constitution Reform, March 5, 1919 was that there was wide spread awakening in the depressed classes and consequently they started clamoring for adequate representation.⁹

The result of the First Dispatch on Indian Constitutional Reform was that the existence of depressed classes was recognized for the first time in Indian History under the Government of India Act, 1919 with the result that among the fourteen non-official members nominated by the Governor-General to the Central Legislative Assembly, one was the representative of the depressed classes. In the provincial Legislature four nominations in the central provinces two in Bombay, two in Bihar

and one each in Bengal and united provinces represented the depressed classes. In Madras ten members were nominated to represent nine specified depressed classes.¹⁰

(i). Simon Commission: The British Policy

The Act of 1919 could not solve the constitutional problems. The Indian National Congress at its annual session in 1919 condemned the reforms as inadequate and unsatisfactory. The political activities of Indian leaders became more vigorous. It led to further deterioration of the working of the governmental machinery. Realizing the situation as serious the British Government in pursuance of the provision contained in the Act of 1919 announced the appointment of the India Statutory Commission better known as the Simon Commission after the name of its Chairman, Sir John Simon. In November 1927, the Commission was appointed. It landed at Bombay on February 3, 1928, to commence the work of re-examination of the Indian problem as declared in the Act of 1919. The Commission consisted of seven Englishmen as members. Its non-India character was not acceptable to almost all the Indian parties. The Congress party decided to boycott the Commission at every stage and in every form. The Commission was shown black flags with slogans 'Go back Simon'. In order to seek cooperation the Central Government appointed a committee for British India, and every Legislative Council elected its provincial committee to work with the Simon Commission. Dr. Ambedkar along with other members was elected by the Bombay Legislative Council on August 3, 1928,¹¹ to be on the Provincial Committee. Several memorials and representations of various depressed classes associations and organizations all over India were addressed to the Simon Commission highlighting the fact that these unfortunate brethren were leading a miserable life. The Madras

Adi Dravida in a manifesto explained that a very high percentage of the lower orders of the people in India had no habitation of their own. It was expressed openly that they were allowed by sufferance to live on the lands of the land-owing higher classes and were regarded no better than a chattels.¹² The representations made by various depressed classes organizations to the Simon Commission show that these classes had virtually lost patience to tolerate injustices. These organisations fearlessly explained that they had not even the right to safeguard their individual lives. The organizations of the depressed classes reminded the Simon Commission of the fact that the depressed class all over India have awakened to the point of asserting themselves and displaying boldness never shown by them in the history of India. To quote B.G. Mandal,

“The jugglers talk of equality and fraternity but their sympathies are lip deep. They have been giving us bluffs for the last five thousand years. The so-called patriots of India demand political rights, but they are not ready to give social rights to their own country men.”¹³

All these pressures, exerted by the different depressed classes organizations compelled the Simon Commission to suggest 10(Ten) reserved seats for depressed classes. Dr. Ambedkar, however, was not satisfied and hence he said, “the safety of depressed classes lay in being independent of government and the congress. We must shape our cause ourselves.”¹⁴

He laid down emphasis on the improvement of social manner and habits by the depressed classes. He was firmly of the view that political power could not be a panacea for the ills of the depressed classes. He believed that their solution lies in their social elevation.

They must clean their evil habits. They must improve their bad ways of living. They must be educated. All these will result in the emancipation of the depressed classes and establishment of such a society in the country of ours in which one man will have one value in all domains of life, political, social, and economic.¹⁵

After the condemnation of Simon Commission by the people of India, the British Government called the First Round Table Conference in London. The Conference failed, as it was not attended by the Indian political leaders who were mostly in jail, due to Civil Disobedience Movement launched by Mahatama Gandhi. The British Government did not consider it proper to proceed with the framework of future constitutional reforms without participation of Indian National Congress. It was then thought to call Second Round Table Conference. In the meanwhile efforts were made to bring about reconciliation between the Congress and the government. The efforts of Sir Tej Bahadur Sapru and Sir M.R. Jayakar succeeded and resulted into the famous Gandhi-Irwin Pact, which was signed in 1931. The government released all the political prisoners and Mahatama Gandhi withdrew the Civil Disobedience Movement. Mahatama Gandhi then went to London to attend the Conference as the sole representative of the Congress. Besides a number of issues the communal problem was specifically discussed but the conference ended without any definite conclusion.

Dr. Ambedkar who was representing the interest of untouchable wanted Gandhiji to make a clear-cut commitment for safeguarding the special representation of the depressed classes. Gandhiji spoke on two occasions before the Committees¹⁶, which were constituted, to work out the issues to be taken up by the Round Table Conference.

Ambedkar was disappointed when Gandhi referred the problem of special representation claimed by the different communities who said:

“The Congress has reconciled itself to special treatment of the Hindu-Muslim-Sikh tangle. There are sound historical reasons for it. But the Congress will not extend that doctrine in any shape or form.”¹⁷

From this extract of Gandhiji's speech it became clear to Ambedkar that Gandhiji was not prepared to give any political recognition to any community other than Muslims and Sikhs. He was not prepared to recognize the Anglo-Indian the depressed classes and the Indian Christians.¹⁸ Ambedkar then declared that if the depressed classes were not to be recognized in the future Constitution of India as was done by the minorities sub-committee during the first session of the Round Table Conference, he would neither join that particular committee nor whole-heartedly support the proposition for adjournment.¹⁹ Gandhiji's reluctance to support Ambedkar's demand came to light. That followed a reaction in the quarters of depressed classes all over India. The All-India Depressed Classes Conference, under the Presidentship of Rao Bahadur M.C. Rajah at Gurgaon session declared that Gandhiji was misrepresenting the case of the untouchables and strongly denounced the claim made by Gandhiji that the Congress had taken care of the untouchables from the beginning and had championed the cause of the untouchables. I say, said Rajah, the President of the Conference, 'that these statements are untrue'.²⁰

The Conference supported the demands put forth by Ambedkar and declared that no Constitution would be acceptable to the depressed

classes which did not include in it the system of separate electorates for the depressed classes.²¹ However, when the British Premier noticed that there was no unanimous solution of the minorities problem, he asked all the members of the Minorities Committee to sign a requisition authorizing him to settle the communal problem and to pledge for acceptability of his decision. Gandhiji signed this pledge along with other members. Ambedkar did not sign this requisition. The Prime Minister then adjourned the Conference on December 1. Gandhiji left for India and reached Bombay on December 28, 1931.

The depressed class people were totally unsatisfied with the developments of Gandhi-Ambedkar dialogue with the result hostile demonstrations were resorted to. Ultimately, it was clear that nothing could be expected from an agreement in such a way for the disposal of the communal issue and the British Government decided to give its won formula regarding the same. Ramsay MacDonald, thereafter gave his famous 'award' known as the 'communal award' on August 17, 1932.²²

(ii). The Communal Award: Divide & Rule Policy

Keeping in view the pressure from all corners, the 'Communal Award' of Mr. Ramsay Macdonald was announced. The most important part of the award relating, to the depressed classes was, "Members of the depressed classes qualify to vote will vote in a general constituency. In view of the fact that for a considerable period those classes would be unlikely by the means alone, to secure adequate representation in the legislature, a number of special seats will be assigned to them. These seats will be filled by election from special constituencies in which only members of 'depressed classes',

electorally qualified, will be entitled to vote. Any person voting in such a special constituency will, as stated above, be also entitled to vote in a general constituency. It is intended that these constituencies should be formed in selected areas where the depressed classes are most numerous, and that, except in Madras, they should not cover the whole area of province.”²³

His Majesty’s Government did not consider that these special depressed classes constituencies would be required for more than a limited time. They intended that the constitution should provide that they should come to an end after twenty years if they had not previously been abolished under the general powers of the electoral revision. Perhaps Macdonald Award was a singular victory for Dr. Ambedkar and the politicians in the country can’t ignore recognition of the fact that the depressed classes shall have to be taken into confidence, for a future set-up or constitution of India and in future their existence. To quote Ramsay Macdonald, “We felt it our duty to safeguard what we be believed to be the right of the depressed classes to a fair proportion of representation in the legislature, we are equally careful to do nothing that would split off their community from the Hindu world.”²⁴ The Macdonald award was a great Shock to Mahatma Gandhi and when this communal award was announced, granting separate, electorates to the depressed classes, Gandhiji declared his resolve to fast unto death. If the separate electorate for depressed classes were not abolished. Ultimately, an historic agreement known as Poona Act was reached on September 24, 1932. The man text of the Poona Act ²⁵ was as follows:

1. There shall be seats reserved for the depressed classes out of the general electorate seats in the provincial Legislatures.

2. Election to these shall be joint electorates subject however to the following procedure:

All the members of the depressed classes registered in the general electoral role in a constituency will form an electoral college, which will elect a panel of four candidates belonging to the depressed classes for each of such reserved seats by the method of single vote. The four persons, getting the highest number of votes in such primary election, shall be candidates for election, by general electorate.

3. Representation of the depressed classes in the Central Legislature shall likewise be on the principle of joint electorate and reserved seats by the method of primary election.
4. In the Central Legislature, 18% of the seats allotted to general electorate of British India shall be reserved for the depressed classes.
5. The system of primary election of a panel of candidates for election for central provincial legislature shall come to an end after the first ten years, unless terminated sooner by mutual agreement under the provision of clause 6 below.
6. The system of representation of the depressed classes by reserved seats in the provincial and central legislatures as provided for in clause 1 & 4, shall continue until determined by mutual agreement between the communities concerned in the settlement.

The Poona pact was in fact of manifest material advantage to the depressed classes, which formed the basis of their representation in the Government of India Act, 1935.

By the end of 1940's the preferential treatment of the depressed classes through the policy of reservation had become a hard reality, the nation's politico-constitutional life and the nation could not afford to divert the beneficiaries of the reservation policy. What could be done at the time of the framing of constitution was a compromising approach with ultimately goal of assimilation of all the classes of the people into the mainstream of national life. By the end of independence, consciousness had given way to equalitarian humanism.²⁶

After Independence the Government of India Act, 1935 was replaced by Constitution of India 1950, it incorporated the concept of equality upon which the governmental machinery was to be carried on. The Constitution discarded many such things which were in contradiction to equality and the system of separate election under the communal award was the one which the Constituent Assembly replaced with the 'Universal Franchise'.²⁷ A right to vote was conferred on every adult citizen irrespective of caste, religion, statute and sex etc. But in view of the sequence of events that took place in the past, regarding the protection of depressed classes, the framers of the Constitution could not avoid to give them better and secured position and had to reserve seats for the scheduled caste and scheduled tribes in Lok Sabha under Article 330 and Vidhan Sabha under Article 332 in proportion to their population.

The reasons being that the scheduled castes and tribes had been in a position of disadvantage. They were not in a position to compete

with the advanced sections of the society on a footing of equality. Under the Article 334 the reservation were originally subjected to a time limit of 10 years i.e. only upto January 25, 1960. But this period was extended to 20 years by the Constitution (English Amendment) Act 1959 and again to 30 years by the Constitution (Twenty Third amendment) Act 1969 and still further extended to 40 years by the Constitution (45th Amendment) Act 1979, enforced from January 26, 1980. Initially it was thought that the 10-year time limit would be enough to bring those communities to the level of others, but continuous extension of the period indicates that the results of reserving seats were quite positive and perhaps this period may be extended further if the situation does not improve satisfactorily. The scheduled castes and tribes come to the Legislatures through election whereas Anglo-Indian community is nominated by the President to the Lok Sabha seats (Article 331) and by the governor in the case of state (Article 333). The Constitution only guarantees that seats would be reserved for them in such number as would be commensurate with their population.

The Constitution, therefore, ensures that the interests of these people are appropriately protected and thus it enables them to participate in the national life. Some new castes in the list of those getting reservation benefits have been added which led to increase in the population of Scheduled Caste and Scheduled Tribes. Thus the number of reserved constituencies has to be increased by decreasing the general constituencies. For example in 1976, the scheduled caste population was 14. per cent of the total population and they had 78 seats reserved in the Lok Sabha and 540 seats in the various Vidhan Sabhas. Likewise, the scheduled tribes population was 6.09 per cent of

the total population and had 38 seats reserved in the Lok Sabha and 282 seats in the Vidhan Sabhas. After the 1976 amendment of the Scheduled Castes and Scheduled Tribes Act, their respective population became 15.5 per cent and 7.5 Percent of the total population. Accordingly the seats reserved for them are 79 and 40 seats in the Lok Sabha and 620 and 302 in various Vidhan Sabhas respectively. This trend has often been resented by anti-reservations.

The Constitution provides for allocation of seats in Lok Sabha and to the several states upon the completion of each decennial census. Article 82 provides that upon the completion of each census the allocation of seats in the Lok Sabha to the states and the division of each state into territorial constituencies, shall be readjusted by such authority and in such manner as Parliament may determine by law. Clause (3) of Article 170 makes similar provision in regard to the seats in the State Legislative Assemblies and the division of the states into territorial constituencies. In pursuance to these provisions Parliament enacted, on the lines of an earlier Act of 1952 although with a some important difference, the Delimitation Commission Act 1962.

C. THE DELIMITATION LAW: ITS ROLE AND WORKING

Delimitation Commission²⁸ is not a permanent body but is only appointed for determining and demarcating constituencies before the election. The body is appointed by the Parliament and submits the report to it. The functions of the Commission under the Act are:

1. To determine, on the basis of the latest census figure and having regard to the provisions of Articles 81, 170, 330, and 332,

- (a) The number of seats in Lok Sabha to be allocated to each state and the number of seats, if any, to be reserved for the scheduled castes and the scheduled tribes of the states and
 - (b) The total number of seats to be assigned to the legislative assembly of each state and the number of seats, if any, to be reserved for the scheduled castes and for the scheduled tribes of the state.
2. To divide each state into territorial constituencies and delimit them.

The constituencies for the Lok Sabha in 1977 and 1980 were the same. For the 1977 elections, Delimitation Commission constituted under the Delimitation Act 1972 determined the constituencies. The Delimitation Commission divided the country into 542 single number parliamentary constituencies including 78 reserved for scheduled castes and 38 for scheduled tribe and allocated them to the 22 states and to 9 union territories. Subsequently seats reserved for scheduled castes were increased from 78 to 79 and 38 to 40 for scheduled tribes, in accordance with the provisions in the Schedule Castes and Scheduled Tribes Orders (Amendment) Act 1976. It is not necessary to delimit constituencies afresh due to the formation of a new state or the transfer of areas from one state to another. In such cases the Parliament invariably vests the delimitation power in the Election Commission.²⁹ At the time of elections the Election Commission prepares detailed rules which provide important guidelines in conducting the affair pertaining to elections. The general as well as scheduled castes and

schedule tribes constituencies for the 1984 General Elections continued to be the same as were under the 1980 Elections.

(i). Election Commission and Rules Thereunder.

The most striking feature of the Indian Constitution is its adoption of democracy on the basis of adult franchise. Undoubtedly it has implications far beyond its political significance i.e. break down of feudal traditions and system of separate electorate. Many social groups who had no right to vote or were unaware of their strength are now able to chose their representatives. The Constitution undoubtedly puts the process of political system into the hands of every adult through which they are not, only able to enforce their rights but can also seek to affirm their right to equality. These aspects are the very foundation of democracy. The success of democracy, therefore, rests upon fair and free elections. The Constitution establishes the democratic form of government both at the centre and in the states and has made suitable administrative arrangements to ensure free and fair elections. Part XV of the Constitution (Articles 324 to 329) deal with the matters of elections. Article 324 has created a centralized agency in the shape of the Election Commission, which has an overall charge of all the matters pertaining to election.

The Constitution protects the issues of delimitation of constituencies from judicial scrutiny and ensures elections at the proper time. Article 329 (a) provides that the matters concerning the validity of any law relating to delimitation of constituencies will not be questioned in any court. This is done with a view to ensuring that elections are held at the proper time and are not required to be postponed because of judicial interference.³⁰ Clause (b) or Article 329

takes away the jurisdiction of the courts between the commencement of the polling and the final election.³¹ The judicial power merely decides whether a person has a right to get his name included in the electoral list or whether he is subject to one of the prescribed disqualifications.³² In view of the above, no significance can be attached to any challenge which affects the 'election' and any irregularity committed while it is in progress. Earlier, the election disputes were submitted to the Election tribunals through election petitions but the Nineteenth Amendment to the Constitution in 1966 abolished these after having deleted certain word from Article 324(1), which resulted in speedy disposal of election cases. Representation of the People act, 1951 has elaborate provisions for ensuring fair elections and the practices, which may vitiate the validity of the election, are mentioned therein. Thus, the matters relating to elections to the Parliament and the States are controlled and supervised by the Central Government in view of the vast diversities existing in India from one state to another state and regions, on the basis of various factors like language, religion and culture. Centralized election machinery could be the only agency to conduct the elections fairly and ensure adult suffrage. It was indeed proposed in the Constituent Assembly that there should be separate Commissions for the states and the centre but the proposal was not accepted because it was brought to the notice both of the Drafting Committee as well as of the central Government that in provinces the executive government is instructing or managing things in such a manner that those people who do not belong to them either racially, culturally or linguistically, are being excluded from being brought on the electoral rolls. Since franchise is a most fundamental thing in a democracy, no person who is entitled to be brought on the electoral

rolls, should be excluded merely as a result of the prejudice of a local government, or the whim of an officer.³³

The centralized election agency was thus envisaged as a national necessity to curb and thwart any intention of any state government to push the regionalism through the preparation of electoral list.³⁴ The Constitution thus provides for a permanent agency headed by the Chief Election Commissioner who is a whole-time official. The reasons as to why the office of the Election Commissioner should be a permanent office is 'that the skeleton machinery would always be available' which may also meet the need in the event of a bye-election that may take place at any time. Furthermore, an assembly may be dissolved before its period of five years has expired. Consequently, the electoral rolls will have to be kept up-to-date all the time so that the new election may take place without any difficulty. These agencies were deemed sufficient to have permanently the office of the Chief Election Commissioner.

The Election Commission consists of the Chief Election Commissioner, and such number of other Election Commissioners as the President may from time to time fix. The Chief Election Commissioner is a whole-time official to be appointed by the Parliament. He acts a Chairman of the Election Commission. To enable him to function impartially and fearlessly, he enjoys security of tenure, in as much as he cannot be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court, and the conditions of service cannot be varied to his disadvantage after appointment. He, thus, enjoys all the appurtenances of a Supreme Court judge. Further, any other Election Commissioner or a regional Commissioner cannot be removed from office except on the

recommendation of the Chief Election Commissioner. His salary as well as the expenditure on the staff of the Election Commission is a charge on the Consolidated Fund of India, thus, not subject to the vote of Parliament.

The Election Commission performs the following functions:

- a. It undertakes proper preparation and maintenance of the electoral rolls. It directs and controls the annual preparation or revision of electoral rolls in all states and fixes programmes connected therewith.
- b. It appoints Chief Electoral Officer for each State in consultation with the government concerned, Electoral Registration Officers, Returning Officers, and Assistant Returning Officers, for each assembly and parliamentary constituency. The Revising Authorities are appointed by the state governments with the approval of the Commission to decide claims and objections during the preparation of the electoral rolls.
- c. It superintends elections to fill vacancies occurring from time to time in Parliament as well as state legislatures.
- d. The commission receives election petitions challenging the validity of elections. The Commission appoints Election Tribunals for their hearing, can withdraw the petition pending before the Tribunal and transfer to other tribunal at any stage after notice to parties and for reasons to be recorded.

- e. The Commission decides whether a contesting candidate has failed to lodge his account of election expenses within the time or in the prescribed manner. The decision is announced in the gazette, and the candidate is informed about it.
- f. It advises the President or the Governor (as the case may be) in deciding whether a member of Parliament or a member of the state legislature (as the case may be) has incurred any of the disqualifications.
- g. It is the duty of the Commission to re-determine the number of seats to be reserved for scheduled castes and scheduled tribes in Lok Sabha and state legislatures, and to amend the former Delimitation Commission's final order wherever necessary as provided by the Act.
- h. The Chief Election Commissioner is an ex-officio member of the Delimitation Commission, which is an independent Commission, set up from time to time, is more or less judicial in character, and is entrusted with the task of readjustment or delimitation of constituencies.
- i. The Election Commission has the authority to order the production and inspection of election papers while in the custody of returning officers. This was done, in April 1962, by the Central Government through an amendment of the Conduct of Election Rules. Till recently, only a competent court or tribunal was authorized to pass orders in this regard. As a result of difficulties experienced during the third General Election, it became necessary to

vest these powers in the Election Commission also. The election papers include packets of unused ballot papers, packets of used ballot papers whether valid, tendered or rejected, packets of the marked copy of the electoral roll, and the attestation of signatures of electors.

Besides, the above functions of Elections Commission the Constitution provides for appointment of other officers to assist the Chief Election Commissioner. Setting up organizational units at state level and district level and constituency level carries on the electoral machinery. The central authority issues instructions, directives, circulars and exercises general supervision and control over the preparation and revision of the electoral rolls. The election of a big country like India is not an easy task. It involves a huge army of skilled and efficient persons on whom the responsibility is placed.

(ii). Rotation of the Reserved Constituencies

The reservation of seats for scheduled castes and scheduled tribes seeks to give them sufficient representation in the Union and State Legislatures. The reservation provision is temporary and originally it was to be enforced for ten years. It was expected that during this period of ten years they would progress and would be able to compete with the rest of the society on a footing of equality. But it was felt that ten years time was insufficient and that the schedule castes and scheduled tribes needed reservation for a longer period of time. The period of ten years was extended to twenty and afterwards to thirty years which has further been extended by ten years.³⁵ The extension of time thus automatically maintains the reservation policy of seats. Since reserving any particular seats permanently could be undemocratic and might foster vested

interests and perpetuate separatist feelings causing hindrance to the growth of nationalism. Thus the principle of rotation was suggested. No constituency would thus remain earmarked forever for the scheduled castes and the scheduled tribes. On the other hand the principle of rotation will lead to diffusion and disposal of beneficent influences that radiate from the reserved seats. This may enable the members of the scheduled castes and tribes residing at different places in the state to get an opportunity of being trained and participate in the political leadership. Viewed from the angle of democratic principle the making of a constituency as 'reserved' for all the time makes the meaning of at least democracy redundant to the bulk of those voters in that constituency, who are outside the category of the reserved classes. The right to vote would be of less value unless accompanied by a right to seek election, which a reserved constituency obviously debars. The system of rotation has the advantage of removing a disability, which is not of a permanent nature.

(iii). The Concept of Double-Membership Constituency

The adoption of principle of rotation helped abolishing the double-member constituency with the enactment of the Two-member Constituencies (Abolition) Act, 1960, which was necessitated as a result of the Supreme Court decision in *V.V. Giri v D.S. Dora*.³⁶ Earlier in the first two elections, there had been double-member constituencies but after the Act of 1960, the concept of single member constituencies operates.

D. THE RESERVATION OF SEATS: AN UNPRECEDENTED STEP

Indian being democratic state adopted the system of 'adult-franchise'. The Constitution initially conferred on every person who is not less than twenty-one years of age, the rights to vote.³⁷ There is to be one general roll for every territorial constituency and no person is to be ineligible for inclusion in any such roll or can claim to be included in any special electoral roll on grounds only of religion, race, caste and sect or any of them.³⁸ The Constitution guarantees equality and prohibits discrimination which according to Laski is the crux of democracy. But a rule of equality enforced without taking into account the existing inequalities in social life would cause injustice and negation of democracy. As has already been discussed that Indian society is unequal and stratified. The lower straits of this social stratification have suffered politically. The Constitution undertook this great task and under different provisions provides assistance to remove their political backwardness by adopting the method of discriminating others in their favour. The groups of people who are to be assisted in political matters are the same i.e. scheduled castes and scheduled tribes. These groups are given political assistance by reserving seats in Parliament and Legislative Assemblies.³⁹ The reservation of seats in legislative forums was necessary since it is in the nature of a guaranteed representation and not a separate electorate. It primarily meant their representation and participation in the democratic functioning to make them aware of their political rights, which have been the main object of democracy. The reservation of seats or political assistance is a temporary arrangement and as such involves two important issues i.e. (a) what should be the basis of reservation of seats

in the legislatures, and (b) the extent of reservation. Both these issues are discussed below:

(i). Reservation Criterion.

The Constitution provides different basis for purposes of protective discrimination. Clause (4) of Article 15, the Constitution provides for making special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. The identification of socially and educationally backwardness thus form the basis for the purposes of protective discrimination. Article 16(4) permits reservation of jobs in the state services for those who are backward and are inadequately represented in the state services. Accordingly, there are two bases firstly, backwardness and secondly, inadequate representation in the state services. In the absence of any definition of scheduled caste and scheduled tribes the Constitution authorizes the President,⁴⁰ in consultation with the Governor of State, to specify the castes or tribes which are to be called as scheduled castes and scheduled tribes. Under this power the President has promulgated a number of orders giving lists of the castes and the tribes.⁴¹ The discretion of the President to designate castes as scheduled castes and scheduled tribes is subject only to the power of Parliament under Article 341(2) and 342(2). The courts have so far not encouraged attempts to get such discretion judicially reviewed.⁴² But the judiciary has the power to do so⁴³ as is done by it in cases of backward classes.

The competency of a person to contest a reserved seat has frequently been questioned on the ground that the person does not belong to a scheduled caste or scheduled tribe. The matter apparently

does not involve any dispute provided the caste on the basis of which the person is contesting the election is included in the Presidential Order. But when such a question is raised the court generally tries to find out whether the caste to which the person belongs is a sub caste or is only a different name for one of the castes mentioned in the Presidential Order or the law passed by the Parliament. The Supreme Court determined the issues involving 'caste' question in various cases⁴⁴ wherein the court determined the right of a person to reservation on changing his religion and thereafter converting to his original one. The issue thus, is whether such a person would be entitled to the benefits of reservation. The Supreme Court has dealt with this issue in two cases.⁴⁵

The first case i.e. Arumugam's case⁴⁶ involved the electoral issues. The appellant and the respondent had been opponents in electoral contest since long time as candidates from 68 KGF⁴⁷ constituencies for election to the Mysore Legislative Assembly. The constituency later became a reserved one for the members of scheduled castes and therefore, only such members could contest the election from this constituency. One of the castes that were included in the list was Adi Dravida for purposes of election from this constituency. Rajgopal filed his nomination as Adi Dravida and won the election. Arumugam challenged the election of Rajgopal on the ground that he was not an Adi Dravida on the date he filed the nomination. The Mysore High Court sustained the objection by taking Rajgopal as Christian. Rajgopal while still a minor became Christian in 1949 to secure admission to high School and he asserted that he subsequently got reconverted into Hinduism. By an order dated 30th August, 1949, the Mysore High Court held that the first respondent was converted to

Christianity in 1949 and on such conversion he ceased to be an Adi Dravida and, therefore, at the material date, he could not be said to be a member of scheduled caste, and was consequently ineligible for being chosen as candidate for election from a reserved constituency.⁴⁸

On appeal the Supreme Court considered four basic questions; out of them two are relevant for our purposes. These are:

1. Whether on conversion to Christianity he ceased to be an Adi Dravida
2. Whether on reconversion to the Hindu fold he once again became a member of the Adi Dravida caste.

As regards the first question the Supreme Court held that 'when once he became Christian he ceased to be a member of Adi Dravida caste.'⁴⁹ As regards the second question i.e. reconversion to Hinduism fold, the court referred to a number of decisions of various High Court which laid down the principle that:

"On reconversion to Hinduism a person can become a member of the same caste in which he was born and to which he belonged before having been converted to another religion."⁵⁰

The Supreme Court did not pronounce any opinion on this point as Rajgopal had failed to establish that he subsequently became a member of the Adi Dravida Hindu caste after he embraced the Hindu caste religion.⁵¹

Again in 1972's elections to the Mysore State Assembly, Rajgopal and Arumugam both filed their nominations for reserved constituency.

Arumugam objected to the nomination of Rajgopal on the ground that he was not an Adi Dravida of Hindu religion at the date of filing nomination and he was therefore not qualified to stand as a candidate for the reserved constituency. Arumugam contended that Rajgopal was Christian, Rajgopal by saying that he was never converted to Christianity and even if it was held that he had become Christian, he got reconverted to Hinduism since long, and was accepted by the members of the Adi Dravida caste as belonging to their fold. He was, therefore, an Adi Dravida professing Hindu religion at the material date and hence qualified to stand as candidate. The Returning Officer, by an order dated 9th February, 1972, upheld Arumugam's objections and rejected the nomination papers of Rajgopal that on conversion to Christianity Rajgopal ceased to be an Adi Dravida and he could not claim the benefit of the Constitution (Scheduled Castes) Order, 1950 on his reconversion. Arumugam obtained the highest number of votes in the election and was declared elected.

Rajgopal challenged the election of Arumugam on the ground of improper rejection of his nomination paper. Rajgopal put forward twelve important circumstances subsequent to February 1972 as an authentic proof that he was accepted by the Adi Dravida caste as their member and as such he was, on the material date and Adi Dravida professing Hindu religion as required by the Constitution (Scheduled Castes) Order, 1950. The Mysore High Court accepting the contentions of Rajgopal, observed:

“It is settled law that reconversion to Hinduism does not require any formal ceremony or rituals or expiatory ceremonies, that a reconvert to Hinduism can revert to his original Hindu caste

on acceptance that the quantum and degree of proof of acceptance depends on the facts and circumstances of each case, according to the established customs prevalent in a particular locality amongst the caste there.”

The High Court held that Rajgopal’s nomination was improperly rejected by the Returning Officer and accordingly declared the election to be void.

Arumugam then came to Supreme Court in appeal. The Supreme Court upheld the decision of the High Court Bhagwati J. (as he then was) who delivered the judgment of the court referred to the definition of caste. He accepted the definition of caste given by the High Court of Madras in *Cooposami Chetty v. Duraisami Chetty*⁵² as:

“As caste is a voluntary association of persons for certain purposes. It is a persons governed by their own rules and regulations for certain internal purposes.”

Renunciation of a religion for another one and re-embracing the former faith often occurs in a society. What are then the legal and social consequences of such occurrences? The learned judge explained that it does not follow as an invariable rule that whenever a person renounces Hinduism and embraces another religious faith is automatically ceases to be a member of the caste in which he was born and to which he belonged prior to his conversion. The court accepted the observations of Madras High Court in G. Michael’s case⁵³ that the general rule is that a convert ceases to have a caste as it is predominantly a feature of Hindu society, but that ultimately depends

upon the structure of the caste, its rules and regulations. Whether a person ceases to belong to the caste on his renunciation of Hindu faith, the able judge said:

“It cannot, therefore be laid down as an absolute rule uniformly applicable in all cases that whenever a member of a caste is converted from Hinduism to Christianity, he loses his membership of the caste. It is true that ordinarily on conversion to Christianity, he would cease to be a member of the caste, but that is not an invariable rule. It would depend on the structure of the caste and its rules and regulations. There are castes, particularly in South India, where this consequence does not follow on conversion, since such castes comprise both Hindus and Christians⁵⁴

The court was convinced by the evidence adduced by Rajgopal in support of his contention and accepted that he was Adi Dravida, Bhagwati, J. referred all the important decisions of Madras High Court since 1886⁵⁵ and asserted that the consistent view taken in this country has been that on reconversion to Hinduism, a person can once again become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the caste accept him as a member. The learned judge said “there is no reason either on principle or on authority which should compel us to disregard this view which has prevailed for almost a century and lay down a different rule on the subject. If a person who has embraced another religion can be reconverted to Hinduism there is no retrial

principle why he should not be able to come back to his caste if other members of the caste are prepared to readmit him as a member. The Supreme Court accordingly sustained the views of the High Court.⁵⁶ For availing the benefits of the rule as contained in the Constitution Scheduled Caste Order 1950, the Supreme Court established that converts would be entitled for protective discrimination.

The other case⁵⁷ in which similar issue was involved. The facts of the case are that one Johnson Tao was born to Christian parents, originally belonging to the Mediga caste a schedule caste in Andhra Pradesh. He applied to seek admission to the Guntur Medical College on the basis of his belonging to a backward class, since in Andhra Pradesh the Christian converts from untouchable have been recognized as such. He was refused admission on that basis. He then reconverted to the Hindu fold and changed his name to Mohan Rao, and obtained a certificate from the Tehsildar; certifying that he was Mediga by caste to apply for admission as a scheduled caste candidate. The Medical College admitted him but thereafter, cancelled his admission on the ground that he was not a Hindu by birth. This was done on the basis of note (b) Rule 2(c) of the Selection Rules which read :

No candidate other than Hindu including Sikh can claim to belong to a scheduled caste. No candidate can claim to belong to the scheduled caste except by birth.

Mohan Rao challenged the rule and the government counsel conceded that the rule was repugnant to paragraph 3⁵⁸ of the Constitution (Scheduled Caste) Order 1950. A single judge of the Mysore High Court admitted the contentions of Mohan Rao on the

ground that his application for admission was rejected on the sole basis that he was not a Hindu by birth and not on the ground that he was not a Madiga by caste. The issue was considered to be of vital legal importance and was reheard by a division bench in appeal, which also upheld the decision of the single judge. The important socio-legal question that emerged out of the case is 'whether a person who was not a Hindu by birth can regain the caste of his parents on his reconversion? This aspect of the matter was touched upon in this case by the Supreme Court on appeal which stated that a candidate in order to be eligible for a reserved seat should be a member of scheduled caste by birth went beyond the provision of clause (3) of the Constitution (Scheduled Castes) Order 1950 and was rightly condemned as void. But the court observed that there was no absolute that a person would lose his caste on reconversion. It would depend upon the structure of the caste and its rules and regulation.⁵⁹ The court following Arumugam case stated that the reasoning therein was equally applicable to a case where the parents were converted from Hinduism to Christianity and the child is born after their conversion. On his becoming Hindu, if members of the caste to which his parents belonged before their conversion accept him as member of their fold, then he would be deemed to belong to that caste. The only condition for admission of a person as a member of the caste is the acceptance by other members of the caste.

The conclusive effect of the decision is that a person who was a Christian on his conversion to the Hindu fold can regain the caste of his parents if other members of the caste accepted him. The outcome of the Supreme Court decision is that a person, acquires caste by his birth, can no longer be regarded as absolute, which is in consonance with the

approach already adopted by Bhagwati, J., in Arumugam's case. It is obviously a departure from the Madras decision in *Mechael Pillai v. Barthe*⁶⁰ wherein it was expressly held that 'caste is based on birth'. However, both these cases i.e. Arumugam and Guntur Medical College pose a problem for those who convert themselves to another religion and then reconvert to the original one in order to avail the benefits of protective discrimination. It also poses problem for the state to identify them for the same purpose. The desire to have benefits arising out of reservation policy is manifested on wider plane. At point of time a large number of conversion took place. Many backward people embraced Buddhism but after conversion they demanded that reservations available to scheduled castes should be extended in their favour also. There are instance where high caste people have declared themselves to be either scheduled caste or Harijan. A survey conducted by Civil Rights Enforcement Cell of the Government of Karnataka reveals that 'every year thousands of caste Hindus get themselves declared as Harijans to secure admission in professional colleges, jobs and promotions.'⁶¹ Such practices are also prevalent in other state.⁶²

In an unreported case,⁶³ the Supreme Court has upheld the constitutional validity of the Constitution (Scheduled Castes) Order, 1950, as amended and ruled that it did not discriminate against Christians who earlier belonged to scheduled castes by excluding them from the benefits of reservation. In this case the Movement filed two writ petitions for Protection of Human Rights of Marginalis Committee and a Christian – convert. One of the petitioners who challenged the order was Mr Soosai, a Cobbler from Tamil Nadu, who belonged to the Adi-Dravida community (a scheduled caste community) before he embraced Christianity. He challenged the order as he was not given a

free 'bunk' because he was a Christian while others belonging to his caste who had continued to be Hindus were allotted such bunk by the Khadi and Village Industries Board under a central scheme.

The other petition challenged a circular of the Tamil Nadu Government to the state public service commission stating that Christians reverting to Hinduism to obtain appointments against reserved quotas would lose them on reverting back to Christianity.

A division bench of the court comprising the Chief Justice, Mr. P.N. Bahgwati, Mr. R.S. Pathak and Mr. Justice A.N. Sen, dismissed the two petitions and ruled that "it is not sufficient to show that the same caste continues after conversion." The judges pointed out that under paragraph 3⁶⁴ of the Constitution (Scheduled Castes) Order 1950, 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.

From this study of the decisions of the Supreme Court, it can be derived that the caste is a functional aspect of the society and not related to birth. As such, the other important issue, which comes out of this approach of, the apex judiciary that if caste is not related with the birth then in the name of caste people would draw benefits through manipulation and also caste will perpetuate in the society. The Karnataka Civil Rights Cell indicates that the 'benefits' of reservation were not going to weaker sections but were being grabbed by the caste Hindus, so called, Neo-Harijans or well placed Harijans.⁶⁵ Moreover, conversion cases should be discouraged where the purpose of

conversion is only to acquire new claims or rights. A motivated conversion is not associated with faith. Conversion affects change in one religion's belief, which is available to every individual under our Constitution. No doubt, upon conversion, it is not only the religious faith that changes but the personal law of the individual changes too, and as such new rights and privileges are bound to accrue. But where the conversion is totally motivated to secure 'reservation' benefits such conversion is not inspired by religious views but contains an element of motive. Dushkin points out that reservation in favour of untouchables is not aimed to eradicate untouchability but as a means of recompense for the past injustices suffered by them and for social and economic betterment of these groups.⁶⁶

The object of 'reservation' for backward or scheduled caste people is multi-dimensional. The aim is to raise them from their existing backwardness and provide the opportunities to participate in the political life of the country. Backwardness or the status of scheduled caste is determined on social norms not on religious views or faith. If the religious factor would become criteria for backwardness, then 'conversion' might be a phenomena of social life to attain some ulterior aim. It is quite possible that who are economically well off might change their religion for availing the benefits of reservation. Moreover, this approach would be in contradiction to the secular nature of our Constitution. Although the scheduled castes and scheduled tribes, persons are those who have been the victims of the Hindu caste system, and as such they belong to a particular religion and to a defined group of persons who are designated by a caste.

In deciding the caste disputes the judiciary generally proceeds with two basic concepts i.e. 'Hindu' and 'caste', whereas in judging the

eligibility of a person for a reserved seat the judicial approach would be more in consonance with the secularism if the test is based upon whether the person was born in castes or tribes and has suffered social handicaps.⁶⁷ Birth and social victimization could be the two tests which would not only discourage conversion but ensure representation of those who belong to scheduled castes and tribes in the legislatures as envisaged by the Constitution. The Constitution guarantees representation of all the sections of people in the legislature is necessary and inevitable for the democratic functioning of the government so that every individual and sections of people may realize their rights and is able to enforce them. Secondly, in order to achieve it or to have the participation of every section of people it becomes necessary to assist that section of people who are weak in the society and are not competent or not politically aware. Scheduled castes and scheduled tribes and Anglo-Indians being in a position of disadvantage are not capable to compete with advanced sections of the society due to their poor economic conditions, the lack of education and political awareness. In view of their problems the Constitution has adopted the system of reservation of constituencies for these people.

(ii). Reservation Extent and Scope

The matters pertaining to the safeguards of for minorities, the scheduled castes and the scheduled tribes were exhaustively discussed by the Constituent Assembly through the advice and assistance of Advisory Committee and sub-committee. A meeting of the Advisory Committee was held on May 11.1949. The report on the question of reservation of seats in Parliament and Legislative Assemblies for scheduled castes stated that :

“The resolution for the abolition of all reservation for minorities other than scheduled castes found whole-hearted support from an overwhelming majority of the members of the Advisory Committee. So far as the scheduled castes were concerned it was recognized that their peculiar position would make it necessary to give them reservation for a period of ten years.”⁶⁸

Vallabhai Patel explained this important decision to the Assembly on May 25, 1949 and said that the proposal of the Advisory Committee to provide reservation only to scheduled castes and scheduled tribes was due to the backward position of these communities, which made it necessary that their representatives should be members of the legislatures and actively participate in the political life of the country.⁶⁹

When the Article 295A relating to reservation of scheduled castes and tribes laying down the period of ten years from the date of the commencement of the constitution was introduced in the Constituent Assembly, there was a great deal of anxiety expressed by some members representing scheduled castes that the period of ten years would be quite an insufficient period and that reservations might be necessary even thereafter.⁷⁰ Dr Ambedkar himself was prepared to press for longer period, but the ten years period was the result of general agreement among the parties accepted by the Assembly. The opinion of the Assembly was that if at the end of ten years the condition of the scheduled castes and tribes had not improved or they wanted a further extension of the period it would not be beyond their

capacity or their intelligence to invest new ways of getting the same protection, which they were promised here. In spite of the willingness of Ambedkar to give a far longer time the Assembly had been specific that reservation should end after ten years.⁷¹ The Article was adopted by the Assembly and in the final draft of the Constitution the corresponding Article was numbered as 334.⁷²

Article 334 has now been amended three times in order to extend the reservation period of ten years already fixed by the Constituent Assembly. It was considered at the time of expiry of ten years that this period was insufficient to enable the scheduled castes to attain adequate social status experience and resources to enter into open competition for participation in the political process.

In order to make the Parliament aware about the position and progress. Article 338 of the Constitution authorizes the President to appoint an special officer or Commissioner of scheduled casts and scheduled tribes to submit a report annually to the Parliament. On the basis of the report the Parliament is kept in touch with the progress of scheduled castes and scheduled tribes so as to enable it to take decision either to extend the period or limit the same.

(iii). Scheduled Castes, Scheduled Tribes and OBCs: Special Measures under Constitution.

Article 338⁷³ of the Constitution earlier provided for the institution of the high office of a 'special officer'. After constitution (Sixty fifth) Amendment Act, 1990. The Commission for Scheduled Castes and Scheduled Tribes consists of a chairperson, Vice-Chairperson and five other members Entrusted with the duty of

investigating all matters related to the safeguards provided for the scheduled castes and scheduled tribes and also for reporting on the working of the measures to the President. All such reports are laid before each Houses of Parliament. It was Dr. Ambedkar 's proposal to the minorities Sub-Committee which was accepted by the Constituent Assembly that an independent officer be appointed by the President at the Centre and the Governors in the Provinces to report to the Union and Provincial Legislature respectively on the working of the Minorities safeguards.⁷⁴ Article 299 of the Draft Constitution provided for the appointment of a Special Officer for Minorities for the Union and one for each state, who would be charged with the duty of investigating all matters relating to the safeguards provided by the Constitution and were required to make periodic reports to the respective governments. These reports are to be placed before the appropriate legislatures.⁷⁵ In this Article (Article 229), Drafting Committee introduced two important amendments. Firstly, the jurisdiction of special officers was limited to scheduled castes and scheduled tribes, Anglo-Indians and other backward classes. Secondly that there was to be only one special officer to be appointed by the Union Government who would function for the Centre as well as for the states. The amended Article was moved by K.M. Munshi on October 14,1949.⁷⁶ On the issue of jurisdiction of the 'special officer', the demand of few members⁷⁷ was that the jurisdiction of the officers should extend to matters pertaining to all minorities including Muslims, Christians and Sikhs. K.M.Munshi replying to the debate emphasized that what the special officer was to investigate would be the political safeguards for the protection of certain well-defined sections of citizens, and since specific political safeguards were not confined to the scheduled castes and scheduled tribes and Anglo-Indians and certain

backward classes. The amendments demanded by the members were negatived and the article as proposed by Munshi was adopted.⁷⁸ The final adoption in November, 1949, was set forth as Articles 330-342 in Part XVI of the Constitution. Article 338 deals with the appointment of special officer for the scheduled castes and scheduled tribes to watch and see implementation of the safeguards.

The officer of the special office i.e. Commissioner was created in November 1950 and since then many reports have been submitted. So far the successive commissioners⁷⁹ have presented 26 reports containing over 5000 recommendations to the government.⁸⁰ These reports are helpful in implementing the welfare programmes and exploiting the various governmental schemes. The forth Lok Sabha had appointed a Parliamentary Committees on the welfare of the scheduled castes and scheduled tribes to study the action taken on the reports submitted by the Commissioner. The office of the 'Commissioner' is a constitutional functionary and the annual reports could be valuable to know the social and economic problems of schedule castes and tribes and to solve them gradually, the Commissioner is, adequately, assisted and cooperated by the governmental machinery both at the union as well as state levels. The reports would provide valuable data of achievements of the programmes implemented and would enable to manage for future planning for their economic, educational and political prosperity. The report of the Commissioner is significant and is of vital importance to take decision relating to the need for further extending the time, which has been given to them under Article 334 of the Constitution.

The very object of reservation of seats in the legislature is to make the scheduled castes and scheduled tribes conscious of their

rights and enable them to participate effectively in the political process. This object can well be achieved those who are educated and economically well off. For their active participation, education and economic base is essential otherwise their participation in the political process would be just a physical or numerical participation. It is also expected from them to articulate the interests of the communities they represent. But it has been noted that scheduled castes and scheduled tribes members are less articulate and independent than others. They participate less in the debates and except few they remain silent. They are less influential in shaping the policies. On two occasions, however, they have been effective. In 1965, they opposed the Lokur Committee's report which called for the de-scheduling of some castes and tribes and in 1967 their motion that the constitutional safeguards for the scheduled castes and scheduled tribes were not being fully implemented ultimately brought the then government's first defeat in the Lok Sabha.⁸¹ Since then they have managed to become more effective and have their say in formulation of policies for the 'weaker sections'.

The problems of scheduled castes and scheduled tribe are primarily, social segregation and educational backwardness. Unless they are educated and poverty among them is removed, the policy of reservation in legislature would continue for the time to come. Political reservation may have been a historical and political necessity but the objectives for which the constitutional provisions were framed would be defeated by the pressure of other problems in which the scheduled castes and scheduled tribes are involved viz., poverty, lack of education etc., and as such their backwardness is bound to perpetuate and they would not be able to attain that standard and position which is

necessary to compete independently in the contests on political level. The ultimate necessity, therefore, is to tackle this problem on economic and educational front so as to utilise the advantage of reservation to improve their social status.

On the other hand, political reservation is a political necessity to provide political justice and is essential for the proper functioning of a democracy. But it is not desirable that it does not become a permanent feature nor that it seeks to be a source of complacency for political gains on account of political reservation. Political reservation is *prima facie* unconstitutional being based on inequality and is obviously incompatible to the basic concept of homogeneity, fraternity which are essential attributes of nationhood. Many members of the Constituent Assembly discarded the idea of reservation. It has been accepted as a temporary measure, i.e. till the backwardness is either minimized or the scheduled castes and scheduled tribes are able to develop confidence. It was conceded to secure their adequate representation in the democratic functioning of the country, but if this policy is continued the other serious problems might arise and other minorities would try to avail the benefit of 'reservation'. It would, therefore, in the interest of the state as well as for the weaker section to come out of such policy measures. But it is necessary, before the state takes any step to eradicate this policy, that the scheduled castes and tribes or other backward classes have gained reasonably and satisfactory educational and economical progress.

It is submitted, keeping in view the opinions of the members of the Constituent Assembly, that there were two objectives for providing reservation provisions. Firstly, to help backward sections of society in improving their social, educational, economic and political status, so

that they may compete with other well off sections of the society. Secondly, to withdraw, as early as possible, the safeguard extended to the weaker sections of the society. Unless we achieve the former objective, the later one cannot be achieved. Unless both the objectives are fulfilled a classless society, which is essential for unity and integrity of the nation, cannot be formulated. With this approach it can be hoped that the opinions of the members of the Constituent Assembly would be guiding source to achieve beneficial result.

NOTES AND REFERENCES

1. D.J. De, Interpretation & Enforcement of Fundamental Rights, 2000 ed, p. 12.
2. Minerva Mills case, AIR 1980, SC. 1789
3. Supra note 1.
4. Supra note 1 p. 71.
5. J.R. Kamble, Rising and Awakening of Depressed Classes in India. (1979) p. 62
6. S.S. Jaswal, Reservation Policy and the Law, 2000 ed. p. 33
7. Ibid p. 34
8. Ibid.
9. Supra note 4 p. 69
10. Ibid
11. Granville. Austin, The Indian Constitution, corner stone of a Nation p. 144
12. Supra note 4 p. 72
13. The Hindu, Madras, Feb. 25, 1929, p. 2
14. Supra note 4 p. 77
15. Ibid
16. Dhananjay Keer, Dr. Ambedkar, Life and Mission p.114
17. Ibid p. 173
18. Ibid p. 176
19. Ibid
20. Ibid p. 179

21. Ibid
22. A.B. Kieth, Constitutional History of India p. 352
23. Ghurye and Appadorai, Speeches and Documents on the Indian constitution (1957) vol. 1 p. 41
24. Ibid
25. Supra note 6 p. 41
26. Galnter, Marc, Competing Equalities (1984) p. 37.
27. See Art. 326 of Indian Constitution.
28. The Delimitation Commission appointed in 1952 and completed its task in 1955
29. P.N. Krishna Mani, Elections candidates & Votes p. 31
30. Meghraj Kothari V Delimitation Commission, AIR 1897 SC 69 N.P.
Punnuswami V Returning Officer, AIR 1952 SC 64
31. H.P. Mulshankar V V.B. Raju, AIR 1973 SC 2602
32. C.A.D Vol. VII P. 906
33. Ibid p. 905
34. Ibid p. 405
35. AIR 1959, SC 1318
36. Article 32, The Constitution of India
37. Article 325, The Constitution of India
38. Article 330 and 332, The Constitution of India
39. Article 366 (24), 341 and 342, The Constitution of India
40. The Constitution (Scheduled Castes) Order, 1950.

41. Mohd. Ghouse “Judicial Control of Protective Discrimination”, 11 Journal of Indian Law Institute, 371 (1969); Rajendra V. State of Saurashtra AIR 1968 SC 1812.
42. Supra note 32
43. Basavalingappa v. Munichinappa, AIR 1965 SC 1269
Bhaivalal v. Harikrishna Singh, AIR 1965 SC 1557, Abhov Pada Saha v. Sudhir Kumar Mondal, AIR 1967 SC 115,
Lazman Siddappa Naik v. Kattimani Chandappa Jampana, AIR 1965 SC 929, Bhaiva Ram v. Munda Anirudha Patar, AIR 1971 SC 155.
C.M. Arumugam v. S.Rajgopal, AIR 1976 SC 939; and Guntur Medical College v. Mohan Rao, AIR 1976 SC 1905
44. C.M. Arumugam v. S. Rajgopal, AIR 1976 SC 393
45. Kolar Gold Field
46. Supra note 46 p 941
47. Supra note 44 p 942.
48. Ibid
49. Ibid
50. 1910 ILR 33 Mad. 67
51. G. Michael v. S. Venkateswaran, AIR 1952 Mad. 474
52. Supra note 45 p. 947
53. Administrator General of Madras v. Anandachari (1886) ILR 9 Mad. 466
54. Supra note 45 p. 949
55. Guntur Medical College v. Mohan Rao, AIR 1976 SC 1905
56. “No person who professes a religion different from Hindu or the Sikh religion shall be deemed to be a member of a schedule Caste”.
57. Supra note 57 p. 1907
58. AIR 1917 Mad. 431

59. The Hindustan Times, February 16, 1983, Col. 3 & 4 p. 1.
60. "Gujarat Where Backward Elites Manage To Get Reservation Benefits", A Report, The Hindustan Times, March 1981.
61. Reported in The Times of India, October 2, 1985
62. Supra note 58
63. Supra note 61
64. L. Dushkin, Scheduled Caste Politics p. 175
65. S.P. Sathe, 'Reservation of Seats in Legislatures for Scheduled Caste and Schedule Tribes, Minorities and The Law, Journal of Indian Law Institute, 1984 p. 257
66. C.A.D. Vol. VII p. 269-72
67. B.Shiva Rao, The Framing of India's Constitution p. 742
68. C.A.D. Vol. IX at 674, 677 and 682
69. Supra note 69 p. 777
70. Article 334: Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to ---
 - a. The reservation of seats for the scheduled castes and the scheduled tribes in the House of the People and in the Legislative Assemblies of the States; and
 - b. The representation of the Anglo-Indian Community in the House of the People and in the Legislative Assemblies of the States by nomination,
Shall cease to have effect on the expiration of a period of (thirty years) from the commencement of this Constitution:
Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the existing House or Assembly, as the case may be.
71. Article 338:
 - (1) There shall be a special Officer for the scheduled castes and scheduled tribes to be appointed by the President.
 - (2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the scheduled castes and scheduled tribes under this Constitution and report

to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such report to be laid before each House of Parliament.

(3) In this article references to the scheduled castes and scheduled tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of Article 340, by order specify and also to the Anglo-Indian community.

72. Supra note 69 p. 756

73. Ibid at 764-65

74. C.A.D. Vol. IX p. 251

75. M/S Bhupinder Singh Mann and Hukum Singh

76. Supra note 69 p. 779

77. The post of Commissioner had been held by Public men like Mr. L.M. Shrikant, Mr. A.K. Chanda, Mr. S.C. Sen Gupta, Mr. Nirmal Kumar Bose, and Mr. Shanker Rao Mane and by Mr. Shishir Kumar, former M.P.

78. The Hindustan Times, Sept. 20, 1982.

79. The Times of India, Oct. 11, 1979

80. The Hindustan Times, Sept. 20, 1982

81. The Times of India, Oct. 11, 1979

CHAPTER - V

SOCIO-ECONOMIC POLICIES AND CONSTITUTIONAL WISDOM OF NON- DISCRIMINATION

A. AN OVERVIEW

At the time of drafting the Constitution, the drafting committee was in the position to examine the development, which had occurred all around the world and had the experience of English legal system. They, therefore, adopted useful and important parts from them. The Universal human Rights Charter, which was almost adopted by the General Assembly of the united Nations, was an additional progress that drew their attention most in framing the Constitution. These were the ready material for their reference, but they had to be used in context of the problems of people of India. The first and most crucial problem was the Caste system, which divides the entire population into different sections and communities. This evil not only divided the people but also developed disunity and hatred amongst the people to prejudice one against the other. The second problem before them was that of safeguarding the religion, language and culture of various sections of the society. The last but not the least problem was the question of removing the discrimination, a major source of social suffering. These problems resulted in a fragmented society marked with intolerance, hatred and class distinctions together with the exploitation of weaker sections of the society. In these circumstances, the framers of the Constitution visualized that the principle of equality can alone serve as an important and desirable principle for being incorporated in the Constitution. This would enable to prevent discrimination and uproot

many of these evils. Before discussing the constitutional provisions dealing with equality or non-discrimination it would be pertinent to give a brief account of British policy and the national movement.

Besides those general factors, which resulted in persistent diversities in Indian way of life, the British policy towards the Indians was the most vital factor for creating inequality.

Under the British Government the Indians were mostly excluded from the administration. They were denied rights and privileges enjoyed by the ruling sections of the society. An atmosphere of 'equality' did not exist. Moreover, they scrupulously made efforts to divide¹ Indians amongst themselves. The 'reforms' introduced by them added to the separatist tendency. The reforms enlarged the size of the legislature and adopted principle of giving separate representation to the Muslims.² This principle was gradually extended to other communities and the Government of India Act, 1935, gave separate representation to Indian Christians, Anglo-Indians, Europeans and Harijans.³ The British thus segregated the people and provoked the other classes with the result that Indians were wholly divided amongst themselves. This policy was vigorously denounced but could not be totally checked and it ultimately resulted into the establishment of a separate independent state known as Pakistan.

The Indian Council's Act, 1909, had the merit of securing change in the legislature but failed in its effort to check the propagation of self rule by the National Movement by Indian National Congress.⁴ The Act of 1909 was followed by strong political activities for the realization of self rule in India. The British, in order to suppress the

many of these evils. Before discussing the constitutional provisions dealing with equality or non-discrimination it would be pertinent to give a brief account of British policy and the national movement.

Besides those general factors, which resulted in persistent diversities in Indian way of life, the British policy towards the Indians was the most vital factor for creating inequality.

Under the British Government the Indians were mostly excluded from the administration. They were denied rights and privileges enjoyed by the ruling sections of the society. An atmosphere of 'equality' did not exist. Moreover, they scrupulously made efforts to divide¹ Indians amongst themselves. The 'reforms' introduced by them added to the separatist tendency. The reforms enlarged the size of the legislature and adopted principle of giving separate representation to the Muslims.² This principle was gradually extended to other communities and the Government of India Act, 1935, gave separate representation to Indian Christians, Anglo-Indians, Europeans and Harijans.³ The British thus segregated the people and provoked the other classes with the result that Indians were wholly divided amongst themselves. This policy was vigorously denounced but could not be totally checked and it ultimately resulted into the establishment of a separate independent state known as Pakistan.

The Indian Council's Act, 1909, had the merit of securing change in the legislature but failed in its effort to check the propagation of self rule by the National Movement by Indian National Congress.⁴ The Act of 1909 was followed by strong political activities for the realization of self rule in India. The British, in order to suppress the

political upheaval, passed important legislations,⁵ and in 1914, during the first world war, Britain wanted India's full cooperation in terms of man and money. This policy absolutely changed the stand of Indian Nationalists and consequently Indian Nationalism rose very high under the impact of the First World War. In 1916 Indian National Congress urged the British Government to declare its future policy regarding the self-rule in India. The British Government realizing the seriousness of the demands, decided to introduce changes in the Act of 1909, and declared its future policy in India. Consequent to that Montague, the then Secretary of State for India, came to India. He studied all the problems and finally, in consultation with Lord Chelmsford, drew up a report on Indian Constitutional Reforms, which came to be known as Montague Chelmsford Reforms, and were embodied in the Government of India Act, 1919.

The reforms introduced by the Act of 1919 failed to satisfy the India political leaders for various reasons. The main cause for the failure was the defect in the system of 'Dyarchy'.⁶ The Indian National Congress at its annual session in 1919 condemned the reforms as inadequate, unsatisfactory and disappointing and consequently there was persistent demand for further reforms. As the Act of 1919 began to be implemented, the National Movement gained strength when Mahatama Gandhi gave a call to offer Satyagrah against the oppressive laws passed by the legislature in spite of the opposition by the people. Jallian Wala Bagh tragedy of April 13, 1919, in which 400 people were killed and 1200 were wounded and other inhuman attitudes of the British Government resulted in violent resentment against the Government. The Government then appointed a Commission, known as Simon Commission⁷ in pursuance of a provision of Government of

India Act 1919 to enquire and submit report to the Crown of the working of the Government of India. In its reports the Commission made many recommendations for constitutional reforms, out of which one recommendation was the constitution of the communal electorate. The Commission was criticized and boycotted by Indians for having no Indian as its member and unsatisfactory recommendations. Lord Birkenhead, while justifying the exclusion of Indian from the Commission, suggested to Indian to draft constitution and submit the same to the British Parliament for consideration. The Indians accepted the suggestion and an All Parties Conference was held in Bombay on May 19, 1928.⁸ It was presided over by Dr. M.A. Ansari. This Conference appointed a Committee⁹ under the Chairmanship of Pandit Motilal Nehru to determine and consider the principles of a Constitution for India. The Committee produced a report, which has gone down in the history by the name of Nehru Report. It contained for the first time in the vast history of India, the principle of equality under a separate heading of fundamental rights. This report provided guidelines to the framers of the Constitution after independence. The report contained almost all these rights, which are embodied in the Preamble and set out in Chapter III under the heading of Fundamental Rights of the Constitution. The Nehru Report enumerated nineteen fundamental rights. One of these was all citizens shall be equal before law and shall possess equal civil rights. The same is reproduced in Article 14 of the Constitution in a modified form.

The Nehru Report pressed the British Government to include those rights in newly drafted constitution but the Simon Commission rejected the idea. The matter was discussed by the first conference in 1930, and therefore on the occasion of Second Round Table

Conference held in 1931, a memorandum circulated by Mahatama Gandhi at the second session of the Conference, *inter-alia*, demanded that the new Constitution should include a guarantee to the communities concerned of the protection of cultures, languages, scripts, education, profession and practice of religion and religious endowments and protect personal laws; and that the protection of political, and other rights of minority communities should be the concern of the Federal Government.¹⁰ Prime Minister Ramsay MacDonald expressed his opinion in favour of their inclusion in the Constitution of India with a view to safeguard the interest of the minorities. But before this could be implemented the attitude of the Government changed with the formation of National Government in England. Lord Reading ridiculed the idea of fundamental rights.¹¹ Sir John Simon gave three reasons for not including fundamental rights in the future Constitution of India. He contended that since the British Constitution did not recognize any fundamental rights, there was no necessity of these rights in the case of India as well. He further argued that the necessity of fundamental rights arose only when there was autocracy and that was not the case in India. India was going to have Parliamentary form of Government and there was no necessity of any fundamental right and it gives a false sense of security, which was not desirable. The result as that the Government of India Act, 1935, did not contain Bill of Rights.¹²

During the Second World War, the British Government imposed all kinds of restrictions on the people of India, and there was no remedy or legal protection against the exercise of those arbitrary powers. Special courts were constituted to try people for their political involvements. It was this experience, which compelled the people of

India to incorporate fundamental rights in the present Constitution. The subject of fundamental rights figured prominently in the deliberation of Conciliation Committee.¹³ The Committee was of the opinion that, however, inconsistent with British law it might be, in the peculiar circumstances of India, fundamental rights were necessary, not only as assurance and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, government and the courts. The Committee felt that it was for the constitution body first to settle the list of fundamental rights and then to divide them into justiciable and non-justiciable purpose of their enforcement.¹⁴ The British Cabinet Mission in 1946, recognized the need for a written guarantee of fundamental rights in the Constitution of India. In paragraph 19 and 20 of its statement of May 16, 1946, envisaging a Constituent Assembly for framing the Constitution of India, it recommended the setting up of an Advisory Committee for reporting, *inter-alia*, on fundamental rights.¹⁵

The objective resolution, submitted by Pandit Jawaharlal Nehru, was adopted by the Constituent Assembly, on January 22, 1947. It was solemnly pledged to draw up, for India's future government, a Constitution wherein "shall be guaranteed and secured to all people of India justice, social, economical and political, equality of status, opportunity and freedom of thought... and wherein adequate safeguards would be provided for minorities backward and tribal areas and depressed and other classes."¹⁶

Two day after its adoption the Assembly elected an Advisory Committee for reporting on minorities, fundamental rights, and on the tribal and excluded areas.¹⁷ The Advisory Committee, in turn,

constituted on February 27, 1947, five sub-committees, one of which was to deal with fundamental rights. The problem faced by the sub-committee on fundamental rights was related to the selection of rights which were to be regarded as fundamental and the creation of institution to safeguard them.¹⁸ After an initial reaction against the bifurcation of the fundamental rights, they were further classified into justiciable and non-justiciable rights. Part III which is entitled 'fundamental rights contains justiciable rights like equality, life, liberty and property'¹⁹ and were made enforceable in a court of law. Part IV, entitled 'The Directive Principles of State Policy', contains non-justiciable rights, such as, rights to employment and education etc. The citizen has no judicial remedy if he is denied the enjoyment of these rights.

The chapter on fundamental Rights enumerates several rights²⁰ and the Right to Equality is one of those rights contained in Article 14,²¹ of the Constitution. The article embodied the principle of equality, which was first included in the draft submitted to the sub-committee on Fundamental Rights by Shri K.M. Munshi and Dr. B.R. Ambedkar. Subsequently it was discussed, modified and finally approved by the Constituent Assembly and incorporated in the Constitution of India. Being well acquainted with political, social and economic inequalities, which existed in the country, the framers of the Constitution tried to incorporate the principle of equality in various forms in the whole of the Constitution. Although the Preamble reflects the spirit of equality but they did not consider it enough to state this principle only in the Preamble. A part of the Preamble reads that the Republic²² shall secure to all its citizens:

Justice-- social, economic and political.,
Liberty-- of thoughts, expression, belief, faith and worship,
Equality-- of status and opportunity and to promote among the all,
Fraternity-- assuring the dignity of the individual and the (unity and integrity of the nation).²³

Besides the rights enshrined in Part III of the Constitution, there are other rights guaranteed by the Constitution which secure socio political equality for all citizens. Under Article 325²⁴ elections to the House of the people, the lower House of the Parliament, and to the Legislative Assembly of every state shall be on the basis of adult suffrage. Every citizen, twenty-one years of age shall be entitled to be registered as a voter at any such election. There are no special electoral rolls. No person shall be ineligible for inclusion in the general electoral roll on grounds only religion, race, caste, sex or any of these. The Indian constitution is not a mere framework of government. It is a forward-looking statute, which visualizes profound social and economic changes. The Constitution emphasizes that such changes must come through constitutional methods and without the sacrifice of the dignity and liberty of the individual. The chapter on fundamental rights and directive principles of state policy contain enumeration of basic values and aspiration of Indian society.²⁵

B. RIGHT TO EQUALITY: SOCIO-LEGAL DIMENSIONS:

There are five Articles dealing with numerous dimensions of equality under this head. Article 14²⁶ deals with equality in general, Article 15²⁷ deals with legal equality and non-discrimination. Article

16²⁸ deals with equality for public (government) employment. Article 17²⁹ and 18,³⁰ deal with social equality. It may be noted that in this group of Articles, there is no mention of economic equality, that is, equal remuneration for equal work. This aspect has been covered by Article 39(d)³¹ of the Directive Principle of State Policy under which a state may strive to secure through suitable state legislation is equal pay for equal work for both men and women. But it is not available to citizen as a matter of right. It does not become enforceable in case state fails to implement to these provisions or any provision contained under the scheme of Directive Principles of State Policies". Article 14 declares that;

“the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

Pantanjali Shastri, CJ, while explaining the relation between the two expression observed that the second expression is corollary of first and it is difficult to imagine a situation in which the violation of ‘the equal protection of the laws’ will not be the violation of ‘equality before the law’. Equality before the law is a negative concept, and equal protection of law is a positive one. The former declares that everyone is equal before law, that is no one can claim special privileges and that all classes are to be equally subjected to the ordinary law of the land. The latter postulates equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed.³⁴ The impact of the negative content on the positive content has not so far

been clearly discerned and the Supreme Court has mostly been concerned with the positive aspect.³⁵

However, the Right to equality as embodied in Article 14 is enforceable only against the arbitrary and unfair state sponsored action. The term state in reference to equality means all the organs of the state and its instrumentalities encompassed by Article 12 of the Constitution of India.

(i). Equality Before Law

A prominent English Jurist, Prof. A.V. Dicey, after having made a comparative study of all the important constitutions of the world, claims that English legal system has a distinction and specialty over other Constitution for it is based on principle of 'equality before the law', which is one of the ingredient of Rule of Law.³⁶

According to Dr. Jennings equality before law means that among equals the law should be equal and should equally be administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence'.³⁷ It implies, thereby, the absence of any special privilege in favour of any individual. Every person, whatever be his rank or condition, is subject to the jurisdiction of the ordinary courts. No man is above the law. Every person may sue and be sued. But equality before the law does not mean identity of position as between citizens, irrespective of their duties and functions. Accordingly, wider powers may be conferred upon public officials than these of citizens. But if default is made or wrong is done in the exercise thereof, then they must

be treated according to law by the courts.³⁸ Certain exceptions to this rule are recognized by the Constitution,³⁹ and by the Criminal Procedure Code.⁴⁰ Every state, indeed, recognizes some exceptions to this rule. Some of these exceptions are based on the unity and integrity of nation and some are based on political grounds, which have also been recognized by our Constitution.⁴¹ Equality before the law does not seek to do away inequality, it comprehends that all persons should be treated equally, like should be treated alike. Among equal or placed in similar circumstances, law should be administered equally.

(ii). Equal Protection of Laws

The second expression, of Article 14 'the equal protection of the laws', taken from the American Constitution, is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution. Fazal Ali and Mukherjee JJ. and some other judges of the Supreme Court have also pointed out that Article 14 of our Constitution corresponds to the 'equal protection' clause in Section 1 of the Fourteenth Amendment to the Constitution of the United State of America,⁴² which declares "nor shall any state deny to any person equal protection of laws"

The meaning of the phrase, therefore, is that all person and things under similar circumstances should be treated alike both in privileges conferred and liabilities imposed there should be no discrimination between one person and another by laws. Equal law should be applied to all in same situation.⁴³ It does not, whoever, mean that the law conferring privileges or imposing liabilities should be general in character and universal in application. What is prohibited is discrimination between persons, who are substantially in similar

circumstances or conditions. This gives rise to very important question of legislative classification or distinction between persons or things made by law. It has been accepted that persons or things can be classified into groups and such groups may differently be treated, provided there is reasonable basis for such difference or distinction. Accordingly, the legislature can make reasonable classification of persons and things for the purpose of legislation.⁴⁴ Hence, if the law deals equally with those classification in a defined class, then it does not offend Article 14 and has been held justified by the Supreme Court. ‘A legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects, and for that purpose it must have large powers of selection or classification of persons and things upon which laws are to operate’.⁴⁵

However, in order to conform the reasonable classification to the constitutional requirements, a law must satisfy two conditions as pointed out by Das, J.⁴⁶

- i. “The Classification must be founded on an intelligible differentia which distinguishes persons and things that are grouped together from others left out of the groups.”
- ii. “That differentia must have a rational relation to the object sought to be achieved by the Statute in question.”

The intelligible differentia, which is basis of the classification and object of Act, are two distinct things. What is necessary is that there must be nexus between basis of classification and object of Act, which makes classification. It is only when there is no reasonable basis for a

classification that legislation making such classification may be declared discriminatory. Article 14 of Indian Constitution is directed against the state actions and the expression “any person” used in the said Article denotes that guaranteed of equal protection of laws is available to any person which includes also the justice persons like company, association or body of individuals. The protection of Article 14 extends to both citizens and non-citizens and to natural persons as well as legal persons. The equality before law is guaranteed to all without regard to race, colour or nationality. The corporations being justice persons are entitled be benefit of Article 14 of the Constitution of India.

From bulk of cases decided by the Supreme Court of India it is evident that Article 14 of the Constitution of India aims at to provide protection against every form of arbitrary unfair and unreasonable discrimination whether legislative or administrative. In a leading case *E.P. Royappa Vs State of Tamil Nadu*,⁴⁷ the Supreme Court of India challenged the traditional concept of equality which was based on reasonable classification and has laid down new concept of equality. The court speaking through Justice P.N. Bhagwati held;

“Equality is a dynamic concept with many aspects and dimensions and it can not be cribbed cabined and confined within traditional and doctrinaire limits. Form positive point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to rule of law in a republic while other to whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit

in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14”

In *Maneka Gandhi Vs Union of India*⁴⁸ again Hon’ble justice Bhagwati said;

“Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.”

The court in *R.D. Shetty Vs. Airport Authority of India* prevented to discriminate ensuring equality between one citizen and another reiterated the principle. Article 15 enacts:

“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.’

2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them subjected to any disability, liability, restriction or condition with regard to

(a). Access to shops, public restaurants, hotels and place of public entertainment, or

(b). The use of wells, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

3.Nothing in this Article shall prevent the State from making any special provision for women and children.

4.Nothing in this Article or in clause (2) of Article 29⁴⁹ shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes”.

The rights of non-discrimination as specified in this Article were contained in the draft submitted by Munshi and Ambedkar. According to Munshi's draft :

All persons irrespective of religion, race, colour, caste, language or sex are equal before the law and are entitled to the same rights and are subject to the same duties.⁵⁰

All persons shall have the right to the enjoyment of equal facilities in public places subject only to such laws as impose limitations on all persons, irrespective of religion, race, colour, caste and language.⁵¹

Ambedkar expressed the same principles in his draft. In his explanatory note appended to his draft, he observed that discrimination was a menace to be guarded against, if the fundamental rights were meant to be real. In a country like India, he said, where it was possible for discrimination to be practiced on a vast scale and in a relentless manner, fundamental rights could have no meaning, unless provision was made for protection against discrimination on ground of race, or creed or social status.⁵²

After discussing the draft the sub-committee on fundamental rights formulation provision as part of clause 5, the legal equality clause – in its draft report.

1. All persons within the Union shall be equal before the law. No person shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on grounds of religion, race, caste, language or sex.

In particular :-

- a. there shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.⁵³

B.N. Rao, Constitutional Advisor said that the above provision, for the most part followed the drafts in the Nehru Report (1928) and the Congress declaration of 1933. He apprehended that draft might prejudicially affect the institution of separate schools, hospital, and the like for women.⁵⁴

Alladi Krishnaswamy Iyer made a suggestion which was accepted and the word 'person' was replaced by 'citizen'.⁵⁵ Some basic issues were further discussed and after considering and examining them, the article was several times amended on the suggestions of the members of the Sub-Committee on Fundamental Rights Minorities Sub-Committee. The Drafting Committee, in due considerations of the

suggestions, incorporated the Article in the Draft Constitution as Article 9. When the Draft Constitution was circulated for eliciting opinion, the members of the Assembly and others proposed a number of amendments. An amendment proposed by K.T. Shah was of great importance. It sought to add scheduled castes and backward tribes at the end of clause (2) of the draft Article. Ambedkar, who replied to the debate, accepted other amendments and the one moved by K.T. Shah and Mohd Tahir was considered to be not necessary.⁵⁶ Thereupon, Shah's amendment had been negated by the Constituent Assembly and passed it after renumbering it. Article 9 became Article 15 of the Constitution as finally passed by the Constituent Assembly on November 26, 1949. It may be noted clause (4) did not appear in the Article finally passed by the Constituent Assembly. A judicial decision⁵⁷ laid down that it would not be within the power of the State to give preferential treatment to backward communities in the matter of admission to educational institutions, as this would be contrary to Article 15 (prohibition of discrimination) and Article 29(2).⁵⁸ It was felt that the special responsibility of the State for improving the condition of backward classes required that the state should have such power. The Constitution (First Amendment) Act 1951.⁵⁹ added this new clause to Article 15. The clause made it expressly clear that 'nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes'.

Article 15 now contains four clauses. Under the clause (1) the state is prohibited to discriminate citizens on the grounds only of religion, race, caste, sex, place of birth or any of them. Clause (2) deals

with the social problems practiced in the society, on the basis of religion, race, caste, sex, place of birth. It prevented the social evil practices of restricting others from access to shops, public restaurant or the use of wells, tanks, bathing ghats, roads, and places of public resort, maintained wholly or partly out of state funds or dedicated to the use of the general public. The last two clauses were incorporated in the Article, which may be considered as specific instances of unequal but separate benefits to a section of citizens, who are socially or educationally weak and deprived citizens.

By enacting Article 15, the framers of the Constitution imposed restrictions, both upon state and citizen, to discriminate even on very flimsy grounds and has gone into the minutest details of social relations, where discrimination was prevalent as a common feature. It is a social compromising approach of the Constitution so as to minimize the social sensitiveness of the people and to promote a sense of fellowship. In Indian society, any government that existed before never tackled social problems and their evil practices seriously. The Mughals remained unconcerned with these social problems. The feudal system of land holding, which they brought, rigidified these social practices. The Britishers continued it for their own purpose of retaining political power and the socially backward classes were use for dividin⁶⁰ the people. This is borne out by the Minto-Morley Reforms, which introduced a system of separate communal representation for Muslims. This award was gradually extended to other communities, and it resulted into the division of Indian amongst themselves.⁶¹ The British courts almost followed the Executive Policy and attached more sanctity to customs⁶² than to law. Those customs maintained the hereditary status quo with all its inequalities as advised and directed by the native

land officers. Those customs were never interpreted to benefit the society and make it move towards a new equilibrium and check the imbalance, but instances reveal that no effective and serious steps were ever taken either by the legislature or by the judiciary to release the society from unequal social burden. The Article in the light of past experience of 'inequality' gave a new dimension to age-old social values and emphasized rational relations.

(a). Province of Article 15 (1).

As to the scope of this Article the Supreme Court has held that "the fundamental right conferred by Article 15(1) is conferred on a citizen as an individual and is guarantee against his being subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen generally."⁶³ Regarding the meaning of 'discrimination' which only occurs in Article 15 and 16 and is not used in Article 14, Patanjali Shastri, CJ, after referring the meaning given in Oxford Dictionary⁶⁴ and bringing out the difference between Article 14 on the one hand and Article 15 and 16 on the other, observed :

"...Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those Article. Both the position under Article 14 is different. Equal protection claims under that Article are examined with the presumed that the state action is reasonable and justified".⁶⁵

The social legislation seeking reforms in the personal law has been held constitutional and not discriminatory under Article 15(1), (2) and Article 14. The Hindu Marriage Act, 1946, which was enforced among Hindus and excluded Muslims, was challenged as discriminatory on the grounds of religion. The Act was held⁶⁶ not violative of Article 14 and 15 (1). The court said that the state is free to embark on social reforms in stages. The Hindu Marriage Act, 1946, which introduced social reforms was again challenged as unconstitutional. In *G.Sambireddy V. G. Javamans*,⁶⁷ the court held the Act constitutional and also approved the earlier case.⁶⁸

The Supreme Court, in a number of cases, interpreted the Article to check the continuance of discrimination based on the ground enumerated in Article 15. Saurashtra, a law, which restricted the movements of certain communities by insisting on their reporting to the police daily, was held *ultra-vires*, as it was a discrimination based on race.⁶⁹ Likewise a law which deprived a female proprietress to hold and enjoy her property on the ground of her sex was held violative of Article 15.⁷⁰ In another case,⁷⁰ the Supreme Court pointed out that a law which discriminates on the ground of residence does not infringe Article 15. Place of Birth is distinct from residence. In one case,⁷² a rule of the State Medical College requiring a capitation fee, from non-Madhya Bharat Students for admission to the college was held valid as the reasons for exemption from payment of capitation fee was *bonafide* residence and not place of birth. Clause (2)(a) of Article 15 declares all the shops public restaurant, hotel and places of public entertainments or clause (b) wells, tanks and bathing ghats, roads and places of public resort, maintained wholly or partly out of state funds or dedicated to the use of the general public, open to be freely used by any person and no

citizen shall on the grounds specified in the Article be subjected to any disability, liability, restriction or condition.

In the light of preceding discussion, it may be well said that Article 15 constitutes a perfect guarantee of non-discrimination in any form, and pushes the society to merge with advanced social rules based on social justice.

Article 16 consists of five clauses. Clause (1), which embodies equality principle, reads:

“There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.”

Clause (2) describes the grounds on which citizen shall not be discriminated against, in respect of any employment or office under the State. The grounds are religion, race, caste, sex, descent, and place of birth, residence or any of them.

Clause (1) of this Article declares all citizens equal in matters of public employment whereas clause (2) expressly prohibits discrimination on certain grounds. Clause (3) and (4) are discriminatory clauses.

Article 16 is more specific in content than Article 15, related to public employment only. Taxing the three Articles, viz, 14, 15, and 16, together, it is evident that the entire three Articles incorporate the same principles of equality and denounce discrimination that operates in general, specific and more specific areas. Explaining the relative scope of Articles 14, 15, and 16, Das j. said:

“Article 14 guarantees the general right of equality, Article 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment to any office under the State. Article 15 does not mention descent as one of the prohibited grounds of discrimination as Article 16 does.”⁷³

Equality of opportunity is another most important element of the concept of ‘equality’ in any society there has always been three types of inequalities, namely, political, social and economic. Almost with the realization of its value and worth, social reformers fought to obtain ‘equality’ in all these three types. Political equality is achieved through struggles of national freedom and enfranchisement, without discrimination on the basis of colour, religion etc. balancing the social values and economic equality to achieve opportunities for every individual to secure employment for his subsistence and well being. The Article is the reproduction of the Preamble of the constitution, which envisages among other things, equality of status and opportunity. Equality of status is only possible when economic conditions are improved by providing opportunities equally. Equality of opportunity, properly understood, means that “those conditions are created by the State, must be equalized so that each man’s share of wealth may be determined solely by his natural abilities”.⁷⁴ Laski says that “the idea of equality is obviously an idea of leveling. It is an attempt to give each man as similar a chance as possible to utilize what powers he may possess”.⁷⁵ The equality of opportunity to all citizens without consideration based on caste, race, colour etc. is the corner stone of all the democratic state as it enables every citizen to develop his personality and status of living, and the steps taken by the State in

solving this problems of economic inequality is therefore based on economic justice. Abraham Lincoln always defended equality on the ground that in the long run it favoured the best interests of every individual. To it he attributed every thing desirable in free society.⁷⁶ The Fourteenth Amendment to the Constitution of the United State embodies the great ideas of Lincoln which required not merely the State to protect the freedoms, but also the federal government to secure those freedoms.

In India, during the British Raj, equality principle was never adopted either in economic matters or in social relations. Although steps were taken in this regard but no serious efforts were made to operationalize those measures. The first legislative declaration to appoint Indians irrespective of religion, place of birth etc. was embodied in the Charter of 1833.⁷⁷ it was the first legislation, which excluded caste criteria in the appointment of government services. The next legislative measure in which the British Policy to employ Indians was embodied in the Queen Victoria's Proclamation announced on November 1, 1858.⁷⁸ The proclamation, which is of great historical importance, was embodied in the Government of India Act, 1858, under which the Government of India was transferred to the Crown through Secretary of State,⁷⁹ The Proclamation continued:

“...We shall respect the rights, dignity and honour or native princes as our own. The principle of religion toleration was inculcated, differentiation on grounds of race or creed in the public service was disapproved, and the ancient rights, usages and customs of India were to be respected⁸⁰

But in spite of the British liberal policy to provide opportunity to every person, the higher class of Indian elite or English people occupied all the higher posts. Before 1878 in almost all services, agriculture, post and telegraphs, customs, excise sale, opium, mint, prisons, archeology, Geology, registration higher officers were Britishers.⁸¹ Indian were mostly excluded from the important services and naturally with the passing of time the demand for the admission of Indians to the higher posts increased. British policy, in matters of services appears to be of two phases. The one of exclusion, which operated before the Crown adopted the powers in 1858. In the administration of justice, they only sought help from the native law officers in interpreting local customs and usages or in the collection of revenue and excluded any but covenanted servants from occupying places worth over 500 a years.⁸² Policy of exclusion of Indians from services or calculated administrative approach to recruit Indians were condemned by the nationalist leaders and on the basis of the exclusion of Indians, the Simon Commission⁸³ was boycotted.

As the Simon Commission failed and the exclusion of Indians was justified, it was proposed by the British Government to have an agreed Constitution. This proposal was accepted and an all-party conference was held in 1928, which appointed a Committee with Pandit Motilal Nehru as its Chairman, to workout principle of constitutional reforms. The Committee recommended a report which is known as 'Nehru Report'. The Nehru Report contained various recommendations, the one was:

“No person shall by reason of his religion caste creed be prejudiced in any way in regard to public employment, office of power or honour and the exercise of any trade or calling...”

The British Parliament was considerate to give the due importance to the sentiments of Indians and also as a matter of policy, enacted Section 298(1)⁸⁴ in the Government of India Act, 1935, when the present Constitution was being framed after acquiring independence, Munshi and Ambedkar⁸⁵ submitted a draft containing the principle of equality of opportunity and prohibition of discrimination on grounds of religion, race, caste, or language in the matter of public employment. Shri K.T. Shah and Harnam Singh also incorporated this basic principle in Clause 2 and 8 of their respective drafts.⁸⁶ When the Sub-Committee on Fundamental Rights discussed the subject on March 24, 1947, Shah pressed his view that the Constitution should guarantee non-discrimination, not only in "public employment but also in employment in any enterprise aided and assisted by the State".⁸⁷

The Sub-Committee rejected the suggestion and its draft report contained a provision on equality of opportunity in public employment in Sub-Clause (1)(b) of clause 5.⁸⁸

In his explanatory notes on the draft clause, B.N. Rao pointed out that Sub-clause (1)(b) was actually adopted from Section 298 of the Government of India Act, 1935.⁸⁹ When the Sub-clause was considered by the Sub-Committee on April 14 and 15, 1947, Alladi Krishan Swamy Iyer referred to enactments like the Hindu Religious Endowments Act which restrict certain appointments to Hindus and suggested that it would be necessary to protect such provisions. This suggestion was accepted and the provision was redrafted as an independent clause and appeared in the report of the Sub-Committee as clause 5:⁹⁰

There shall be equality of opportunity for all citizens:

- i. in matters of public employment;
- ii. in the exercise or carrying on of any occupation, trade, business or profession, and no citizen shall on any of the grounds mentioned in the preceding section be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business or profession within the Union. Nothing herein contained shall prevent a law made prescribing that the incumbent of an offices to manage, administer or superintendent the affairs of a religious or denominational institution shall be a member of a particular religion, or denomination.⁹¹

The Sub-Committee on Minorities recommended the addition of a proviso to clause 5 in order to meet the claims of minorities to special representation in the services.⁹² After discussing the matter in detail it was finally decided to refer the clause for redrafting to the *ad hoc* committee appointed earlier⁹³ for considering clause (4).⁹⁴ When the clause as redrafted came before the Advisory Committee on April 22, 1947, discussion centered round the respective merits of certain phrases used in the exception clause which as recommended by the *ad hoc* committee read :

Nothing herein contained shall prevent the state from making provision for reservations in favour of clauses not adequately represented in the public services.

The Advisory Committee accepted the entire provision after going through the spirit of the draft provision submitted by the adhoc committee and was discussed in the Constituent Assembly on April 30, 1947. The clause as accepted by the Constituent Assembly was reproduced in the Constitutional Advisor's Draft Constitution of October 1947, as clause 12 without any substantial alterations and appeared as Article 10 of the Draft Constitution prepared by the Draft Committee with one important modification: instead of the words "in favour of any particular class of citizens" the words "in favour of any backward class of citizens" were inserted. Draft Article 10 read as follows:

1. There shall be equality of opportunity for all citizens in matters of employment under the State.
2. No citizen shall, on grounds only of religion, race, caste, descent, place of birth or any of them, be ineligible for any office under the State.
3. Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State.
4. Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any person professing a particular religion or belonging to a particular denomination.⁹⁵

The Draft Article came up for consideration before the Assembly on Nov. 30, 1948, for eliciting opinion a number of amendments were received. During the general elections the use of he

word “backward” in clause (3) of the draft Article, ⁹⁶ Ambedkar said that the Draft Committee had to reconcile opposing points or view to produce a “workable proposition which will be accepted by all”. If this was borne in mind, it would be seen that no better formula could be produced than the one embodied in clause (3). He added:

Unless you use some such qualifying phrases as ‘backward’ the exception in favour of reservation will ultimately eat up the rule altogether...That I think...is the justification why the Drafting Committee under took on its own shoulders the responsibility of introducing the word ‘backward’ which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly.⁹⁷

Ambedkar referred, finally, to two questions raised during the debate; first, regarding the definition of ‘backward community’ and the second regarding the justiciability of clause (3) of the draft Article. Regarding the former he said :

Anyone who reads the language of the draft itself will find that we have left it to be determined by each local government. A backward community is a community, which is backward in the opinion of the Government.⁹⁸

As for the latter he said,

It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter.⁹⁹

On being put to vote, all the amendments, except those accepted earlier by Ambedkar, were negated by the Assembly and draft Article 10, as amended, was adopted to be added to the Constitution. Subsequently the Drafting Committee as Article 16 renumbered it without any alternation or modification in substance.

As regards Clause (5) of the Article it provides another exception to equality principle added to the draft Constitution on the motion of Alladi krishnaswamy Iyyer¹⁰⁰ and is based upon the secular principle.

“(4) Nothing in this Article shall prevent the state from making any provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.”

(b). Province of Article 16(1).

Article 16(1) provides a right to equality of opportunity in matter of public employment and clause (2) guarantees that no citizen shall be discriminated against in respect of any employment or office under the state on the ground only of religion, race, cast, descent, place of birth, residence or any of him or her. The rule applies only in respect of employment or offices, which are held under the State. It must therefore, be read with Article 12,¹⁰¹ which defines state. Both the clauses confer a right on each individual citizen.¹⁰² Article 16(1) does not confer a right to obtain a public employment but confers a right to equality of opportunity for being considered for such employment. Article 16 does not exclude selective tests nor does it preclude the

laying down of qualifications for office, not only of mental excellence but also of physical fitness, sense of discipline, and moral integrity loyalty to the State etc. Where the appointment requires technical knowledge evidence of such knowledge may be required.¹⁰³ Since the equality of opportunity is in respect of any employment, Article 16 cannot be confined to the initial matters prior to the act of employment but includes other matters relating to employment such as the provision about the salary and periodical increments therein, terms as to leave, gratuity and pension and as to the ages of superannuating. It also includes promotion to selection posts.¹⁰⁴ Rules of equality is not applicable between members of separate and independent clauses of service. This equality of opportunity can only be as between persons who are securing the same employment. Thus the roadside stationmasters and guards belong to two separate and distinct classes of services between whom there is no scope for predicating equality or inequality of opportunity in matters of promotion. Article 16(1) accordingly was not infringed by rules enabling guards to be promoted faster than roadside stationmaster to posts of stationmaster. In another case, the Supreme Court considered the question of equality of opportunity and laid down that the three tier system evolved for police in Rajasthan was valid.¹⁰⁵ There is no denial of equality if the service rules permit premature retirement of Government servants.¹⁰⁶ Likewise Article 16(1) has no application to persons occupying different grades in the same service.¹⁰⁷

Article 16 has no application to a contract for the sale of goods to the state. Independent contractors cannot call themselves employees of the State and cannot claim the right conferred under this clause.¹⁰⁸ Article 16(2) contains forbidden grounds to discriminate citizens in

matters of employment. The forbidden grounds of discrimination are race, caste, sex, descent, and place of birth, residence or any of them. The scope of Scope of Clause (1) of Article 16 is wider than the scope of clause (2) as it is limited only the specified grounds contained therein because discrimination on the grounds other than those mentioned in Clause (2) has to be judge in the light of the general principles laid down in Clause (1).¹⁰⁹ The clause applied only to public or state employment as is evident from the words, “any employment or office under the state” make it clear that article applies only to public employment. The words “office” and “employment” are of wide connotation. Lord Wright accepting the New English Dictionary meaning declared a position or place to which certain duties are attached especially one of a more or less public character.¹¹⁰ The word ‘employment’ or appointment under the state means that the persons so appointed or employed holds a position of subordination to the state.¹¹¹ Another phrase used in clause 20 ‘discrimination’ is also important about which the judicial view has already been discussed.¹¹²

The word ‘only’ is very significant and its interpretation is possible in two ways. The one view is that the prohibited grounds should not be the only or sole consideration for discriminatory treatment. If sex, religion, etc. is not only ground for the differentiation the law will be valid irrespective of its operation. Accordingly it becomes necessary for the courts to consider the scope and object of the Act so that actual grounds of discrimination could be found of on which the law is based, and if he only basis of the impugned Act is discriminative on one or more grounds specified in Article 15, then the Act is bad but if the true basis of the Act is something different, the Act is not invalidated because one of its effects might be to invoke such

discrimination. According to other interpretation it is the effect and operation of the Statute which is the determining factor and its purpose or motive. As such the court should not hold a law repugnant to the guarantee given by Article 15(1) if, as a result of the law a person is denied any right or privilege solely because of his religion, caste, race, sex, or place of birth. Lord Thankerton in a case¹¹³ arose under Section 298(1)¹¹⁴ Government of India Act, 1935, where the similar interpretation of the word 'only' occurring in the section was involved, expressed the views¹¹⁵ similar to the second interpretation. The Supreme Court has also affirmed the second view in its decision in state of *Bombay v. Bombay Education Society*,¹¹⁶ involving the interpretation of the word 'only' contained in Article 29(2) of the Constitution.

The validity of various legislation discriminating in public services have been questioned under Article 16. Thus in a case,¹¹⁷ The Supreme Court struck down an Act,¹¹⁸ under which the Collector was required to select persons from among the last holders of office, because it amounted to discrimination on the ground of descent. Similarly in reservation of posts in favour of Hindus, Muslims and Christians was held violative of Article 16(2) as based on religion,¹¹⁹ Almost similar problem was raised in *Triloki Nath v. State of J&K*,¹²⁰ where the State Government formulated a policy of reserving fifty per cent of the vacancies to the civil services of the state for Muslims of the entire state of Kashmir, forty per cent of vacancies for the Jain Hindus and ten per cent for Kashmir Hindus. The state justified such policy under Article 16(4) on the ground that Muslims of the state and the Jain Hindus constituted 'backward' classes of the citizen who not adequately represented in state services under Article 16(4). The

Supreme Court did not accept State jurisdiction and emphasized that in determining whether a section forms a backward class, a test based solely on caste, community, race, religion, sex, descent, place of residence of birth cannot be adopted because it would directly infringe Article 16(2). The Court said that the normal rule contemplated by the Constitution is equality between aspirants to public appointments, but in view of the backwardness of certain classes the state could make a provision for reservation of posts in their favour. But here was an instance not of reservation in favour of any backward class but in effect, of distribution of the total number of posts on the basis of community or place of residence. This was contrary to Article 16(1) and (2) and as hardly permissible under Article 16(4).¹²¹

Article 16(1) and (2) of the Constitution are non-discriminatory provisions safeguarding the interests of the citizens on the principle of equality. These clauses have been invoked innumerable times ever since the Constitution came into force. Beside these Articles, there are two other Articles i.e. Article 17 and 18,¹²² in the fundamental rights chapter which secure equality to citizens social justice and equality of status as contained in the preamble of the Constitution. Article 17 relates to abolition of untouchability. Untouchability is a perpetuating social problem in Hindu society, which is an offshoot of caste, religion, and descent. On account of this evil a considerable size of Hindu society is treated unequal in all matters of life. This article declares this practice of untouchability as an offence punishable under the law. Although the content of this Article has already been covered by Article 15. Thus, on the ground of untouchability no one will be denied access to shops, public restaurant, bathing ghats etc, but there could be this Article forbids all many more forms of unequal treatment.

The other Article 18 is related to the abolition of 'title'. The practice of conferring titles was adopted by British Government and is feudalistic by its very nature. It creates inequality and the formation of a separate class of elite in the society. A title is an appellation given to a person or family as a sign of privilege of distinction or profession, as the title of Lord. It is something that hangs to one's name as an addition. The recent conferment of honours as Bharat Ratna, Padma Vibhushan (Dusra Varga), Padma Vibhushan (Tisra Varga), etc. are not to be treated in the category of title, for these distinctions are not meant to be used as appendages before one's name.

The above discussion of equality principle and the constitutional provisions to prevent discrimination not only on the part of state but private citizens also are the obvious evidence of the aspirations of the framers of our Constitution the create a new society to be founded on new social order, equality and economic and political justice. As regards the political equality, it is dealt under other provisions of the Constitution guaranteeing equal right to vote to all adult citizens irrespective of caste, colour, race, religion, or sex etc. In a democratic state the right of franchise is not only necessary for the formation of the government but the guarantee secures every individual to protect his right. Through this right arbitrariness or discriminatory attitude of the legislature as well as of the executive is restricted. The political equality or equality in right to vote is an essential ingredient of democracy.

C. FROM EQUALITARIANISM TO EGALITARIANISM.

The preceding discussion related to the principle of equality including non-discriminatory provisions¹²² in the constitution. Under

these provisions the Constitution prohibits discrimination in general and also on the grounds of religion, race, caste, sex, place of birth or any of them. Article 325 guarantees political rights to every adult citizen. The guarantees of the above nature essentially ensure equality, secularism and help serve the democratic norms to develop in India. These guarantees are of great significance in view of the social and economic history of India, which has revealed varied inequities prevalent in the social system. Rigidified by the feudal society and later exploited by the British Government, this phenomenon resulted into pushing a large section of the Indian people into the realm of 'backward class', which could be identified through the sufferings of that class of people.

Social and economical inequalities have been working upon each other in the Indian society. The social inequality is the byproduct of caste system prevalent amongst Hindus. The orthodox Hindu view has been that society is divinely ordained on the basis of the four castes. The authority on which this view rests is the statements in the 'PURUSHASUKTA' in the Rig Veda,¹²³ wherein it was devised that each division alienated the other, both in material existence and spiritual matters with a sense of caste superiority in the life style. It ultimately exerted hierarchical domination over one another and inevitably gave rise to the division of professions. Intellectualism became the preserve of those were placed in the superior order and the performance of manual and menial jobs went to lower orders so much so that men in the lowest rung of the order ere excluded from the social life and were never allowed to live in the main habitat parts of the towns and villages. These people were classified under the Constitution as scheduled castes and schedule Tribes. Because of total alienation

they remained socially, educationally and economically backward and today are much behind from the rest of the society. These two categories constitute a large part of the Indian population. Almost seventy millions of people are living in the backward conditions for no fault of their own. Poverty and illiteracy have pervaded them and they had never had a chance to ameliorate themselves. They are doubly sufferers, both socially and economically. Influence by these problems the framers of the Constitution decided to bring these downtrodden, neglected and harassed people to the level of the society and human dignity. They, therefore, took an unprecedented step in human history by enacting provisions in the chapter on fundamental rights to provide them opportunities to improve their social condition and come at par with the society. These are the provisions under which preferential treatment by the state are permitted for their rapid advancement. Under Article 15(4), 16(4)¹²⁴ measures can be adopted exclusively for persons who are scheduled castes, scheduled tribes and 'backward' both in terms of social and educational criteria. Such measures shall be constitutionally protected and would not be considered as violative of equality principles embodied in the Preamble or in Article of Fundamental Rights.¹²⁵ Thus, the state can adopt measures to provide for the advancement of classes of citizens who are socially and educationally backward, scheduled castes and scheduled tribes and notwithstanding that this may amount discrimination. Under these clauses i.e. 15(4) and 16(4) discrimination is permitted and protected for the educational economic and social developments. These discriminatory clauses are in fact compensatory classes for assisting the backward citizen without which it would not be possible for them, to compete with the advanced sections of the society. These provisions may appear to be in derogation of the principle of equality and the

spirit of the Preamble, but in view of the past history – Indian social conditions the permissible or protective discrimination is necessary to bring equality in the society where such a vast difference between the advanced and backward sections of the population exists and which cannot be removed without providing the weaker sections opportunities to improve their lot even at the cost of the rights of others. •

The 15(4) and 16(4) essentially reflect the liberal and humanistic approach of the constitution framers in the context of Indian social facts. Under these Articles the states are empowered to discriminate in favour of scheduled castes, schedule tribes and backward classes in providing educational and employment opportunities by reserving seats in the educational institutions and jobs in public services. Although, the matter of reservation is left on the discretion of the state but it has been held by the Supreme Court that the discretion is not absolute, the guarantee of equal protection is to be kept in mind.¹²⁶

(i). Article 15 (4)

Article 15(4) did not exist in the Constitution and was added by the Constitution (First Amendment) Act, 1951, after the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*.¹²⁷ In this case two separate applications were considered, one by Champakam Dorairajan and the second by C.R. Srinivasan. The first application was concerned with the medical education in the State of Madras. The State of Madras maintained four Medical Colleges with 330 seats. Out of these 330 seats some were reserved but the major group of seats had for many years before the commencement of the Constitution been apportioned in the manner stated below. Likewise, the State of Madras maintained four Engineering Colleges and the total

number of seats available in those colleges were 395. Out of these, some seats were reserved, but the majority of seats were also apportioned in the same manner. These apportionments were done according to what was laid down in directive called the communal G.O. Thus, for every fourteen seats to be filled the candidates were to be selected strictly one of the following basis :

Non Brahmins (Hindus)	:	06
Backward Hindus	:	02
Brahmins	:	02
Harijans	:	02
Anglo-Indian & Indian	:	01
Christians		
Muslims	:	01
		<hr/>
Total		14
		<hr/>

This communal Government Order (G.O) was adhered to even after the commencement of the Constitution. Indeed, in June 1950, a fresh G. O. was issued substantially reproducing the previous communal G.O. Champakam Dorairajan moved for admission to the Madras Medical College and it was her case that the restriction regarding the number of Brahmin candidates made it impossible for her to get admission. She, therefore, applied before the Madras High Court under Article 226,¹²⁸ challenging the communal G.O. as void in as much as it violated her fundamental rights under Article 15(1)¹²⁹ and Article 29(2)¹³⁰ of the Constitution. Srinivasan had applied for admission to the Government Engineering College at Gundy, but

owing to the restriction on the number of admissions under the communal G.O. he was denied admission, although on merits his application was for superior to those who had actually been admitted. He also made an application before the Madras High Court under Article 226 of the Constitution challenging the communal G.O. being violative of his fundamental rights under the Constitution. The Madras High Court against which appeals were granted these applications taken to the Supreme Court. It was contended on behalf of the State of Madras that the communal G.O. could be sustained under Article 37¹³¹ and Article 46¹³² of the Constitution. Article 37 contained in Part IV, namely, the Directive Principles, provides that the state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and scheduled tribes, and shall protect them from social injustice and all forms of exploitation. Reliance was also placed on Article 1,¹³³ which provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state, but it contains clause (4) which lays down that nothing in the said Article shall prevent state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, was not adequately represented in the services under the State.

Mr. Justice S.R. Das (as he then was) held that none of these Articles had any application. Articles 37 and 46 were Directive Principles, which could not override the provisions of the Fundamental Rights. As regards Article 1, it was held that it made a special provision in the case of services, but there was no corresponding provision in Article 29. It was held that the classification in the communal G.O.

proceeded on the basis of religion, race, and caste and was, therefore, a clear violation of Article 29(2) of the Constitution and was void. By this decision the object of the state to advance any socially and educationally backward classes of citizen suffered a set back. The provisions contained in the chapter of Directive Principle of State Policy proved to be ineffective for being subservient to Fundamental Rights and unjusticiable in character. The Government, therefore, felt it necessary to amend the Constitution to nullify the effect of the decision, empowering the State to adopt measures under which the interests of backward classes of people pertaining to education could be protected. This aim of the government was achieved by the Constitution (First Amendment) Act 1951, which added clause (4) to Article 15. The Amendment thus cleared the way of state to assist the backward classes both socially and educationally.

It may be recalled that when (Article 9 according to Draft)¹³⁴ was discussed by the Constituent Assembly. Prof. K.T. Shah had moved an amendment that at the end of Clause (2)¹³⁵ of Article 9 the following be added:

“or for scheduled castes or backward tribes, for their advantage, safeguards or betterment.”¹³⁶

But Dr. Ambedkar had opposed the amendment on the ground that it might have just the opposite effect on the object¹³⁷ to be achieved. The proposal made by Prof. Shah, which was suppressed by the Constituent Assembly has been resurrected and embodied by the Parliament¹³⁸ in clause (4) of Article 15, within three years of the

functioning of the Constitution as a result of the judicial decision in Champakam case.

(ii). Article 16 (4).

This clause provides another exception to non discriminatory rule contained in clause(1) of the Article. Article 335¹³⁹ of the Constitution supplements this clause.

In the pre-partition days the India elite, irrespective of the consideration that they were efficient or deserved, those posts, monopolized almost all high posts in government services. The high posts ere considered to be 'elite posts' must be occupied by elite persons, on the theory of 'ascription'. The abilities and achievement were rarely acknowledged. The other people were regarded as disqualified one way or the other. With this approach, most of the posts in government services were not in circulation and remained dominated by higher classes. Moreover, the British government gave more emphasis on the criteria of caste and social status in the appointment to government posts. This trend gave rise to an 'institutionalized' pattern of profession and hereditary employment.¹⁴⁰ Moreover, the Brahman community in order to maintain its superiority in the society has always remained vigilant for their education and economical advancement. The Brahmins had taken to English education earlier than the other communities and thus were in a position to enjoy monopoly of jobs under the government services. On the other hand the other communities woke up late to the opportunities then available. Ultimately they ere pushed much behind of the Brahmins. This resulted into the organization of the non-Brahmins movement,¹⁴¹ particularly in southern India. Certain measures were thereafter adopted to curtail the

Brahmin representation in services as well as education and the policy of communal reservation was actively pursued by the Madras Government ever since i.e. 1920¹⁴² There was similar non-Brahmin movement in Maharashtra according to Kaka Kalelkar Commission Report.¹⁴³ In Mysore, it achieved remarkable success. Communal reservation adopted in different regions of south was of different forms that carried on against non-Brahmins communities. It may be noted that the Supreme Court in Champakam case quashed one such government order, which had been operating in Madras before the commencement of the Constitution, in 1951. When the Constituent Assembly took up this problem of 'communal reservation' for discussion, Sardar Patel, the Chairman of the Advisory Committee on Minorities and Fundamental Rights, dismissed a proposal for communal reservation in the services as 'a dangerous innovation'. He asserted that 'this Constitution of India, of free India, of a secular state, will not hereafter be disfigured by any provision on a communal basis'.

This clause and clause (4) of Article 15 are thus the inevitable provisions in a society like India which is stratified on the basis of race, caste, and socio-religious views, that have erected class and caste barriers, resulting into economic and social inequality. Justice requires that inequalities in the society must be corrected by special measures to protect those who had been adversely affected and have remained backward. The Constitution, in adopting these measures has of course endeavoured to break the caste and class barriers and has moved toward purging the society from these evils. In doing so, a new socially equilibrium will be inculcated and total welfare would be enhanced which would ensure equality and would be in conformity of the Rule of Law.

NOTE AND REFERENCES

1. Minto-Morley Reforms, it is also known as Indian Council Act, 1909. Lord Morley, the then Secretary of State for Indian and Lord Minto, Viceroy of India after whose names the Reforms are called as they agreed to introduced legislative reforms on the principle adopted by them.
2. A representation of Muslims in October 1906 headed by Sir Agha Khan demanded for separate representation by members chosen by themselves, was conceded by the Government, V.S. Mahajan, and Constitutional History of India p. 58.
3. Ibid p. 61
4. Ibid p. 326.
5. Defence of India Act, 1915, Indian Press Act, 1910- A.B. Keith, A Constitutional History of India p. 239.
6. Under this system subjects were classified as central and provincial and provincial subjects were divided into two parts : Transferred and Reserved subjects. The Governor with the help of Executive Council administered the reserved subjects and the Government with the help of the Ministers dealt with the transferred subjects while the Governor nominated the members of Executive Council, the Ministers were appointed by the Governor from amongst the members of the legislature.
7. Indian Statutory Commission came to the popularly known as Simon Commission, B. Shiva Rao, The Framing of India's Constitution p. 173.
8. V.D. Mahajan, The Constitutional History of India p. 119.
9. Ibid.
10. Indian Round Table Conference (Second session) Vol. III, Appendices I, III, B. Shiva Rao, The Framing of India's Constitution pp. 173-74.
11. M.V. Pylee, Constitutional Government in India p 191.
12. Ibid p. 192.

13. Also known as Sapru Committee appointed by an All- Parties Conference (1944-45).
14. Constitutinal Proposals of the Sapru Committee (Bombay 1945) p. 256-57.
15. Select Documents 1, 48(i), pp. 214-16.
16. Ibid, 111 p. 4.
17. C.A.D. Vol. II, p. 325-27.
18. B.N. Rao, The Characteristic of the India Constitution p 245.
19. Article 19(1)(f) of the Constitution contained the right to acquire, hold and dispose of property, which was deleted by the 44th Amendment Act in 1979.
20. Article 14,15,16,17 and 18.
21. Infra note 136.
22. Now Sovereign Socialist Secular Democratic Republic, substituted by the Constitution (Forty-second Amendment) Act, 1976, S.2 with effect from 3.1.1977, Constitution of India (as amended upto the Constitution, Forty-fourth Amendment) Act, 1978.
23. Bracketed part substituted by the Constitution (Forty-second Amendment) Act, 1976, S.2 (w.e.f. 3.1.1977). Ibid.
24. Article 325 : There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either. House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex, or any of them.
25. S.P. Sathe, Fundamental Rights and Directive Principles of State Policy, Constitutional Development since Independence, Journal of Indian Law Institute (1975) p. 407.
26. Article 14, : The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
27. Article 15 : (1). The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2). No citizen shall, on grounds only of religion, race, caste, place of birth or any of them, subject to any disability, liability,

restriction or condition with regard to –(a). Access to shops, public restaurants, hotels and places of public entertainment, or (b). The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. (3). Nothing in this Article shall prevent the State from making any special provision for women and children. (4). Nothing in this Article or Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.

28. Article 16 : (1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state. (3). Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office (under the Government or any local or other authority within, a state or union territory any requirement as to residence within the State or Union Territory) prior to such employment or appointment. (4). Nothing in this Article shall prevent the State from making any provision for the reservation or appointments posts in favour of any backward class of citizens which in the opinion of the state, is not adequately represented in the services under the state. (5). Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denomination institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. (But clause(4) added to Articles 15,16 after amending the constitution which was equal to case are exceptions to Art. 15(1) and 16(1) at the State are allowed to make provisions for the socially and educationally backward class of citizens).
29. Article 17 : ‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘untouchability’ shall be an offence punishable in accordance with law.
30. Article 18 : (1) No title not being a military or academic distinction, shall be conferred by the State. (2). No citizen of India shall accept any title from any foreign state. (3). No person who is not a citizen of India shall, while he holds any office of profit or trust under the state, accept without the consent of the President any title from any foreign state. (4). No person holding any office of profit or trust under the

state shall, without the consent of the President accept any present, employment, or office of any kind from or under any foreign state.

31. Article 39(d) : That there is equal pay for equal work for both men and women.
32. Article 12 : In this part, unless the context otherwise requires, 'the state' includes the Government and Parliament of India and the Government and Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India.
33. State of West Bengal v. Anwar Ali, AIR 1952 SC 75, 79 : 1952 SCR p. 284.
34. State of U.P. v. Deoman Upadhvay, AIR 1960 SC 1125-33.
35. Per Jaganmohan Redday J. in Kesavanand Bahrti v. State of Kerala (1973 4 SCC, 225) pp. 53-54.
36. Rule of Law- Dicey gave to the rule of law three meanings:
 - i. It means in the first place, the absolute supremacy of predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government ... a man may be punishable for a breach of law, but he can be punished for nothing else.
 - ii. It means, again, equality before the law or the equal subject of all classes to the ordinary law of the land administered by the ordinary law courts.
 - iii. The Constitution is the result of the ordinary law of the land.
37. Jennings, The Law of the Constitution (1952) fourth edition p. 49.
38. V.G.Row v. State of Madras, AIR 1951 Mad. 147 (F.B.)
39. Article 361 of the Constitution of India.
40. Section 197 Cr.P.C.
41. Article 51 of the Constitution of India.
42. Charanjit Lal Chowdhary v. Union of India, AIR 1951 Sc 41, 1950 SCR 869.

43. Satish Chandra v Union of India, AIR 1953 SC 250, 252: 1952 SCR 655.
44. Bhudhan v. State of Bihar 1950 SCR 191.
45. Ameerunnisa Begum v. Mehboob Begum, AIR 1953 SC 91, 1953 SCR 404.
46. State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 : 1952 SCR 250.
47. Constitutional Law of United States at 573-74.
48. Satwant Singh v. A.P.O. New Delhi, AIR 1967 SC 1836.
49. Article 29 : (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
50. Article III(1) Select Documents II, 4(ii)(b) p. 74-75.
51. Article III(3), Ibid.
52. Article II(1) (4) Select Documents 11, 4(ii)(d) Appendix 1, Explanatory Notes, Note on Article II(ii) (3) p. 98-99.
53. Draft Report, Annexure Clause 5, Select Documents II, 4(ii) p. 133.
54. Select Documents 11, 4(v)(c) p. 148.
55. Minorities, April 14-15, 1947, and Report, Annexure Clause 4, Select Documents 11, 4(vii) and (viii) at 164, 167, 171-72.
56. Dr. Ambedkar had opposed the amendment on the ground that it might "have the opposite effect". "The object, he had added, which all of us have in mind is that the scheduled castes and scheduled tribes should not be segregated from the general public. For instance, none of us, I think would like that a separate school should be established for the scheduled castes when there is general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a state to say, 'well, we are making special provision for the scheduled castes'. To my mind they can safely say so by taking shelter under the Article if it is amended in the manner the Professor wants it. I, therefore, think that it is not a desirable amendment" – C.A.D. vol. VII at 655-56.

57. State of Madras v. Smt. Champakam Dorarraian, AIR 1951 SC 226.
58. Supra note 159.
59. Constitution (First Amendment) Act, 1951.
60. Madras Communal G.O. Per Das J., Judgment in the State of Madras v. Champakam Dorairajan for many years before the commencement of the Constitution of India on 26th Jan. 1950, the seats in both Medical College and Engineering College so apportioned between the four district groups of districts used to be filled up according to certain proportions set forth in what used to be called the communal G.O. Thus “for every 14 seats to be filled by the selection committee candidates used to be selected strictly on the following basis, Non-Brahmin (Hindus 6, Backward Hindus 2, Brahmin 2, Harijans 2, Anglo-Indians and Indian Christians 1, Muslim 1.
61. Supra note 111.
62. Atma Ram v. King Emperor, AIR 1924 Nag. 121.
63. Nain Sukh Das v. State of U.P., AIR 1953 Sc 384 : 1953 SC 1184.
64. The Concise Oxford Dictionary, Edited by Fowler & Fowler 5th Edition, 1964.
65. Kathi Raning Rawat v. State of Saurashtra, AIR 1952 SC 123.
66. State v. Nasru Appa Mali, AIR 1952 Bom. 84.
67. G. Sambireddy v. Jayamana (1972) A.A.P. 156.
68. Supra note 176.
69. Sanghar Umar Ravmal v. Stte, AIR 1952 Sau. 124.
70. Mrs. A. Crachnell v. State, AIR 1952 All. 746.
71. Joshi D.P. v. State of M.P., AIR 1955 SC 334.
72. Rustam Mody Parsi v. State of M.B., AIR 1954 MB 119.
73. G. Dasrath Rama Rao v. State of A.P., AIR 1961 SC 564(1961) 2 SCR 931.
74. Henry Alonzo Myers, Are Men Equal at 121.
75. Harold J. Laski, Liberty in the Modern State, new edition p. 53.

76. Supra note 184 p. 93.
77. Section 87 : No Indian subject of the Company in India was to be debarred from holding any office under the Company by reason of his religion, place of birth, descent and colour, A.B. Keith, A Constitutional History of India, p. 135.
78. A.B. Keith, Constitutional History of India at 167.
79. Ibid p. 165.
80. Ibid p. 167.
81. Ibid p. 201.
82. Act of 1793, Ibid p. 135.
83. Simon Commission : In pursuance of a provision contained in Government of India Act 1919, a Commission headed by Sir John Simon was appointed to examine and inquire the working of the Government established under that Act and suggested future constitutional reforms.
84. Section 298(1) of the Government of India Act, 1935.
85. Munshi's Draft Article III(5), Ambedkar Draft Article II(i)(6), Select Documents 11, 4(ii)(b) & (d) p. 74-86.
86. Select Documents 11(2)(ii) and 11, 4(ii)(c), p. 49-81.
87. Minutes, Select Document, 11 4(iii) p. 117.
88. Draft Report, Annexure Clause 5, Select Document 11, 4(iv) p. 138.
89. Section 298(1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring holding or disposing of property or carrying on any occupation, trade, business or profession in British Indian.
90. B. Shiva Rao, Framing of India's Constitution p. 192.
91. Minutes and Report, Annexure, Clause 5, Select Document II, 4(vii) and (viii) p. 164, 171-72.
92. Interim Report, Annexure, Clause 5, Select Documents II, 5(ii) p. 208.

93. Ad hoc Committee appointed earlier Article 15 was discussed with Munshi, Rajgopalacharya, Panikkar and Ambedkar, Supra note 200 p. 185.
94. Advisory Committee Proceedings, April 21, 1947, Select Document II, 6(iv) at 223-26.
95. Select Documents III, 1(i) and 6 at 8 and 521-22.
96. Corresponding to Clause (4) of Article 16 of the Constitution.
97. B. Shiva Rao, Framing of India's Constitution at 200, also C.A.D. Vol. VII p. 698-99.
98. Ibid.
99. C.A.D. Vol. VII p. 699-702.
100. Supra note 200.
101. Article 12 : In this part, unless the context otherwise requires, the state' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
102. T. Devadasan v. Union of India, AIR 1964 SC 179.
103. Banarasi Das v. State of U.P., 1956 SCR 357, General Manager, S. Rly. v. Rangachari, 1962, 2 SCR 586, Sugtha Prasad v. State of Kerala, AIR 1965 Kerala. 19.
104. General Manger, S. Rly. V. Rangachari, AIR 1962 SC 36.
105. All India Station Masters' Association v. G.M. Central Rly., AIR 1960 SC 384, Ram Sharan v. Dy. I.G. of Police Ajmer, AIR 1964 SC 1559, Menon v. State of Raj. AIR 1963 SC 81 Shyam Sunder v. Union of India, AIR 1965 SC 212.
106. T.G. Shivacharana Singh v. State of Mysore, AIR 1965 SC 280.
107. Kishori Mohan Lal Bakshi v. Union of India, AIR 1962 SC 1139.
108. C.K. Achuthan v. State of Kerala, AIR 1959 SC 490.
109. Sukhnandan Thakur v. State of Bihar, AIR 1957 Pat. 617.
110. MoMillan v. Guest (1942) AC 561, 566.

111. Dattatraya Motiram v. Bombay, AIR 1953 Bomb. 842.

112. Supra note 175.

113. Panjab Province v. Daulat Singh, AIR 1946 P.C. 66.

114. Supra note 199.

115. It is not a question of whether the impugned Act is based only on one or more of the grounds specified in Section 298(1), but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the Sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the Sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however, laudable, will not obviate the prohibition of sub-section (1).

116. AIR 1954 SC 561.

117. Gazula Dasrath Rao v. State of A.P. AIR 1961 SC 564.

118. Madras Heriditor village Office Act 1895

119. B. Venkataraman v. State of Madras.

120. AIR 1969 SC 1.

121. Ibid. p. 3-4.

122. Article 21 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations laid down.:

- a. Everyone has the right to take part in the government of his country, directly or through free chosen representatives.
- b. Everyone has the right of equal access to public service in his country.
- c. The will of the people shall be the basis of the authority of government, this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure.

123. Articles 14, 15(1), 16(1) and 325 of the Constitution of India.

- 124.K.M. Panikkar, Hindu Society at Cross Road first ed. At 6. '
- 125.Supra note 137 and 138.
- 126.Supra note 13, 137 and 138.
- 127.M.R. Balaji v. State of Mysore, AIR 1963 SC 649.
 Chitralekha v. State of Mysore AIR 1964 SC 1289,
 Devdasan v. Union of India AIR 1964 SC 179.
- 128.A.I.R. 1951 SC 226, 1951 SCR 525.
- 129.Article 226 : Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, or any of the, for the enforcement of any of the rights conferred by Part III and for any other purpose.
- 130.Supra note 137.
- 131.Supra note 159.
- 132.Article 37: The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.
- 133.Article 46; The state shall promote with special care the educational and economic interest of the weaker sections of the people, and, particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation.
- 134.Supra note 138.
- 135.Article 9 of the Draft Constitution Corresponded to Article 15 of the Constitution of India.
- 136.Clause (2) of Article 9 read: "Nothing in this Article shall prevent the state from making any special provision for women and children".
- 137.C.A.D. Vol. VII p. 655.
- 138."The object", he had added, "which all of us have in mind is that the scheduled caste and scheduled tribes should not be segregated from

the general public. For instance non of us, I think would like that a separate school should be established for the scheduled castes when there is a general school I the village open to the children of the entire community. If these words are added, it will probably give a handle for a state to say, 'well, we are making special provision for the scheduled castes'. To my mind they can safely say so by taking shelter under the Article if it is amended in the manner the Professor wants it. I therefore, think it is not a desirable amendment”.

139.The Prime Minister said: “Now we come to this House for amendment because we have notice some lacunae. We have noticed that difficulties arise because of various interpretations. It has been pointed out to us by judicial interpretations that some of these lacunae exist...(It) becomes business as Parliament to see whether the purpose we aimed at is fulfilled, because if it is not fulfilled then the will of the community does not take effect...Therefore, while fully respecting what the courts of the land have done and obeying their decisions, nevertheless it becomes our duty to see whether the Constitution so interpreted was rightly framed and whether it is desirable to change it here and there, so as to give effect to what really in our opinion was intended or should be intended. Therefore, I come up before this House, not with a view to challenge any judicial interpretation but rather to find out and to take the assistance of this House in clearing up doubts and in removing certain approaches to this question which have prevented us some times from going ahead with measures of social reform and the like”. The Law Minister said : “The necessity for the amendment of Article 15 has arisen on account of judgments recently delivered by the Supreme Court in two cases which came up before them from Madras State. One case was the State of Madras v. Champakam Dorairajan and the other was The state of Madras v. Venkataramana. PD Part II, XII(1951) 8816, 8817 and 9005.

140.Article 335: 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.

141.Gazula Dasrath Rama Rao v. State of A.P. AIR 1961 Sc 564. In this case the Supreme Court invalidated the Madras Hereditary Village Officer Act, which had required the Collector to select persons from among the last holders of offices.

142.Justice Party in Madras which was latter supplemented by the Dravida Kazahgam and the Dravida Munetra Kazahgam aimed at putting an end to Brahmin domination: T.S. Rama Rao, Protective

Discrimination and Educational Planning, Journal of India Law Institute, 1967 at 73.

143.Kaka Kalelkar Report of the Backward Commission XXIII (1956).

CHAPTER - VI

PHILOSOPHY AND WISDOM OF PROTECTIVE DISCRIMINATION UNDER THE CONSTITUTION, VIZ-A-VIZ JUDICIAL DICTA

A. AN OVERVIEW

The whole philosophy and wisdom of protective discrimination are based upon social justice, which seeks to promote equality of opportunity mainly in the field of education and services. The promotion of equality of opportunity, without eradication of backwardness, is not possible.

This chapter deals with the concept of protective discrimination, which in itself highlights the causes of backwardness and the need to eliminate this curse. Broadly speaking classification of backward people has been made under the following heads:

- (a). Scheduled Castes
- (b). Scheduled Tribes
- (c). Other Backward classes of Citizens

The scheduled castes and scheduled tribes have been defined under the definitional Article 366 of the Constitution and further there is a procedure to specify them through notifications by the President. Such specification, however, is subject to amendment, if any, by the Parliament. Identification, after such amendment, is final and has never been questioned in the Court.

The question of identification of backward classes of citizens other than scheduled castes and scheduled tribes led to divergent judicial approaches because the expression 'backward classes' has not been defined in the Constitution. In the absence of such definition, the identification made by the centre or the states have been questioned before the court. An effort has been made, in this chapter, to analyse these cases in order to identify the class which could be treated as 'backward'.

B. CONCEPT OF PROTECTIVE DISCRIMINATION

Protective discrimination, as has been dealt at various places so far, is a policy of discrimination, which is protected under the Constitution. This policy is obviously inconsistent to principle of equality, though it seeks to remove or diminish social, educational and economic disparity in the people. It is a social necessity. Prof. Alexendrowics defines it in these words :

Protective discrimination indicates the measures of protection including reservation of seats in colleges and posts in government services sanctioned by the Indian Constitution, by way of exception to the general principle of equality and non-discrimination embodied in Article 14, 15(1), 16(1) and 16(2) of the Constitution and in favour of the scheduled castes and scheduled tribes and backward classes.¹

Reservation policy is not based on merit but a non-meritorious candidate is to be preferred on fulfilling the basic requirements. In

Janki Prasad case,² Palelkar J. pointed out that 'it is implicit in the idea of reservation that a less meritorious person is to be preferred to another who is more meritorious'. Reservation is an inevitable policy in the countries where there has been or still exist social stratification or a section of society had been economically, socially and educationally suppressed. With the idea of equality or of equal treatment, it is necessary to protect the interest of suppressed at the cost of the interest of those who had been ahead of them. It is a process to bring social, economic and educational equality. Reservation thus implies equality. Mr. K. Subbarao, former Chief Justice of India in his book writes :

In the race of life, unless adventitious aids are given to the under-privileged people, it would be impossible to suggest that they have equal opportunities with the more advanced people. This is the reason and the justification for the demand of social justice that the under-privileged citizens of the country should be given a preferential treatment in order to give them an equal opportunity with other more advanced sections of the community.³

Without giving preferential treatment to the weaker sections, the object of providing equal opportunity to them cannot be achieved . The achievement of such object is necessary to meet the end of social justice.

It may be noted that reservation does not mean to absolutely deny or totally pull down the high class or advanced section of society. No doubt the interest of advanced section of society is bound to be affected but care has to be taken that they are not affected arbitrarily. Subbarao in his book further explains that our enthusiastic

protective discrimination may be resisted by others as illogical and unjust on many ground; first it would amount to punishing innocent people for misdeeds of their predecessors; second why should somebody be punished for discriminatory practice of others in past and lastly, the persons for whom preferences are awarded now are being rewarded for wrong done to their ancestors.⁴ Therefore, it is desirable that protective discrimination should not be allowed to result into reverse discrimination causing social disapproval and tension. While making reservation under Article 16(4), therefore, care should be taken that unreasonable, excessive or extravagant reservation are not provided for that would be eliminating the general competition in field which may create widespread dissatisfaction among the employees affecting their efficiency. Thus, the judiciary has been involved in guarding the general interest by keeping the extent of reservation within reasonable limits.

C. Constitutional Classification for Preferential Treatment

A large portion of population in India continues to remain backward because of persistent economic and social inequities. The pervading socio-religious prejudices against a class of persons and also the privileges enjoyed by others acknowledged the existence of status with differential treatment amongst the various groups and sub-groups resulting in the formation of socially, educationally and economically under privileged class. If preferential treatment is not given to this under privileged class they will continue to remain in a state of backwardness. Only through preferential treatment we can raise the level of backward groups and demolish to an extent the barriers created by socio-religions prejudices and predilections.

Pandit Jawahar Lal Nehru intervening in the debate on Draft Constitution emphasized the eradication of backwardness in following words:

“May I say one word about certain tendencies in the country which still think in terms of separatist existence or separate privileges and a like ? This very Objective Resolution set out adequate safeguards to be provided for minorities, for tribal areas, depressed and other backward classes. Of course that must be done,It is right and important that we should raise the level of the backward groups in India and bring them up to the level of the rest. But it is not right that in trying to do this we create further barrier, or even keep on existing barriers because the ultimate objective is not separatism, but building up an organic nation, not necessarily a uniform nation because we have varied culture, and in this country ways of living differ in various parts of the country, habits differ and cultural traditions differ. I have no grievance against that ultimately in the modern world there is a strong tendency for the prevailing culture to influence others. That may be a natural influence. But I think the glory of India has been the way it managed to keep two things going at the same time: that is, its infinite variety and at the same time its unity in that variety. Both have to be kept, because if we have only variety, then that means separatism and going to pieces. If we seek to impose some kind of regimental unity that makes a living organism rather lifeless.”⁵

Mr. Nehru warned against the unpleasant effects of backwardness. If it continues, it would generate feeling of separatism and adversely affect the unity of the nation. Further it may act as an obstacle in making India a welfare state free from exploitation.

The backwardness developed either due to economic causes or was embedded in socio-religious conditions. These have proved a great curse and a stumbling block in the way of nation's progress and unity. The Constitution, therefore, endeavors to eradicate the backwardness by providing special facilities to backward section of people. In order to achieve this aim these people have to be initially identified so as to ensure that only right persons are benefited by the constitutional measures. The Constitution has included various provisions to safeguard backward classes under a given social set-up. A list of scheduled caste, and scheduled tribes is prepared and periodically looked into. Article 338 provides for appointment of a Commission to determine the condition of backwardness of the scheduled caste and scheduled tribes. Under Article 335 the states are required to consider the interest of these two groups without any prejudice to maintenance of efficiency in the administration. The President under Article 340 may by an order appoint a commission to investigate the conditions of socially and educationally backward classes. Thus under the various provisions of the Constitution care and precautions have been taken to identify and provide special facilities only to such backward people as one fulfilling the constitutional criteria of backwardness. Preferential treatment under various provisions of the constitution is available to scheduled caste scheduled tribes and other backward classes (hereinafter backward classes).

(a). Scheduled Castes

The definitional Article 366 of the Constitution defines Scheduled Castes as follows:

“Scheduled castes’ means such castes, races or tribes or parts of or groups within such castes, race, or tribes as are deemed, under Article 341, to be scheduled castes for the purposes of this Constitution.⁶

Under Article 341(1) the President may, after consultation with the governor with respect to a State, specify the castes as Schedule Caste in that State.⁷ However the Parliament is having power under Article 341(2) to exclude or include any caste, race, or tribe. The President issued the Constitution (Schedule Castes) Order, 1950 and Constitution (Schedule Caste) union Territories Order 1950 which specified Schedule Caste with relation to each State and Union Territories. By virtue of Clause (2) of Article 341 and 342 Parliament passed in 1976 the Scheduled Caste and Scheduled Tribes Orders (Amendment) Act. 1976.

The scheduled castes suffer from the economic and educational background. Article 341(1) is aimed at providing additional protection to them. The President is authorized:

- (i). To specify castes, races, and tribes as Scheduled Caste,
- (ii). to limit the notification to parts of or groups within the castes, race, or tribes considering the economic, social and educational backwardness of that part or group, and
- (iii). to specify castes, races and tribes or parts hereof 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.⁸

(b). Scheduled Tribes

Scheduled Tribes have been defined in the Constitution as under:

‘Scheduled Tribes’ means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be scheduled tribes for the purpose of the Constitution.⁹

Under Article 342(1)¹⁰, the President may by public notification specify the tribes or tribal communities or parts or groups within tribes or tribal communities which shall be deemed to be Scheduled Tribes for the purpose of the Constitution. The President issued the Constitution (Scheduled Tribes) Order 1950, which has been amended from time to time. By virtue of clause (2) of Article 342 Parliament passed in 1976 the Scheduled Castes and Scheduled Tribes Order (Amendment) Act. 1976.

Scheduled tribes are regarded as aboriginals who from the beginning generally lived in forests or the mountain valley. They were thus cut off from the mainstream of civilization with limited interaction with other societies. They were governed by their own customs and traditions. In India there is the largest concentration of tribal population after Africa. According to 1971 census, there were 38,000,000 members of scheduled tribes, constituting 6.97 percent of the country’s population.¹¹ These tribes are about 255¹² in number. Since Independence, the tribal people have been of special concern to

the government. They constitute an important minority and large sums of money are being spent on them every year to ameliorate their economic conditions. The Constitution has assured them equal protection and a number of legislative measures by the centre as well as the state governments have been introduced to protect their interest and promote their welfare. The setting up of community development blocks and tribal development agencies are among the organizations which were initiated by the government from time to time to improve the conditions of these people. But inspite of all these efforts there is very little change and improvements in their economic and educational conditions. It is mainly because of inaccessibility to the areas they live, internal communication, diversity in their language and culture.

(c). Backward Classes

So far as the Scheduled Castes and Scheduled Tribes are concerned they are defined in the definitional Article 366 under clauses (24) and (25) respectively but nowhere in the Constitution the term 'backward class' has been defined. It has been left to the state governments to spell out the term. The pointer to this effect can be found in the Constituent Assembly Debate, which had set out that – "A backward class is a class or community who is backward in the opinion of the Government."¹³

But it has been judicially conceded that backward classes of citizens are those who are economically, socially and educationally weak. Due to these reasons they lag much behind the standards of the socially and educationally advanced people. Apparently determining

the definition of backwardness of people should not be difficult task. It is directly and primarily related to poor economic conditions, which in fact governs all faculties of life. A poor father's son will be poor and remain poor till the economic conditions of father are improved. But it is submitted that economic weakness is not the only expression of backwardness some other factors also intrinsically operate that lead to backwardness such as ignorance, illiteracy or religious views dominate the mind that their condition of life has been so determined by God and as such the backward people seldom think to come out of their backwardness. This has been the condition in pre-Independence India particularly in the rural areas. But after Independence the efforts of framers of the Constitution were mainly directed to reconstruct the Indian society on the basis of equality and fraternity. This was only possible when this large chunk of population, which is the victim of backwardness, is drawn out from their present state. In the post constitutional period the President of India appointed two Backward Class Commissions¹⁴ to determine the criteria of socially and educationally backward classes and to prepare a list of such classes as were to be entitled for preferential treatment under the Constitution. The necessity of appointing the Commission was felt in view of the fact that the matter of determining the criteria of backwardness has been assigned to states. The states in doing so generally defines backwardness in its own way and political expediency play its own role. For example, a difference arose between the State West Bengal and the Commission for Backward Classes on the criteria of identifying socially and educationally backward classes in the country. The Chief Minister, Mr. Jyoti Basu told the Commission in a meeting that the West Bengal Government did not recognize the accepted criteria for classifying backward classes on social and

educational factors. He was of the view that the Government, the economic factor alone appeared to be the proper way to classify the backwardness of a community. The commission did not accede to the suggestion of the Chief Minister and expressed its opinion that a Marxist analysis would not be applicable to India where peculiar system of caste has been operative for a long time.¹⁵ This attitude is likely to prevail in other states also.

The Central Government considered it expedient to appoint Backward Classes Commission primarily with the object to evolve a criteria in accordance with the constitutional provisions and applicable to all the states. The criteria suggested by the First Commission was not acceptable to the Government, and the implementation of the recommendations of the Second Commission led to large-scale violence throughout the country.

In fact defining 'backwardness' is much more difficult than it appears to be. Survey oriented information disclose that there are under-privileged sections of citizens in all the classes and castes. The categorization of these classes becomes more difficult when caste and economic factors are considered as the basis of their identification and the Supreme Court has not accepted both the factors as rational and constitutional. Moreover, the impact of these two facts is inevitable also. The Supreme Court has expressed its opinion that backwardness must be understood in social and educational context. Rejecting criteria of *poverty* the court said that in view of the fact that India is by an large poor country, a large section of population would fall under the backward category, and thus the whole object of preferential treatment would be defeated. In some cases *Caste* as a

factor to define backwardness was approved but in many cases the court gave its opinion that caste may have some relevance but it cannot be the sole or even the dominant criterion. Such a view was expressed primarily to prevent perpetuation of the caste system and to guard against the trend that higher castes are not included in the category of socially and educationally backward classes of citizen. These efforts were aimed at balancing the equality in society as embodied in the preamble of the Constitution.

D. PROTECTIVE DISCRIMINATION AND JUDICIAL ACTION

1. Identification of Scheduled Castes and Scheduled Tribes

The Scheduled Castes and Scheduled Tribes do not come into conflict as the President does their identification. The Constitution authorized the President of India to make notification specifying what castes, races, or tribes or parts of or groups within castes races or tribes would be treated as Scheduled Castes¹⁶ and what tribes or tribal communities or parts of or groups within tribes or tribal communities would be identified as scheduled tribes.¹⁷ The Parliament under Articles 341(2) and 342(2)¹⁸ has power to include in or exclude from such lists any caste, race, tribe or tribal community. The state cannot prepare their own lists of schedule caste and scheduled tribes. The state governments or any authority except the Parliament under Article cannot alter the notification of the President of India under Articles 341(1) and 342(1). The specification by the President is done with the consultation of governor of each state. The Purpose of such notification is mainly to provide an authentic list of groups of persons

to be treated as scheduled castes and scheduled tribes for constitutional protections and avoids any litigation on this issue in the court of law. The specification, of particular caste, race, tribe or tribal community as scheduled caste and scheduled tribe cannot be questioned in court. In *Parsram Vs. Shivchand*¹⁹ the determination of a particular caste as scheduled caste was raised. The Supreme Court held that in order to determine whether particular caste is a schedule caste within the meaning of Art. 341, one has to look at the public notification issued by the President in this behalf. It is not open to the court to securities by evidence whether a person who is described as of one caste also falls within a specified caste. A person specified as 'mochi' in Punjab does not fall within the caste of 'Chamars' as included in the notification issued by the President. The court refused to make for this purpose, scrutiny of the gazetteers and the glossaries of the castes in Punjab.

Provisions were made that a special officer for scheduled caste and scheduled tribe to be appointed by the President of India and that it was the duty of such special officer to investigate the matters relating to safeguards provided to scheduled castes and scheduled tribes under the Constitution. A report, annually, was to be made to the President relating to such investigation, inquiry or evaluation of the working of safeguards.²⁰

It was felt that a high-level seven-member commission under Article 338 would be more effective than a single special officer. After Constitution (Sixty-fifth Amendment) Act 1990 (w.e.f. 12.03.1992) the Commission for Scheduled Caste & Scheduled Tribes consists of a Chairperson, Vice-Chairperson and five other

members. It is a permanent body. Provisions are not available in the Constitution for such a permanent body for backward class.

2. Determination of 'Backward Classes' and Judicial Responses

Soon after the enforcement of the Constitution the Supreme Court, in *state of Madras vs. Champakam Daroirajan*²¹ was considering the validity of the order, popularity be known as 'communal G.O.' which fixed the proportion of students of each community that could be admitted to State medical and engineering colleges. The G.O. was issued before the enforcement of the Constitution and it was being acted upon. The special Bench of Seven Judges came to unanimous conclusion that the allocation of seats in the manner aforesaid is violative of Articles 15(1) and 29(2). The court pointed out that while in case of employment under the State, clause (4) of Article 16 provided for reservation in favour of backward class of citizen, no such provision was made in Article 15.

Soon after the decision in the aforesaid case clause (4) was added by the Constitution (First Amendment) Act 1951 which reads:

“Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any *socially and educationally backward class as of citizens* or for the Scheduled Castes and the Scheduled Tribes.”

Article 16 (4), which existed before the First Amendment and still exist in the same form, reads:

“Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any *backward class of citizens* which in the opinion of the State, is not adequately represented in the services under the state.”

Article 15(4) speaks about ‘socially’ and educationally backward classes’. The words ‘backward classes’ are qualified with the words ‘socially and educationally’, whereas the words ‘backward class’ in article 16(4) are independent of such qualifications. The difference in terminology raises the question. Whether the term ‘backward classes’ in Article 16(4) is to be understood in the same sense as in Article 15(4) i.e. socially and educationally backward classes. It has been held in several cases that the term ‘backward classes’ under article 16(4) is identical with ‘socially and educationally backward classes in article 15(4), leading to the conclusion that there is no difference between Article 15(4) and 16(4) as far as the definition of ‘backward classes goes. This opinion was consistently taken in various cases.²²

However, opposite view was taken in *Indra Sawhney Vs Union of India*.²³ It was held that the scope of term ‘backward classes’ in Article 16(4) is broader than the term ‘socially and educationally backward classes’ in Article 15(4) and certain classes who qualify under 16(4) within the meaning of ‘backward classes’, may not qualify within the meaning of ‘socially and educationally backward classes.’ In the light of this decision it becomes more vital to know as to who are ‘socially and educationally backward classes. Thus it is desirable to determine the scope of ‘backward Classes, After the addition of clause (4) to Article 15, a problem of determining socially

and educationally backward classes of citizens, has been faced by the states. Moreover, the determination of socially and educationally backward classes of people is made by the states and the courts only test the legality and constitutionality of such determinations. The first case in which reservation for backward classes of people and its legality and constitutionality was questioned before the Supreme Court is *M.R. Balaji V State of Mysore*.²⁴ This case is having special significance because it laid the basis of classifying people into socially and educationally backward classes of people, as well as, fixed the quantum of reservation. Therefore, this is a leading case to be discussed in detail.

Before Balaji's case, some development, which took place in the State of Mysore, should be taken into account. On 26th July, 1958 an order was issued, declaring all the communities excepting Brahmin community as socially and educational backward and reserving a total 75% seats in educational institutions in favour of socially and educationally backward classes and Scheduled Caste and Scheduled Tribes. This order was challenged before the High Court. But the State conceded that there was some drafting error. The order was quashed. Again two orders²⁵ dated May 14, and July 22 in 1959 were issued and all communities excepting Brahmins, Banyas, Kaysth, Muslims, Christains and Jains were classified as socially and educationally backward classes. About 65% of the seats were reserved for such backward classes and Schedule Castes and Scheduled Tribes. Both the orders were challenged in *Rama Krishna Ram Singh Vs. State of Maysore*.²⁶ The High Court quashed the orders. Thereafter the state appointed a committee²⁷ to investigate the problems and advise the government as to the criteria to be adopted in

determining the educationally and socially backward classes and the specially provisions which should be made for their advancement.

The committee submitted its final report in 1961, in which it recommended that the only practical method of classification could be the one based on caste and communities. The committee also specified the criteria to be adopted for determining the educational and social backwardness of the communities and recommended that the backward classes should be sub-divided into 'backward' and 'more backward classes'. The state adopted the test laid down by the report and on the question of communities, which should be treated as backward, the state made some variations and passed the impugned order on July 31, 1962, under which the backward classes were divided into two categories viz; backward and more backward. This order reserved 28% seats for backward classes and 22% for the more backward classes. The reservation of 15% and 3% for the scheduled castes and scheduled tribes respectively continued to be the same. The result was that only 32% of seats were available to the 'merit pool'.

The petitioners applied for admission to the medical and engineering colleges affiliated to or maintained by the Mysore University. They were refused admission on the ground that the Government Order of July 31, 1962, had reserved a certain percentage of seats available for specified categories and that none of them fell within those categories, nor could they be included in the remaining percentage left for meritorious students. In Balaji's Case candidates who had secured more marks than those admitted under the order challenged the validity of the order. Though qualified on

merit they failed to get admission only because of the government order. The main contentions of the petitioner were as follows:

- a. That the basis adopted by the order in specifying and enumerating the socially and educationally backward classes of citizens in the state was unintelligible and irrational and the classification made on the said basis was inconsistent with Article 15(4) and was a fraud on the power conferred by this Article on the State.
- b. That the extent of reservation prescribed by the said order was also unreasonable and extravagant.
- c. That the impugned classification impinged upon Article 15(1) as it was based on caste and was not saved by Article 15(4).

The learned Advocate General contended on behalf of the state, that Article 15 must be read in the light of Article 46.²⁸ and argued that Article 15((4) has deliberately and wisely placed no limitation on the State in respect of the extent of special provision for the advancement of certain castes or communities as specified in the order and it was meant to carry out the directive principles enunciated in Article 46. It was also obvious that unless the educational and economic interests of all the weaker sections of the people were promoted quickly and liberally, the ideal of establishing social and economic equality would not be attained, and there could be no doubt that Article 15(4) authorized the state to take adequate steps to achieve the object which it had in view. It was also suggested that the absence of any limitation on the state's power to make an adequate special provision indicates that if the problem of backward classes of

citizens and scheduled castes and scheduled tribes in any given state is of such a magnitude that it requires the reservation of all seats in high educational institutions, it would be open to the state to take that course. So, the reservation of large number of seats for the weaker sections of the society would not affect either the depth or efficiency of scholarship at all.

Mr. justice Gajendragadkar (as he then was), delivering the Judgment of the court, observed that the result of the order was that 68% of the total available seats came to be reserved by the government for the scheduled castes and scheduled tribes, the backward and more backward classes. No doubt Article 15(4) of the Constitution enables the government to make special provision for the advancement of educationally backward classes and the Scheduled Castes and Schedule Tribes, but such provisions must be within permissible limits contemplated by the Article. Further, in determining the categories which were to be included in the order, the learned judge observed that government had applied in the main the test of castes. The classification of backward and more backward classes had been made on the basis caste. Although caste might be a relevant factor in determining social backwardness, it was not the only factor and hence the state had proceeded on the wrong basis and the resulting classification was invalid. The learned judge also observed that the criteria used by the state to determine educational backwardness also suffered from infirmity. The government had included in its list of backward classes, castes and communities in which the average student population per thousand was slightly above or very near or just below the state average. The approach was not correct and that only those communities in which the average was

considerably below the state average could properly be classed as educationally backward.

In considering the scope and extent of the expression 'backward classes' under Article 15(4) the court pointed out that it is necessary to remember that the concept of backwardness is not intended to be relative in the sense that the classes who are backward in relation to the most advanced classes of the society should be included in it. The backwardness under Article 15(4) must be social and educational. It is not either social or educational but it is both. The group of citizens to whom Article 15(4) applies are described as 'classes of citizens' not as 'castes of citizens'. If the classification of backward classes of citizens was based solely on the caste of citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.²⁹

As regards the extent of reservation the court emphasized that reservation should be adopted, but that reservation must not be of such nature as to exclude other communities as a whole. While accepting the difficulties of the adjustment of the interests of the weaker sections with the community as a whole, the court said in a general way that a special provision should be less than 50% and how much less than 50% would depend upon the relevant prevailing circumstances in each case. Hence, the court concluded that the classification made by the impugned order rests on the sole basis of caste, which in its opinion is not permitted by Article 15(4) and ...that the reservation of 68% made by the impugned order is not authorized by Article 15(4). Therefore, it follows that the impugned

order is a fraud on the constitutional power conferred on the state by Article 15(4). The important issues involved in this case were:

- a. Criteria for backwardness
- b. 'Caste' and 'Class' issue
- c. Extent of Reservation
- d. Clause (4) of Article 15 and 16 were compared and the court laid down the following principles:
 - i. Backwardness of class must be both social and educational,
 - ii. Article 15(4) refers to backward class and not caste, but conceded that caste may be a relevant factor in determining social backwardness but it cannot be the sole or dominant test,
 - iii. As regards the extent of reservation, it should be less than 50%
 - iv. 'Backwardness' has the same meaning under clause (4) of Article 15 and 16. The court said that 'what is true in regard to Article 15(4) is equally true in regard to Article 16(4)'.³⁰

It may be noted that Balaji case also considered the report of the Commission³¹ appointed by the President under Article 340 on January 29, 1953, to investigate the condition of socially and educationally backward classes of people within the territory of India. The Commission found that caste couldn't be avoided in laying down the test for the determination of backwardness. But the court was of the view that caste is not the appropriate test except in the case of Hindus and thereby did not agree with the findings of the Commission.

The main thrust in Balaji was to diminish if not absolutely avert the effect of caste, which had kept the society divided on the basis of

inequality, and to ensure equality and foster the values enshrined in the preamble. The court distinguished 'caste' and 'class' and observed that there has been different sociological effect. Class has been included in Article 15(4) and 16(4) because it has mobility whereas 'caste' is stagnant concept. There is no possibility of shifting a person of one caste to another caste. A Brahmin will always remain a Brahmin, howsoever he is ignorant or illiterate. A Harijan whether learned would remain Harijan. Caste system has the quality of generating separatism, a sense of superiority on religious, racial and cultural grounds. It widens the gap in human relations and negates the idea of universal brotherhood and social integration, whereas the concept of 'class' has opposite effects and tendencies. The former is institutionalized and the latter is functional and mobile. It is because of these reasons caste criterion is not only constitutionally prohibited but sociologically undesirable. But the question is, what then should be the basis on which person may be classified as socially and educationally backward classes of citizen so that the benefits available under the Constitution may reach to the right and deserving persons and also be protected from the judicial scrutiny in order to achieve this object. The centre and states appointed various Commissions. The reports of such commissions, in determining the socially and educationally backward classes of persons show that the classes of people who are backward belong to a particular caste and the caste and social and educational status are inter-related, as such no satisfactory basis could be deduced so far, which could be workable and acceptable to the court. The Commission, therefore, due to social complexities found it difficult to avoid caste in preparing the list of backward classes and considered caste as an unavoidable factor. The analysis of the cases hereafter taken up highlights this endeavour of

states to determine backwardness and the judicial responses on those determinations. Such endeavour of state and judicial responses disclose that for determination of backward classes mainly two dominant factors have been considered which are as follows:

- i). Caste Criterion
- ii). Poverty or economic criterion

Apart from the aforesaid considerations the court in order to determine the ambit and scope of the expression 'backward classes of citizens', compared Articles 15(4) and 16(4) which is being considered under the following heads:

Compatibility of Articles 15(4) and 16(4).

- (i). Status of Clause 4 of Articles 15 and 16, whether it is an exception, proviso or an instance
- (ii). Whether reservation of backward classes is possible under clause (1) of Article 16 by applying the principle of reasonable classification?

(a). Criteria For Backwardness

The states while making notifications and the judiciary during the course of its judgements adopted, frequently, the caste and poverty factors for determining the 'backward classes.' Hereafter the analysis of cases is taken up taking in view these factors.

(i). **Caste Criterion**

As the whole operationalization of Article 15 (4) as well as 16 (4) is base on the determination of backward classes or people, it is, therefore, an essential pre-requisite to identify people as to who are backward. Backwardness in Indian social system is common particularly in the people who have been economically poor and in the social development they formed a caste identifiable by their profession or occupation. The Supreme Court has tested the adequacy of determining backwardness since Balaji's case.

In Balaji's case the Nagan Gowda Committee Report³² was rejected. Therefore, the government of Mysore brought out another order³³ adopting different pattern for categorizing backward classes which is explained in para 2 of the order which stated as under

Backwardness for purposes of Article 15(4) of the Constitution must be social and educational. The problem of determining who are socially and educationally backward classes is a complex one. An elaborate investigation and collection of data and examination of such data, which would inevitably involve considerable length of time, may be desirable. But the obligation of the state to make special provision for the advancement of the backward classes is a pressing problem and cannot be postponed. Pending such elaborate study and investigation of the problem government considers that the classification of socially and educationally backward classes should be made on the following basis-

(i). Economic Condition, and (ii) occupation.

By this order, the class of people whose annual income was Rs. 1200/- or less and who belonged to any of the following occupations- (i). actual cultivator, (ii). Artisan, (iii). Petty businessmen, (iv). Inferior services, and (v) Any other occupation involving manual labour, were classified as socially and educationally backward.

Although the order did not take 'caste' into consideration for defining backward classes but the classification could not be spared and was challenged in the state High Court.³⁴ It is notable that it was challenged on the ground that caste should have been taken into consideration for classifying backwardness as it was held in Balji's case that caste in relation to the Hindu may be a relevant factor though it was also observed that it cannot be sole basis for determining backwardness. The High Court held that the classification made by the state was a very imperfect classification however observed:

"It is clear from the decision of the Supreme Court in Balaji's case, AIR 1963 SC 649, that in the very nature of things, there can be no satisfactory classification of the backward classes belonging to the Hindu religion, if we ignore the 'caste' basis."³⁵ However the court upheld³⁶ the classification under Article 14 because it had fulfilled the two tests viz;

1. The classification being rational and based on intelligible differentia and

2. The basis of differentiation having rational nexus with its avowed policy and object.

Chitralkha.³⁷ The Supreme Court thus got another opportunity to review the classification made by the state government brought the case to the Supreme Court in appeal. The court considered mainly two important issues:

- (i). whether a caste can be treated as a class of citizen,
- (ii). Whether a caste as a whole could be classified as backward.

The Supreme Court in the first place said “it is obvious that the government as a temporary measure, pending an elaborate study, has taken into consideration occupation of the family concerned as a criteria for backward classes within the meaning of Article 15 (4) of the Constitution”. The court held the classification as correct under the circumstances. Then referring the earlier decision of Supreme Court and the interpretation given to it by the Mysore High Court, through Subba Rao J., explained,³⁸ in relation to that case (Balaji) that, two principles stand out prominently ;

- a. that the caste of a group of a citizens may be a relevant circumstance in ascertaining their social backwardness, and
- b. that though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the sole judge or test in that behalf, and also pointed out that Balaji’s decision was misinterpreted by the High Court and added that if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression ‘backward castes’ instead of classes.

Subba Rao J., observed :

“Article 15 (4) does not speak of caste but only speaks of classes. If the makers of the Constitution intended to take caste also as units of social and educational backwardness, they would have said so as they have said of the scheduled castes and scheduled tribes ...The juxtaposition of the expression ‘backward classes’ and ‘scheduled castes’ in Article 15 (4) also leads to a reasonable inference that the expression ‘classes’ is not synonymous with ‘castes’”³⁹

Mr. Justice Subba Rao further expressed the opinion, in this regard :

“Various provisions⁴⁰ recognize the factual existence of backward classes in our country brought about by historical reasons and make a sincere attempt for welfare of the weaker sections thereof. They shall be so construed as to effectuate the said policy but not to give weight age to progressive section of our society under false colour of caste to which they belong...The juxtaposition of the expression ‘backward classes’ and ‘scheduled castes’ also leads to a reasonable inference that expression ‘classes’ is not synonymous with ‘castes’”⁴¹

Form the decision of the Supreme Court in this case the court took the same view, which was taken in Balaji’s case, that caste should not be considered either the sole or dominant factor in determining ‘backwardness,’ however, caste may have some relevance for ascertaining whether a particular citizen belongs to a class. Furthermore, the courts have not precluded the concerned

authority from determining the social backwardness of group of citizens if it can do so without reference to caste. But, it has not made it one of the compelling circumstances affording the basis of ascertainment of backwardness of a group of persons. If the court can ascertain the backwardness of a group of persons on the basis of other relevant criteria it would not be invalid.

Obviously the rationale of this view (of Justice Subba Rao) is that India being caste-ridden society operates predominantly on the consideration of caste, which develops a sense of separation from each other and prejudices in day to day life. In case caste is given importance then the vice of caste would perpetuate, and the egalitarian social set up as desired by the founding fathers of the Constitution would be defeated. Thus the Supreme Court in these two cases i.e. Balaji and Chtralekha rejected the view taken by the Mysore High Court that caste is an inevitable factor in determining backwardness, however upheld the order of Mysore Government in the later case, classifying backward classes on the basis of income and occupation.

In another case, *P.Rajendran v. State of Madras*,⁴² (hereinafter Rajedran) the same problem that whether a classification of backward citizens be made on the basis of their caste, was again considered by the Supreme Court. In this case, the state of Madras made rules for the selection of candidates for admission to the first year integrated M.B.B.S. Course. Rule 6 of those rules classified as socially and educationally backward and reserved seats for the classes specified in Group III of revised Appendix 17-A to the Madras Educational Rules. Rule 8 distributed seats in the M,B.B.S. course and provided for

admission on a district wise basis. The criterion fixed for determining, a candidate's district, was nativity. The candidate could ordinarily choose the district from where he had passed his S.S.L.C. examination or specified in his nativity certificates, or the place of birth of his parents or guardian or the sites of his parent's immovable property. The government constituted a number of Selection Committees to select candidates from each district for admission to the M.B.B.S. course. The petitioner's challenged the validity of the rules reserving the case seats for backward classes and distributing district wise seats in the M.B.B.S. course. They contended that those rules are contrary and an infringement of the rights available under Article 15(1) and 14 of the Constitution. The court struck down, only that rule which distributed district wise seats in the M.B.B.S. course, on the ground that it infringed Article 14. The court found that the classes of persons referred to in rule 5 as socially and educationally backward were only castes. But accepting the state's plea that each of those castes was as a whole socially and educationally backward, the court held that, in view of petitioner's failure to controvert the states plea and to establish that even one of those castes was not as a whole backward, the said rule was valid. The court further said:

“A caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)”.⁴³

The above observation of the Court, that a caste is also a class of citizens if the caste as a whole is socially and educationally

backward, is a clear deviation from Balaji's and Chitralkha case which decided that the caste could not equated with class and caste could not considered as sole basis for determining backwardness.

In *State of Andhra Pradesh v. P. Sagar*,⁴⁴ the Supreme Court affirmed the decision of the High Court of Andhra Pradesh in *Sukhdev v. The Government of A.P.*⁴⁵ the list of castes prepared by the State of Andhra Pradesh for purpose of selecting candidates from backward classes in Medical Colleges of the States, was declared invalid by the High Court of Andhra Pradesh on the ground that the order notifying the said list classified the backward classes on the basis of caste which subverted the object of Article 15 (4) of the Constitution. Therefore, the State of Andhra Pradesh prepared a fresh list, claiming to have been made taking into account all considerations and criteria given by the senior expert law officers and reserved 20 per cent of the seats for the backward classes.

The list was challenged in *State of A.P. Vs P. Sagar*⁴⁶ the petitioner contended that the Government had adopted the same list of backward classes which was struck down by the High Court of Andhra Pradesh in Sukdeo's case⁴⁷ and the new lists with some modification, basically the same, made reservation in favour of castes and not classes, infringed the guarantee under Article 15 (1). On behalf of the state it was urged that caste is one of the relevant tests in determining backwardness, and cannot be ignored in determining the socially and educationally backward classes; if a group has been classified as backward on other relevant consideration, the classification is not liable to be challenged as invalid on the ground that for the purpose of classifying the designation of caste is given.

The Supreme Court came to the conclusion that since the fresh G.O was under challenged and it was again prepared on the same basis it could not be sustained since it did not fall within the exception provided in Article 15(4). Thus, the court following Balaji and Chitralkha, declared the classification as unconstitutional being based on caste and community. Shah J., pointed out that the expression 'class in Article 15 (4) means a homogenous section of the people grouped together because of certain likeness of common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class as a test, solely based upon the caste or community, cannot also be accepted'.

The court said:

“The Parliament has by enacting clause (4) attempted to balance as against the right of equality of citizens the special necessities of the section of the people by allowing a provision to be made for their advancement. In order that effect may be given to clause (4), it must appear that the beneficiaries of the special provisions are classes which are backward socially and educationally and they are other than the scheduled castes and schedule tribes and that the provision made is for their advancement”.⁴⁸

In the opinion of the court reservation may be adopted to advance the interests of weaker sections of society, but in doing so care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institution:

“Accordingly, the criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth, and backwardness being social and educational must be similar to the backwardness from which the scheduled castes and schedule tribes suffer”.⁴⁹

The court interpreted the word ‘class’ as distinct from caste and made no departure from earlier two cases except Rajendran in which the class was treated at par with caste.

After the G.O. of Andhra Pradesh was struck down, the Government appointed a Commission⁵⁰ to determine the criterion to be adopted in considering whether any section of the citizens of India in the State of Andhra Pradesh are to be treated as backward classes. The Commission was appointed by a Government G.O.,⁵¹ which was primarily to investigate and determine the various matters regarding the preparation of list of backward classes for providing a reservation in educational institutions and also for appointment of posts in Government services. The Commission after having completed its work submitted its report to the Government on June 20, 1970. The Commission recommended a list of 92 classes which were classified as socially and educationally backward and for whom reservation was advised in educational institutions. The Government accepted the criteria adopted by the Commission for determining the social and educational backwardness of the citizens and consequently G.O.⁵² was issued for identification of backwardness mainly on the basis following facts:

- i. the general poverty of the class or community as a whole,

- ii. occupations pursued by the classes of citizens the nature of which must be inferior or unclean or undignified or unremunerative or one which does not carry influence or power,
- iii. caste in relation to Hindus,
- iv. educational backwardness.

Under the G.O. 25% of the seats in professional colleges were to be reserved for backward classes. The order was challenged and the Andhra Pradesh High Court declared on May 13, 1971, the criteria as invalid on the ground that the criteria adopted was mainly based on caste which is opposed to the principle laid down by the Supreme Court in Balaji case. This issue came before the Supreme Court in appeal in *State of A.P. v. U.S.V. Balaram*,⁵³ in which the court agreed with the High Court that the list of backward classes of people is based on caste but the court was of the view that even on the assumption that the list was based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward.⁵⁴ Thus, the court took the view that if an entire caste is as a fact, found to be socially and educationally backward, their inclusion in the list of backward by their caste name is not violative of Article 15 (4) or in other words the view that a caste is also a class and the reservation in favour of an entire caste is not bad in law. The court concluded:

“The list of backward classes which is under attack before us may be considered to be on the basis of caste, a close examination will clearly show that it is only a description of the group following the particular occupations or

professions, exhaustively referred to by the Commission. Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of backward classes is warranted by Article 15(1). the groups mentioned therein have been included in the list of backward classes as they satisfy the various tests which have been laid down by this court for ascertaining the social and educational backwardness of a class".⁵⁵

The Supreme Court did not follow the Balaji's principle and totally relied on Rajendran decision that if caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Article 15(4).

In *Triloki Nath Tikku Vs State of J & K* ⁵⁶, the Supreme Court totally relied upon Rajendran's view on 'caste' as ground for reservation. The court held that an entire caste or community may in the social, economic and education scale of values at a given time be backward but that is not because they are member of caste or community but because they form a class. The approach of the court shows that there may be situations where the entire caste or community be considered as backward for being considered to be given protection. But the court disapproved the state policy and struck down the Government Order, whereby 50% seats for Muslims, 4% for Hindus of Jammu and 10% for Kashmiris were reserved saying that the state proceeded not to make reservation in favour of any

backward class but on the basis of community and reservation based on community, or place of residence is contrary to Article 16(4) and hence 'no reservation permitted by clause (4) of Article 16 can be said to be made.'⁵⁷

The Supreme Court in *Periakaruppan*,⁵⁸ approved the list framed on the basis of caste, and held that it did not suffer any infirmity because the entire caste was substantially socially and educationally backward. But the court struck down the unit-wise distribution of seats for the medical institutions.⁵⁹ Thus, *Periakaruppan* followed the *Rajindran* view that caste could be equated with class if the entire caste is socially and educationally backward.

In *Janki Prasad Case*⁶⁰, the Supreme Court through Mr. Justice Palekar distinguished between 'caste' and 'class' and asserted that Article 15(4) speaks of only classes of citizens and the 'class' identified as backward must be both educationally and socially backward. The court followed *Chitrlekha* case which discarded caste as the dominant criterion in the identification of backward classes of citizens,⁶¹ and observed that "if we interpret the expression 'class' as 'caste', the object of the Constitution will be defeated and the people who do not deserve any aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand if the entire caste by and large is backward, it may be included in the scheduled caste by following the appropriate procedure laid down in the Constitution".

Palelkar J., speaking for the majority, observed that “in identifying backward classes, therefore, one has to guard oneself against including therein sections which are socially and educationally advance because the whole object of the Constitution would otherwise be frustrated”.⁶² The court relied upon the principle laid down in *Sagar*,⁶³ but deviated from *Rajendra*⁶⁴ in which it was enunciated that the classification of backward classes on the basis of caste is within the purview of Article 15 (4) provided those castes are shown to be socially and educationally backward. The principle is attributed to the entire caste on the basis of which the classification of backward classes by their caste name will not be violative of Article 15 (4). Thus the court rejected to equate caste with class.

In another case *State of U.P. v. Pradip Tondon*⁶⁵ the main issue for consideration for the Supreme Court was whether the instructions framed by the State, in making reservations in favour of candidates from rural areas, hill areas and Uttar Khand for admission of students to medical colleges in State of Uttar Pradesh was intra-vires of the Constitution. Ray, CJ.,⁶⁶ categorically rejected caste as the sole test for determining backwardness and observed that ‘neither caste, nor race, nor religion can be made basis of such classification’.⁶⁷ When Article 15 (1) forbids discrimination on such grounds, they cannot be made the criteria for determining backwardness, Article 15(4) will stultify Article 15 (1). When a classification takes recourse to caste as one of the criteria in determining socially and educationally backward class, the expression ‘classes’ in that case violates the rule of *expressio unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than groups based on

caste.⁶⁸ Validating reservation for candidates from hill areas and the Uttarkhand Division as instances of socially and educationally backward classes of citizens the court opined that backwardness is judged by the economic basis when they do not make effective use of resources. When large areas of land maintain a sparse, disorderly and illiterate population whose property is small and negligible, the element of socially backwardness is observed, but the same could not be said for the rural areas as 80 per cent of the population in the State of Uttar Pradesh, who live in rural areas cannot be homogenous class by itself.⁶⁹ The Supreme Court thus laid down that reservation of seats in medical colleges for candidates from rural areas is unconstitutional. However, such reservation for candidates from hill areas and Uttarkhand division is valid.⁷⁰ It further asserted that social and educationally backward classes of citizens are groups other than groups based on caste.⁷¹ Caste, as sole test, for determining backwardness was categorically rejected. *Janki Prasad* was relied whereas totally deviated from *Rajindran* and *Balram*.

In *K.S. Jayashree v. State of Kerala*,⁷² in which it was again asserted that in determining the backwardness, caste cannot be the sole or imminent test. In this case income criteria was adopted in pursuance of which the state government issued an order⁷⁸ that members of families of certain specified communities whose aggregate annual income is below Rs. 6000/- which was revised and enhanced to Rs. 10,000/- would be entitled to the reservation. The petitioner in this case applied for admission to one of the medical colleges at Trivandram in the State of Kerala and produced a certificate showing that the total income of her family from all sources is Ra. 11,752/- for the year 1975-76 and she belongs to

Ezhava community. She was not selected, though candidates belonging to Ezhava community who obtained less marks were selected. The Principal, medical college sent a memorandum to her that according to specification of G.O., she cannot be considered under reservation scheme as her family income exceeds Rs, 10,000/-. The petitioner contention was that the exclusion of her case from reservation scheme was not based on rational ground for there was no reason to exclude a community on the basis of income and if the socially and educationally backward classes are set out in the annexure, income cannot be the criterion of admission to provide the benefits of Article 15(4). The state contention was that the expression backward class is not used as synonymous to backward caste or backward community. The members of entire community or caste may at a given time in social, economical, and educational scale of values be backward and may be identified as backward classes on that account. The reason is that they are treated as backward not because they are members of a caste or community because they form a class. The court accepted the reasoning of the state and dismissed the petition. Chief Justice, A.N. Ray,⁷³ virtually reproduced the reasoning of Gajendragadkar J. (as he then was) in Balaji.⁷⁴ Ray, C.J. Observed:

“ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however, be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness, which results from poverty, is likely to be aggravated by consideration of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is

not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness".⁷⁵

The learned Chief Justice further explained:

“any classification of backward classes of citizens is based solely on the caste of the citizen, it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty, it will not be logical”.⁷⁶

Thus the court rejected either caste or poverty as sole criteria for determining backwardness. However, it was held that social backwardness, which results from poverty, is likely to be aggravated by consideration of their caste.

In *Chotey Lal vs State of U.P.*⁷⁷ an advocate of Allahabad High Court and some others challenged the order⁷⁸ of government of Uttar Pradesh under which reservation, of posts in the state judicial services for backward classes, dependents of freedom fighters, ex-detunes under MISA and DISIR were made. The petitioners appeared at the State Judicial Services Examination, which had been held in April 1978, to fill 150 temporary posts. Of the total posts 27 were reserved for scheduled castes, 3 for scheduled tribes, 8 for dependents of freedom fighters, 12 for disabled officers of Military services and 23 for backward class. The main thrust of the petitioners was on the reservation for backward classes. The Order of the U.P. Government specified the backward classes that including Ahirs and Kurmis and some other castes. The petitioners contention was that the castes mentioned in the Order, were not backward classes within the

meaning of Article 15 (4) and 16 (4) of the Constitution as Ahirs and Kurmis are big farmers, and many of them are highly educated and occupied high post. Hence, the entire castes mentioned in the G.O.⁷⁹ could not be termed as 'backward class' within the scope of Article 16 (4). Therefore, there was no rational basis for creating reservation for them. The vital issues involve in this case were the tests to determine whether a group of people included in the list constituted a backward class of citizen and secondly whether the Government of Uttar Pradesh had correctly determined as to who should be included in the backward classes. The other issues, which were included in the petition, were, eight post reserved for dependents of freedom fighters, 12 posts for disabled officers of Military services. Eight posts reserved for dependents of freedom fighters were also available to those persons who were actually detained under MISA and DISIR for six months but this benefit should not be available to anti-social elements. These issues were neither much pressed nor the court elaborated it except that the court justified these reservations on the classification adopted by the state. The court referred some of the cases of Supreme Court⁸⁰ wherein it was held that there could be valid reservations apart from those permissible under Article 15(4), that such reservation did not necessarily infringe the equality protection under Article 14 and that classification based on lawful state policy was not violative of that Article. Relying heavily on the principle⁸¹ that emerged from the decision in some of the earlier cases, Mr. Justice Misra who gave the judgment on behalf of himself and of Mr. Justice K.N. Goyal observed:

“Reservation for children of Defence
Personnel and Ex-Defence Personnel can

validly be made. The application of these principles can be extended to the children of freedom fighters who in consequence of their participation in the emancipation of struggle become unsettled in life and in some cases had been economically ruined, hence they were not in a position to make available their children that class of education which would place them in fair competition with the children of those who did not suffer from that disadvantage.”⁸²

As regards the reservation of posts for backward classes of citizen and determination of backward classes, the two most pressed issues, Misra J. made a thorough and detailed analysis of all the preceding cases pertaining to the latter issue. In connection with the former it appears that the Government of Uttar Pradesh had been endeavouring to prepare a list of backward classes for providing them educational facilities. In 1945 the Education Department of the Provincial Government prepared a list of 59 communities. Out of 59, 38 castes belonged to Hindu community and 21 castes belong to Muslim community for providing educational facilities treating them as backward classes. After Independence a Sub-Committee of the Cabinet of the State Government of Uttar Pradesh again examined the matter. A list of 15 communities described as backward classes for the purposes of being considered for recruitment to the public services was drawn. Almost all these 15 communities were selected out of the said 59 communities without making any subsequent study of these communities. It was pointed out by the state that the reason for leaving the position undefined so far was that it was felt that the Backward Classes Commission would initially draw up a list of backward classes in each state and the list submitted by the state till then should be treated as working or provisional list and the same will

be replaced by the authoritative list when issued by the Backward Classes Commission. Thus, the list was merely a provisional list and working list. But the striking thing was that no reason was stated as to why the castes mentioned in the list were considered as backward classes. In other words the castes, which were earlier recognized only for grant of educational facilities, were in future to qualify also for preferential treatment in matters of recruitment to public services.

In 1953, the President appointed a Backward Classes Commission.⁸³ The Commission identified some of the castes as 'most backward' classes of citizen. In December 1975, the state of U.P. appointed Chhedi Lal Sathi Commission for considering the conditions of what are described as 'most backward' classes as contradiction from 'backward' classes of citizens and to suggest means to improve their lot. What the Sathi Commission did was to enlarge the list of 'most backward classes' as identified Kaka Kalelkar Commission. The Muslim backward castes were set out in list 'C' while the remaining were set out in list 'B'. The caste in respect of which exception has been taken by the petitioners are to be found in list 'B'. About them the Sathi Commission stated that these castes comprised even big farmers and craftsmen and that their condition was much better than that of the 'most backward classes'⁸⁴. Towards the end of the recommendations it was specifically mentioned 'that these castes did not really stand in need of any reservation, but ten per cent reservation was recommended for them.'⁸⁵

As regards the report of Kaka Kalelkar Commission, the Central Government did not feel satisfied about the approach adopted by the Commission in determining as to who should be treated as

‘backward classes’ under Article 15 (4). Mr. Justice Misra summarized the whole efforts of the State in determining socially and educationally backward classes of citizen as:

“What we thus find is that the enumeration of certain castes among Hindus as well as Muslims as backward classes by the State Government is based ultimately on the list prepared by the pre-independence Provincial Government in 1945. That list was presumably prepared on the basis that those castes were at that point of time educationally backward, though even for coming to that conclusion the tests applied or the data acted upon are not disclosed, and accordingly, it was necessary to provide for them special educational facilities”.⁸⁶

In the above set of circumstances the state thus failed to defend the impugned G.O. and could not convince that it had applied the correct lists and proceeded in a proper manner after proper investigation. The learned judge therefore, found the G.O. unconstitutional and declared, the Government Orders⁸⁷ are a fraud on the constitutional power conferred on the state under Articles 15(4) and 16(4) of the Constitution in the sense the expression has been defined⁸⁸ in M.R.Balaji and are as such invalid. The High Court upheld the reservation for the scheduled caste and others while striking down part of the state government orders that applied to backward classes and the court regarded Kurmis and Ahirs and other castes mentioned in the Government Order as not backward classes within the meaning of Article 15(4) and 16 (4).

The Constitution of Independence India has given a new look to cast issue and envisaged to establish a society free from caste feeling. The Constitution distinguishes between 'castes' with 'Class' and defined that the social units who are identified as deserving to be specially helped economically, socially and educationally must not be based upon 'Caste'. The judiciary therefore, asserts that the 'backwardness' must be social and educational. But in actual differentiation process, it has been experienced that the 'Caste' becomes an indispensable factor for the reasons that those who are 'backward' in any way have been so of their low 'caste'. Backwardness and caste are linked together or caste has played a distinctive role to keep them backward. It is on this faith, Supreme Court in Chitralakha case, relying on the opinion of Gajendragadkar J., in Balaji case observed that if class is treated as caste, the whole object of the Constitution would be frustrated. Justice Subba Rao in Chitralakha case took the view that caste should not be taken at all into account in determining backwardness as classes is not synonymous with caste. The court while considering the word class as contained in Articles 15(4) & 16(4) of the Constitution, asserted that 'caste' and 'class' are sociological and functionally distinct and distinguishable. Mainly the following two opinions have emerged:

- (a). 'Class' cannot be equated with caste. However caste may be relevant in determining the backwardness but not sole consideration.
- (b). 'Class' can be equated with caste if whole caste is socially and educationally backward.

Finally comes the famous case of Indra Sawhney⁸⁹ in the series in which the principles regarding determination of backwardness has been crystallized along with other issues from Article 15⁹⁰ and 16⁹¹ by the Supreme Court. Facts of this case, in brief, are as follows:

In January 1979, the second Backward Classes Commission was appointed under Article 340 of the Constitution headed by Sri B.P. Mandal.

The terms of reference of the Commission were:-

- (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 citizen so identified;
- (iii). to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of citizens which are adequately represented in the public services and posts in connection with the affairs of the Union or of any State and
- (iv). to present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

The report was submitted on 31st December 1980 identifying as many as 3743 castes as socially and educationally backward classes and recommended for 27 percent reservation for them. On

August 13, 1990 Office Memoranda (called O.M.) was issued in order to implement the commission report, reserving 27 per cent seat for backward classes in government services. Consequently violent anti-reservation movement continued for three month resulting in heavy loss of person and property. The Supreme Court Bar Association challenged the O.M. in question and its stay was sought. On October 1, 1990 the Five Judges Bench of Supreme Court till the final disposal of the case stayed the operation of O.M..

After the change of government at the centre following general election in the first half of 1991, another Office Memo was issued on 25th September 1991 modifying the earlier one, keeping in view the violent agitation. Following modifications were made:

(i). Within 25 per cent of the vacancies in civil posts and services under the government of India reserved for SEBCs, preference shall be give to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of candidates are not available, unfilled vacancies shall be filled by other SEBCs.

(ii). 10 per cent of the vacancies in civil posts and services under the government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii). The criteria for determining the poorer sections of SEBCs or other economically backward sections of the people who are not covered by any existing schemes of reservation are being issued separately.

The Supreme Court considered the class-caste issue and elaborately opined in the following words:

“Coming back to the question of identification, the fact remains that one has to begin somewhere-with some group, class or section. There is no set or recognized method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with caste, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional, with it, more so when caste, occupation, poverty and social backwardness are so closely intertwined in our society?”⁹²

In some of the cases discussed earlier it was held that identification of backwardness with caste is unconstitutional with which the court in this case did not agree holding that one can well begin with castes, which represent explicit identifiable social class/groupings. The reasons for identifying backwardness with caste were given by the Court B.P. Jeevan Reddy, J.⁹³ giving majority opinion emphasized:

“...If a Commission/Authority begins its process of identification with caste (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be unconstitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is

found in a caste, it can be treated as backward; if it is found in any other groups, section or class, they too can be treated as backward.⁹⁴

The court emphasized that in a vast country like India it is absolutely not possible to apply a uniform test but if a real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward.

Objection was raised in the court against adopting caste as the basis of identifying backwardness in the light of Article 16(2), which prohibits discrimination on the basis of 'caste' also. The court did not agree with the objection giving the reasons and further asserted:

“The only basis of saying that caste should be excluded from consideration altogether while identifying the Backward Class of citizens for the purpose of Article 16(4) is clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of clause (2). It prohibits discrimination on any or all the grounds mentioned therein. The significance of the word 'any' cannot be minimized.⁹⁵ Reservation is not being made under clause (4) in favour of a 'caste' but a backward class. Once a caste satisfied the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that backward class is not adequately represented in the services of the State.”⁹⁶

The Supreme Court has finally settled that caste may be considered to identify backward class and further that Article 16(2) is

no bar for such consideration. Further, if representation in the services is inadequate of such class, it is entitled to reservation which will fulfill the object of Article 16(4).

It is submitted that before Indra Sawhney case the opinions of the Supreme Court and various High Courts were not uniform. In one way or the other the judicial opinion played an important role which led to unsettled policy formulations by various states employing varying parameters and eventually such parameters could not provide positive results even after fifty years of independence. Even today the fruits of reservation policy do not reach the actual needy sections of the society. Identification of this section on the basis of caste will go a long way *inter-alia* we apply the principles of creamy layer and identification of backward classes and most backward classes with a sense of achieving the desired objects of protective discrimination. For the purpose of identification of backwardness, the basis of poverty or economic factor time and again has come up for consideration by leading to Indra Sawhney's case. It is desirable to make an analysis of the case so far decided, right now, dealing with 'poverty' factor.

(ii). The Poverty or Economic Criteria

How far the poverty criteria would suit and be practical in India? The judicial opinion has sought to take into account this factor. In the Poverty is linked generally with the low caste people in the Indian society. To adopt the poverty criteria would thus be giving an indirect approval to the identification of socially backward classes of people on the basis of caste. In Balaji case, Gajendragadkar J. said:

Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizen.⁹⁷

The court also pointed out the relevance of occupation and habitation could be the criteria of social backwardness.⁹⁸ In *Chitrallekha*,⁹⁹ therefore, the Supreme Court reiterated *Balaji*. After *Chitrallekha*, the Supreme Court had been analyzing the 'caste' and 'class' criteria with the poverty criteria gloved in. In 1973, the Supreme Court had an occasion to test the validity of the poverty criterion. In *Janki Prasad*,¹⁰⁰ *Praekar, J.*, referred to *Balaji* case and conceded that in India, social backwardness was associated with economic backwardness, but he refrained from adopting this criterion as it would make a very large proportion of the population backward. He adopted a new approach i.e. educational criteria by saying that:-

In India social and educational backwardness is further associated with economic backwardness it is observed in *Balaji's* case 'that backwardness, socially and educationally, is ultimately and primarily due to poverty. But if poverty is the exclusive test, a very large proportion of population in India would have to be regarded as socially and educationally

backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise because even in sectors which are recognized as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor-some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is, therefore, to determine whether class or group is socially and educationally backward.¹⁰¹

Justice Palekar asserted that as a matter of fact, the concept of education was a cardinal element in social equipment¹⁰² and suggested that the policy-matter should ascertain as to who are educationally backward and extend protective discrimination to that section of society.

It is submitted that the criteria of 'education' and 'poverty' have similar effects. The 'poverty' and 'education' criteria become coextensive and are unsuitable for purposes of protective discrimination. This may be evident from decision of the Supreme Court and High Courts in a group of cases.¹⁰³

In the case of *T. Shameem v. Medical College, Trivandram*,¹⁰⁴ the Government Order¹⁰⁵ based on Kumara Pillai Commission¹⁰⁶ was questioned in the Kerala High Court. Pillai Commission recommended that families whose annual income did not exceed Rs. 4,200/- per annum would be entitled to the benefits of protective discrimination in the form of reservation. The Government increased

the ceiling of income from 4,200/- to 6000/-¹⁰⁷ and then issued the impugned order, and insisted that only applicants belonging to the backward classed, who are members of families whose annual income is below 6,000/- p.a. will be entitled to admission to the seats reserved for students belonging to the backward classes. A single judge bench of the Kerala High Court found the income limit arbitrary, unsustainable and the poverty criteria as irrelevant to social backwardness. The learned judge said:

The Commission has really accepted the test of poverty as the determining factor of social backwardness, it is here exactly where the shoe pinches. On page 36 para of the report, the Commission reached to the following conclusion:

Members of the families in the state which have an aggregate income of Rs. 4,200/- and above per annum from all sources put together cannot be considered to belong to any social backward class whatever may be the caste or community to which they belong.¹⁰⁸

The learned judge further said:

The test of poverty cannot be the determining factor of social backwardness. According to the Kumar Pillai Commission Report and Ext. P.1 G.O. : nobody who is not a member of the castes and committee listed in Appendix VIII to the Commission Report (Annexure in Ext. P.1 G.O.) will come under the socially and educationally backward classes. The listed committees and castes are those who are treated as backward classes for the purposes of reservation in public services under Article 16(4) of the Constitution. What has been done ... is to take a few members of those communities out on the basis of their income

and to treat the rest as socially and educationally backward classes. The basis of this differential treatment is poverty and poverty alone. This cannot be the determining factor for determining the social and educational backwardness under Article 15 (4) of the Constitution.¹⁰⁹

Considering the income limit of Rs. 6000/- the learned judge analysed the issue from practical point of view and observed that,

The income limit of Rs.6000/- cannot be considered to be just and proper. In a case where both the father and mother of an applicant are class IV employees in the state services, the aggregate annual income will be more than the ceiling fixed... Simply because they have got an income above the ceiling fixed can be considered as not socially and educationally backward and their son or daughter be denied admission. Viewed from another angle also this ceiling of Rs, 6000/- is highly arbitrary. A family whose annual income is less than the ceiling fixed will not be in a position to send their children to a medical college. To maintain a son or daughter alone in a medical college more than fifty per cent of their annual income will be necessary. With the balance left, the head of the family will not be in a position to make both ends meet considering the high cost of living at present. The ceiling of income provided... is highly arbitrary and hence cannot be sustained.¹¹⁰

The question that came up for consideration in *State of U.P. Vs Pradip Tandon*¹¹¹ was whether the orders of the State of U.P. reserving seats in the medical college in the state for candidates from rural, hill and Uttarakhand areas of the state are constitutionally valid.

The contention on behalf of the state was that reservation for persons belonging to the rural, hill and Uttarakhand areas are for socially and educationally backward classes. It was also contended that these reservations are valid on geographical or territorial basis. The reservation was considered necessary in view of the lack of educational facilities in these areas who have been either illiterate or one with very modest education. The level of income is low and their economic condition is unsatisfactory. Considerable emphasis was laid on the feature that rural India is socially and educationally backward by reason of poverty. The court (through Ray C.J.), in this case reiterated the interpretation of 'caste' in Balaji and Chitrallekha cases and held that 'socially backward classes of citizens are groups other than groups based on caste'.¹¹²

On this reasoning the court accepted the people of hill and Uttarkhand areas as instances of socially and educationally backward classes of people and upheld the reservation of seats for them but refused to sustain the reservation for rural areas on the ground that rural areas represent socially and educationally backward classes of citizens. Ray, CJ, said that on the basis of 'poverty' and common traits of agriculture the majority population¹²² of rural areas of the state cannot be a homogenous class.¹¹³ The court said that it is incomprehensible as to how 80.1 per cent of the rural population areas or 7.5 crores in rural parts in Uttar Pradesh can be suggested to be socially backward because of poverty. The court further asserted that it is also not possible to predict poverty as the common trait of rural people. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India.¹¹⁴ Thus criteria of 'poverty' as the basis of social

and educational backwardness enunciated in Janki Prasad was not followed in the above case.

It is striking to note that the Kerala High Court, accepting the recommendations of Pillai Commission upheld the poverty criteria in *State of Kerala v/s Krishan Kumari*¹¹⁵ by overruling its own decision in Shameem case.¹¹⁶ P.G. Nair, C, J, analysed the judgments of all the previous cases¹¹⁷ including Balaji,¹¹⁸ wherein 'poverty' was not accepted as criteria for the determination of socially and educationally backward classes of citizens, though considerable emphasis was given. Nair, C.J., regarded poverty as one of the most important element responsible for social and educational backwardness. Citing from R. Jacob case¹¹⁹ he pointed out that,

In these regions of human life and values the clear cut distinctions of cause and effect merge into each other. Social backwardness contributes to educational backwardness, perpetuates social backwardness and both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition.¹²⁰

Further the observations of Gajendragadkar, J., in Balaji¹²¹ case was cited to show that

Social backwardness is in the ultimate analysis the result of poverty to a very large extent, The classes of citizens who are deplorably poor automatically become backward.

The Chief Justice asserted:

We do not understand the judgment as laying down that poverty is not a relevant factor. All that has been ruled is that poverty cannot be a determining factor. The very same judgment stresses the relevancy of poverty and accepts the position that it is one of the elements to be considered in determining social and educational backwardness.¹²²

The learned Chief Justice accordingly felt that 'poverty' plays a very dominant role in preventing the citizen to make any effort towards social and educational advancement and the citizens by their position of stagnation become backward. Stressing 'poverty' as a relevant factor Chief Justice Nair finally said.:

The conclusion therefore is irresistible that poverty or economic standards is a relevant factor in determining social backwardness or even educational backwardness because the economic position has a direct nexus to social and educational status. Economic backwardness contributes to social backwardness and prevents educational advancement.¹²³

Thus, Kerala High Court reversed Shameem¹²⁴ to uphold the criterion of 'poverty' and laid down that economic backwardness plays a part in social backwardness and in educational backwardness. Poverty is a relevant factor. Economic backwardness contributes to social backwardness.¹²⁵

In *K.S. Jayshree Vs State of Keala*,¹²⁶ 'poverty' element came for consideration before Supreme Court. The brief facts¹²⁷ of this case has already been mentioned during the consideration of caste factor for identifying backwardness. It was clearly observed that poverty by itself could not be considered as sole criteria for determining social backwardness. A.N. Ray, C.J.¹²⁸ held:

“Social backwardness in the ultimate analysis is the result of poverty to a large extent. Social backwardness, which result from poverty, is likely to be aggravated by consideration of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness.”¹²⁹

Thus the court accepted the relevancy of caste and poverty both for determining backwardness within the meaning of Article 15(4). Poverty by itself is not relevant in determining factor for social backwardness but it may be relevant in the context of social backwardness. Thus the court held that poverty can be adopted as a criteria for determining social backwardness and unless social backwardness is ascertained we cannot proceed to determine the backwardness within the meaning of Article 15(4).

*K.C. Vasant Kumar V State of Karnataka*¹³⁰ is an unusual case in which the court expressed its view without reference to any specific facts. The Karnataka government wanted to appoint a commission for examining the question for affording better educational and employment opportunities and the government

requested the court to lay down guidelines for the commission on the issue of reservation under Articles 15(4) and 16(4). The five judges of the court, however, expressed a diversity of views.

According to Chandrachud, C.J., two tests should be conjunctively applied for identifying backward classes:¹³¹

(i). They should be comparable to the Scheduled Caste and Scheduled Tribes in the matter of backwardness, and

(ii). They should satisfy the means test laid down by the state government in the context of prevailing economic conditions.

Desai, J. is against 'caste' being regarded as a major determinant of backwardness. He has argued, "If state patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness the danger looms large that this approach alone would legitimize and perpetuate caste system."¹³² He opined: "the only criterion which can be realistically devised is the one of economic backwardness."

Chinnappa Reddy, J. observed: "Poverty, caste, occupation and habitation" are the principal factors contributing to "social backwardness"¹³³ Further he was of the view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class. Caste the learned, Judge said, is the primary index of social backwardness so that social backwardness is often readily identifiable with reference to person's caste. According to Sen, J. :

“The predominant and the only actor for making special provisions under Article 15(4) or for reservation of posts and appointments under Article 16(4) should be poverty, and caste or a sub caste or a group should be used only for identification of persons comparable to scheduled caste and scheduled tribes.”¹³⁴

Venkataramiah, J. agreed with Chinnappa Reddy, J. that identification of backwardness can be made on the basis of caste. he has, however suggested ‘caste-cum-means’ test as a ‘rational test’ to identify backward people for the purpose of Article 15(4) and 16(4) for all members of a caste need not be treated as backward.¹³⁵

It is submitted that the following two views explicitly come out made by judges in *vasnat Kamar case*:¹³⁶

(i). ‘Poverty’ is predominant or one of the principal factors for determining backwardness.

(ii). ‘Poverty’ is a relevant factor in the context of prevailing economic conditions in determining the backwardness.

In some way or the other almost all the judges emphasized that poverty factor cannot be altogether ruled out in determining backwardness.

Now, comes the important case *Indra Sawhney V. Union of India*.¹³⁷

The court observed:

“...a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis alongwith and in addition to social

backwardness but it can never be the sole criterion.”¹³⁸

Thus it is submitted that the court did not agree with the view of Desai, J. expressed in Vasant Kumar Case.¹³⁹ It is thus, finally, settled that poverty or economic factor cannot be sole criterion for determination of backwardness. However it is submitted that consistently, the economic factor though not sole but a relevant factor for determining backwardness in association with other factors.

A survey of cases from Balaji to Indra Sawhney indicates that in order to determine ‘backward class of citizens’ various tests have been applied. Mainly two factors i.e. caste and poverty have been taken into account. Five sets of opinions have emerged which are as follows:

(i). Caste is equated with class – caste in the sole factor for identifying backward class if the whole caste is socially and educationally backward.¹⁴⁰

(ii). Caste is not equated with class – Poverty is the principal factor for determining backward classes.¹⁴¹

(iii). ‘Caste cum means test’¹⁴²

(iv). Neither caste nor poverty could be taken as sole factor but are to relevant in determining the backwardness.¹⁴³

(v).If backwardness is found a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward.¹⁴⁴

(b). Article 15 (4) & 16 (4) – Compatibility and Judicial Treatment

Article 15 (1) prohibits the state from making any discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15 (4) allows discrimination, which reads

Nothing in this Article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

Article 16 of the Constitution contains five clauses.¹⁴⁵ Clause (1) embodies basic principle that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. Clause (4) of this Article authorizes the state to protect the interests of backward classes of citizens in matters relating to employment or appointment to any office under the state. It reads:

Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state.

The High Courts and Supreme Court interpreted the two provisions on several occasions. In both the provisions the expression 'backward' classes of citizens has been used with the difference that in Article 15(4), this expression is qualified by 'social and educational' whereas in Article 16(4) a condition is attended i.e. "which in the opinion of the state is not adequately represented in the services under the state." The court in almost all the cases in which the interpretation of 'backward class' was involved, said that his expression of both the provisions has the same and similar meaning.¹⁴⁶ In *Janki Prasad case*,¹⁴⁷ Palelkar J., speaking for the Constitution Bench stated:

"Article 15 (4) speaks about socially and educationally backward classes of citizens while Article 16 (4) speaks only of 'any backward class of citizens'. However, it is now settled that the expression 'backward class of citizens' in Article 16 (4) means the same thing as the expression 'any socially and educationally backward called of citizens in Article 15 (4). In order to qualify for being classed a 'backward class citizen', he must be a member of socially and educationally backward class. It is social and educational backwardness of a class which is material for purpose of both Article 15 (4) and 16 (4).¹⁴⁸"

The matter, as to whether 'backwardness' in Article 15(4) and 16(4) has the same meaning, came for consideration in *Indra Sawhney's Case*.¹⁴⁹ It was held:

"Clause (4) of Article 16 does not contain the qualifying words 'socially and educationally' as does clause(4) of Article 15. It may be

remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: 'backward class of citizens' in Article 16(4) takes in Scheduled Caste, Scheduled Tribes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4)."¹⁵⁰

The court further emphasized:

"if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty – which in turn breeds and perpetuates the social and educational backwardness."¹⁵¹

Earlier the courts took the view, consistently, that 'backwardness' has the same meaning for both Articles 15(4) and 16(4). But in Indra Sawhney's case' different view was taken. The view taken, was that meaning of 'backwardness' under Article 16(4) is wider than Article 15(4).

(i). Article 16(4) – exception, proviso or instance of Article 16(1) ?

According to the principles which have been enunciated the decisions of the Supreme Court in *Balaji*,¹⁵² *Chitralkha*,¹⁵³ and *Devadasan*¹⁵⁴ these two provisions viz., Article 15 (4) and 16(4) are exception to clause (1) of Article 15 and clause (1) of Article 16 respectively. By exception it does not mean that clause (4) of Article 15 and clause (4) of Article 16 render clause (1) of both the Article ineffective or inoperative. But the court while considering the effect of these provisions upon each other kept the interest of backward classes of people in view. The court thus maintained a balance between two competing interests and did not suppress other's interests. This is what the court did in *Balaji*. It preserved the rights of the citizens, having merit and efficiency while protecting the interest of the weaker section. In *Janki Prasad case*,¹⁵⁵ Palelkar J., reproduced the observations of Shah J., (as he then was) in *State of A.P. v. P. Sagar*¹⁵⁶ Palelkar, J. described the scope of clause (4) of Article 15 holding it as an exception to clause (1) of Article 15, in the following words:

Clause (4) is an exception to clause (1) being an exception; it cannot be extended so as in effect to destroy the guarantee of clause (1). The Parliament has by enacting clause (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. In order that effect may be given to clause (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they

are other than the scheduled castes and scheduled tribes and that the provision made is for their advancement. Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth and the backwardness being social and educational must be similar to the backwardness from which the scheduled castes and scheduled tribes suffer.¹⁵⁷

It is submitted that prominently the aforesaid four cases i.e. Balaji, Chitralakha, Devadasan and Janki Prasad held that clause 4 of Article 16(4) an exception to clause (1) of Article 16. However it is worth noting that way back in 1964 in Vevadasan case, Subbarao, J., opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but it is only an emphatic way of stating the principle inherent in the main provision itself.¹⁵⁸ This dissenting opinion of Subbarao, J., was upheld in Thomas case¹⁵⁹ in which the majority (Ray, C.J., Mathew, Krishan Iyer and Fazal Ali, JJ.) stated that Article 16(4) in not an exception to Article 16(1) but it was merely an emphatic way of stating principles implicit in Article 16(1). Finally, in Indra Sawhney case¹⁶⁰ the court held:

“We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate in equality. Article 16(4) is an

instance of such classification, put in to place the matter beyond controversy. The “backward class of citizens” are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in services of the state. Accordingly, we hold that clause (4) of Article 16 is not an exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1).”¹⁶¹

The consistent view taken in various cases¹⁶² that Article 16(4) is an exception of Article 16(1) was not accepted in Thomas¹⁶³ case and same view was taken in Indra Sawhney’s case with the difference that in Thomas case the court opined that Article 16(4) is an emphatic way of stating the principle inherent in the main provision i.e. 16(1) whereas in Indra Sawhney case the court stated that Article 16(4) is an instance of Article 16(1). Further the court held that:

(a).Article 16(1) permits reasonable classification for ensuring attainment of equality

(b). For assuring equality of opportunity it may well be necessary in certain situation to treat unequally situated person unequally.

Now it is settled that Article 16(4) is an instance of Article 16(1) rather than exception or proviso. Apart from this the court observed that Article 16(1) permits reasonable classification being a facet of Article 14.

(ii). Whether 16(1) permits reservation?

The ambit of Article 16(1) with respect to Article 16(4) was also came for consideration in Indra Sawhney's case.¹⁶⁴ The court observed:

“We wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under clause (1) of Article 16, appointments and/or posts¹⁶⁵ can be reserved in favour of a class.”

Thus, the inference is that reservation could be made even under 16(1) by applying the principle of reasonable classification. The question arises, what is that class which come within the purview if Article 16(1)? The Court explained the view in the following words:

“On a fuller consideration of the matter we are of the opinion the clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; if is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification ins stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is very exceptional situations – not for all and sundry reasons-that any further reservation, of whatever kind, should be provided under clause (1). In such cases, the state has to satisfy

if called upon, that making such provision was necessary (in public interest) to redress a specific situation.^{166,}

It is submitted that from the aforesaid observations the following inferences may clearly be deduced:

1. The claims for reservations on the ground of 'Backward Classes' could be made only under Article 16(4) and not under Article 16(1).
2. Applying the principle of reasonable classification may make under Article 16(1) reservations.
3. Reservation of a class other than backward classes may be made only in very exceptional situations and the state has to satisfy that such provision for reservation was necessary, in public interest, at a given point of time, to redress a specific situation.

E. LIMITATION AND LAXITIES

The consideration for limitation arose in Balaji's case under the background that the quantum of reservation should not be allowed to go beyond the contemplated constitutional scheme. The reservation to needy class is permissible in order to raise their status so that they may compete with the advanced section of society in a fair manner but not at the cost of merit and efficiency.

Secondly, Nagan Gowda Committee way back in 1961 classified 'backward classes' into 'backward' and more 'backward'

classes. The matter from Balaji's to Indra Sawhney's did not escape the consideration by the courts.

Thirdly, the policy of reservation is to facilitate the actual needy persons and to eliminate those who have been already benefited. The idea is to identify that compact backward class who is entitled for reservation and hence the concept of creamy layer came for consideration.

Thus under the head of limitation and Laxities the following points are taken up:

- (i). Limitation on Reservation
- (ii). Backward and More backward classification
- (iii). Concept of creamy Layer

(i). Limitation on Reservation

The State may provide reservation, to weaker sections of the society, in educational institutions and government services under Article 15(4) and 16(4). Article 15(4) is silent about the extent of reservation whereas Article 16(4) enumerates merely for adequate representation. This clause came to be interpreted for the first time by Supreme Court in Balaji case.¹⁶⁷ In this case, the court laid down a general principle in regard to the extent of reservation by saying:

“The reservation should and must be adopted to advance the prospects of the weaker sections of society, but in providing for special

measures in that behalf care should be taken not to exclude admission to higher educational centers to deserving and qualified candidates of other communities. A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society, which are a first charge on the states and the centre, have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all seats available in the colleges, that clearly would be subverting the object of the Article 15(4). In this matter again we are reluctant to say definitely what would be a proper provisions to make speaking generally and in a broad way a special provisions should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case.¹⁶⁸

The issue pertaining to the extent of reservation starts from this stage. The Supreme Court decided this issue in large number of cases and held reservations to be excessive where the extent was found beyond 50%. Balaji decision made the extent of protective discrimination an important issue to be scrutinized by the court as to see that in applying protective discrimination the interests of other communities are not completely eroded and it maintains a balance between the competing claims. In *Ramesh Chandra Garg v. State of Punjab*¹⁶⁹ wherein a rule of Government provided for reservation of 60 per cent of seats for weaker sections of the society was challenged to be excessive. The Punjab High Court applied Balaji decision and struck down the rule. In many subsequent cases the rule of 50 per cent was applied in relation to education and public services.

In *Chitrelekha*¹⁷⁰ the Supreme Court said that reservation can be minimum and not maximum. The Gujarat High Court declared unconstitutional an order of government making reservation of all the 100 per cent of land for Harijans, Adivassis and backward persons. Such reservation ceased to be reservation at all within the meaning of Article 15(4) as the order amounts to be a class legislation.¹⁷¹ In another significant case, the state indirectly made a rule that the reserved quota of 12.5% seats for scheduled castes and 5% seats for scheduled tribes which could not be utilized will be carried forward to next year and would continue in the same way in the subsequent years. The order was challenged in *T. Devadasan v. Union of India*,¹⁷² and the court by majority decision invalidated reservation of about 65 per cent of government jobs resulting from the 'carry forward' rule in a particular year. Mudholka J., (for the majority) noted that the members of scheduled castes and tribes are by and large backward in comparison with other communities in the country but the purpose of Article 16(4) is to ensure that such people, because of their backwardness, should not be unduly handicapped in the matter of securing employment in various services of the state. He observed:

“Where the object of a rule is to make reasonable allowance for the backwardness ...by reserving certain proportion of appointments ...what the state would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other

communities, the position may well be different and it would be open then for a member of more advanced class to complain that he has been denied equality by the state...”¹⁷³

The court noted that the reservation policy contemplates the idea for making reasonable allowance for the backward classes. The reasonable allowance means a certain portion of appointment. It should not be so excessive that it practically denies the reasonable opportunity to other advanced sections of the society.

In Thomas case,¹⁷⁴ Balaji’s limit of ‘less than 50%’ was questioned and was considered by the two judges (Krishna Iyengar and Fazl Ali JJ.) Fazal Ali, J. observed:

“This means that reservation should be within permissible limits and should not be cloak to fill all posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time clause (4) of Article does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that percentage of reservation should not exceed 50%. As I read the authorities, this is however, rule of caution and does not exhaust all categories. Suppose for

instance a State has a large number of backward class of citizens which constitute 80% of the population and the government, in order to give them proper representation, reserves 80% of the job for them can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object to this provision is to take steps to make inadequate representation adequate.”¹⁷⁵

Krishna Iyyer, J. agreed with the aforesaid view in the following words:

“I agree with my learned brother Fazal Ali, J. in the view that the arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre.”¹⁷⁶

Fazal Ali, J. held that 50% rule enunciated in Balaji’s case is a rule of caution not based on mathematical formula. He asserted that situation may arise when the reservation may be made of 80% seats of the job. It is submitted that idea of 80% seats is certainly beyond reasonable limit, which the scheme of reservation does not permit. It is abundantly clear from next case, which is taken up.

In Indra Sawhney’s case¹⁷⁷ the court viewed:

“Adequate representation cannot be read as proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportional

reservation is accepted only in Articles 330 and 332 of the Constitution and that two for a limited period.....Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extra ordinary situations....”¹⁷⁸

In Thomas case¹⁷⁹ justification for reservation upto 80% was based on population, as backward class of citizens and the idea of proportionate reservation constituted 80% of the population was as such accepted which is not feasible in the light of the decision in Indra Sawhney case. The majority took the view that clause (4) of Article 16 speaks about adequate representation and adequate representation does not mean proportionate reservation.

It is submitted that efficiency and merit of the class other than backward class cannot be overlooked on the ground of proportionate reservation. Certainly the scheme of clauses (1) and (4) of Article 16 taken together is entirely different. Emphasis to this aspect was given in Indra Sawhney case in the following words:

“It is needs no emphasis to say that the principle aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is special provision though not an exception to clause (1). Both the provisions have to be harmonized keeping in mind the fact that both are but the restatements of the principles of equality

enshrined in Article 14. The provision under Article 16(4) conceived in the interest of certain sections of the society – should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society.....From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.¹⁸⁰

Thus the permissible limit for reservation of weaker sections of the of the society has been fixed as 50% and this principle should be strictly followed. If under any peculiar or characteristically conditions, the principle is needed to be relaxed, extreme caution is to be exercised and special case made out.¹⁸¹ In view of the aforesaid consideration it appears that reservation beyond 50% is not permissible and the principle should , strictly, be followed.

(ii). Backward and More Backward Classification

In Balaji's case¹⁸² the Supreme Court had the occasion to consider the division of backward classes into backward and more backward categories as the order issued by the state of Mysore based on the recommendations of the Nagan Gowda Committee¹⁸³ made such classification. Considering the classification in Balaji's case the court held:

“That the sub-classification made by the order between Backward Classes and more backward classes does not appear to be justified under Article 15(4), Article 15(4) authorizes special provision being made for the really backward classes. In introducing two

categories of backward classes what the impugned order, in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced compared to the advanced classes in the state and that, in our opinion is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the state is treated as backward and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of backward and more backward. The classification of these two categories, therefore, is not warranted by Article 15(4).¹⁸⁴

Chinnappa Reddy, J., in Vasant Kumar case¹⁸⁵ stated:

“We do not see why on principle there cannot be classification into Backward classes and More Backward classes, if both classes are not merely a little behind, but far behind the most advanced classes. In fact such a classification would be necessary to help the More Backward Classes; otherwise those of Backward Classes who might be a little more advanced than the More Backward Classes might walk away with all the seats.”¹⁸⁶

Keeping in view both the observations, the respondents in Indra Sawhney's case raised the matter and questioned the correctness of the opinion in Balaji's case, which was opposed to such classification. Considering the opinions given in Balaji¹⁸⁷ and Vasant Kumar¹⁸⁸ cases, the Supreme Court held:

“We are of the opinion that there is no Constitutional or legal bar to a State categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a state makes such categorization, whether it would be invalid. We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class, which scored eleven or more points, was treated as backward class. Now, it is not as if all the several thousands of castes groups/classes score identical points. There may be some castes/groups/classes, which have scored points between 20 to 22, and there may be some who have scored points between 11 and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes.”¹⁸⁹

The effect of the aforesaid opinion expressed by B.P. Jeevan Reddy, J. is that the decision of Balaji's case with respect to classification of backward classes stands overruled. It is submitted that such classification should be made and for both categories of classes i.e. backward classes and more backward classes percentage of reservation may be fixed so that backward classes other than more backward classes not walk away with major proportion of seats. The classification is an appropriate measure to ensure that most backward classes raise their status speedily so that historic injustices and inequities afflicting in the society may be removed with greater pace in order to fulfill true object of Article 15(4) & 16(4)

(iii). Concept of Creamy Layer

The Principle of 'creamy layer' as such was not a point of consideration in Jayashree case¹⁹⁰ but the validity of such idea was accepted. Therefrom the idea came to be considered in subsequent cases whenever the occasion arose. Though the case has already been discussed earlier in this chapter but from different point of view. However it appears desirable to discuss the case in the context of the concept of creamy layer.

An order of the State of Kerala issued by the government came for consideration. According to that order members of families of certain specified communities whose annual income was below 10,000/- were entitled to the reservation. The petitioner applied for admission to one of the medical college at Trivendram and produced certificate showing that the total income of her family from all resources was Rs. 11,752/- for the year 1975-76 and she belongs to Ezhava community. She was not selected, though candidates of her community having less mark were selected. The principal of the college informed her that the annual income of her family exceeds Rs. 10,000/- and she could not be selected for admission. The petitioner contention was that the exclusion of her case from reservation scheme was not based on rational ground for there was no reason to exclude a member of a community on the basis of income. The State contended that they were treated as backward not because they were members of a caste or community but because they form a class based on income. The court accepted the contention of the State and dismissed the petition.¹⁹¹ The cut-off point based on income to treat a set of persons as constituting a different class within the same community.

In Vasant Kumar,¹⁹² Chinnappa Reddy, J. while considering the issue of 'creamy layer,' made following observation:

"...one must however, enter a caveat to the criticism that benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away in the same way, by the top creamy layers amongst them on the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be had if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?"¹⁹³

Reddy, J., did not agree with the identification of creamy layer as a class within a broader class (backward class). It is submitted that observations of Reddy, J., as it goes did not approve the idea which was enunciated in Jayshree case.¹⁹⁴ It may be noted that he gave his observations as an individual whereas in Jayshree case A.N. Ray, C.J. made observation speaking for himself, M.H. Beg and Jaswant Singh J.J. Thus the opinion cannot be considered to have been overruled. In Indra Sawhney¹⁹⁵ after quoting the aforesaid observation of Reddy, J., the majority view was given by B.P. Jeevan Reddy, J.,¹⁹⁶ in the following words:

“The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily mean economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in facts. After excluding them alone, would class be a compact class.”¹⁹⁷

After giving the aforesaid reasoned opinion in was further asserted:

“It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness. We feel that exclusion of such socially advanced members will make the ‘class’ as truly backward clause and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to other Backward Class only and has no relevance Scheduled Tribes, Scheduled castes.)¹⁹⁸

Thus the court approved the exclusion of ‘creamy layer’ from other backward classes and after exclusion the remaining class is the backward class within the meaning of clause (4) of Article 16. In this way the object of the clause could be served better because the remaining class is that compact backward class which is the real claimant

NOTES AND REFERENCES

1. C.H. Alexanderowicz, Constitutional Development in India, (1958) p. 56
2. Janki Prasad Parimo V State of J & K, AIR 1973 SC 930
3. K. Subba Rao, Social Justice and Law, p. 26
4. Ibid
5. C.A.D. Vol. VII, p. 323 (Nov. 8, 1948)
6. Article 366(24)
7. "The President may with respect to any State or Union territory, and where it is a State after consultation with the governor thereof by public notification specify the castes, races, or tribes or parts of or groups within castes, races, or tribes which shall for the purposes of the Constitution be deemed to be scheduled Castes in relation to that State or Union territory, as the case may be."
8. Bhaiyalal V. Harkishan Singh AIR 1965 SC 1575
9. Article 366(25)
10. The president may with respect to any State or Union territory and where it is a State after consultation with the governor thereof by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory as the case may be.
11. Census 1971
12. Ibid
13. C.A.D. Vol. VII, p. 782

14. Commission was appointed in 1953 under the Chairmanship of Kaka Kalekar is known after his name, the other was set-up in January 1979 with B.P. Mandal as its Chairman.
15. The Hindustan Times, July 27, 1980
16. Supra note 7
17. Supra note 10
18. Article 341(2),
“Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race, or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Article 342(2)
Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.
19. AIR 1969 SC 597
20. Article 338 (the provision of special officer was replaced by high level seven member commission through Constitutional Amendment in 1990)
21. AIR 1951 SC 226
22. M.R. Balaji V State of Mysor, AIR 1963 SC 649; Triloki Nath Tikku V State of J & K. AIR 1967 SC 1283; Janki Prasad V State of J & K. AIR 1973 SC 390.
23. AIR 1993 SC 477
24. AIR 1963 SC 649
25. Order No 59 dated 14th May 1959 and Order No. 79 dated 22 July 1959.
26. AIR 1960 Mysore 338

27. Mysore Backward Class Committee, (1961) with R. Nagan Gowda as its Chairman
28. "the State shall promote with special the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Caste and Scheduled Tribes and shall protect them from social injustices and all forms of exploitation."
29. Supra note 24 p. 659
30. Ibid p. 663
31. Kaka Kalekar Commission, para 10, 11, and 13, Chapter V
32. Supra note 27
33. Order No ED TGL 63, dated 26 July, 1963
34. D.G. Vishwanath V. Government of Mysore, AIR 1964 Mys. 132
35. Ibid 139
36. Ibid 140
37. R. Chitrlekha V State of Mysore, AIR 1964 SC 1823
38. Ibid p. 1833
39. Ibid
40. Article 15(4), 16(4), 29, 46, 341 and 342
41. Supra note 37
42. AIR 1968 SC 1012 (K.N. Wanchoo C.J., R.S. Bachawat, J.M. Shelat, G.K. Mitter and C.A. Vaidialingam, JJ.)
43. Ibid pp. 1014-15
44. AIR 1968 SC 1379 (J.C. Shah, V. Ramaswami and G.K. Mitter, JJ.)
45. 1966 W.R. 294
46. Supra note 44
47. Supra note 45

48. Supra note 44 pp. 1382-83
49. Ibid
50. Andhra Pradesh Government appointed a Commission headed by retired Chief Justice of Andhra Pradesh High Court and Costituted alongwith nine other members who were to be members of the State legislature. The retired Chief Justice so appointed resigned and the Commission was headed by a retired I.A.S. officer.
51. G.O. No. 870 dated 12th April, 1968
52. G.O. No 1793/Education dated 23rd September 1970
53. AIR 1972 SC 1375
54. Ibid p. 1399
55. Ibid
56. AIR 1967 SC 1283 (M. Hidayatullah, C.J., J.C. Shah, S.M. Sikri, V. Ramaswami and V. Bahrgava, JJ.)
57. Ibid
58. A. Periakaruppan V State of Tamil Nadu AIR 1971 SC 2303 (J.C. Shah, K.S. Hegde and A.N. Grover, JJ.)
59. Ibid at 2310
60. Supra note 2
61. Supra note 37
62. Supra note 2
63. Supra note 44
64. Supra note 42
65. AIR 1975 SC 563
66. Speaking for himself., K.K. Mathew, N.L. Untavalia, JJ.
67. Supra note 65 p. 567

68. Ibid
69. Ibid p. 569
70. Ibid p. 571
71. Ibid p. 567
72. AIR 1976 SC 2381
73. Speaking for himself, M.H. Beg and Jaswant Singh, JJ.
74. Supra note 24
75. Supra note 72
76. Ibid
77. Chhotey Lal V. State of U.P. AIR 1979 All 135, Civil Misc. Writ Petition No. 2637 decided on 2nd Feb., 1979, Judgment delivered by T.S. Misra, J. on his own behalf and on behalf of K.N. Goyal, J.
78. U.P. Government G.O. No. 2003/40, National Integration, 6.11.77 dated 20.07.1977
79. Ibid
80. D.N. Chanchala V. St. of Mysore, AIR 1971 SC 1769, Chitra Ghosh V. Union of India, AIR 1970 SC 35 Subhashni V State of Mysore, AIR 1966 Mys. 40
81. (i). The state has power to lay down classification or categories of Persons from whom recruitment to the public service may be made,
(ii). **The principles underlying Articles 15(4) and 16(4) are that Preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand equal position with the more advanced sections of the society**
(iii). This principle may be applied to those who are handicapped but who do not fulfill the requirement under Article 15(4).
82. Supra note 77
83. Kaka Kalekar Commission was appointed in 1953 under Article 340(1) of the Constitution

84. Sathi Commission Report, Chapter XV p. 151

85. Ibid p. 12-13

86. Supra note 77 p. 161

87. Government Order dated 6th September 1955, 17th September 1958 and 20th August, 1977

88. Supra note 24 p. 659

89. Indra Sawhney V. Union of India AIR 1993 SC 477

90. Article 15

(1). The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2). No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to –

(a). access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3). Nothing in this article shall prevent the State from making any special provision for women and children.

(4). Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste and the Scheduled Tribes .

91. Article 16

(1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2). No citizens shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any or them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3). Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union Territory] prior to such employment or appointment.

(4). Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of

any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A). Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotion, with consequential seniority, to any class] or classes or posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

(5). Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(The Constitution Seventy Seventh Amendment inserted Clause (4A) to Article 16) Act, 1995, S.2 after the decision of Indra Swahney's case)

92. Supra note 89 p. 554

93. B.P. Jeevan Reddy, J., (For himself and on behalf of M.H. Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ.)

94. Supra note 89 at 555

95. In *Air India V. Nargesh Mirza* (AIR 1981 SC 1829, para 66), The Supreme Court held:

“What Article 15(1) and 15(2) prohibit is that discrimination should not be made only and only on ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer res integra but is covered by several authorities of this court.” Reference was made to *Yusuf Abdul Aziz V. State of Bombay* AIR 1954 SC 321 and *Miss. C.B. Muthamma V. Union of India* AIR 1979 SC 1868

96. Supra note 89 p. 555

97. Supra note 24 (1963) Supp. 1. SCR 460-61

98. Ibid

99. Supra note 37

100. Supra note 2

101. Ibid p. 973

102. Ibid p. 938
103. T. Shameem V Medical College, Trivendram, AIR 1975 Ker. 131, Pradip Tandon V State of U.P. AIR 1975 DC 563, State of Kerala V. Krishna Kumeri, AIR 1975 Ker. 54, Jayshree V. State of Kerala AIR SC 2381
104. AIR 1976 Ker. 131 (K.K. Narendran, J.)
105. G.O. P. 208/66/Edn. Dated 2.5.1966
106. Kumar Pillai Commission was appointed by the State of Government in pursuance of a suggestion made by a division bench of Kerala High Court in State o Krala V Jacob Mathew AIR 1964 Ker. 316
107. Supra note 104 p. 134
108. Ibid p. 137
109. Ibid p. 138
110. Supra note 104 p. 138
111. Supra note 65
112. Ibid p. 567
113. Ibid p. 568-69
114. According to 1971 census the total population of rural India was 43.89 Crores out of total population of 54.79 Crores. The rural population of Uttar Pradesh in 1971 was 7.5 Crores, i.e. 80% of the total population of the State.
115. AIR 1976 Ker. 54
116. Supra note 104
117. State of Kerala V R. Racob, AIR 1964, Ker. 316 Hariharan Pillai V. State of Krala AIR 1969 Ker. 42 (F.B.), State of U.P. V Pradeep Tandon , AIR 1975 SC 563 and Junior P. Parimoo V State of J & K AIR 1973 SC 930
118. Supra note 24

119. Supra note 117
120. Supra note 115 p. 59
121. Supra note 24
122. Supra note 115 p. 59
123. Ibid p. 67
124. Supra note 104
125. Supra note 115 p. 60
126. Supra note 72
127. Ibid
128. Supra note 73
129. Supra note 72
130. AIR 1985 SC 1495
131. Ibid
132. Ibid
133. Ibid
134. Ibid
135. Ibid
136. Ibid
137. Supra note 89
138. Supra note 9 p. 562
139. Supra note 130
140. P. Rajendra v. State of Madras, AIR, 1968 SC 1012; State of Andhra Pradesh v. USV Balram, AIR 1972 SC 1375; Triloki Nath Tiku v. State of J&K; AIR 1967 SC 1283; A. Oeriakaruppan v. State of Tamil Nadu, AIR 1971 SC 2303.

141. K.C. Vasant Kumar v. State of Karnataka, AIR 1985 SC 1495
(Desai, J. held that only criterion which can be realistically devised is one of economic backwardness. Chandra Chund J. relied on 'means test')
142. Ibid. (Venkataramiah and Chinnappa Reddy; JJ.)
143. M.R. Balaji v. State of Mysore, AIR 1963 SC 649; R. Chitrlekha v. State of Mysore, AIR 1964 SC 1823; State of A.P. v. P.Sagar AIR 1968 SC 1379; Janki Prasad Priso v state of J & K; AIR 1973
144. Indra Sawhney v. Union of India AIR 1993 SC 477.
145. Supra note 91
146. Supra note 37
147. Supra note 2
148. Ibid
149. Supra note 89
150. Ibid p. 556
151. Ibid p. 557
152. Supra note 24
153. Supra note 37
154. Devadasan V. Union of India AIR 1964 SC 179
155. Supra note 2
156. Supra note 44
157. Supra note 2
158. Supra note 154
159. State of Kerala V. N.M. Thomas AIR 1976 SC 490
160. Supra note 89

161. Ibid p. 139
162. M.R. Balaji V. State of Mysore AIR 1963 SC 649; R. Chitralkha V. State of Mysore AIR 1964 SC 1823; T. Devadasan V. Union of India, AIR 1964 SC 179; Janki Prasad Parimoo V State of J & K, AIR 1973 SC 930
163. Supra note 159
164. Supra note 89
165. Ibid at 536
166. Ibid p. 541
167. Supra note 24
168. (1963) Supp. 1 SCR pp. 469-70
169. AIR 1966 Punj. 476
170. Supra note 37
171. (1970) 11 Guj. L.R. 386
172. T. Devadasan v. Union of India, AIR 1964 SC 179 (S.K. Das, Acting C.J., K. Subba Rao, Raghubar Dayal, N. Rajagopala Ayyangar and J.R. Mudholkar, JJ.)
173. Ibid p. 185
174. Supra note 159
175. Ibid
176. Ibid
177. Supra note 89
178. Ibid p. 565
179. Supra note 159
180. Supra note 89 p. 566
181. Ibid

- 182.Supra note 24
- 183.Supra note 27
- 184.Supra note 24
- 185.Supra note 130
- 186.Ibid
- 187.Supra note 24
- 188.Supra note 130
- 189.Supra note 89 p. 563
- 190.Supra note 72
- 191.Ibid
- 192.Supra note 130
- 193.Ibid p. 1495
- 194.Supra note 72
- 195.Supra note 89
- 196.Supra note 93
- 197.Supra note 195 p. 559
- 198.Ibid p. 560

**CONCLUSION
&
SUGGESTIONS**

CONCLUSION & SUGGESTIONS

Equality as envisioned by the Constitution is of various kinds. These are social and economic equality, political equality and civil equality. The Constitution comprehends all these forms of equality enumerating them under its various provisions. Article 14 contains civil and natural equality. It guarantees right to 'equality before the law' and 'equal protection of the laws'. Article 17 and 18 has been introduced in order to substantiate equality by abolishing untouchability (Article 17) and feudal tradition of conferring any title or any distinction (Article 18). Although these provisions are significant as they deal with important social and economic situations but the basic doctrine of equality is in fact implanted in Article 14 which governs all the forms of equality.

In *State of Kerala V N.M. Thomas*¹, the Supreme Court realized the coverage and poignancy of Article 14 and applied equality principle contained therein to the problems of protective discrimination which is permitted under Article 15(4) and 16(4) of the Constitution. This Article can also largely be applied to others matters of civil and criminal laws and administration of justice. It is a repository of secularism and socialism and the whole concept of welfare state is embodied in this article. It can be submitted said that Article 14 lays down such principles from which the whole jurisprudence of equality can be derived. Besides these Articles dealing with social and economic equality, the Constitution also guarantees political equality on the basis of adult franchise under Articles 326 and 326.

Equality involves, first of all absence of legal discrimination against any individual or group of persons and secondly, claim of all the

opportunities and privileges on equal basis. To secure equality to all persons in India who have ever remained divided and stratified on the basis of caste, religion, language and culture which resulted into inequality was the most difficult task. Moreover, in Indian society inequality operated for so long a time not as a social norm but as a religious injunction that an endeavour to abolish all these centuries long existing evils and to build a society based on equality and equal justice may seemingly appear to be the collective misadventure of the framers of the Constitution. But inspite of realizing the task to be very difficult to achieve, they did not loose their spirit and determination and enacted various provisions to eradicate past practices of inequality. They were convinced that if the base of social structure will be replaced by the concept of equality all the social evils i.e. poverty, injustice, exploitation and social stratification would automatically be uprooted.

In view of the social history and vast social and economic gap they had to deviate from the basic principle of equality embodied in the said provisions of the Constitution. Social gaps had to be filled up through legal means by providing special help to those who formed the lowest stratum of the society. As such they enacted some provisions in the Constitution under which discrimination in their favour has been permitted otherwise it would not be possible for them to come up or compete the advance section of the society on account of their dire backwardness. These backward groups are termed as scheduled castes, scheduled tribes and other backward classes. They are constitutionally kept under special policy of protective discrimination enveloped in Article 15(4) and 16(4) under which these groups of persons are specially helped in educational and economic fields. Schedule castes and scheduled tribes have been provided special help in political matters also under

Articles 330, 332, and 335. The Constitution, here allows denying equality for the sake of equality in view of the past social inequality.

The implementation of protective discrimination thus involves the exercise of balancing the social, economic and political interests. The provisions relating to reservation of seats in educational institutions (Clause (4) of Article 15 reservation in employment or appointments by the State (Clause (4) of Article 16) and political equality (Articles 330 and 332) are the examples through which the constitutional policy of protective discrimination is being implemented. These articles authorize the centre and state governments to reserve seats in educational institutions, government services and House of People and Legislative Assemblies of the states to achieve the object of advancing the socially and educationally backward sections of the society, as well as of scheduled caste and scheduled tribes. In carrying out this policy of reservation some basic questions have arisen viz, who are entitled; what should be the quantum of reservation, its continuation, viz, how long reservation benefit will be available to the weaker sections of the people and whether on each point of service tenure reservation would be available to them. All these issues have been coming up before the Supreme Court for its decision in a large number of cases.

As regards the entitlement, the Constitution recognizes scheduled caste and scheduled tribes and other backward classes as weaker sections of society, they are, therefore, entitled to get reservation benefits. The scheduled caste and scheduled tribes are defined categories but who are backward classes is a matter, which has neither been defined by the Constitution nor by the Court satisfactorily. The Constitution in Article 15(4) only contains the words 'socially and educational backward classes of citizens? The problem is who are socially and educationally backward

classes of citizens'. Of all the problems the most controversial has been the problem of identification of backward classes. This issue first came before the Supreme Court in *Balaji's case*.² The court laid down four important points which are : (1) caste based criteria for the identification of backward classes is unconstitutional, (2) caste may be one of the relevant factor but must not be the sole factor or the criteria, (3) social backwardness was in the ultimate analysis the result of poverty to a large extent, (4) the special provision should be less than 50% and how much less than 50% would depend upon the relevant prevailing circumstances in each case.

In Indian social system, those who are socially and educationally backward are the groups belonging to low caste. Caste and social and educational backwardness are interwoven, therefore, it is very difficult to separate them. Thus, the present position is that neither there is any national policy, nor the Supreme Court could lay down any suitable criteria for the identification of backward classes. Although, the court attempted other criterion such as poverty to enable the states to carry on the policy of reservation but it also could not serve the purpose. In the absence of any nationally recognized criteria, the states were allowed to work out their own criteria and pursue the reservation policy. In doing so states were mostly guided by caste oriented political pressure and provided reservation on the basis of caste.

At the time of elections it has been noted that reservation policy was being used to catch votes and caste feeling generally aroused to win the election. This trend will not only defeat the constitutional objects but the country might be caught in the throes of an inter-caste civil war. At present no section of Indian population is against reservation system but resentment is shown when it is wrongly implemented and politicized

under the garb of social justice. It is, therefore, high time that the central government formulates a uniform policy to deal with the problems of weaker sections of society and the reservation system be supervised by high powered central agency until it is abolished.

The quantum is another issue about which our Supreme Court has said much. On this issue the Supreme Court through Gajendragadkar J. in Balaji's case evolved a formulae of "50 per cent and less" depending upon the condition and population of backward classes in a state but in any case it must not exceed 50 per cent. In Devadasan³ case the 'carry forward rule' which resulted in a quota reservation of 60% was struck down by a majority of 4:1. Similar issue came before the court in Thomas case in which the dissenting opinion of Pathak, J., coincided with Gajendragadkar, J., who observed that 50 per cent for reservation quota in totality is a rule which appears fair and reasonable, just and equitable and violation of which would contravene Article 335. But the Supreme Court in subsequent cases deviated from this principle and finally in Thomas case Krishan Iyer and Murtaza Fazl Ali, JJ. were of the opinion that the reservation could go to the extent of 80 per cent. It is agreed that backward classes have been the social sufferers and to liberate them from position is the primary aim of the Constitution. But it would be an irrational approach to neglect the interest of others or other factors like efficiency is ignored altogether. These would antagonize the society at large and the implementation of reservation policy would be vigorously retarded. Gajendragadkar, J., laid down a very reasonable and acceptable principle of "50 per cent and below". This principle must be restored and adhered to in order to avoid any social conflict.

The Thomas⁴ case has widened the scope of quantum by so interpreting Article 16(1) vis-a-vis 16(4) and applying 'legislative

classification' principle of Article 14 to the matters of protective discrimination. Under Article 14 any classification, which fulfils two, tests i.e. that the classification must be based on reasonable differentia and secondly the differentia should have a rational relation to the object sought to be achieved, by the statute in question. In case of classification of backward classes two tests are in full compliance of constitutional requirements and hence the method of classification was taken to be the most befitting and an uncontroversial principle to sustain the impugned order. Such classification will help to get rid of the 'caste and class' controversy. Despite it, the issue of 'quantum' is still very important and delicate in the overall economic and social context. The application of Article 14 to the problem of protective discrimination is constitutional and Thomas decision establishes it, accordingly the whole of the backward classes of people can be rationally classified as 'backward' and would be entitled for the benefit of reservation. It is not workable because in Thomas case percentage of entitlement was based on percentage of population take, for example, the backward people comes to the figure of say 60 per cent in a state then 60 per cent and the percentage of scheduled castes and scheduled tribes, would come roughly to about 80 per cent. Further in case the children or dependent of freedom fighters distinguished sportsmen or women, handicapped etc. are also included which is possible under Article 14, then the whole of the educational or employment opportunities would be swallowed by the reservation scheme and nothing will be left for the meritorious.

In providing reservation, caste-oriented political pressure has often been disturbing the social condition and temperament. During Janata Government, when it came into power in 1978, the two states, U.P. and Bihar ambitiously increased the quota of reservation and some castes like

Kurmis, Yadav and Ahirs were classed as backward classes and accorded reservation. The quantum of reservation increased to 49 per cent. The 'reservation' made for the castes were all prosperous and the state of Uttar Pradesh in classifying these castes as backward was influenced by the political motive by the Bhartiya Lok Dal (BLD) group of the Janata Party which was dominating in U.P., and those castes supported the BLD. The High Court of Allahabad upheld the reservation of scheduled castes and others while striking down part of the state government order that applied to backward classes. From the attitude of the then government of Uttar Pradesh it is obvious that the 'caste' factor played a dominant role in framing the policy of reservation and as such the attitude was not only unconstitutional but happened to be the main cause of caste clashes and atrocities. The same attitude was adopted by the increasing the reservation quota as to achieve political gains. In these states, particularly Gujarat the caste conflict and anti-reservation agitations have become the regular events since 1981. What is required and appropriate for the State is to keep the policy matters away from the caste influence. A caste-ridden policy would not only be unconstitutional but would be vigorously repulsed creating law and order problem. It is, therefore, necessary that states should take extra precaution in identifying backward classes and fixing quota for them. What is to be again emphasized that the classification of backward classes and 'reservation' for them are the areas of delicacy and social animosity. It must of course be carried on in order to establish social and economic equality but it should be absolutely politically immune otherwise serious complications and dissatisfaction might erupt, leading to chaotic situation.

The present study has envisaged that the identification of 'Scheduled Castes and Scheduled Tribes' and determination of 'backward

classes of citizens.' 'Scheduled castes' and 'scheduled tribes' have been defined under Article 366(24) and 366(25) respectively but the expression 'backward classes of citizens' as appears in Article 15(4) and 16(4) has not been defined under the definitional Article 366. The determination 'backward class' which is entitled to preferential treatment is vital because unless such class is determined, the object of raising its social status cannot be achieved in order to establish an egalitarian society.

Many States tried to identify 'backward classes' in their own way and such identifications were questioned before the courts and consequently no definite criteria for determining the 'backward classes' came to be recognized. The Central Government for the first time appointed Backward Class Commission under Article 340 of the Constitution on January 29, 1953. The Commission popularly known Kaka Kalekar Commission submitted its report on March 30, 1955. The report made by the Commission was considered by the Central Government, which apparently was not satisfied with the approach adopted by the Commission in determining the criteria for identifying the backward class under Article 15(4). The Memorandum of action appended to the Report of the Commission while placing it on the table of Parliament (as required by clause (3) of Article 340) on September 3, 1956, pointed out that the caste system is the greatest hinderance in the way of our progress to egalitarian society and that in such a situation recognition of certain specified castes as backward may serve to maintain and perpetuate the existing distinctions on the basis of caste. The Memorandum also found fault with certain tests adopted by the Commission for identifying the backward classes. It expressed the opinion that a more systematic and

elaborate basis has to be evolved for identifying backward classes. The report was never discussed by the Parliament.

On August 14, 1961 the Central Government wrote to all states governments stating *inter alia* that “while the state governments have the discretion to choose their own criteria for determining backwardness, in the view of the government of India it would be better to apply economic tests than to go by caste”. It was open to every state to draw up its own lists for the purposes of Articles 15 and 16. So far as the Central services are concerned, no reservation was ever made in favour of other backward classes though made in favour of Scheduled Castes and Scheduled Tribes.

By the order of the President of India, in the year 1979, under Article 340 of the Constitution Second Backward Class Commission was appointed to investigate the conditions of ‘socially and educationally backward classes’ within the territory of India. It submitted its report on December 31, 1980 identifying as many as 3743 castes as ‘socially and educationally backward classes’ and recommended for 27 percent reservation for them. Thus, basically identification for backwardness was based on castes.

From the survey of judicial attitude in various cases it is evident that in some way or the other caste and poverty were the factors which came up for consideration. These two factors were considered for determination of backwardness either as sole factor or relevant factor. The matter to a greater extent crystallized in Indra Sawhney’s case (1993). The view taken in 1993 was that the caste can be treated as a class. If it is socially backward it would be a backward class for the purposes of Article 16(4). The view taken in Indra Sawhney⁵ (1993) was

explained by the Supreme Court in *Indra Sawhney II* (2000)⁶ in the following words:

“Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. Therefore, from that caste, creamy layer and non backward class of citizens are to be excluded. If the caste is to be taken into consideration then for finding out socially and economically backward class, creamy layer of the caste is to be eliminated for granting benefit of reservation, because that creamy layer cannot be termed as socially and economically backward.”⁷

Thus after excluding the creamy layer from a particular caste, the remaining section of that caste is the truly backward class entitled for reservation. In a caste creamy layer is an advanced section of that caste and the remaining section is backward. The advanced section of particular caste and backward section of that caste cannot be treated equal because it would mean treating unequals as equals and it is against the principle of equality enunciated in Article 14 of the Constitution. The scheme of the constitution also envisages preferential treatment only to that section of citizens which is truly backward. Therefore, to determine such truly backward class exclusion of ‘creamy layer’ appears to be justified, pragmatic and constitutionally sound.

Unless the ‘creamy layer’ is identified it could not be possible to exclude them from a backward caste in order to determine truly backward class. The declaration of law relating to creamy layer expressed

in Indra Sawhney (1993) was considered in Indra Sawhney (2000) in order to identify the 'creamy layer' in the following words:

“...in each of these named backward classes listed one below the other, it is not difficult to make horizontal divisions of those belonging to (i) constitutional offices, (ii) particular services (iii) professions, (iv) industry and trade, (v) particular income level and (vi) particular holding of property etc. to segregate the creamy and non creamy layers in each vertical sub-classification of backward class and say that the children of such persons in these horizontal subdivisions of the backward classes be creamy layer and therefore outside the backward class.”⁸

Thus identification of creamy layer could be made on the basis of 'means test' or by applying 'economic criteria'. To determine truly backward class, tests at two stages are to be made. Firstly the classification of backward class is made by applying caste criteria and secondly sub-division of such backward class is made between creamy and non creamy layers by applying 'means' test in order to exclude creamy layer and identify truly backward class which would be entitled for reservation.

The Supreme Court in Indra Sawhney case (1993) directed the government of India to specify the basis of exclusion whether on the basis of income, extent of holding or otherwise of 'creamy layer'. A sincere effort by the State to identify 'creamy layer' may implement the declaration of law made in Indra Sawhney's case. In the light of the

direction by the court in Indra Sawhney's case (1993) government of India, Ministry of Personnel, Public Grievances and Pensions (Development of Personnel and Training) issued office memorandum dated September 8, 1993 providing for 27% reservation for other Backward Classes. Para 2(c) of the memorandum excludes the persons/sections mentioned in column 3 of the Schedule.⁹ In the said memorandum the schedule consists of "creamy layer" for exclusion from the reservation. The determination of 'creamy layer' based on the said schedule is applicable to services covered by the centre. In *Ashoka Kumar Thakur v/s State of Bihar*¹⁰ the criteria for identifying the 'creamy layer' by the government of India was found to be in conformity with the law laid down in Indra Sawhney case (1993)¹¹

The states of Bihar¹² and U.P.¹³ also made criteria for identification of 'creamy layer'. The Supreme Court in Ashoka case¹⁴ held such criteria as violative of Article 16(4) and wholly arbitrary violative of Article 14 and against the law laid down in Indra Sawhney Case (1993).¹⁵ State of Kerala made statutory declaration to the effect that 'no creamy layer' exists in the State of Kerala. Such statutory declaration was held by the Supreme Court in Indra Sawhney Case (2000) as unconstitutional. The approach of the State of Bihar, U.P. and Kerala speaks of the volume of political considerations aimed at keeping the vote back intact.

New dimensions associated with the reservation policy have emerged out of political considerations which appear to have eclipsed the positive developments of long judicial exercise. A controversy has arisen over the move announced by the congress in Rajasthan seeking support to have 14 percent reservation in public employment for the economically backward sections among the advanced castes. The B.J.P. pleads apparently for the 'poor' in addition to reservation for Scheduled Caste,

the Scheduled Tribes and other Backward Class. Seven more castes have been added to OBC's list in Delhi. The Delhi University has opened up to 5 per cent reservation for the talented in sports, music, drama and the like.

The present scheme of reservation which is being followed includes 15 percent scheduled castes, 7 per cent scheduled tribes and 27 per cent OBC's. The sum of all comes to 49 per cent. The court has ruled that reservation cannot exceed 50 per cent keeping in view the merit and efficiency. If more classes are added to the present scheme of reservation, it is possible only by curtailing the share of OBCs. It is sure to lead to anger, if not violence, among the OBC against the forward class.

Rajeev Dhavan, a senior learned advocate of Supreme Court reacting over the recent controversy has rightly said.

“The pursuit of equality has been hijacked by politics to become a pursuit for votes. India's reservation policy was designed to make ‘unequals equal – not to open the door to every demand for preference by all or any community... Today's politics of reservation follows the quest for electoral victory, not social justice. An already divided nation on many fronts will be cleaved and pared into competing groups on an unparalleled scale that will make the Mandal controversy seems like a wisp of smoke.”¹⁶

The Attorney General, Soli Sorabji informed the Centre that reservation for Economically Backward Classes (EBCs) cannot be effectuated by an ordinary legislation in view of the Supreme Court Judgment in Indra Sawhney's case.¹⁷ Elaborating he said:

“Article 15(4) can be suitably amended by inserting the word “economically” before the words “socially and educationally backward.”

Similarly he said:

Article 16(4) can be amended by adding the words “including economically backward class” after the words “any backward class of citizens” and before “which in the opinion of the state...”¹⁸

The Attorney General strikes a note of caution that such reservation would come within 50 per cent limit fixed by the Supreme Court. And to exceed this limit to provide for reservation to the EBCs, a further Constitutional amendment was needed. Such amendment will also be subject to judicial scrutiny on the ground that it violates the basic structure of the constitution, viz., and equality.¹⁹

On October 3, 2003, the Union Cabinet approved, in principle, the proposal for Constitutional amendments in order to provide reservation for EBCs. The Cabinet decided to appoint a National Commission for working out the modalities in consultation with the State and Union Territories to recommend steps to be taken for advancement for such category of citizens.²⁰

It is submitted that the whole scheme of reservation was to raise the standard of oppressed class popularly known as backward class and the scheme never contemplated the class to be identified solely on economic consideration. The Supreme Court may annul the whole political exercise leading to legislation. If the pursuit for votes is allowed to continue the ‘lower’ castes will continue to be discriminated against in

their daily life. The caste evil has to be fought collectively and comprehensively. The battle plan should be carefully modified in order to provide justice to the truly oppressed and needy among us.

The other vital aspect of reservation is its continuation. It was accepted as a mode to social transformation for a period of ten years but it is continuing even after a lapse of five decades. Its continuation is another very sensitive area and agitates the mind of the community. Another aspect of reservation, which is related to its continuation, is alarming and requires constant attention. There are signs of an elite class being created within the backward classes. It comprises of those socially and educationally backward classes of people who were benefited by the reservation policy and have attained better economic and social status after becoming civil servants and professionals like-IAS, PCS officers, Physicians and Engineers. But under the definition of socially and educationally backwardness, their children continue to get benefits out of reservation policy, and those who are in no position to take advantage of reservation are being deprived by this elite of so called backward classes of people. Thus, the policy is not being properly implemented and as such frustrates the objects of Article 15(4) and 16(4). Such backward people should be de-listed and be carefully looked that they do not get the benefit of reservation any more because they do not suffer from economic and social disabilities and there remains no reason to provide them or their children the benefits of reservation. They stand on equal footing as other non-backward classes. Thus, any benefit or privilege to these classes in the form of reservation would be a denial of socio-economic justice to truly backward class.

During some general conclusion from the above study it is suggested in the first place that reservation is a historic need and should

be continued. To abolish 'reservation' would be early but a fresh look at the way the reservation policy is necessary and consistent effort should be made to keep it separate from the influence of 'caste politics'. It has been conceded that reservation to the weaker sections has not produced the desired change in their social, educational and economical structure. All that it has achieved is the creation of a new 'elite classes,' within that section, by availing reservation benefits, and still their children are entitled to reservation. A section of citizens is highly critical of the continuation of such reservation system. They rightly believe that nation cannot afford to invest a huge amount of money on the backward classes of citizens for so long when it does not help truly needy class. The increase in number of seats in professional colleges in various states (Gujarat and Madhya Pradesh are recent example) off and on is also provocative and amounts to destruction of right guaranteed under Article 29(2). Besides the reservation in jobs and professional colleges, the reservation in 'promotions' is conceded as killing the enthusiasm and zeal to work and would adversely affect the standard and efficiency of administrative machinery.

It is widely felt that reservation on the caste basis has given rise a lot of controversy, and bitterness and as such economic criteria will be more appropriate. But if 'poverty' is made the criteria it would again fail as a sizeable population live below the poverty line. In K.C. Vasant Kumar,²¹ the Chief Justice Chandrachud gave his opinion that economic backwardness must be adopted and the reservation policy should be reviewed every five years. The other judges although gave separate judgments but all of them adopted same approach as expressed by the Chief Justice. A view also sometimes come on the surface that all necessary financial help be given to scheduled castes and scheduled tribes

candidates to pursue their studies but at every stage the selection be made strictly on merit.

Apart from reservation in professional colleges and jobs, scheduled castes and scheduled tribe have also been granted several concessions including relaxation of age limits, fee and in the required standard and more opportunities for promotions whereas for general candidates even though belonging to the poorest upper caste families are required to submit the whole requisite fee. Even after that the chances of the already employed scheduled castes candidates to get the new jobs are far greater.

There is a lot of substances in these charges. There can be no doubt that the policy of reservation will have to continue till the backward classes are integrated with the society. They have right to assistance but they should not be wholly and always dependant on reservation for that would reduce their spirit of competitiveness. Dr. B.R. Ambedkar, the principal architect of our Constitution had made it clear that reservation would not be a permanent feature. It was meant only for ten years but the ten years period was considered to be insufficient and therefore, has been extended five times. But it should not perpetuate. Its continuation will not only be harmful for the scheduled castes and scheduled tribes but would disintegrate the society and some time may lead to explosive situation. But so long 'reservation' is continuing it must be streamlined and supervised by high-powered committee to ensure that the working of reservation system operates on democratic and constitutional principles and its side effects are also minimized. Regarding the abolition of reservation, it is suggested that whenever it is thought to abolish reservation, Article 16(4) and 335 be deleted first and almost ten years thereafter Article 15(4) 330 and 332 be deleted from the Constitution.

Another important question is that although the constitutional policy of protective discrimination will realize equality through educational and economic opportunities to the downtrodden but whether the economic upliftment would solve their social problem of discrimination and oppression. The society would remain stratified if they were not integrated with other advanced sections of the society without which social justice or equality would remain an unaccomplished goal. Although, reservation will continue so long social and economic inequalities exist but it would be better in the interest of the backward classes and scheduled castes and scheduled tribes themselves to become self-reliant as early as possible. This would also help them in the process of their social acceptance and assimilation. These aforesaid problems are the most significant and sensitive aspects of reservation system which need to be carefully looked at and directed in accordance with judicial inquiries and declaration.

In the very end it is submitted that reservation *prima facie* is against the ethos of equality but it has been adopted to eliminate inequalities existing in all forms in our social system in which the inter-caste barriers operated not as social norms but as religious injunction. In the present situation the views of old generation are continuing although we have made notable progress in the post-constitutional period. But what we are venturing to achieve is a matter, which is based on social and moral attitude of the society and is not purely a legal matter. It is, therefore, a matter to be carefully dealt with and the zeal or enthusiasm to provide help to the downtrodden may rupture the social fabric.

It is, therefore, necessary that while framing the policy, the prevailing temperament of the society should never be overlooked, otherwise the aim of social equality is bound to be defeated or it would

have to be achieved by indirect method as being done after the recommendations of two Backward Classes Commissions. The two commissions could not accomplish what it was expected except the identification of large number of castes as backward and recommending reservation in their favour, thus reducing the opportunities for other classes. This resulted into obvious caste-clashes and the social relations become more sensitive and caste-oriented. The primary aim is to establish social equality. Social equality, as conceded by the apex judiciary, is very difficult to achieve. It cannot be forced upon people by the laws. But, if the sentiments of social equality were carefully and wisely cultivated, surely there would be a considerable progress to the realization of social justice.

Continuance of reservation of scheduled castes and scheduled tribes at national level and reservation of backward classes provided by various States with varying policies for more than fifty years have not produced desired result. The main cause is the section of society within scheduled caste, schedule tribes and backward class which had already been benefited, continue to be benefited for generation to come and more deserving class among them are left with no mercy. For example, a class within scheduled caste and scheduled tribes or backward class was extended reservation and thereafter this class attained the status equivalent to advanced class by all standards of education and wealth. But the members of this class if allowed to continue to get the benefit of reservation they walk away with major share of reservation leaving apart truly needy class. Under this background a strong case is made out for applying the principle of creamy layer not only to backward classes but also to scheduled castes and scheduled tribes. A proviso should be inserted in Articles 341 and 342 of the Constitution providing for

indicators to identify the class within Scheduled Caste and Scheduled Tribes, which had already been benefited, may be excluded for purposes of reservation. Thereafter actual needy section of scheduled castes and schedule tribes will get the total share of reservation. Only through this process the needy section will get the opportunity to raise their standard.

The Creamy layer principles, evolved in Indra Sawhney case, are a declaration of law and should be implemented enveloped with rule of law. The Constitutional scheme of reservation is for actual needy groups or sections of the society. The continuance of benefit to that class who has already been benefited is beyond constitutional scheme because treating advanced class and disadvantaged class of particular caste equally is against the principle of equality. As we have seen in earlier paras while making criteria for identification for 'creamy layer' the approach of the State Government is highly arbitrary and against the mandate of the Constitution. Constitutional amendment is required so that a comprehensive scheme may be introduced, dealing with creamy layer to be applicable, uniformly, to all States.

The reservation policy for backward classes should be made more effective. The President had so far appointed two Backward Class Commissions. The recommendations of First Backward Class Commission were not accepted. However the recommendations of Second Backward Class Commission were accepted by providing 27 per cent reservation for backward classes. The Third Backward Class Commission is to be appointed by the President as approved by the Union Cabinet on 3rd October 2003. A system of regular monitoring of the implementation of reservation policies is necessary. Constitutional amendment is needed to provide for National Commission of Backward Classes as a permanent body like National Commission for Scheduled

Caste and Scheduled Tribes. This body should monitor and investigate the matters relating to backward classes. A provision should also be made to place the report of such commission on the table of the Parliament annually. It must be empowered not only to make recommendation but also to issue guidelines where it feels glaring disparities in the process of implementation of reservation policies. Thus it is suggested that Article 340 should suitably be amended so as to provide a permanent body of National Commission for Backward Class having adequate representation of members from backward class.

It has been conceded that the existing reservation regime has failed to address the plight of actual needy people hitherto even after more than half a century. The protective discrimination, keeping in view the socio-legal analysis, in shape of reservation has to be programmed in such a manner that the most deserving section of the Scheduled Caste, Scheduled Tribes and backward class is benefited. In order to achieve the constitutional mandate expeditiously and to make the reservation regime result oriented some suggestions, has been made in the concluding paras above, and is summarized as follows:

1. The creamy layer principles must be extended to Scheduled Caste and Scheduled Tribes also.
2. Criteria for creamy layer should be determined by the centre to exclude the classes which have already been benefited and attained the status equivalent to advanced class. Such criterion should be made uniformly applicable to reservations made by the Centre as well as all the States.
3. A proviso should be inserted to Articles 15(4) and 16(4) to exclude creamy layer for the purpose of reservation.

4. A clause should be inserted in definitional Article 366 defining the expression “backward class of citizens” taking guidance from the judicial exercise made, from Balaji’s case to Indra Sawhany case keeping it in view that such guidance was not available when the Constitution was enforced.
5. Article 340 should suitably be amended so as to provide a permanent body of National Commission for Backward classes for monitoring investigating and issuing guidelines on regular basis dealing the matters related to backward classes.

It is submitted that to realize and accomplish the Constitutional vision of just, equitable and egalitarian society, the guidelines and suggestions arrived at supra must be incorporated, crystallized and be codified whenever any legislative exercise in future is undertaken therefor as well as other legislations governing the reservation policies and programmes.

NOTES AND REFERENCE

1. AIR 1976 SC 490
2. M.R. Balaji V. State of Mysore, AIR 1963 SC 649
3. T. Devadasan V. Union of India, AIR 1964 SC 179
4. State of Kerala v. N.M. Thomas, AIR 1976 SC 490
5. Indra Sawhney V. Union of India AIR 1993 SC 477
6. Indra Wawhney v. Union of India AIR 2000 SC 498
7. Ibid p. 505
8. Ibid p. 508
9. See Annexure I
10. AIR 1996, SC 75
11. Ibid p. 78
12. See Annexure II
13. See Annexure III
14. Supra note 10
15. Ibid p. 85
16. The Hindu, June 13, 2003, p. 10
17. The Hindu, June 19, 2003
18. Ibid
19. Ibid
20. The Hindustan Times, October 4, 2003
21. K.C. Vasant Kumar v. State of Karnataka, AIR 1985, SC 1495

ANNEXURES

Annexure-I**SCHEDULE**

Description of category		To whom rule of exclusion will apply
1.	2.	3
I	CONSTITUTIONAL POSTS	<p>Son(s) and daughter(s) of</p> <p>(a). President of India;</p> <p>(b). Vice President of India</p> <p>(c). Judges of the Supreme Court and High Courts:</p> <p>(d). Chairman & Members of UPSC and of the State Public Service Commissioner; Comptroller & Auditor General of India;</p> <p>(e). Persons holding Constitutional positions of like nature</p>
II	SERVICE CATEGORY	Son(s) and daughter(s) of
A.	Group A/Class I Officers Of the All India Central and State Services (Direct Recruits).	<p>(a). parents, both of whom are Class I officers;</p> <p>(b). parents; either of whom is a Class I officer;</p> <p>(c). parents, both of whom are class I officers, but one of them dies or suffers permanent incapacitation.</p>

(d). parents, either of whom is a Class I officer and such parent dies or suffers permanent incapacitation and before such death or such incapacitation has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years

(e). parents, both of whom are class I officers die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years

Provided that the rule of exclusion shall not apply in the following cases;

(a). Sons and daughters of parents either of whom or both of who are Class I officers and such parents(s) dies/die or suffer permanent incapacitation.

(b). A lady belonging to OBC category has got married to a Class-I officer, and may herself like to apply for a job.

- B. Group B/Class II officers of the Central & State Service (Direct Recruitment) Son(s) and daughter (s) of the
- (a). parents both of whom are Class II officers.
 - (b). parents of whom only the husband is a Class II officers and he gets into class I at the age of 40 or earlier.
 - (c). parents, both of whom are Class II officers, and one of them dies or suffers permanent incapacitation and either one of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of 5 years before such death or permanent incapacitation;
 - (d). parents of whom the husband is a Class I officer (direct recruit or pre-forty promoted) and the wife is a Class II officer ad the wife dies; or suffers permanent incapacitation; and
 - (e). parents, of whom the wife is a Class I officer (Direct Recruitment or pre-forty promoted) and the husband is a Class II Officer and the husband dies or suffers permanent incapacitation.

Provided that the rule of exclusion shall not apply in the following cases:

Sons and daughters of

(a). Parents both of whom are Class II officers and one of them dies or suffers permanent incapacitation.

(b). Parents, both of whom are Class II officers and both of them die or suffer.

Permanent incapacitation, even though either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years before their death

C. Employment in Public Sector Undertaking etc.

The criteria enumerated in A & B above in this Category will apply mutatis mutandis to officers holding equivalent or comparable posts in PSUs, Banks, Insurance Organisation Universities, etc. and also to equivalent or comparable posts and positions under private employment, pending the evaluation of the posts on equivalent or comparable basis in these institutions, the criteria specified in Category VI below will apply to the officers in the Institutions.

III. ARMED FORCES INCLUDING PARAMILITARY FORCES whom (persons holding civil posts are not included) Son(s) and daughter(s) of parents either or both of whom is or are in the rank of Colonel and above in the Air, Army and to equivalent posts in the Navy and the Air Force and the Para Military Forces. Provided that:-

(i). if the wife of an Armed Forces Officer is herself in the Armed Forces (i.e. the category under consideration) the rule of exclusion will apply only when she herself has reached the rank of Colonel;

(ii). the service ranks below Colonel of husband and wife shall not be clubbed together;

(iii). If the wife of an officer in the Armed Forces is in Civil employment, this will not be taken into account for applying the rule of exclusion unless she falls in the service category under item No.II in which case the criteria and conditions enumerated therein will apply to her independently

IV PROFESSIONAL CLASS AND THOSE ENGAGED IN TRADE AND INDUSTRY

(I). Persons engaged in profession as a doctor, lawyer, chartered accountant, Income -tax consultant, financial or management consultant, dental surgeon, engineer, architect, Criteria specified against Category VI will apply:-

computer specialist, film artists
and other film professional,
author, play wright, sports person,
sports professional, media
professional or any other vocations
of like status.

II. Persons engaged in trade, business and industry. Criteria specified against
Category VI will apply:
Explanation:

(i). Where the husband is in some profession and the wife is in class II or lower grade employment, the income/wealth test will apply only on the basis of the husband's income.

(ii). If the wife is in any profession and the husband is in employment in a class II or lower tank post, then the income/wealth criterion will apply only on the basis of the wife's income and the husband's income will not be clubbed with it.

V. PROPERTY OWNERS
Agricultural holdings

Son(s) and daughter(s) of persons belonging to a family (father, mother and minor children) which owns

(a). only irrigated land which is equal to or more than 85% of the statutory area, or

(b). both irrigated and unirrigated land, as follows:

(i). The rule of exclusion will apply where the precondition exists that the irrigated area (having been brought to a single type under a common denominator) 40% or more of the statutory ceiling limit for irrigated land (this being calculated by excluding the unirrigated portion). If this precondition of not less than 40% exists the only the area of unirrigated land will be taken into account on the basis of the conversion formula existing, into the irrigated type. The irrigated area so computed from unirrigated land shall be added to the actual area of irrigated land and if after such clubbing together the total area in terms of irrigated land is 80% or more of the statutory ceiling limit for irrigated land, then the rule of exclusion will apply and disentitlement will occur.

(ii). The rule of exclusion will not apply if the land holding of a family is exclusively unirrigated.

- B. Plantations
- (i). Coffee, tea, rubber, etc. Criteria of income/wealth specified in Category VI below will apply.
- (ii). Mango, citrus, apple plantation etc. Deemed as agricultural holding and hence criteria at above under this Category will apply.
- C. Vacant land and/or buildings in urban areas or urban agglomerations VI below will apply.
- Explanation : Building may be used for residential industrial or commercial purpose and the like two or more such purposes.
- VI. INCOME/WEALTH TEST
- Sons(s) and daughter(s) of
- (a). Persons having gross annual income of Rs. 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years.
- (b). Persons in Categories I,II,III, and V A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within income/wealth criteria mentioned in (a) above.

Explanation :

(i). Income from salaries or agricultural land shall not be clubbed;

(ii). The income criteria in terms of rupee will be modified taking into account the change in its value every three years. If the situation, however, so demands, the interregnum may be less.

Explanation : Wherever the expression “permanent incapacitation” occur in this schedule, it shall mean incapacitation which results in putting an officer out of service.”

Annexure - II

The Governor of Bihar promulgated Ordinance No. 5 of 1995 on January 27, 1995 called “the Bihar Reservation of vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995. By the said Ordinance Section 4 of the Bihar Act 3 of 1992 was amended and after the second proviso, the following was added;

“Provided also that reservation under clause (d) shall not apply to the category of backward classes specified in Schedule III.”
Schedule III is reproduced hereunder:

Scheduled III

[See Section 4(2)]

1. The son or daughter of the President of India, the Vice-President of India, the Chief Justice and Judges of the Supreme Court of India, the Chief Justice and Judges of the High Court the Chairman and Members of the Union Public Service Commission and the Chief Election Commissioner;
2. The son or daughter of such officers who has been directly recruited in Class I Services of the Central Government or a State Government or an Undertaking or an institution fully or partly financed by them; and
 - (a). Whose income from salary is rupees ten thousand or more per mensem, and
 - (b). Whose wife or husband, as the case may be, is at least a graduate, and
 - (c). Who or his wife or her husband, as the case may be owns a house in an urban area, and
 - (d). Whose mother or father has also been directly recruited to Class I services.

Explanation – Class I means the pay bracket fixed by the State Government from time to time for Class I.

3. The son or daughter of such person engaged as doctor, advocate, charter accountant, tax consultant, financial consultant, management consultant, architect or other professionals, and
 - (a). Whose average income from all sources for three consecutive financial years is not less than rupees ten lakhs per annum; and
 - (b). Whose wife or husband, as the case may be, is at least a graduate; and
 - (c). Whose family owns immovable property at least of rupees twenty lakhs.
4. The son or daughter of such person engaged in trade or commerce, and
 - (a). Whose average income from all sources for three consecutive financial years is not less than rupees ten lakhs per annum; and
 - (b). Whose wife or husband, as the case may be, is at least a graduate; and
 - (c). Whose family owns immovable property at least of rupees twenty lakhs.
5. The son or daughter of such industrialist
 - (a). Whose level of investment in running unit or units is more than rupees ten crores; and
 - (b). Such unit or units are engaged in commercial production for at least five years; and
 - (c). His wife or husband, as the case may be, is at least a graduate.

6. The son or daughter of such agricultural land holder:
 - (a). Whose average income from all sources other than agriculture for three consecutive financial years is not less than rupees ten lakhs per annum; and
 - (b). Whose wife or husband, as the case may be, is at least a graduate; and
 - (c). Who or his wife or her husband, as the case may be, own house at least of rupees twenty lakhs in an urban area.
7. The son or daughter of person, other than the persons specified in serial 1 to 6 of this Schedule :-
 - (a). Whose main source of income is other than animal husbandry, fisheries, poultry, weaving, craftsmanship, handicraft and artisanship; and
 - (b). Whose average income from all sources for three consecutive financial years is not less than rupees ten lakhs per annum; and
 - (c). Whose wife or husband, as the case may be is at least a graduate; and
 - (d). Whose family owns immovable property at least of rupees twenty lakhs.
8. If a person included in serial 1 to 7 of this schedule performs inter-castes marriage with a backward class person other than the categories under serial 1 to 7 of this Schedule, his/her son or daughter shall not be excluded.

Note:- I. The level of income and the value of property shall be modified taking into account the variation in the money value every three years or less period, as the situation may demand.

Note:- II. An affidavit filed by the father or the mother of the candidate, or in case of their death, by the candidate himself, shall be deemed to be decisive in respect of income, value of property and educational qualification.”

Annexure– III

So far as the State of Uttar Pradesh is concerned the categories sought to be excluded from the backward classes (creamy layer) are mentioned in Schedule II read with Section 3(b) of the Uttar Pradesh Public Service Reservation of Scheduled Castes and Scheduled Tribes and Other Backward Classes Act, 1994. The said categories are as under:

<u>“Categories of Persons excluded”</u>	<u>Criteria for exclusion</u>
1. Sons and daughters of	
(a), IAS, IFS, IPS, Indian Forest Service other Central service (direct or promotee)	(i). Income from salary of service is 10,000/- or above per mensem
(b).U.P. Civil Service, U.P. Police Service State Service (direct recruitment)	(ii). Spouse is at least Graduate. (iii). He or his spouse owns a house in urban area.
(c). Group A/Class-I officers of any Deptt. or Ministry of Govt. of India or Educational, Research or other institutions (No.1 included In above(a).)	
(d). Group A/Class-I officer of any Deptt. or Institution of State Govt. (No.1 included In (b) above)	
(e). An officer of defence forces or Para Military forces not below rank of colonel or equivalent.	

2. Sons and Daughters of --

Persons engaged in profession as a doctor, Surgeon, engineer, lawyer, architect, Chartered Accountant, media & Information professional, management and other consultant, film artist & other film professional, running educational institution or coaching institute or

engage in the business as a share broker or in entertainment business

i) his average income from all sources should not be less than Rs. 10 Lakh per for 3 consecutive financial years.

ii). Spouse at least a graduate

iii). His family property (immovable) should be worth Rs. 20 Lakh.

3. Sons and daughters of Businessman.

i). Provided whose average income for 3 consecutive financial years is not less than Rs. 10 Lakh per annum.

ii). Spouse at least a graduate.

iii). immovable family property worth at least 20 lakhs.

4. Sons and daughters of Industrious.

i). whose Level of investment in running units is over Rs. 10 crore and such units are engaged in production for at least 5 years.

ii). Spouse at least a graduate.

5. Sons and daughters of – a person whose holdings is within limit fixed under the U.P Imposition of Ceiling on Land Holdings Act 1960.

i). has an income of Rs. 10 Lakhs in a year from sources other than agriculture.

ii). His Spouse at least a graduate.

6. Sons and daughters of – any other person not mentioned in aforementioned categories.

i). Whose income from all sources for 3 consecutive financial years is not less than Rs. 10 Lakhs per annum.

ii). Spouse at least a graduate.

iii). Immovable family property worth at least Rs. 20 Lakhs.

TABLE OF CASES

TABLE OF CASES

- A. Periakaruppan Vs. State of Tamil Nadu, AIR 1971 Sc 2303.
- Abhoy Pada Saha Vs. Sudhir Kumar Mandal, AIR 1967 SC 115.
- Administrator General of Madras Vs. Anandachari (1886) ILR 9 Mad 466.
- Akhil Bhartiya Sochit Karamchari Sangh Vs. Union of India, AIR 1981 Sc 300
- All India Station Masters Association Vs. G.M. Central Railways, AIR 1960 SC 384.
- Amalendu Kumar VS State, AIR 1980 Par. 1 (F.B.)
- Ameerunisa Begum v. Mehboob Begam, AIR 1953 SC 91
- Anil Kumar v. State of Mysore, (1969)17 Mys. Law Rep. 110
- Arti v. state of J & K, AIR 1981 SC 1009
- Atma Ram v. King Emperor, AIR 1924 Nag. 121
- B.C. Wwain v. Secretary, Works & Transportation Department AIR 1974 Orissa 115
- B. Venkataraman v. State of Madras, AIR 1951 SC 223
- Baker v. Carr, 369 US 186 (1962)
- Banarasi Das v. State of U.P., 1956 SCR 357
- Basavalingappa v. Munichinappa, AIR 1965 SC 1269
- Bhaiya Ram v. Munda Anirudha Patar, AIR 1971 SC 155
- Brown v. Board of Educatin, 347 US, 489 (1954)
- Budhan v. State of Bihar, 950 SCR 191
- Bhaiyalla v. Harikrishna Singh, AIR 1965 SC 1557
- C.K. Achuthan v. State of Kerala, AIR 1959 SC 490
- C.M. Anumugam v. S Rajgopal, AIR 1976 SC 939
- Charanjit Lal v. Union of India, AIR 1951 SC 41

- Chandappa v. Luxman Naik, AIR Mys. 182
- Chitra Ghosh v. Union of India, AIR 1970 SC 35
- Comptroller and Auditor General v. Jagammathan, AIR 1987 SC 537
- Chotey Lal v. State of U.P., AIR 1979 All. 135
- Cooposami Chetty v. Durraisami Chety (1910) ALR 33 Mad. 67
- D. C. Vishwanath v. Government of Mysore, AIR 1964 Mys. 132
- D.N. Chanchala v. State of Mysore, Air 1971 SC 1762
- Dattatraya Motiram v. Bombay, AIR 1953 Bomb. 842
- Desu Ravadu v. Andhra Pradesh Public Service Commission, AIR 1967 AP 353
- Duncan v. Louisiana, 391 US 145 (1968)
- Deepak v. State of Bihar, AIR 1982 Pat. 126
- Deva Ram v. State of Haryana, AIR 1974 P&H 279
- G. Dasrath Rama Rao v. State of A.P., AIR 1961 SC 564
- G.K. Kelkar v. Chief Controller of Imports, Air 1967 SC 839
- G. Michael v. S. Venkateshwaran, AIR 1952 Mad. 474
- G. Sambireddy v. G. Jayamana (1972) App. 156
- Ganga Ram v. Union of India, AIR 1970 SC 2178
- General Manager Southern Railways v. Rangachari, AIR 1962 SC 36
- Gopal Narain v. State of U.P., AIR 1964 SC 370
- Griffin v. Illinois, 351 US, 12,17 (1958)
- Grovey v. Townsend, 295 US, 45 (1935)
- Hariharan Pillai v. State of Kerala, Air 1968 Ker. 42 (F.B.)
- Hari Prasad Mulshankar Trivedi v. V.B. Raju, Air 1973 SC 2602
- Indra Sawhney v. Union of India, AIR 1993 SC 477

Indra Sawhney-II v. Union of India (2000) 1 SCC 168

Jacob Mathew v. State of Kerala, AIR 1964 Ker. 39

Jagdish Rai v. State of Harayana, AIR 1977 P & H 56 (F.B.)

Jagdish Saran v. Union of India, AIR 1980 SC 280

Jai Singham v. Unio of India, AIR 196 Sc 1427

Janki Prasad Parimod v. State of J & K, AIR 1973 SC 930

Joshi, D.P. v. State of M.B. (P), AIR 1955 SC 334

K.C. Vasanth Kumar v. State of Karnataka, May 8, 1985 SCALE Vol. 1, No.19.

K.S. Jayashree v. State of Kerala, AIR 1976 SC 2381

Kathi Raning Rawat v. State of Saurashtra, AIR 1952 SC 123

Kasava Iyanger B.S. v State of Mysore, AIR 1956 Mys. 20

Keshavananda Bharti v. State of Kerala, (1973) 4 SCC 225, AIR 1973 SC 1461.

Khandige Sham Baht v. Agricultrual, I.T.O. Kaseragod, AIR 1963 SC 591

Kishan Singh v. State of Rajasthan, AIR 1955 SC 795

Kishori Mohanlal Bakshi v. Union of India, AIR 1962 SC 1139

Kolpfer v. North Carolina, 383 US 213 (1967)

Kumar Nivedita Jain v. State of M.P. AIR 1981 MP 129

Laxman Siddappa Naik v. Kathmani Chandappa Jamparia, AIR 1965 Sc 929

M.R. Balaji v. State of Mysore, AIR 1963 SC 649

Madhava Rao Scindia v. Union of India, AIR 1971 SC 530

Madhuri Patel v. Additional Commissioner Tribal Development, JT (1994) 5 SC 488

Mallov v. Hogan, 378 US 1 (1964)

McMillan v. Guest, A.C. 561, 566 (1942)

Meghraj Kothari v. Delimitation Commissioner, Air 1967 Sc 669

Menon v. State of Rajasthan, AIR 1963 SC 81

Michael Pillai v. Barthe, AIR 1917 Mad. 431

Mohan Singh Chawla v. Punjab University, AIR 1997 SC 788

Mrs. A. Cracknell v. State, AIR 1952 All 746

N.P. Ponnuswami v. Returning Officer, Air 1952 SC 64

Nainsukh Das v. State of U.P., AIR 1953 SC 384

Nishi v. State of J & K, AIR 1980 SC 1975

Nixon v. Condon, 286 US 73 (1932)

Nixon v. Hirodon, 273 US 536 (1927)

P. Rajendran v. State of Madras, AIR 1968 SC 1812

Painter v. Texas, 380 US 400 (1965)

Punjab Province v. Daulat Ram, AIR 1946 PC 66

R. C.Cooper v. Union of India, AIR 1970 SC 564

R. Chitralkha v. State of Mysore, AIR 1964 SC 1823

Rama Kant Chaudhary v. State of Bihar, 1979 BLJR 554

Rama Krishna Singh Ram Singh v. State of Mysore, AIR 1960, Mys. 338

Ramkrishna v. Justice S.R. Tandolkar, Air 1958 SC 538

Ram Saran v. Dy. I.G. Police, Ajmer, AIR 1964 SC 1559.

Ramesh Chandra Garg. V. State of Punjab, AIR 1966 Punj. 476

Roshan Lal Tondon v. Union of India, AIR 1967 SC 1889

Rice v. Elmore, 333 US 875 (1948)
Rustam Modi Parsi v. State of M.B., AIR 1954 M.B. 119

S.A. Partha v. State of Mysore, AIR 1961 Mysore 220
Sanghar Umar Ravmal v. State, AIR 1952 Sau. 124
Satish Chandra v. Union of India, AIR 1953 SC 250
Satwant Singh v. AP.O., New Delhi, AIR 1967 SC 1836
Sham Sundar v. Union of India, AIR 1969 SC 212
Smith v. Allwright, 321 US 649 (1944)
State of A.P. v. P. Sagar, AIR 1968 SC 1379
State of A.P. v. U.S.V. Balram, AIR 1972 SC 1375
State of Bombay v. Bombay Education Secretary, AIR 1954 SC 561
State of Bombay v. Naru Appa Mali, AIR 1952 Bom. 84
State of Kerala v. Jacob Mathew, AIR 1964 Ker 316
State of Kerala v. Krishna Kumari, Air 1976 Ker. 54
State of Kerala v. N.M. Thomas, AIR 1976 SC 490
State of Kerala v. Rafia Rahim, AIR 1978 Ker. 176
State of Kerala v. T.P. Roshna, AIR 1979 SC 765
State of M.P. v. Puranchand, Air 1958 M.P. 352
State of Madras v. Smt. Chanpakam Dorairajan, AIR 1951 SC 226
State of Mysore v. P. Narasingh Rao, Air 1968 Sc 349
State of Punjab v. Hiralal, AIR 1971 SC 1777
State of Sikkim v. Surendra Prasad Sharma, JT (1994) 3 SC 372
State of U.P. v. Deoman Upadhya, AIR 1960 SC 1125
State of U.P. v. Pradeep Tandon, AIR 1975 SC 563
State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75
Subash Chandra v. State of U.P., AIR 1975 SC 563
Subhashni v. State of Mysore, Air 1966 Mys. 40

Sudhir Kumar Ghosh v. Auk Kameya, XXVII CLT(short Notes) 5, 1961

Sugutha Prasad v. State of Kerala, AIR 1965 Ker. 19

Sukhdev v. The Government of A.P., 1966 W.R. 294

Suknanda Thakur v. State of Bihar, Air 1957 Pat. 617

T. Devadasan v. Union of India, Air 1964 SC 179

T.G. Shivacharan Singh v. State of Mysore, AIR 1965 SC 280

T. Shameem v. Medical College Trivendrm, Air 1976 Ker. 131

Triloki Nath Tikku v. State of J&K, AIR 1969 SC 1

Umesh Chandra Sinah v. V.N. Singh, AIR 1968 Pat. 3.

Union of India v. Dr. Mrs. S.B. Kohli, AIR 1973 SC 811

Union of India v. V.P. Prabhakaran, (1971) 11 SCC 6338

Union of India v. Kashikar, AIR 1986 AIR 431

V. G. Row v. State of Madras, AIR 1951 Mad. 147 (F.B.)

V.V. Giri v. D,S, Dora, AIR 1959 SC 1318

Virendra v. Union of India, AIR 1992 All 147

Vishwanath v. Government of Mysore, AIR 1964 Mys. 132

William v. Mississippi, 170 US 213 (1898)

Yangnapurushadasji v. Muldas, AIR 1966 SC 1119.

BIBLIOGRAPHY

B I B L I O G R A P H Y

- Abid Husain, S. : Indian Culture (1963) Asia Publishing House
- Acton : Essay on Freedom and Power
- Agarwal, U.C. : More Equal Than Others, Hindustan Times, July, 18, 2003
- Alexandrowice : Constitutional Development in India (1957) Oxford University Press
- Allchin, Bridget : The Birth of Indian Civilization (1968) Hardonodsworth, Penguin Books
- Andre Beteille : Affirmative Action revisited, The Hindu, June 30, 2003
- Andre Beteille : The Idea of Natinal Inequality and Other Essays (1983), Oxford University Press
- Arora, N.D. : The Lok Sabha Elections in India (1977), Pragatee Prakashan
- Austin, Granville : The Indian Constitutional Cornerstone of a Nation (1972), Bombay University Press
- Bernerjee, D.N. : Our Constitutional Rights (Their Nature and (Extent) (1960), The World Press Pvt. Ltd., Calcutta
- Basu, D.D. : Commentaries on the Constitution, Vth Edition, S.C. Sarkar & Sons (Pvt) Ltd. Calcutta
- Borale, P.T. : Segregation and Desegregation in India- A Soco-Legal Study, Manaktalas, Bombay.
- Brant Irving : The Bill of Rights (1965), New York, Bobbs – Merrill

- Canney, A. Maurice : An Encyclopaedia of Religion (1976)
Delhi, Nag Publishers
- Cowell, Herbert : The History and Constitution (TLL) Vth
Edition (1905), Thacker, Spink & Co.
- Dastur, Aloo J. and : Studies in the Fourth General Elections,
1972 Others Allied Publishers Pvt. Ltd.
- Desai, A.R. : Social Background of Indian Nationalism
(1976), Popular Prakashan, Bombay
- Deshmukh, B.G. : Reservation Issue, The Hindu, June 15,
2003
- Deshpande, V.S. : People and the Constitutiona, (1974) JILI,
Vol. 16
- Dicey, A.V. : Introduction to the Study of the Law of the
Constitution (1962), London, Macmillan &
Co. Ltd.
- Dixon, R.B. : The Racial History of Man (1923)
- D.J.De, : Interpretation & Enforcement of
Fundamental Rights, 2000
- Dushkin, L. : Scheduled Caste Politics
- Diwan, Paras : Indian Political Parties in the Working of
Parliamentary Democracy – an Analysis,
(1972), JILI, Vol. 19
- Friedman W. : “Law in Changing Society,” Sweet &
Maxwell Ltd. U.K. 1972
- Galanter Marc : Law and Society in Modern India,” Oxford
University Press, New Delhi, 1997,

- Gajendragadkar, P.B.: Secularism and The Constitution of India (1971), Bombay University Press, Bombay.
- Galanter Marc : Competing Equalities (1984), Oxford University Press, Delhi
- Ghouse, Mohammad: Judicial Control of Protective Discrimination (1969) JILI
- Ghurye, G.S. : Caste and Race in India, Vth Edition, Popular Prakashan, Bombay
- Gill, S.S. : Diluting Mandal, The Hindu, June 24, 2003
- Grierson, G.A. : Linguistic Survey of India (1927), Vol. I Part I, Government of India Central Publications branch, Calcutta
- Guha, B.S. : Racial Elements in the Population
- Gunnar Myrdal : Asian Drama (1968), Vol. I & II, Allen Lane
The Penguin Press, London.
- Gwayer & Appadorai: Speeches and Documents on the Indian Constitution (1921-47), Vol. I and II, Oxford University Press, Bombay
- Harris, Robert J. : The Quest for Equality (1960), Louisiana State University Press, Baton Rouge.
- Hartmann, Horst : Political Parties in India (1977) Meenakshi Prakashan.
- Hidayatullah, M. : Democracy in India and the Judicial Process (1966), Asia Publishing House
- Indian Law Institute : Constitutional Developments since Independence New Delhi (1975).

- Educational Planning (1967)
Minorities and the Law(1972)
- The Hindustan Times, October 4, 2003
- Institute of Constitutional and Parliamentary Studies : Elections and Electoral Reforms (1971);
Horizon of Freedom(1969)
- Jacson, J.A. : Social Stratification (1968), Cambridge
University Press
- Jain, M.P. : Indian Constitutional Law (1978), N.M.
Tripathi Pvt. Ltd. Bombay.
- Jaiswal, S.S. : Reservation Policy and the Law, 2000.
- Jennings, W. Ivor : The Law and the Constitution (1952),
University of London Press Ltd.
- Kagzi, M.C.J. : Segregation and Untouchability Abolition
(1970), Metropolitan Book Co.
- Kamble, J.R. : Rising and Awakening of Depress Classes
in India, 1979.
- Kashyap, Subhash C.: Jawaharlal Nehru and the Constitution
(1982), Metropolitan Book Co.
- Keer, Dhananjay : Dr. Ambedkar, Life and Mission (1964),
Popular Prakashan, Bombay.
- Keeton, G.M. : The Elementary Principles of Jurisprudence
(1961) Second Edition, Sir Isaac Pitman
and Sons, Ltd., London
- Keith, A.B. : A Constitutional History of India (1961)
(1600-1935), Central Book Depot,
Allahabad
- Kothari, Rajni : Politics in India (1970), Orient Longman
Ltd.
- Kuppuswamy, B. : Social Change in India, VIth Edition, Vikas

Publishing House Ltd.

- Lakoff, Sanford, A. : Equality in Political Philosophy (1964)
East-West Centre Press Hnolulu
- Lal, Shiv : National Parties in India (1972), J.B.
Printers, New Delhi
- Lal, Shiv : Elections in India (1978), J.B. Printers,
New Delhi
- Laski, Heraid, J. : Liberty I the Modern State (1948) New
Edition, George Allen & Unwin Ltd.
Museum Street, London
- Lipson, Leslie : The Democratic Civilization (1964),
Oxford University Press
- Loomi, Charles, P. : Socio-economic Change and Religious
Factors in India (1968), East-West Press,
New Delhi
- Mahajan, V.D. : Constitutional History of India, VIIIth
Edition (1971), S. Chand & Co. New Delhi.
- Maheshwari, Shri : The General Elections in India (1963),
Chaitanya Publication House, Allahabad
- Majumdar, D.N. : Races and Cultures of India (1961), Asia
Publishing House, Bombay
- Mani, P.N. Krishna : Elections Candidates and Voters (1971),
Institute of Constitutional and
Parliamentary Studies, New Delhi
- Mayo : Democratic Theory
- McIver : The Wel of Government
- Mehta, Ashok : The Political Mind of India (1952)
- Miller & Robbert : The People of India)paper material)

- Mirchanandam, G.G.: The People s Verdict (1980), Vikas Publishing House Pvt. Ltd.
- Mukerji, D.P. : Diversities 91958), People Publishing House
- Mukerjee, Radhakamal: A History of Indian Civilization (1956), Hind Kitabs, Bombay
- Mukerji, Nirod : Standing at the Cross Roads (1964), Allied Publishers Pvt. Ltd. Bombay
- Myers, Henry Alonzo: Are Men Equal (1955) Great Seal Books
- Palkhiwala, N.A. : Our Constitution Defaced and Defiled (1979) The Macmillan Co. of India
- Panchanadikar, K.C. : Determinants of Social structure and Social Change in India (1970), Bombay, popular Prakashan
- Panikar, K.M. : Hindu Society at Cross Roads (1955) Asia Publishing House
- Panikar, M.M. : The State and the Citizen (1960), Asia Publishing House
- Park & Tinker : Leadership and Political Institution in India
- Piggot, Stuart : Prehistoric India (1952), Penguin Books
- Poschell : Internaional seminar on Harappan Civilization (Reference Material)
- Prasad, Anirudh : Social Engineering and Constitutional Protection of Weaker Sections in India (1980), Deep & Deep Publications, New Delhi
- Pylee, M.V. : Constitutional Government in India, Asia

Publishing House

- Radhakrishnan, N : Unit of Social, Economic and Educational Backwardness (1965) 7 JILI, New Delhi
- Radhakrishnan, S. : Religion and Culture (1968), orient Paper Backs
- Rajeev Dhavan : Reservation For All ? The Hindu, June 13, 2003
- Rao, K. Subba : Conflicts in Indian Polity (1972), S. Chand & Co. Pvt. Ltd.
- Rao, B. Shiva : The Framing of India's Constitution, Select Documents, Vol. I,II, III, IV, and V (1966), The Indian Institute of Public Administration, New Delhi, Government of India Press.
- Rao. B.N. : India's Constitution in the Making (1960) Orient Longmans
- Rao, K.V. : Parliamentary Democracy of India - A Critical Commentary (1965), The World Press Pvt.Ltd.
- Ross, J.F.S. : Representative Democracy
- Rudolph & Rudolph : The Modrenity of Tradition, Political Development in India, the University of Chicago Press, Chiago and London
- Sagar, S.L. : Hindu Culture and Caste System In India, (1975), Uppal Book Store, Delhi.
- Sathe, S.P. : Fundamental Rights and Directive Principles of State Policy (1975), JILI.
- Sathe, S.P. : Reservation of Seats in Legislatures for Scheduled Castes and Schduled Tribes, Minorities and the Law, (1972), JILI.

- Schwartz, Bernard : The fourteenth Amendment (Centennial Vol.) (1970), The Indian Press, Calcutta
- Setalvad, M.C. : The Indian Constitution (1967) (1950-1965) University of Bombay
- Seervai, H.M. : Constitution of India, (1983) IIIrd Edition, N.M. Tripathi Pvt. Ltd. Bombay
- Shastri, K.N.R. : An Analytical Study of 1967 General Elections in India, Vishva Bharti Prakashan
- Shukla, V.N. : The Constitution of India (1980), Eastern Book Co., Lucknow
- Singh, Bakhshish : The Supreme Court of India as an Instrument of social justice (1976), Sterling Publication Pvt.Ltd.
- Singh, Permanand : Equality of Reservation and Discrimination in Indian (1982), Deep & Deep Publications, New Delhi
- Smith, D.E. : India as a Secular State (1963), Princeton University Press
- Srinivas, M.N. : Caste in Modern India (1970), Asia Publishing House
- Srinavas, M.N. : Social Change in Modern India (1972) Orient Longman, Bombay
- Thaper Romila : A History of India, Vol. I, Penguin Book.
- Thomson, D. : Equality (1949)
- Tope, T.K. : Constitutional Law of India (1982), Eastern Book Co., Lucknow
- Tresolini, Rocco, J. : American Constitutional Law (1959) The Macmillan Company, New York.

- Tripathi, P.K. : Some Insights Ito Fundamental Rights (1971), University of Bombay, Bombay
- Udayakumar, S.P. : Reservation Needs Revamping, The Hindu, July 1, 2003
- Venkatesan, J. : Quota For EBCs – “Constitutional Amendment Needed,” The Hindu, June 18, 2003
- Verma, G.P. : Caste Reservation in India, Law and the Constitution (1980), Chugh Publications
- Wade & Phillips : Constitutional Law (1955), Vth Edition, Longmans Green and Co., London