SOCIAL JUSTICE AND WEAKER SECTIONS : ROLE OF THE JUDICIARY

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DECLARATION

I do hereby declare that my thesis "Social Justice and Weaker Sections: Role of the Judiciary" is the record of the original work carried out by me under the guidance and supervision of Professor Dr. P. Leelakrishnan, Professor and Head, Department of Law, Cochin, University of Science and Technology. This work has not been submitted either in whole or in part, for any degree at any University.

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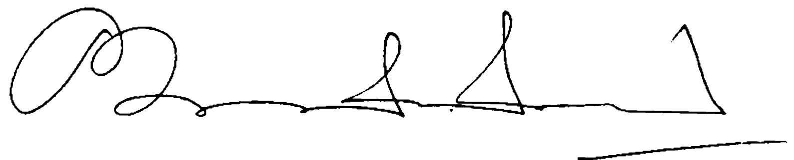
CERTIFICATE

This is to certify that this thesis "Social Justice and Weaker Sections: Role of the Judiciary", submitted by Smt. P. Nagabooshanam, for the Degree of Doctor of Philosophy is the record of bona fide research work carried out by her as part-time research scholar of Department of law, Cochin University of Science and Technology, under my guidance and supervision from 18th March 1984. Earlier she carried out research work under the supervision of Dr. Joseph Minatoor from 15.10.1980 to 17.3.1984. This Thesis or any part thereof, has not been submitted elsewhere for any other degree.



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GUIDE

PREFACE

The Constitution of India, which has been described by an eminent writer as a "Corner stone of a nation", has bestowed sufficient thought on the underprivileged. A number of provisions incorporated in it for their benefit tell the tale of statesmanship of the framers of the Constitution, for the vitality of a Constitution depends on the extent to which it affords protection to the under-priveleged. One such laudable provision in the Constitution relates to "weaker sections of the people", which has directed the State to promote with special care the educational and economic interests of such people. Besides, the Constitution has laid great stress on social justice. No comprehensive analysis in a single work seems to have been made so far of the connotations of social justice and the scope of the constitutional safeguards provided in favour of the weaker sections of the people. This thesis is the result of an attempt to analyse the connotations of social justice and the scope of the constitutional provisions made for the benefit of the weaker sections and the role played by the judiciary in this field.

The expression "weaker sections of the people" is not defined in the Constitution. But, certain indications have been given in the Constitution to identify them. So, an attempt has been made in the Introduction to identify them. A scrutiny

of the provisions of the Constitution, particularly of part III in the Constitution, has revealed the use of four phrases, namely, "women", "Scheduled Castes and Scheduled Tribes", "Backward Classes" and "socially and educationally Backward Classes". So, the scope of the thesis has been indicated in the Introduction. It is confined to the ascertainment of meaning and contents of social justice, identification of certain weaker sections, particularly the socially and educationally Backward Classes, and examination of the extent to which social justice has been rendered or made meaningful to the said four groups of weaker sections. Further, the enquiry has been focussed mainly on the decisions of the judiciary bearing on the subject.

Having thus delimited the scope of the thesis in the Introduction, the concept of social justice has been discussed in three succeeding chapters. The first chapter deals with the semantics of social justice. In this chapter various theories of social justice have been examined and the more viable and serviceable theory has been identified. The preambular concept of social justice has been dealt with in the second chapter. Views of the framers of the Constitution on the subject and relevant constitutional provisions and developments have been analysed. Conclusion reached therein is that the preambular social justice envisions establishment of distributive justice-oriented, non-exploitative and egalitarian social order in India.

The third chapter deals with the meanings attributed to, and the unique role designed for, the concept of social justice by the judiciary in its various decisions.

The phrase "socially and educationally Backward Classes" in Article 15(4) and the term "Backward Classes" in Article 16(4) have not been defined. This has given rise to crucial problem as to what test or tests should be applied to determine the backwardness of people for the purpose of Articles 15(4) and 16(4). The fourth and fifth chapters are devoted to the discussion of this problem. The former is devoted to the discussion of reports submitted by a number of Backward Class Commissions and the latter to the discussion of decisions of the courts bearing on the subject. The discussions have revealed that the majority of the Backward Class Commissions have adopted a narrow view on the subject, whereas the courts have displayed broader attitude and pragmatism in suggesting the criteria or tests to determine backwardness of people for the purpose of Articles 15(4) and 16(4).

Compensatory discrimination in favour of Backward Classes of citizens in the field of education is essential in an imbalanced socio-economic order to ensure social justice to the under-privileged classes. This topic has been discussed indepth in the sixth chapter. Such important aspects as equality in law, equality in fact, quantum of reservation and time span for

reservation have been discussed therein. Reservation of appointments or posts in service under the State in favour of Backward Classes is another instance of compensatory benefit or protective discrimination. This topic has been dealt with in the seventh chapter. Extent of reservation, carry-forward rule, limited carry-forward rule, reservation at promotion stage, protective discrimination under Article 16(1), adequacy of representation and nature or theme of the provisions in Article 16(4) have been discussed at length and critically examined in the chapter.

The next two chapters deal with the position of women and the extent to which social justice has been made meaningful to them. The eighth chapter deals with law, women and their position during the pre-constitution period. Here an attempt has been made to analyse the position of women in the ancient Indian legal system in particular and in the Indian society in general and reformative measures taken to ameliorate their condition. The discussion has led to certain conclusions (1) that the ancient Hindu law treated women with great circumspection and gave them a qualified status, which was far better and more edifying than the position of perfect tutelege and status of manum viri given to women in the ancient Roman law, (2) that it is only certain historical facts of the later period that led to the crystalisation of restrictive social norms and

practices, which deprived women of their valuable rights and reduced their position to that of a slave, and (3) that the reformative legislative measures taken during the end of the last century and first half of the twentieth century to ameliorate the conditions of women touched only the fringe of the problem and not its core.

The ninth chapter deals with "Social Justice to women under the Constitution". The constitutional provisions relating to equal protection of the laws, prohibition of sex-based discrimination and protective discrimination in favour of women have served as a palladium of liberty of women. The legislative measures and executive actions taken under the protective discrimination and equality of law clauses of the Constitution have helped a great deal to improve the position of women in many spheres of life. The discussion has also led to a conclusion that much more have to be done to restore to women, irrespective of their religion, the status of equality in all spheres of life.

The last chapter, which is the tenth chapter, is the concluding chapter. In this chapter the ideas discussed in the preceding chapters have been summed up and conclusions have been arrived at. Besides, important suggestions have been made therein. The suggestions are (1) that the limited carry-forward rule laid down by the court in its decision in Karamchari Sangh

case has made an unreasonable inroad into the right to equality of opportunity in the matter of public employment guaranteed by Article 16(1) and, therefore, it requires review by a bigger Bench; (2) that the classification principle introduced into Article 16(1) by Thomas case to justify protective discrimination in favour of members of the Scheduled Castes and Scheduled Tribes in matters relating to public employment has virtually rendered the right to equality of opportunity in public employment guaranteed by Clauses (1) and (2) of Article 16 reduntant, and therefore, the Thomas decision requires complete review by a bigger Bench of the Supreme Court; (3) that the sex-based discrimination in regard to admission of students into educational institutions, which is permissible under Article 29(2) at present, must be removed by a suitable amendment to Article 29(2) in order to ensure equal treatment to men and women in matters relating to admission into educational institutions; (4) that enactment of uniform civil code is essential to ensure equality of treatment to all women irrespective of their religion or personal laws; (5) that there must be an amendment to \rticle 16 to enable the State to make reservations of posts and appointments in Government service in favour of women on the lines of Article 16(4) to enable women to compete effectively with men for posts in services under the State; (6) that a law must be enacted in India more or less on the lines of section 1 of the Domicile and Matrimonial Proceedings Act of 1973 of

England to put an end to the doctrine of unity of domicile and allow women to retain or acquire domicile of their own as independent individuals after their marriage; and (7) that the use of subtle methods of ingeneously framed rules and regulations and individualised approach to women's physical capacity to deny women of their right to equality of opportunity in public employment must be put an end to by suitable legislations.

I express my deep sense of gratitude to professor Dr. P. Leelakrishnan, Professor and Head, Department of Law, Cochin University of Science and Technology, for the care, concern and interest he has taken in guiding me at every stage of my work. Though I had moments of despair when I was asked to revise my drafts by my guide and my drafts were subjected to seemingly unending process of change to incorporate suggestions and carry out corrections made by him, I realised the wisdom of the entire course of hard work which he made me go through when I completed the thesis. I express my heartfelt thanks to him for the excellent guidance he gave me in preparing my thesis. I record my sincere thanks to the authorities of Cochin University of Science and Technology for an opportunity they gave me to register as part-time researcher and submit my thesis for the Degree of Doctor of Philosophy in Law. My thanks are also due to my husband, Dr. K.P. Krishna Shetty, who gave me constant encouragement in my research work and helped me with valuable suggestions. My sincere thanks to the Librarians of

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INTRODUCTION

INTRODUCTION

The caravan of history marches slowly and steadily through several vicissitudes of human life leaving behind in every nation and in every society a caput mortuum of human beings. This unfortunate and worthless residue of human beings in every society has been the result of the full play of the doctrine of survival of the fittest. In every society the economically and socially stronger sections have invariably and mercilessly suppressed the weaker sections and tried to keep them under subjugation throughout. They have been ably aided in their efforts by the doctrine of laissez faire economy, norms of social heirarchy and the concept of 'police state'. Quantitatively the 'social residue' or the weaker section increased and qualitatively the position of persons who came under this category deteriorated from time to time. These people have had to live under great disabilities imposed by the society. India has not been an exception to this phenomenon. By its rigid caste system and archaic social norms the Indian social order imposed additional strains on the weaker sections; and some groups of people, who had been kept cut of the pale of caste system, lived under inhuman conditions.

However, the modern concepts of Welfare economy, social service state, "social engineering", etc., have compelled the

statesmen and Constitution makers to think in terms of rendering social justice to the downtrodden in the society. It is, therefore, not surprising that the framers of the Indian Constitution, who were great statesmen, liberals and social reformers, made ample provisions in the Constitution in favour of weaker sections of the people. The main purport of the provisions incorporated in the Constitution for their benefit is to grant initial advantages to them and to continue to grant such advantages to them till they reach a stage when they would be able to march forward in dignity and as equals with others.

The Preamble of the Constitution lays stress on socio-economic justice, equality of status and of opportunity and the promotion among the people of India "fraternity assuring the dignity of the individual". The realisation of these ideals necessarily involves the upliftment of the downtrodden, and for this purpose the State has to provide sufficient advantages or to give discriminatory treatment in favour of weaker sections of the people for a reasonable period by way of atonement for the past injustice perpetrated on them. Therefore, the Constitution declares in Article 46 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".

Article 46 is a provision in Part IV of the Constitution which is entitled "Directive Principles of State Policy". Since the framers of the Indian Constitution were influenced by the Irish Constitution in formulating the directive principles, naturally the provisions of Article 46 of the Indian Constitution bear to certain extent a kinship to provisions of Article 45(4)(1) of the Irish Constitution, which states: the State pledges itself to safeguard with special care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirms, the widow, the orphan and the aged". There are certain differences between the provisions stipulated in the two Constitutions. While the Irish Constitution pinpoints a few groups of people who deserve economic assistance, the Indian Constitution particularises "Scheduled Castes and Scheduled Tribes" for the purpose of Article 46; and the Irish Constitution mentions the "economic interests of the weaker sections of the community", whereas the Indian Constitution uses the expression "the educational and economic interests of the weaker sections of the people". It is said the word "educational" was added in Article 46 of the Indian Constitution to emphasize the importance of education to the weaker sections, for without that any economic assistance rendered might not be fruitful or effective. Besides, it is said that it was the lack of education amongst them that was responsible for the perpetuation of social injustice on

them.[1] No doubt, by adding the word "educational" in Article 46, the framers of the Indian Constitution showed a great sense of pragmatism. But, the framers of the Constitution failed to provide a precise definition of the expression "weaker sections of the people". Ascertainment of the meaning of this expression is necessary for a comprehensive discussion of constitutional provisions made for the benefit of such people. Even the Irish provision does not throw much light on the meaning of the expression "weaker sections". So, meaning of the expression used in Article 46 of the Indian Constitution must be gathered from the other provisions of it.

The expression "weaker section" is not mentioned in other provisions of the Constitution. But, in Part III of the Constitution, which embodies fundamental rights, provisions have been made in three places to enable the State to make protective discrimination in favour of certain categories of people. The first provision is Clause (3) of Article 15, which authorises the State to make special provisions in favour of "women". The second provision is Clause (4) of Article 15, which enables the State to make special provisions in favour of "socially and educationally backward classes of citizens" and "Scheduled Castes and Scheduled Tribes". Though, Article 15(1) prohibits the

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1 K.C. Markandan, Directive Principles in the Indian Constitution, (Allied Publishers Private Ltd., Bombay), 1966, p.208.

State from making any discrimination against any citizen on any ground of religion, race, caste, sex or place of birth, the above mentioned provisions permit expressly the State to show concessions or to make special provisions in favour of the specific groups of people mentioned therein. The third provision is Clause (4) of Article 16 which enables the State to make reservations of posts or appointments in the Government service in favour of "Backward Classes" of citizens notwithstanding the fact that Clauses (1) and (2) of Article 16 ensure equality of opportunity in matters relating to appointments or posts in service under the State by prohibiting discrimination against any citizen based on religion, race, caste, sex, place of birth or descent while filling up such posts.

Thus, four groups of people, namely "women", "Scheduled Castes and Scheduled Tribes", "Backward Classes" and "Socially and educationally Backward Classes", have been mentioned for the purpose of special treatment. Evidently, these four groups have been treated as "weaker sections". The first and foremost weaker sections is "women", who virtually constitute one half of the population. Women in this country, as also elsewhere, did not occupy in society a position equal to men. Due to certain historical facts and social norms created by men and the laws, which kept pace with the thinking of the past ages, women occupied a servile position in society. Their rights regarding

marriage, property, succession, education etc., were very much curtailed and they were obliged to live always under the protection and tutelege of men. So they lived a life which might be a grain better than the life of slaves. The long period of supppression of women robbed them of their initiative, their power and the confidence in their ability to face life independently; and, consequently, they became weak both mentally and physically. The constraints-ridden social environment in India not only sustained their weakness but also accelerated it. Naturally, therefore, the Constitution makers thought of ameliorating their conditions and of making amendments for the past injustice by granting initial advantages or adventitious aids to women till they gain sufficient confidence and strength to compete with men in all spheres of life as equals.

The second group of "weaker section" is "Scheduled Castes and Scheduled Tribes". The meaning of the phrase "Scheduled Castes and Scheduled Tribes" is given in Clauses (24) and (25) of Article 366. The "Scheduled Castes", according to Article 366(24), means, "such castes, races or tribes or part of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for purposes of this Constitution". Article 341 says that the President may with respect to any State or Union Territory, 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 this Constitution be deemed to be Scheduled Castes" in relation to that State or Union Territory. The President issued under Article 341 of the required notifications[2] specifying a number of castes, races or tribes which were for the purposes of the Constitution deemed to be Scheduled Castes in relation to various States[3] and Union Territories.

Similarly Article 366(25) defines the "Scheduled Tribes" to mean "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 purposes of this Constitution". Then Article 342 states that the President may, with respect to any State and any Union Territory, 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 Territories. The

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2 See the Constitution (Scheduled Castes) Order, 1950, and the Constitution (Scheduled Castes) (Part C States) Order, 1951.

3 For example, in relation to the old Madras the following castes, tribes, etc., have been mentioned: Adi Andhra, Adi Dravida, Arunthathiyar, Baira, Bandi, Bariki, Bavuri, Bellara, Byagari, Chachati, Chakkiliyan, Chalavadi, Chamar, Chandala, Cherumar, Dandaso, Devandrakulanathan, Ghasi, Godari, Kadan, Kalladi, Kanakkan, Karimpalan, Kudumban, Kuravan, Kuruchchan, Madari, Maila, Mala, Mavilan, Moger, Muchi, Nalakeyava, Nayadi, Pagadai, Paky, Pallan, Panidi, Panan, Panchama, Panniandi, Paraiyan, Paravan, Pulayan, Puthiraivanan, Raneyar, Samban, Sennan, Tiruvalluvar, Valluvan, Valmiki, Vettuvan, etc.

President issued required notifications[4] under Article 342, specifying a number of tribes and tribal communities which were deemed to be Scheduled Tribes for the purpose of the Constitution in relation to several States[5] and Union Territories. Thus, there is no difficulty in identifying the Scheduled Castes and Scheduled Tribes for the purpose of favourable treatment under the Constitution.

The other two phrases are "Backward Classes" and "socially and educationally Backward Classes". They have not been defined in the Constitution. The phrase "socially and educationally Backward Classes" is used in Article 340(1), which says that the President may by order appoint a Commission to investigate the conditions of "socially and educationally Backward Classes" within the territory of India. The Commission so appointed may in its report suggest, among others, steps that should be taken to improve their condition.[6] This Article does

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4 See the Constitution (Scheduled Tribes) Order, 1950 and the Constitution (Scheduled Tribes) (Part C States) Order, 1951.

5 For example some of the tribes and tribal communities listed in relation to old Madras State are as follows: Arana-ndan, Bhottadas, Bhunias, Godabas, Goudus, Kosalya Goudus, Magatha Goudus, Kattunayakan, Konda Kapus, Kondareddis, Kondhs, Kota, Koya, or Goud with its subsects - Kudia Kurumans, Manna Dhora, Maune, Mukha Dhora, Muria, Paiga-rapu, Palasi, Paniyan, Porjas, Deddi Dhoras, Savaras, Sholaja Todda, etc.

6 Article 340(1) States: "The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally

(Contd.......)

not furnish a definition of the phrase, nor does it give a clue to its meaning.

The phrase "weaker sections" mentioned in Article 46 of the Constitution is wide enough to include women, Scheduled Castes and Scheduled Tribes, socially and educationally Backward Classes, Backward Classes, children, "untouchables" and bonded labour. Therefore, any discussion on weaker sections and social justice must be in relation to all the above mentioned groups. But, here the discussion on social justice has been carried on mainly in relation to "protective discrimination" or "compensatory discrimination" stipulated in the Constitution. Therefore, the discussion has been confined in this work to four groups of weaker sections, namely, women, Scheduled Castes and Scheduled Tribes, socially and educationally Backward Classes and Backward Classes, in whose favour provisions have been made for the said protective discrimination in three Articles of the Constitution, namely, Articles 15(3), 15(4) and 16(4). No doubt,

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6 (Contd......)
Backward Classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

Article 15(3) mentions children too.[7] But, "Children" have been left out of the scope of this work for three reasons. First, children, unlike other weaker sections, are considered to be weaker group in society because of their age and not due to the result of economic and social suppression. Secondly, age can be a basis for classification and if children are treated as a class for special treatment, there is nothing in Article 15(1) to prevent it.[8] Thirdly, the constitutional safeguards for children demands a separate and different discussion.

"Social justice and Weaker Sections" is a fascinating subject and a number of books and articles have already appeared on the topic. In this work an attempt has been made to examine the topic from an angle, which is not done hitherto. "Social Justice" is a subtle concept. Great jurists discussed it and arrived at different conclusions; the Preamble of the Constitution laid stress on it and Constitution makers explained its connotations; and the judiciary made deep analysis of it in various decisions. Necessarily, therefore, meaning and contents of "social justice" have to be ascertained after analysing the various theories

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7 Article 15(3) States: "Nothing in this article shall prevent the State from making any special provision for women and children".

8 Article 15(1) States: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

advanced by the jurists, the views expressed by the framers of the Constitution and the judicial pronouncement.

The weaker sections, which are sought to be covered in this work, are "Backward Classes", socially and educationally Backward Classes", "Scheduled Castes and Scheduled Tribes" and women. The first two categories of weaker sections have not been defined in the Constitution. So, their meaning and the criteria to determine them have to be gathered from the reports submitted by various Backward Class Commissions and judicial decisions rendered in a number of cases. The main thrust in this work is to understand the meaning and contents of social justice, identify the relevant weaker sections and to examine the extent to which the social justice has been rendered to the said weaker sections. The scope of this thesis is confined to the examination of the role of the judiciary in this field. So, the enquiry has been focussed mainly on the decisions of the judiciary bearing on the subject with a view to assessing the role of the judiciary in rendering social justice meaningful to the weaker sections in particular and to the Indian Society in general.

CHAPTER I

SEMANTICS OF SOCIAL JUSTICE

CHAPTER I

SEMANTICS OF SOCIAL JUSTICE

The clamour for social justice has been going on from time immemorial. All through the course of history societies have continued to be hierarchical in structure. Numerous attempts were made at different times by administrators, political philosophers, thinkers and seers to propound the concept of social order so that the societies might shed off their hierarchical structure. But these attempts had hardly succeeded in shaking the structure. The modern world is influenced very much by the democratic values. It is now being swept from one end to the other by the ever increasing waves of human rights. In such a context, the clamour for social justice has become more pronounced and intense, particularly in societies wherein there are large number of "socially handicapped human groups".[1] Needless to say that India is one such country wherein social justice has become the prime need of the time, which can be ignored only at its own peril. The great Republican Stalwart Abraham Lincoln, who cherished a sublime desire to liberate the Negroes from the bonds of slavery, declared,

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1 V.R. Krishna Iyer, <u>Social Justice and the Handicapped Humans</u>, (1978), p.4.

referring to his country, that this nation was "conceived in liberty and dedicated to the proposition that all men are created equal".[2] The substance and spirit of this declaration were embodied in Article 1 of the Declaration of Human Rights of 1947 made by the United Nations, which states "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".[2a] India also is a country conceived in liberty. Besides, in the presence of weaker sections or socially handicapped persons in India, the provisions of Article 1 of the Declaration of Human Rights, 1947, have made social justice the imperative need of the time for India. Therefore it is necessary to ascertain the meaning or connotation of social justice.

The concept of social justice has been viewed as a catalytic agent to render the much valued right to equality more meaningful and purposeful in all societies. It is inextricably linked with the right to equality in all spheres of human life. Harold J. Laski has rightly remarked that the more equal are the social rights of citizens, the more likely they are to be able to utilise their freedom in realms worthy of exploration.

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2 As quoted in Krishna Iyer, Id., p.32. See also Illinois v. Allen, (1970) 397, U.S. 337.

2a Article 1 of Universal Declaration of Human Rights, 1947.

History of the abolition of social privileges, according to him, has been also the history of the expansion of what in our inheritance was open to the common man. The more equality there is in a state, the more use, in general, we can make of our freedom.[3] Such cherished gifts of equality can hardly be enjoyed by all in class-ridden, caste-ridden and status-conscious hierarchical societies. So, in hierarchical societies, which consist of oppressed classes, deprived sections, under-privileged sects and socially-relegated groups, the concept of social justice assumes several connotations. In fact Justice Krishna Iyer, dealing with the problems of social justice, uses several phrases like "habilitative justice", "corrective and creative process", "dismantling of the hierarchical social system" and "distributive economic justice" to convey the differet meanings and aspects of the concept of justice.[4]

Long ago, in a different social milieu, Aristotle enunciated the doctrine of 'distributive justice', which meant the distribution of goods and honours 'to each according to his place in the community', and 'the equal treatment of those equal before the law.[5] The phrase 'to each according to his place in the

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3 Harold J. Laski, <u>Liberty in the Modern State</u>, (1948), p.52.

4 <u>Op</u>. <u>Cit</u>., pp.3, 4 and 3.

5 For a Comment see W. Friedmann, <u>Legal Theory</u>, (1967), p.10.

community' would show that Aristotle's 'distributive justice' did not extricate itself from the pyramidical society. It was, in fact, superimposed on it. Even the second meaning "the equal treatment of those equal before the law" failed to mitigate situation, for the entire doctrine was made applicable to society without disturbing its rigid social strata. The equality of treatment was confined to citizens, from which category Aristotle excluded artisans and slaves on the ground that virtue is impossible for men whose time is consumed in manual labour.[6] Evidently 'distributive justice', as enunciated and applied by Aristotle to the society around him, is not very useful to tackle the problems of social justice in the societies of the present era. But, if Aristotle's 'distributive justice' is stripped of its restrictive meaning of Aristotlean age and is given wider connotation of distribution or dispersal of benefits and burdens equally to all in society, it may prove to be a potent instrument to bring about social justice in every hierarchical society, including Indian Society.

No doubt, social justice and distributive principle have been discussed by many political philosophers since Aristotle. But the analysis presented by David Miller[7] appears to be very

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6 G.H. Sabine, A History of Political Theory, p.95.

7 David Miller, Social Justice, (1976), pp.17-22.

comprehensive. He says that "the concept of social justice is best understood as forming one part of the broader concept of justice in general. To comprehend it properly, we should begin by looking at justice as a whole, and then attempt to mark off that decision of justice which we call social justice".[8] According to him, the subject matter of justice is the manner in which benefits and burdens are distributed among men, whose qualities and relationships can be investigated.[9] There are two political principles, namely 'aggregative principle' and 'distributive principle'. The former refers only to the total amount of good enjoyed by a particular group; the latter to the share of that good which different members of the group have for themselves. For instance, the principle that the sum total of happiness enjoyed by the group should be maximized is aggregative, while the principle that each member of the group should enjoy an equal amount of happiness is distributive. This distinction clearly brings out the potency or effectiveness of 'distributive principle' compared to the 'aggregative principle'. Besides, Miller adverts to the principle that amount of benefit an individual enjoys or the amount of burden he suffers should be proportionate to the quantity of the relevant attribute which

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8 Id., p.17.

9 Id., p.19.

he possesses.[10] The principle is no doubt very appealing, but quantification of the amount of benefit one enjoys and the amount of burden he suffers and establishment of equation between them and the quantity of relevant attribute which the individual possesses may bristle with practical difficulties. Yet, it is an excellent principle in so far as it serves as an ideal, which the laws of the society strive to reach.

It is interesting to note that David Miller has tried to impart meaning to the equation between the benefit burden factors and the relevant attributes of an individual by drawing a distinction between 'legal justice' and 'social justice' and 'private justice' and 'social justice'. Drawing a contrast between legal justice and social justice, he says that "legal justice concerns the punishment of wrong doing and compensation of injury through the creation and enforcement of a public set of rules (the law)".[11] Miller explains social justice as the distribution of benefits and burdens throughout a society, as

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10 Id., p.21

11 According to him, the "legal justice" deals mainly with two types of issues. First of all, it stipulates the conditions under which punishment may be inflicted, adjusts the scale of punishment to fit the nature of different crimes, and, in the sphere of civil law, regulates the amount of restitution which must be made for injuries. Secondly, it lays down procedures for applying the law-the principles of fair trial, rights of appeal, etc., form part of legal justice.

it results from the major social institutions, property systems, public organisations, etc. It deals with such matters as the regulation of wages and (where they exist) profits, the protection of persons' right through the legal system, the allocation of housing, medicine, welfare benefits, etc.[12] Proceeding further he says that "since punishments have been included in the scope of legal justice, 'burdens' should be read to mean 'disadvantages other than punishment', i.e., such things as unpleasant or onerous work, bad housing conditions, etc.

Can a distinction be struck between "private justice" and "social justice"? David Miller says that it can be. Private justice relates to the dealings of a man with his fellow beings when he is not acting as a participant in one of the major social institutions. The sense of 'justice' raises no new problems on its own account, when the same criteria are relevant for both species of justice. Problems do arise, however, when private and social justice conflict. For example, an employer may try to deal justly with his work force, by paying each man a wage which is thought to correspond to his contribution at work. Assuming that the assessment is correctly made, private justice between employer and workers has been realized - but the wages received may be out of line with the wages paid in other places

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12 Ibid.

for the same work, in which case the employer has unwittingly perpetrated a social injustice.[13] Obviously social justice is wider and pervasive concept, not synonymous with private justice. What appears to be private justice may not often conform to norms of social justice.

Apart from these there are three other principles of justice, which have a bearing on social justice. They are 1) Conservative justice (to each according to his rights), 2) Ideal Justice of Sidgwick (to each according to his due or desert), and 3) Prosthetic justice of Raphael (to each according to his needs).

The concept of conservative justice, which means "to each according to his rights", is virtually intended to sustain the social status quo. Rights which have already crystalised in society must be upheld and the existing order of norms must be sustained irrespective of the fact whether the existing order of norms and rights is just or unjust. In other words, the conservative justice gives no scope for change in the existing social order which may be inherently unjust. But, David Miller seems to have tried to put a gloss over the status quo-oriented conservative justice and to mitigate its conservative stance when

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13 Ibid., p.23.

he said that "the notion of conservative justice can be derived from the general formula by interpreting a man's due as that to which he has a right or is entitled.[14] This does not explain whether a man is entitled or has a right only to what is his due or a man's due in a society is determined by the right he has achieved and enjoyed in it. If a man is entitled only to what is his due, then it may not militate against concept of social justice because what one man's due cannot markedly or inexplicably different from another man's due. But, the conservative justice formula, "each according to his right", does seem to lend itself to such interpretation. David Miller, however, has tried further to explain that "the rights in question may be legal rights, institutional rights or certain types of moral rights, such as the rights one derives from a promise or other non-legal agreements. Rights generally derive from publicly acknowledged rules, established practices or past transactions; "they do not depend upon a person's current behaviour or other individual qualities. For this reason it is appropriate to describe this conception of justice as 'conservative'"[15]. Still the unanswered question is whether the legal rights, institutional rights, moral rights, acknowledged rules, established practices, etc., are those found in a

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14 Ibid., p.25.

15 Id.,pp.25-26.

heirarachical society or those found in a society where-in a just social order has been established. If it is the latter, then the principle of conservative justice may be said to conform to norms of social justice. But that does not seem to be the purport of the concept of conservative justice. As explained by Raphael, the object of conservative justice is "to preserve an existing order of rights and possessions, or to restore it when any breaches have been made"[16]. In otherwords, the conservative justice is a status quo oriented concept and hence antithetic to modern concept of social justice.

Sidgwick's principle of "ideal justice" or the "principle of desert" has been explained admirably by David Miller thus: "Men ought to be rewarded according to their deserts. This is evidently another way in which the general formuala of justice can be filled out, a man's due here being taken to mean his deserts. 'Desert' in turn may be interpreted in a number of ways, although it always depends upon the actions and personal qualities of the person said to be deserving. Thus a man's deserts may be measured by his moral virtue, his productive efforts, his capacities, and so on".[17] Then, striking a distinction between the conservative justice and ideal justice, David

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16 Id., p.25.

17 Id., p.26.

Miller says that the former "insists that an individual's right to inherit be protected"[18] and the latter (justice as desert) "demands that a man should earn whatever benefits he receives"[19]. Needless to say that the ideal justice or justice as desert is more in accord with the concept of social justice than the status quo-oriented conservative justice.

Subsequently, nearly a century later, Raphael came out with a new theory of prosthetic justice, which, according to him, is far more advance theory than the ideal justice. As pointed out by David Miller, it is the opinion of Raphael that "the criterion of need is more central to prosthetic (ideal) justice than the notion of desert"[20]. Proceeding further, Raphael says that the concept of need must be distinguished from the concept of desert, for when we speak of a man deserving something we have in mind some favourable attribute which we think ought to bring him a benefit, whereas when one speaks of him needing something we are thinking of a lack or deficiency on his part-for instance we may say that a man needs food, meaning that it is necessary to him, that it will be injurious to him not to have it.[21] No doubt, Raphael's prosthetic justice supplies

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18 Id., p.27.

19 Id.

20 Id., p.27.

21 Ibid.

a good basis for social justice, for the criterion of need, as explained by Raphael, is as much a central theme of social justice as it is of prosthetic justice. But, one cannot deny the fact that the notion of desert, expounded by Sidgwick, and the criterion of need, enunciated by Raphael in his theory or prosthetic justice, together supply a wholesome and comprehensive base for the social justice. In other words, the two principles "to each according to his needs" constitute the sound basis of social justice.

Another important theory on the concept of social justice is the theory of justice propounded by John Rawls. According to his theory of justice, "all social primary goods-liberty and opportunity, income and wealth, and the basis of self respect are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured".[22] The contents of the "social primary goods" specified by Rawls are of particular importance, for the fair distribution of them, namely, liberty and opportunity, income and wealth and bases of self-respect in a society will undoubtedly help to achieve the much needed social justice. Another important

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22 Ibid., p.41. In A.B.S. Karamchari Sangh v. Union of India, A.I.R. 1981 S.C. 298, at p.336, Chinnappa Reddy, J., discusses John Rawl's theory of justice. Again in Vasanth Kumar v. State of Karnataka, A.I.R. 1985 S.C. 1495, at pp.1527-1528, Justice Chinnappa Reddy, discusses Rawl's theory of Justice.

aspect of his theory is that while laying emphasis on the equal distribution of the "social primary goods", he envisages "an unequal distribution" of the social primary goods" if such unequal distribution is "to the advantage of the least favoured". In envisaging such "unequal distribution" of the social primary goods to benefit the "least favoured" in the society, John Rawls has displayed a great sense of pragmatism, for he rightly felt that equal distribution of the "social primary goods" in an unequal or heirarchical society would result in perpetuating the already existing inequality and the social justice would become a cry in the wilderness. The "least favoured" in every society must be given initial advantage to compete with the most favoured in the society by the unequal distribution of "social primary goods" to the advantage of the least favoured. In enunciating this view, Rawls seems to have anticipated the doctrine of "protective discrimination" embodied in the Constitution of India.

Further John Rawls discussed his theory of justice in specific terms and advanced two specific principles. They are as follows:

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty to others.

2. Social and ecconomic inequalities are to be arranged so that they are both

   a) to the greatest benefit of the least advantaged; and

   b) attached to offices and positions open to all under conditions of fair equality of opportunity.[23]

No doubt, from the point of view of social justice, Rawls' theory of justice is pragmatic. But, his attempt to fix priority among the principles established by him seem to deprive his theory of its pragmatic tinge or realistic nature. As contemplated by Rawls, if the benefit to "the least advantaged member of society", or what is now known as "protective discrimination", has to come into operation only after full and satisfactory implementation of the principles of equal liberty and fair equality of opportunity, it will be difficult to achieve social justice in a society in the near future. Needless, therefore, to stress that simultaneous operation of the principles of equal liberty, fair equality of opportunity and protective discrimination is a sine qua non for the purposeful concept of social justice.

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23 Id., 41.

Another great jurist, whose writings have great impact on the concept of social justice, is Roscoe Pound. Pound classifies three legally protected interests, and they are: public interests, social interests and private interests.[24] We are here concerned with his "social interests". He enumerates six important "social interests"[25], and his sixth principle of "social interests" is relevant to the concept of social justice. According to this sixth principle, there is the social interest in the individual human life, which is described by him as "the claim or want or demand involved in social life in civilised society that each individual be able to live a human life therein according to the standards of the society".[26] This principle is considered by Roscoe Pound as "in some ways the most important of all".[27]

It is true that one cannot deny the importance of the principle of social interest in the individual human life. It rightly lays emphasis on the need for each individual "to live a human life". If the socio-economic order of a society enables

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24 For this see W. Friedman, Legal Theory, 5th Edn. 1967, (Stevens & Sons), p.336.

25 *Id.*, p.337-338.

26 *Id.*, p.338.

27 *Id.*, pp.338-339.

every individual human being "to live a human life" such a society undoubtedly fulfills the social justice norms. But the entire doubt arises due to the last phrase "according to the standards of the society", which virtually qualifies the phrase "to live a human life". If the social interest in the individual human life is confined to see that each individual is able "to live a human life" in a society "according to the standards of the society", social interest theory of Roscoe Pound does not go far enough to ensure social justice, unless, of course, "the standards of the society" are so defined as to make them to conform to standards or norms of socio-economic justice. If the social interest theory ordains that each individual has "to live a human life" in the existing heirarchical society in accordance with "the standards of that society", it is in no way different from the other status quo-oriented theories of justice.

The foregoing analysis would show that the concept of social justice has been given a number of meanings by various jurists. First of all, a number of phrases or nomenclatures such as, for example, "habilitative justice", "corrective and creative process", "dismantling of the hierarchical social system" and "distributive economic justice" have been used to describe the concept of social justice. These phrases not only convey the meanings of the concept but also indicate the direction

it is expected to take in a society. Secondly, it means Aristotlean "distributive justice" with a wider connotation of distribution or dispersal of benefits and burdens to all in society without any distinction. Thirdly, the concept of social justice means "distributive principle" which is opposed to aggregative principle". In other words, social justice connotes that each member of the society should enjoy an equal amount of happiness. Fourthly, social justice is distinguished from "legal justice" and it is said to concern with "the distribution of benefits and burdens throughout a society, as it results from the major social institutions". Fifthly, social justice is a pervasive and wider concept than "private justice". Sixthly, social justice means "ideal justice" which, according to Sidgwick, connotes "to each according to his due or desert". Seventh, social justice is equated with "prosthetic justice", which, according to Raphael, means, "each according to his need", Eighth, social justice, according to John Rawls' theory, means equal distribution of "all social primary goods", unless an unequal distribution of any or all of them is to the advantage of the least favoured. More important aspect of the theory is unequal distribution of social primary goods benefiting, or becoming advantageous to, the least favoured in the society. In terms of principle it means equal liberty, fair equality of opportunity and the "difference principle" or "protective discrimination". Finally, social justice means the social interest in securing a social order

in which each individual is able to live a human life. These are some of the important semantics of the concept of social justice, which are relevant in the modern era.

CHAPTER II

PREAMBULAR CONCEPT OF SOCIAL JUSTICE

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One of the basic principles stipulated in the preamble of the Constitution of India is the concept of social justice. The Preamble states, among others, that the "People of India" have solemnly resolved "to secure to all its citizens Justice, social, economic and political". This is the firm resolution of the people of this great country.

Views of the Founding Fathers: Basis for the concept:

Preamble of the Indian Constitution is an abridged version of the "Objectives Resolution" moved by Shri Jawaharlal Nehru in the Constituent Assembly on the 13th December 1946 and adopted by the Constituent Assembly on 22nd January 1947 after much deliberation. The Preambular concept of social justice has been taken from the relevant part of the Objectives Resolution. The views expressed by the Founding Fathers on the socio-economic justice embodied in the Objectives Resolution would give an idea about the meaning of social justice. It is, therefore, necessary to refer to the Objectives Resolution and the Constituent Assembly debate on it.

The Objectives Resolution, from which the Preamble was chiselled out, states thus:

"This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution:

5) Wherein shall be guaranteed and secured to all the people of India Justice, Social, Economic and Political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality".[1]

The socio-economic-political justice stipulated in the Objectives Resolution received enthusiastic support from a large number of members of the House. The views expressed by them indicate the connotation of the concept of social justice. M.R. Masani supported this part of the Resolution relating to socio-economic justice on two grounds.[1a] It rejected the existing social structure, promised social security and provided for equality of opportunity. It envisaged far reaching social changes through the mechanism of political democracy and individual liberty.

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1 For the text, See B. Shiva Rao, The Framing of India's Constitution, Vol.II, pp.3-4.

1a C.A.D., Vol.I, pp.90-92.

Alladi Krishnaswami Ayyar said that "the expression 'justice, social, economic and political' while not committing this country and the Assembly to any particular form of polity coming under any specific designation, is intended to emphasize the fundamental aim of every democratic state in the present day".[2] So, according to M.R. Masani, the concept of socio-economic justice not only connotes rejection of the existing social structure, which is manifestly unjust and oppressive but also heralds far reaching social changes. He is of the opinion, however, that such social changes or transformation have to be brought about through the mechanism of political democracy and guarantee of individual liberty. In other words, social transformation or just social order has to be achieved within the framework of political democracy and without jeopardising the individual liberty. But, according to Alladi Krishnaswami Ayyar, social justice is a fundamental aim of every democratic state in the present day irrespective of a designation it bears as to the nature of its polity. That is to say the social justice is a sine qua non for a true and purposive democratic state, particularly in India wherein the social stratification perpetrated for a long time resulted in an oppressive and exploitative social order.

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2 Id., p.138.

Speaking on the Resolution, Dr. S. Radhakrishnan pointed out the responsibility of the Constituent Assembly "to effect a smooth and rapid transition from a state of serfdom to one of freedom",[3] referred to the socio-economic revolution contemplated in the Resolution and emphasised the need to remake the material conditions and to safeguard the liberty of the human spirit. According to him, it was no good creating conditions of freedom without producing a sense of freedom.[4] Another member, Seth Govind Das, said that "keeping in view the condition of the world and the plight of India, we can say that our Republic will be both democratic and socialist ... if true peace is to be realised, it can only be realised through socialism. No other system can give us true peace".[5]

However, Dr. B.R. Ambedkar expressed his disappointment at the content of the Objectives Resolution relating to socio-economic justice, for he expected in it a clear enunciation of the doctrine of socialism. He said that if the Objectives Resolution, which spoke socio-economic-political justice, had a reality behind it and sincerity, it should have made specific provisions to the effect that socio-economic justice

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3 C.A.D., Vol.II-III, p.253.

4 *Ibid.*, p.257.

5 C.A.D., Vol.I, pp.105-106.

would be achieved through nationalisation of industry and land. Also he said that it would not be possible for any future Government to achieve socio-economic justice unless its economy is a socialistic economy.[6]

Another member, Shri Vishwambar Dayal Tripathi, held a similar view and said that there should be a declaration before hand to the effect that the Constitution should not be framed without laying stress on socialism and the state created under it should not be established on a capitalistic basis.[7] Obviously, according to them, everybody in the modern world, including staunch capitalists, swear by "social justice", but its realisation is possible in a socialistic state only. Hence they pleaded that socialism must be given due emphasis in the Objectives Resolution, which purported to lay the basic framework and principles of the Constitution of India.

There are a few other members who did not agree[7a]. In the opinion of M.R. Masani, the Constituent Assembly had

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6 C.A.D., Vol.I, pp.97-98.

7 C.A.D., Vol.II-III, p.292. The reasons he pointed out is as follows:

Since the body, in which the power and authority would be vested, could interpret the term "Justice" in its own way, it would be possible that in future date if the power was passed on to the capitalists they might interpret in their own way which would be detrimental to the interests of a large bulk of the people.

7a M.R. Masani and Alladi Krishnaswami Ayyar.

no sufficient mandate to incorporate in the Constitution such economic policy of doctrinaire character.[8] According to Alladi Krishnaswami Ayyar, the Constitution should not be rendered rigid by incorporating explicitly a particular economic doctrine, and that it should "contain the necessary elements of growth and adjustment needed for a progressive society".[9] Thus opposition to the use of the term "socialism" or "socialistic state" in the Objectives Resolution stemmed from the fear that use of such term or phrase in it might inject into the Constitution an undesirable rigidity.

Always as he was, Jawaharlal Nehru, the mover of the Objectives Resolution, was particular to avoid controversies. He said, "If, in accordance with my own desire, I had put in that we want a socialist state, we would have put in something which may be agreeable to many and may not be agreeable to some and we wanted this Resolution not to be controversial in regard to such matters. Therefore, we have laid down, not theoretical words or formula, but rather the content of the thing we desire".[10] Ultimately, the paragraph dealing with the socio-economic justice in the Objectives Resolution was approved without any change. Jawaharlal Nehru made very clear

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8 C.A.D., Vol.I, p.91.

9 Id., p.138.

10 Ibid., p.60.

that he desired a socialist state, which would aid through its infrastructure the realisation of the content and goal of social justice. He firmly believed that realisation of its content, that is, full achievement of socio-economic justice, would eventually usher in a socialist state.

The Sheet Anchor of Social Justice:

The debates in the Constituent Assembly makes it evident that the founding fathers made the social justice a predominant goal to be achieved. They gave broad hint on its connotation. Social justice, according to them, meant liberation of society from the existing social stratification, creation of a new and just social order, economic freedom with social equality and, in short, an egalitarian society, which is imbued with democratic ideals and wherein all institutions are impressed with socio-economic justice. In furtherance of this great ideal of social justice they made ample provisions in the Directive Principles of State Policy, but the basic principle is reiterated in a significant provision[10a] of the Constitution. It reads:

"1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a

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10a Article 38.

social order in which justice, social, economic and political, shall inform all the institutions of the national life.

2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations".[10b]

Among all the duties imposed on the State, the one imposed by Article 38 is the basic duty, because it is in full and faithfull discharge of this basic duty lies the realisation of the goal of social justice set by the preamble to the Constitution. Besides, Article 38 gives an indication of the lines in which the State should endeavour to reach the goal. It may be noted that clause(1) of the Article envisages a just social order encompassing all the three major fields of human activity, social, economic and political and this is sought to be achieved by transforming institutions of the national life to that end.

Then, Clause (2) which was introduced into the Constitution by the Forty Fourth Amendment indicates the lines in which the State has to proceed to reach the goal of just

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10b This clause was introduced by Constitution (Forty Fourth Amendment) Act, 1978.

social order. It mentions, in this connection, two functions, namely, (1) minimisation of inequalities in income; and (2) elimination of social inequalities in status, facilities and opportunities. The second function has greater bearing on social justice. These two lines of approach have to be pursued vigorously to establish equality, economic and social, among individuals, groups of people residing in different areas and groups of people engaged in different vocations. Evidently article 38 of the Constitution is a sheet anchor of the concept of social justice and is the reservoir of a host of social welfare legislations that came into force later on. Other directive principles contained in Article 39[11],

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11 The State shall, in particular direct its policy towards securing-

a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

d) that there is equal pay for equal work for both men and women;

e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

39-A[12], 41[13], 42[14], 43[15], 43-A[16], 45[17] and 46[18] are modalities to achieve the goal of the just social order envisioned in Article 38 of the Constitution.

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12 The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

13 The State shall, within the limits of its economic capacity and development, make effective provision securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

14 The State shall make provision for securing just and human conditions of work and for maternity relief.

15 The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life, full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

16 The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings establishments or other organisations engaged in any industry.

17 The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution for free and compulsory education for all children until they complete the age of fourteen years.

18 The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

WHY THE PREAMBLE MADE "SOCIALIST"?

In 1976, Parliament introduced through Constitution (Forty second Amendment) Act, 1976, two words, namely, "Socialist Secular", into the first paragraph of the Preamble. Since then the opening paragraph of the Preamble reads thus: "We the People of India, having solemnly resolved to Constitute India into a Sovereign Socialist Secular Democratic Republic". The Forty second Amendment Virtually spelt out the nature of the State and consequently, what is now contemplated is a Socialist Democratic Republic of India.

One of the objectives of the Forty second Amendment, as explained in the Statement of Objects and Reasons appended to the Amendment Act, is to quicken the pace of socio-economic progress of the people. This objective has a great bearing on the newly introduced preambular expression "Socialist". Introduction of the word into the Preamble became necessary because of two important factors, namely, (1) excessive concern shown by Supreme Court to fundamental rights vis-a-vis the socio-economic legislation, and (2) the new orientation in the juristic technique of the Supreme Court in interpreting the Constitution on lines of the Preambular mandate.

Property and Social Justice: Quick sands for Constitution Makers:

It may be noted that after the commencement of the

Constitution the States were anxious to usher in a new social order in terms of the Constitutional directives to the extent possible. The plethora of economic and agrarian reform laws met with stiff opposition by the affluent and propertied segments of the community and consequently had to pass the acid test of judicial scrutiny. The Bihar State Management of Estates and Tenures Act, 1949, was challenged before the Patna High Court in Kameshwar Singh v. State of Bihar[19] on the ground that the provision made therein offended against the fundamental rights guaranteed by Articles 14[20], 19(1) (f)[21] and 31[22].

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19 A.I.R. 1950 Pat. 392.

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

21 Article 19(1) (f) states "All citizens shall have the right-to acquire, hold and dispose of property". This (Provision has been deleted by the Constitution (Forty fourth Amendment) Act, 1978.

22 Article 31 states: "(1) No person shall be deprived of his property save by authority of law.

"(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given".

The Patna High Court held that the impugned law was unconstitutional because it imposed restriction of the most far-reaching and drastic kind on the property right guaranteed by Article 19(1) (f) and it could not fairly be said that those restrictions were reasonable. In Uttar Pradesh, the validity of the U.P. Zamindari Abolition and Land Reforms Act, 1951 was challenged in Surya Pal v. State of U.P.[23], but was dismissed by the Allahabad High Court. The divergence of views expressed by the High Courts on the validity of socio-economic and agrarian reform legislation rendered their fate uncertain.

In order to put an end to such uncertainty regarding the validity of socio-economic legislation, Parliament enacted the Constitution (First Amendment) Act, 1951 and inserted two new Articles, viz., 31A and 31B and a new Schedule, viz., Schedule IX. Article 31A has immunised from attack under any of the fundamental rights in Part III of the Constitution all laws providing for the acquisition by the State of any estate or any rights therein or for the extinguishment or modification of any such rights.[24] The scope of the Article is confined to "estates"

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23 A.I.R., 1951. All 674.

24 Article 31A states "(1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by any privisions of this part.

defined in Clause (2) (a) of the Article[25].

Article 31B has been inserted to save the specific Acts included in the Ninth Schedule of the Constitution from being declared unconstitutional by the Courts.[26] Ninth Schedule has been added to the Constitution, wherein a number of legialations have been specified.

A close scrutiny would show that they are intended to immunise socio-economic and agrarian reform laws from challenge under any of the specified fundamental rights. The Ninth Schedule served the same purpose, but was introduced as a measure of abundant caution.

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25 Article 31A(2) states: "In this Article-(a) "The expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or muafi or other similar grant.

"(b) The expression 'rights' in relation to an estate, shall include any rights vesting on a proprietor, sub-proprietor, under proprietor, tenure-holder or other intermediar, and any rights or privileges in respect of land revenue".

26 Article 31B states: "Without prejudice to the generality of the provisions contained in Article 31A none of the Acts and Regulations specified in the Ninth Schedule nor any one of the provisions thereof shall be deemed to be void, or even to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and not withstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force".

The tide of challenge on the ground of violation of the rights of property could not be stopped. Subsequently another grave problem arose under Article 31(2)[27] regarding the compensation to be paid when property is acquired or requisitioned for public purpose. Article 31(2) authorised the State "to take possession of" or to "acquire" any property for "public purposes" on payment of "compensation". In this Article two important points involved are acquisition of property for "public purpose" and payment of "compensation" in cases of such acquisition.

Jawaharlal Nehru introduced Article 31 on the 10th September 1949 in the Constituent Assembly by way of amendment for its incorporation in Part III of the Constitution. Explaining the significance of the Article, he said there were two approaches to the right to property embodied therein. One was from the point of view of individual right to property and the other from the point of view of Community's interest in that property right and the Article made an attempt not only to avoid any conflict of interests but also to take into consideration both interests.[28] Then, he said that there was no question of any expropriation without compensation so far as this Constitution was concerned and the law was clear enough

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27 Supra., f.n.22.

28 C.A.D., Vol.IX, p.1192.

regarding acquisition of property for public purpose, compensation to be paid in such cases and method of judging the compensation. Normally speaking, he said, this principle applied only to, what might be called, petty acquisition or acquisition of small bits of property or even relatively large bits of property, for instance, for the improvement of a town. But today the community had to deal with large schemes of social reform and social engineering which could hardly be considered from the point of view of the individual acquisition of a small bit of land or structure. Further he said, if the chosen representatives of the people sitting in the legislature passed such a social reform legislation which affected millions of people, it would not be possible to leave such a piece of legislation to widespread and continuous litigation in the Courts of law without damaging the future of millions of people and the foundation of the State itself.[29] Obviously Jawaharlal laid stress on the implementation of large schemes of "Social reform and Social engineering" in which cases question of payment of adequate compensation would not arise. In other words, where measures are taken to give effect to socio-economic justice schemes which will benefit the society as a whole, the State should not be burdened with the obligation of paying huge amount as compensation.

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29 Ibid.

In fact, he dealt with this point very clearly when he said that it was left to Parliament to determine various aspects of it and there is no reference in this to any judiciary coming into the picture.

Jawaharlal Nehru had no doubt that judiciary's role was nil on determining the quantum of compensation. He said "Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason where it is thought that there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution. Naturally the judiciary comes in to see if there has been a fraud on the Constitution or not. But, normally speaking, one presumes that any Parliament representing the entire community of nation will certainly not commit a fraud on its own Constitution and will be very much concerned with doing justice to the individual as well as the Community".[30]

In the changing concept of property and problems arising from such change in the concept the question of protecting individual right to property was by no means simple and no legal argument of extreme subtlety would solve it unless the solution took into consideration the human aspect of the problem

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30 Id., p.1193.

and also the changes that were taking place in the world.[31]

In conclusion, he said, that the National Congress had laid down years ago that the Zamindari institution and big estate system in India must be abolished, which pledge would undoubtedly be honoured. Judiciary could not stand in judgment over the sovereign will of Parliament representing the entire community. The duty of the judiciary was only to see "in such matters that the representatives of the people did not go wrong".[32] Further, he said that in a detached atmosphere of the Courts they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no Court, no system of judiciary can function in the nature of a third House, as a kind of third House of correction. So, it

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31 Id., pp.1194-95. Nehru said that the concept of property changed from the earlier conception of "property in human beings", which reflected in the institution of slavery in olden days, to the modern conception of "property in a bundle of papers", which consisted of securities, promissory notes, etc. In addition to this there was another change in the modern time and that was, according to him, the "property in shares" in a joint stock company. This, he said, led to concentration of wealth more and more in a limited number of hands. The result was that a few persons with a monopoly over capital could crush small shop-keepers out of existence, their method of business and, in fact, they could do so without giving the slightest compensation.

32 Ibid., p.1195.

is important that with this limitation the judiciary should function[33]. These views convey the idea that the constitutionality or unconstitutionality of the State act must be judged not from the extent of dents it makes on the right to property alone, but from over-all consideration of the Constitution and the extent to which it succeeds or fails to implement the socio-economic policies and ideals embodied in the Constituion.[34] In short, Article 31(2) was designed mainly with a view to facilitating socio-economic policies and bringing a new social order envisioned in the Constitution.

Many members supported the objectives that lay behind the Article 31(2). Holding that the House could not afford to ignore the social and functional character of property, Damodar Swarup Seth said that property was a social institution and like all other institutions, was subject to regulations and claim of common interest.[35] Then, speaking on "compensation" he said when the institution of slavery was abolished in America, no compensation was paid to the slave-owners although many of them had paid hard cash when they purchased them.[36] The doctrine of compensation as a condition of expropriation could not be

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33 Ibid., p.1195-96.

34 K.P.K. Shetty, Fundamental Rights and Socio-Economic Justice In The Indian Constitution, (Chaitanya Publishing House, Allahabad), 1969, p.125.

35 C.A.D., Vol.IX, p.1200.

36 Ibid.

accepted as a Gospel truth. In this connection he drew attention of the House to the death duty, which, he said, was a form of partial expropriation without compensation and it formed an essential feature of the financial system of many a progressive country in the world. It was impossible for the State to pay owners of property in all cases compensation at market value for the property requisitioned or acquired in times of emergency or for the purpose of socialisation of big industries with a view of eliminating exploitation and promoting general economic welfare. What is more, even the suggestion to pay partial compensation in such cases, is viewed with certain amount of disapproval, for, he thought that such payment would have no justification when general transformation of economic structure on socialist lines took place. What he could concede in such circumstances to persons with vested interests was a claim of an opportunity and a share on par with all other citizens of the State.[37]

The concept of compensation in the India's Constitution has always been an object of controversy between advocates of social justice and protectors of individual liberties. This conflict of dogmas was seen reflected even from the debates between founding fathers. According to one argument, the word "compensation" by itself carried with it the connotation that

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37 Ibid.

it must be equivalent in money value of the property on the date of the acquisition. But, the second argument was to the effect that the mere word "compensation" and other phrases in the Article gave much freedom to the legislature in formulating the principles on which and the manner in which the compensation was to be determined. Alladi Krishnaswami Ayyar said that the ommission of the word "just" in the Article was significant in that it showed that the language employed in the Article was not in pari materia with the language employed in corresponding provisions in the U.S. and Australian Constitutions, which stipulated acquisition of property on payment of "just compensation". So, according to him, construction of the word "compensation" in Article 31 must vary from the construction put by the American and Australian Courts on the expression "just compensation" found in their Constitutions. Proceeding further he said that the principles of compensation by their very nature could not be the same in every species of acquisition. In this connection he said that in formulating the principles, the Legislature must necessarily have regard to the nature of the property, the history and course of enjoyment, the large class of people affected by the legislation and so on.[38]

Law, according to Alladi, must serve as an instrument

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38 C.A.D., Vol.IX, pp.1271-1272.

of social progress. Riding back to the road of ancient philosophies, Alladi tried to justify that the institution of property had a role to play in achieving a social purpose and it is not an end in itself.[39]

Thus, the views of the majority in the Constituent Assembly[40] on the right to property and compensation to be paid to persons affected by socio-economic and agrarian reforms were in consonance with their ideas on constitutional goal of social justice. They firmly rejected concentration of wealth or consolidation of property in a few hands and resolutely looked forward for social justice oriented reforms in the agrarian and economic fields. They felt that in ushering in a new era of new social order with social justice the State should not be burdened with, or its efforts should not be hamstrung by, the obligation of paying huge compensation.

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39 Id., p.1274. He said "Our ancients never regarded the institution of property as an end in itself. Property exists for dharma, Dharma and the duty which the individual owes to society from the whole basis of social frame work. Dharma is the law of social well-being and varies from yuga to Yuga.. Capitalism as it is practised in the west came in the wake of the Industrial Revolution and is alien to the root idea of our civilisation. The sole end of property is Yagna and to serve a social purpose, an idea which forms the essential note of Mahatma Gandhi's life and teachings".

40 For the views of the minority in the Constituent Assembly, Particularly views expressed by Thakur Das Bhargava, see the debate that took place on 10th September 1949.

Judicial Pronouncements: Quicksands for Socialist Exercise:

Despite all emphatic views expressed by eminent members of the Constituent Assembly, the history of the decisions of the Courts in the post independence era shows sheer apathy and total disregard to the social justice content of the provisions relating to rights to property. Drawn between the claims for inalienable rights to property and the demands of social control over vested interest in property, more often than not courts took a stand on the former and made a conscious (or unconscious) attempt to perpetuate monopolistic interest on private property and insatiable thirst of man for amassing wealth. Obviously this trend led to a musical chair performance between the Legislature enacting amendments and after amendments to override the impact of judicial decision and trying to usher in an era of welfare and social justice and the judiciary finding out new interpretative techniques with emphasis on the individual rights to property to apply brakes on State's quest for social justice.

The catena of decisions by the Supreme Court and the host of amendments effected by Parliament show the most fascinating history of the constitutional conflicts that free India has ever seen. The starting point of this game with the Patna decision in Kameshwar Singh and the first amendment to the Constitution has already been discussed early.[41] The next

41 Supra, nn.19-26.

chapter of the story is opened by the decision of the Supreme Court in State of West Bengal v. Mrs. Bela Banerjee.[42] The dispute arose in respect of the word "compensation". Should compensation be only an amount determined by the executive or be an amount just equivalent to the market value of the property acquired? The words of the Court are self explanatory. The court held that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner of the property appropriated. Such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of within the limits of this basic requirement or full indemnification of the expropriated owner. The Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are

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42 (1954) S.C.R. 558. The impugned Act, the West Bengal Land Development and Planning Act of 1948, provided for the acquisition of and development of land for public purpose, viz., for the settlement of immigrents who had migrated into West Bengal due to Communal disturbances in East Bengal. The impugned legislation had limited the compensation to market value of the land on 31st December, 1946, no matter when the land was acquired. So, the constitutionality of the quantum of compensation stipulated in the aforesaid Act was challenged in this case.

to be neglected is a justiciable issue to be adjudicated by the Court.[43]

The observation of the Supreme Court was viewed by the States with great apprehension. They felt that it created a great impediment to socio-economic reforms and a drag in their march towards a better tomorrow - their dreamland where social justice and welfare are guaranteed. It would be difficult for States to get enough resources in the near future to give full indemnication to the owners of the expropriated property when property is acquired and socio-economic reforms are introduced. Should social justice ideal of the Constitution remain in that event an unattainable goal? The representatives of the people thought that it should not. Quick was the reaction of Parliament which enacted in 1955 the Constitution (Fourth Amendment) Act and made suitable changes in Article 31(2)[44] and inserted a

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43 Id., pp.563-564, (Emphasis added).

44 Article 31(2) after amendment by Fourth Amendment Act reads as follows: "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

new Clause 2(A)[45] in Article 31 of the Constitution. These changes brought into existence two categories of deprivation of property. One is the compulsory acquisition and requisitioning of property by the State for public purpose, which could be done by law and law must provide for compensation or specify the principles of compensation. The second category of deprivation constitutes cases wherein the ownership or right to possession of property is not transferred to the State, and such cases are not deemed to provide for compulsory acquisition or requisitioning within the meaning of Article 31(2). Besides, the amended provisions of Article 31(2) expressly made the adequacy of compensation non-justiciable.

In Article 31A, the Fourth Amendment Act substitued a much inflated new clause for old clause (1) by which a wider range of laws, which extend from the field of land reforms to the field of industrial and commercial reforms were made immune from challenge before the courts. It is also declared that they shall not be deemed to be void on the ground that they are inconsistent with, or take away or abridge any of the fundamental

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45 The new Clause (2A) of Article 31 inserted by the Fourth Amendment Act provides "where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property".

rights conferred by Article 14, 19 and 31 of the Constitution.[46] Thus, as pointed out by Prof. Alexandrowicz, "this new category of laws which are made immune from judicial review extends from the field of land reform to the industrial and commercial fields".[47]

It must be remembered that all these changes were made keeping in view the goal of social justice. Subsequently, a lacuna or deficiency in Article 31A was brought to the fore by the Supreme Court in Kunhikoman v. State of Kerala[48], wherein Kerala Agrarian Relations Act of 1961 was impugned in so far as it related to ryotwari lands on the ground that it violated the right to property of the ryotwari pattadars and the law was not protected by Article 31A because the definition of "estate" given in the said Article did not cover ryotwari lands. The Supreme Court accepted the contention and quashed the law in so far as it applied to ryotwari lands. Consequently, the ryotwari pattadars escaped from the clutches of the land reform law and ceiling limits imposed by it.

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46 The provisions of Article 31A after the Fourth Amendment Act read as follows: "(1) Notwithstanding anything contained in Article 13, no law providing for-- (a) the acquisition by the State of any estate... shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31.

47 Constitutional Developments in India, (1957), p.94.

48 A.I.R. 1962, S.C. 723.

In order to plug the loophole found in Article 31A, to remove impediments to land reforms and to save several land reform legislations, which were in imminent danger of being challenged before the Court after the decision in Kunhikoman, Parliament enacted Constitutional (Seventeenth Amendment) Act in 1964.

The Seventeenth Amendment incorporated three provisions - (1) compensation at market value for acquisition of a land from cultivator who held lands within the ceiling limits of the land[49], (2) inclusion of ryotwari and agricultural lands under the concept of 'estate' immune from judicial challenge[50] and

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49 The new proviso added to Article 31A(1) by the Seventeenth Amendment, 1964 read thus: "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than market value thereof".

50 Clause (2)(a) of Article 31A as amended by the Seventeenth Amendment Act reads as follows "(a) the expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include:

i) any jagir inam or muafi or other similar grant and in the States of Madras and Kerala, any Janmam right;

ii) any land held under ryotwari settlement;

iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans".

(3) Stuffing the Ninth Schedule with more laws.[50a]

A number of writ petitions were filed before the Supreme Court challenging the validity of the Seventeenth Amendment Act, which came up for discussion in Sajjan Singh v. State of Rajasthan.[51] But the Court approved the previous stand taken in Sankari Prasad v. Union of India[52] - that the power to amend the Constitution includes power to amend fundamental rights. The court rejected the plea of the petitioners to review its Sankari Prasad decision. Consequently, the validity of the 17th Amendment Act was upheld.

Subsequently, the land owners made a second attempt to challenge the validity of the Seventeenth Amendment Act before the Supreme Court in Golaknath v. State of Punjab.[53] The Supreme Court, delivering its six to five judgment in this case, overruled its earlier decisions in Sankari Prasad and Sajjan Singh cases and held (i) that the power of Parliament to amend

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50a Putting Kerala Agrarian Relations Act into bracket of Nineth Schedule saved not only the law from the awkward situation created by Kunhikoman. But also the face of the State committed to bring agrarian reforms.

51 A.I.R., 1965, S.C. 845.

52 A.I.R., 1951, S.C. 458.

53 A.I.R. 1967, S.C. 1643.

the Constitution was derived from Articles 245[54], 246[55] and 248[56] (from the residuary legislative field) which deal with the ordinary legislative powers of Parliament and not from Article 368[57]; and (ii) that Constitution amendment was "law" within

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54 Article 245 States: "(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State".

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation".

55 Article 246 States: "(1) Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in list I in the Seventh Schedule (in this Constitution referred to as the 'Union List').

(2) Notwithstanding anything in Clause (3) Parliament and, subject to Clause (1) the Legislature of any State, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List).

(3) Subject to Clauses (1) and (2) Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as 'State List').

(4) Parliament has power to make laws with respect to any matter for Union Territories notwithstanding that such matter is a matter enumerated in the 'State List'."

56 Article 248 States: "(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List and State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those lists.

57 A.I.R., 1967, S.C. 1643 at pp.1658-1659 and 1669.

the meaning of Article 13(2) of the Constitution, and, therefore, if a Constitution amendment took away or abridged fundamental rights it was void.[58] But, the Court applied the doctrine of "prospective overruling" and said that its decision would have only "prospective operation".[59] Consequently, the Seventeenth Amendment and earlier amendments to part III of the Constitution continued to be valid, but any future amendment to fundamental rights would be invalid.[60] Commenting on this decision a learned author has said that the decision has sufficient potentialities to effect adversely socio-economic measures in future. If the Supreme court in future adopts, as in the past, a narrow and restrictive interpretation on the provisions relating to property right with little or no consideration for society-benefitting or structure-transforming socio-economic legislative measures Parliament will not be in a position to remove the impediment and to facilitate the speedy implementation of the socio-economic reforms by amending suitably the provisions relating to fundamental rights.[61]

Subsequently, Parliament passed two amendments to remove the difficulties created by the Golaknath decision. First is the

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58 Ibid., at p.1658 and 1669.

59 Ibid., p.1669.

60 Ibid.

61 Shetty, op. cit., p.148.

Constitution (Twenty Fourth Amendment) Act, which made necessary modification in Article 368 and 13 to make clear inter alia, that notwithstanding anything in the Constitution, Parliament may in exercise of Constituent power amend any provision of the Constitution[62] and nothing in Article 13 shall apply to any amendment made under Article 13[63]. The second is the Constitution (Twentyfifth Amendment) Act, which incorporated a new Article 31C. This new Article said, among others, that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles laid down in clauses (b) and (c) of Article 39[64] shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31[65]. This was done because Parliament felt that an uninterrupted implementation of the crucial provisions of clauses (b) and (c) of Article 39 in Part IV of the Constitution was necessary for the realisation of social justice.

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62 Refer to Clause (1) of Article 368.

63 Refer to Clause(3) of Article 368 and Clause(4) of Article 13.

64 Article 39(b) States: "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment".

65 The Constitution (Forty Fourth Amendment) Act deleted Article 31 from Part III and consequently from Article 31C.

After the Golaknath decision, a new and definite trend in the technique of interpretation of the Constitution with the help of Preamble emerged. Prior to that decision, the position of the preamble as an aid to construe the provisions of the Constitution was in a nebulous stage. This was mainly due to the fact that the Indian Courts were influenced by the views of Prof. Willoughby and Story and the earlier decisions of American and English Courts. Prof. Willoughby was of the view that the value of the Preamble to the Constitution for purposes of construction was similar to that given to the Preamble of an ordinary statute and in that he said that the Preamble "may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, when the intention of the framers does not clearly and definitely appear".[66] The great Commentator, Story, said that "the Preamble of a Statute is a key to open the mind of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the Statute".[67] A similar view was expressed by the American judiciary in Jacobson v.

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66 Westel, W. Willoughby Principles of the Constitutional Law of the United States, 2nd Edn., 1938, p.43.

67 Story, Commentaries on the Constitution of the United States, (1883), Vol.I, p.459.

Masachusetts[68] wherein a proposition was made to the effect that although the Preamble indicated the general purposes for which the people ordained and established the Constitution, it had never been regarded as the source of any substantive power conferred on the Government or any of its departments. The English Courts had no difficulty in subscribing to the above mentioned views, because they were not troubled by an obligation to interpret written Constitution established by the people. So, in Powell v. Kempton Parke Company[69] it was clearly stated that the rules of interpretation propounded by the judiciary did not permit the Preamble to qualify specific provisions. In other words, the Courts laid down a principle that general words should not be allowed to control the specific stipulations (generalie specialibus non derogant).

The aforesaid views influenced the thinking of the Indian judiciary right upto the year 1967. As a matter of fact, the Preamble to the Indian Constitution is not of an ordinary run, for it is an abridged version of the "Objectives Resolution" adopted by the Constituent Assembly of India on the basis of which Constitution of India was raised subsequently. Naturally, therefore, prime importance has been attached to it. Commending

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68 197, U.S. 11.

69 (1899) A.C. 143, at 157.

strongly the "Objectives Resolution" to the House Jawaharlal Nehru said: "It seeks very feebly to tell the world of what we have thought or dreamt for so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will receive it and ultimately pass it. And may I sir, also with all respect, suggest to you and to the House that, when the time comes for the passing of this Resolution let it be not done in the formal way by the raising of hands but much more solemnly, by all of us standing up and thus taking this pledge anew".[70] At the final stage, that is when the "Objectives Resolution" was transformed and put as Preamble to the Constitution, the eminent lawyer, Alladi Krishnaswami Ayyar said that "so far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has to be attached to the Preamble in a Constitutional Statute".[71] Despite these facts, the Indian judiciary has not been quite clear at the initial stage as to which principle of interpretation has to be adopted regarding the use of Preamble in construing the specific provisions of the Constitution. Consequently, in a few cases the judiciary adopted the traditional and old views expressed

70 For this quotation, See A.I.R., 1973, S.C. 1461 at p.1501.

71 For this quotation, See A.I.R., 1973, S.C. 1461 at p.1503; Also refer C.A.D., Vol.X, p.417.

by Prof. Willoughby and others and in a few other cases it attached much importance to the Preamble in deciding Constitutional issues.

In the first important Constitutional case, namely A.K. Gopalan v. State of Madras[72], Justice Patanjali Sastri said: "There can be no doubt that the people of India have in exercise of their sovereign will, as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality".[73] Proceeding further, he said that "this has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit no less than its intendment should be collected primarily from the natural meaning of the words used".[74] In other words, Mr. Justice

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72 A.I.R., 1950, S.C. 27.

73 Id., p.72.

74 Ibid.

Patanjali Sastri refused to countenance the view that the Preamble or the Preambular concepts could be allowed to give meaning and contents to the provisions in Part III of the Constitution which might differ from what was apparent from the language of the Articles therein.

However a different note has been struck by Chief Justice Mahajan, in Behram Khurshid Pesikaka v. State of Bombay[75] when he said: "We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought expression, belief, faith and worship; equality of status and of opportunity".[76] Proceeding further, he said: "These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of Constitutional Policy".[77] Here, Preamble has been used as an aid in construing the position of fundamental

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75 A.I.R., 1955, S.C. 123.

76 Id., at p.146.

77 Ibid.

rights and the doctrine of waiver of fundamental rights has been rejected.

A similar attitude is evident in In re Kerala Education Bill 1957[78]. In this case main question was whether the Kerala Education Bill enacted in furtherance of certain directive principles violated fundamental rights embodied in Articles 14, 15, 30 etc. Dealing with this question Chief Justice S.R. Das described the Preamble as "the inspiring and nobly expressed Preamble to our Constitution"[79] and said that one of the most cherished objects of our Constitution embodied in the Preamble is "to secure to all its citizens the liberty of thought, expression, belief, faith and worship. Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship. To implement and fortify these supreme purposes set forth in the Preamble, Part III of our Constitution has provided for us certain Fundamental rights".[80] Thus, in this case some attempt has been made to use the Preamble in construing the provisions relating to fundamental rights in Part III of the Constitution.

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78 A.I.R., 1958, S.C. 956.

79 Id., at p.965.

80 Ibid.

But, subsequently in 1960 a different view was expressed by the Supreme Court in In re Berubari Union and Exchange of Enclaves.[81] In this case, dealing directly with the question as to how far the Preamble aids the construction of the Constitution, Justice Gajendragadkar said: "There is no doubt that the declaration made by the people of India in exercise of their sovereign will in the Preamble to the Constitution is, in the words of Story, a key to open the mind of the makers' which may show the general purposes for which they made the several provisions of the Constitution; but nevertheless the Preamble is not a part of the Constitution, and, as Willoughby has observed about the Preamble to the American Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted".[82] Then he opined that "it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble".[83] Needless to say that

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81 A.I.R., 1960, S.C. 845.

82 Id., at p.856.

83 Ibid.

this view is old as the one expressed by Prof. Willoughby. Consequently, by this decision the Preamble has been relegated to the background and its utility as a tool to interpret specific provisions of the Constitution has been put under much cloud. What is worse, the statement in the decision that "the Premable is not a part of the Constitution" has created much confusion in the mind of the people. Those who watched closely the proceedings in the Constituent Assembly and understood that the Constitution was framed on the basis of the "Objectives Resolution" which was later abridged and put as Preamble to the Constitution might have read it with surprise and perhaps with certain amount of amusement.[84]

However, a definite departure from the position adopted in the In re Berubari Union and Exchange of Enclaves has been made in Golaknath v State of Punjab.[85] In latter case, Chief Justice Subba Rao who delivered the majority opinion, has said that the scope and position of fundamental rights cannot be appreciated unless we have a conspectus of the Constitution, its objects and its machinery to achieve those objects. In this connection he has pointed out that "the objective sought to be achieved by the Constitution is declared in sonorous terms in its

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84 The view that "the Preamble is not a part of the Constitution" has been rejected by the Supreme Court in A.I.R., 1973, S.C. 1461.

85 A.I.R., 1967, S.C. 1643.

Preamble"[86] and it, according to him, "contains in a nutshell its ideals and its aspirations. The Preamble is not a platitude but the mode of its realisation is worked out in detail in the Constitution".[87]

Subsequently, the above view received strong support in Kesavananda Bharati v. State of Kerala.[88] In this case, Chief Justice Sikri, struck distinction between construction of an ordinary statute and interpretation of a Constitution and said that in the case of the former Preamble could be used only if language is not plain and clear, but in the case of the latter, as opined by Alladi Krishnaswami Ayyar, all importance has to be attached to the Preamble in a Constitution .[89] Besides, he felt that Preamble to the Indian Constitution has an unique position. In this connection the learned Chief Justice stated "I may here trace the history of the shaping of the Preamble because this would show that the Preamble was in conformity with the Constitution as it was finally accepted. Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution".[90] Then,

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86 Id., at p.1655.

87 Ibid.

88 A.I.R., 1973, S.C. 1461.

89 Id., at pp.1502-1503.

90 Ibid., at p.1501.

tracing the history of the shaping of the Preamble, he concluded thus, "It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble".[91] The Supreme Court strongly reiterated in this case the proposition that all importance must be attached to the Preamble and it must be taken as an aid to interpret the Constitution, because the Constitution must always conform to and exude "the grand and noble vision" expressed in the Preamble.

Naturally, therefore, Parliament felt that since the Preamble to the Constitution had been finally recognised as a tool to interpret the Constitution, it must necessarily indicate guidelines regarding the framework within which "the grand and noble vision" of the Preamble has to be realised and the nature of State which has to emerge and establish strongly on the realisation of such "grand and noble vision" of the Preamble. Besides, as pointed out earlier, Parliament was alarmed by the undue concern shown by the Court to right to property vis-a-vis the socio-economic legislations and agrarian reforms. So, it felt the need to indicate not only the type of socio-economic framework within which "the grand and noble vision" of the

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91 Ibid., at p.1506.

Preamble has to be realised but also the complexion of the State which must come into being firmly on the realisation of the said "grand and noble vision" of the Preamble. Therefore, by the Constitution (Forty-Second Amendment) Act, Parliament introduced the word "socialist" into the Preamble to make it clear that people of this country intended, among others, to establish solemnly a sovereign democratic "socialist" republic.

The foregoing analysis would show that one of the grand and noble visions expressed in the Preamble is "social justice" and it is expected to march forward hand in hand with "economic and political justice" towards the goal of "a new social order" wherein social, economic and political justice would inform all the institution of national life. Apart from that the introduction of the word "socialist" into the Preamble made abundantly clear that social justice, measures must be such as to strengthen the base of the socialist State and egalitarian social order.

At this stage it may be convenient to state the main implications of the Preambular concept of social justice. First, it heralds, as explained by M.R. Masani, far reaching social changes or transformation within the democratic framework. It also eventually means removal of social-stratification and exploitative social order. Second, it connotes, as pointed out by Dr. S. Radhakrishnan, a "transition from state of serfdom to one of freedom". Third, it envisages a just social order encom-

passing all the three major fields of human activity, namely the social, economic and polititai fields. This is sought to be achieved as is evident from the specific provisions, particularly in part IV of the Constitution of India, by transforming all the institutions of national life to that end.

Finally, it envisages now not merely the contents of socialism but also its format or what may be called its infrastructure. That is to say, it has to be realised within the framework of socialist State to strengthen the true egalitarian social order. In other words, the Preambular social justice envisions establishment of a distributive justice-oriented, non-exploitative and egalitarian social order within the socialist democratic republic of India.

CHAPTER III

SOCIAL JUSTICE AND THE COURTS

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In the preceding two chapters we have analysed the viewes of great jurists, political philosophers and Constitution makers on the concept of social justice. It is now necessary to know how the judiciary viewed this concept embodied in the Constitution. "Judges are keenly aware", said Justice V.R. Krishna Iyer, "of some of the social dimensions of the problem and the need to interpret the Constitution as a social document. The Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy".[1] It is therefore interesting to analyse the judicial perspectives of social justice in interpreting this revolutionary "social document", the Constitution of India.

It may be noted that at the initial stage of constitutional development in India Judiciary did not evince much interest in referring to the Preamble or to the Preambular concept of social justice while interpreting the specific provisions of the Constitution. Later, however, the initial stance of indifference

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1 V.R. Krishna Iyer, Social Justice and the Handicapped Humans, (1978), p.31.

changed and the judiciary increasingly relied on the concept of socio-economic justice to solve many knotty social and economic problems that came before the Supreme Court.

1. Social Justice: Antithetic to waiver of Fundamental Rights

In Behram Khurshid v. Bombay State[2] one of the issues before the Supreme Court was whether an individual could waive his fundamental rights. In fact, in the United States the doctrine of waiver of rights was enunciated by some American Judges in construing the American Constitution. This was done on the simple reason that since the rights were reserved by the people to themselves, they might at anytime on their own volition waive them. But Chief Justice Mahajan rejected the doctrine of waiver of fundamental rights because, according to him, it had no relevancy in construing the fundamental rights conferred by Part III of the Constitution of India. In this connection he said "we think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice social economic and political; liberty of thought, expression belief, faith and worship; equality of status and

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2 A.I.R., 1955, S.C. 123.

opportunity"[3] Proceeding further he stated that the fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy.[4]

Evidently, there is a deeper meaning in rejecting the American doctrine of waiver of fundamental rights and the clear linking of fundamental rights as a matter of public or constitutional policy' with such preambular concepts as socio-economic justic. India is a country wherein very large section of the society is economically disabled, socially handicapped and educationally backward. So, incredibly very large number of people are not aware of their fundamental rights and even among those who are faintly aware of the rights are not in a position to reach the citedel of justice to exercise those rights. Added to this, if the doctrine of waiver is read into the Indian Constitution, the weaker sections of the Indian Society may lose many of the precious rights by their default. In that event important rights stipulated in Article 15, 16(4), 17 and 23 of

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3 Id., at p.146.

4 Ibid.

the Constitution would become meaningless rights to the weaker sections. Thus social justice would remain a glittering and unattainable goal. As a matter of fact, similar view was expressed by Justice K. Subba Rao in slightly different strain in Basheshar Nath v. I.T.Commissioner.[5] Rejecting the doctrine of waiver he said that while it is true that the judgments of the Supreme Court of the United States are of great assistance to this Court in elucidating and solving the difficult problems that arise from time to time, it is equally necessary to keep in mind the fact that the decisions are given in the context of a different social, economic and political set up, and therefore great care should be bestowed in applying those decisions to cases arising in India with different social, economic and political conditions.[6]

Justice Subba Rao further said that if the doctrine of waiver is engrafted to the said fundamental principles, it will mean that a citizen can agree to be discriminated. When one realizes the unequal position occupied by the State and private citizen, particularly in India where illiteracy is rampant, it is easy to visualize that in a conflict between the State and a citizen, the latter may, by fear of force or hope of

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5 A.I.R., 1959, S.C. 149.

6 Id., at p.180.

preferment, give up his right. It is said that in such a case coercion or influence can be established in a court of law but in practice it will be well-nigh impossible to do so. The same reasoning will apply to Articles 15 and 16. Article 17 illustrates the evil repurcussion of the doctrine of waiver in its impact on the fundamental rights.[7]

In otherwords, the doctrine of waiver, which is easily applicable in an affluent society like America, will spell disaster to the social justice if it is given effect to in a socially and economically imbalanced society like India. In short, concept of social justice is antithetic to the doctrine of waiver of fundamental rights.

2. Social Justice leads to dynamic Socialism

In an interesting case the Supreme Court discussed the concept of socialism, which spells social justice in the economic field, in relation to State's power to carry on trade and business to the exclusion, complete or partial, of citizens as provided in Article 19(6)(ii) of the Constitution. This was done in Akdasi Padhan v. State of Orissa[8] wherein the Orissa Kendu Leaves (Control of Trade) Act of 1961, which created a State monopoly

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7 Id., at p.181.

8 A.I.R., 1963, S.C. 1047.

in the trade of Kendu leaves, was challenged on the ground that it imposed severe restrictions on the fundamental rights of the petitioner guaranteed by Article 19(i)(g). Dealing with this point Justice Gajendragadkar said that in attempting to construe Article 19(6) which enables the State to nationalise industry or establish a monopoly in trade it must be borne in mind that a literal construction may not be quite appropriate. In interpreting such a provision, one should bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem.

The doctrine of State ownership is the result of the rise of philosophy of socialism. Pointing to the difference in approach to State ownership, Justice Gajendragadkar said that to the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by consideration of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it as a matter of principle

that all important and nation building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, while the second supports nationalisation only on grounds of efficiency and increased output.[9]

Proceeding further the judge referred to the amendment made to Article 19(6) and said Article 19(6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which socialism accepts.[10]

Subsequently in another case, Excel Wear v. Union of India[11] the Supreme Court referred to the aforesaid proposition and said that the difference between the doctrinaire approach and the pragmatic one may enable the courts to lean more and more in favour of nationalisation and State ownership of an industry. This is particularly so after the addition of the

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9 Id., p.1053.

10 Id., pp.1053-1054.

11 A.I.R., 1979, S.C. 25. In this case the employers challenged the constitutional validity of Sections 25-O and 25-R of the Industrial Disputes Act, 1947.

word 'Socialist' in the preamble of the Constitution. But the private ownership of an industry still continues and is recognised. It plays a very dominant role in our economic structure. In such a situation it becomes difficult to realise in full the ideals of socialism.[11a] The Court pointed out that in a state undertaking, the Government being the owner, it may not be difficult to protect the labour even by spending out of the public exchequer. But in a private sector obviously the problems are entirely different. On the one hand the private industry is entangled in the question of management and on the other it must get some return out of this business. Besides the fact remains that private entrepreneurship contributes substantially to the growth of the national economy by formation of more and more capital. In this situation court asks, does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored? The question posed are suggestive of the answers.[12]

It may be noted that this view was expressed by the

11a The Court noted, "Most of the industries are owned by limited companies in which a number of shareholders, both big and small, hold the shares. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does the socialism go to the extent of not looking to the interests of all such persons?" Id., p.36.

12 Id., p.36.

Supreme Court in Excel wear case in response to two rival contentions advanced in the case. On behalf of the employers it was contended that the right to close down the business is an integral part of the right to carry on the business guaranteed under Article 19(i)(g) of the Constitution of India. The impugned law, namely section 25-0(1) and (2) of the Industrial Disputes Act, 1947,[13] which gives a discretion to the appropriate government to grant or not to grant permission for a closure of an industrial undertaking, imposes a restriction on the said

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13 Section 25-0(1) and (2) of the Industrial Disputes Act, 1947, states as follows:

"25-0(1) An employer who intends to close down an undertaking of an industrial establishment to which this chapter applies shall in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner.

Provided that nothing in this subsection shall apply to be undertaking set up for the construction of building, bridges, roads canals, dams or for other construction works.

(2) Where an application for permission has been made under sub-section (1) the appropriate government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reason to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and workmen".

fundamental right which is highly unreasonable, excessive and arbitrary. It is not a restriction but almost amounts to the destruction or negation of that right. The restriction imposed is manifestly beyond the permissible bounds of clause (6) of Article 19 of the Constitution. On the other hand, the opposite contention was that restrictions by the impugned law are quite reasonable and justified to put a stop to the unfair labour practice and for the welfare for the workmen. It is a progressive legislation for the protection of weaker section of the Society. Further, it was submitted that in view of the high philosophies of jurisprudence in relation to the social and welfare legislations, as expounded by renowned jurists and judges abroad, that the action of the closing down a business is no right at all in any sense of the term.[14] It was in the context of these two extreme positions taken by the parties, the Supreme Court expressed its above mentioned views and effectively conveyed the idea that socialism, which spells social justice, must maintain a just balance between several interests, which are allowed to contend against each other in a society.

It is interesting to note that both Akdasi Padhan and Excel wear subtly equated socialism, through the medium of

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14 Excel Wear v. Union of India, A.I.R., 1979, S.C. 25, at p.29.

welfare concept, with social justice. This is evident from the fact that in the former case the concept of socialism, as explained by the Court, tries to find its justification in the 'notion of social welfare', and in the latter case the court clearly said that 'principles of socialism and social justice' cannot ignore, with impunity, interests of different sections of the society. Akdasi Padhan lays stress on doctrinaire aspect of socialism or social justice. But Excel Wear ruling does not deny it, but it lays emphasis on the dynamic content of socialism and social justice. In other words, socialism or social justice is not a static concept indicating a single and only one recipe to all social situations; it is a dynamic philosophy, which has a dynamic role in a mixed economy, for it must maintain a just balance between interests of several sectors or sections which are allowed to function as integral part of the society. In short, social justice, according to the Supreme Court, is doctrinaire in its approach but dynamic in its content and efficacy.

3. Social Justice renders processual Justice into a Versatile Use-tool.

The Supreme Court took an opportunity in Municipal Council, Ratlam v. Vardhichand[15] to discuss the concept of social

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15 A.I.R., 1980, S.C. 1622.

justice. Speaking approvingly about a Magistrate's order made under Section 133 of the Code of Criminal Procedure directing the appellant in this case to bring about abatement of public nuisance, Justice Krishna Iyer tried to find a new social justice content in the Constitution. He said, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapons of versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under Section 133, Criminal Procedure Code. In the exercise of such power, the judiciary must be informed by broader principle of access to justice necessitated by the conditions of developing countries and obliged by Article 38 of the Constitution.[16] This, according to Justice Krishna Iyer, is the "processual branch" of the Indian public law.[17] In this connection, he says that the new attitude of procedural justice reflects what Prof. Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure". Then he says that "the paramount concern is increasingly with 'social justice', i.e., with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people".[18]

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16 Id., p.1628.

17 Id., p.1628.

18 Id., p.1629.

Thus, according to the Supreme Court, as explained by Justice Krishna Iyer, the social justice imparted by the Constitution has rendered the remedial weapon into a versatile use-tool. It also means, finding or picking procedures which are conducive to the pursuit and protection of the rights of the ordinary people. In other words, the social justice, which ensures access to justice to common man, does not render the procedural justice an ineffective vehicle of justice by putting on it a saddle bag of stifling technicalities. That is to say, if procedural justice is denied to common man on technical grounds, the procedural justice ceases to be a versatile use-weapon; and access to justice becomes an ineffective concept and consequently the social justice may remain an unattainable goal. The judiciary has clearly conveyed the idea that the Constitution does not give scope for such a stalemate.

4. Egalitarian Social Order

Of recently, there is a rising tide of judicial activism for rendering justice flowing into different channels of gender justice, worker justice, minorities justice, dalit justice and equal justice. A host of decisions by the highest court of the land bear testimony to this trend.

S.P. Gupta v. Union of India,[19] is one of those landmark

19 A.I.R., 1982, S.C. 149.

cases in this time. The Supreme Court, while discussing the independence of the judiciary, explained the role of the judiciary in realising the constitutional goal of social justice. Justice Bhagwati explained as to what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law.[20] According to him, our Constitution is not a non-aligned rational charter but a document of social revolution. He says that the Constitution casts an obligation on every instrumentality including the judiciary to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. Justice Bhagwati went on, "The judiciary has therefore a socio-economic destination and a creative function. It has to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice".[21]

There is an obvious contrast between the activist role

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20 Id., p.196.

21 Ibid.

of the judiciary and the passive role of the judiciary. According to Justice Bhagwati, the former is necessary for the Indian Society, which is 'pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals'.[22] As he said in the battle between those who are socially or economically unequal, the judicial process may prove disasterous from the point of view of social justice, if the judge is merely passive or negative. They should adopt a positive and creative approach. Judges cannot remain mere bystanders or spectators. They must become active participants in the judicial process ready to use law in the service of social justice through a pro-active goal-oriented approach.[23] But, Justice Bhagwati, advocated for judicial cadres who share the fighting faith of the Constitution and who are imbued with the constitutional values.[24]

Laying stress on the necessity of a judiciary which is in tune with the social philosophy of the Constitution, he observes, that the country must have "Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with

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22 Id., p.197.

23 Ibid.

24 Ibid.

a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives".[25]

The role of the judiciary in reaching the constitutional goal of social justice described by Justice Bhagwati has been supported by Justice Desai, who pleaded for co-operation of the Executive, Legislature and Judiciary in striving to achieve this ideal. In this co-operative venture the judiciary has to be inspired by the values enshrined in the Constitution. This inspiration is necessary, if rule of law is to run akin to rule of life and a feudal society is to be transformed into an egalitarian society by the rule of law.[26] Proceeding further he said, "the judiciary must keep pace with the changing moves of the day, its decision must be informed by values enshrined in the Constitution, the goals set forth in the fundamental law

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25 Ibid.

26 Id., p.445.

of the land, peoples' yearning desire for a chance for the better and promised millennium. An activist role in furtherance of the same is a sine qua non for the judiciary".[27]

In this case, the Supreme Court explained in clear terms two matters, one relating to the meaning of the term 'social justice' and the second regarding the role of the judiciary in realising the social justice. As indicated by the court, the social justice envisages a socio-economic revolution and transformation of the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life. Further it connotes gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals. Besides, it means an egalitarian social order. Apart from indicating the meaning of the term 'social justice', the court laid repeated emphasis on the activist role of the judiciary in realising the aforesaid constitutional goal of social justice.

5. Rule of interpretation making social justice a vibrant concept.

Can drivers working in two public establishments be given two grades of pay and perks? If they are thus treated

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27 Id., p.446.

differently will it not be a violation of the concept of social justice so meticulously guarded under the Constitution? In Randhir Singh v. Union of India,[28] the Supreme Court had to meet this problem. The court laid down the proposition that the fundamental rights must be construed in the light of the Preamble and the Directive Principles of State Policy. In this case the Court, while discussing the principle of "equal pay for equal work", has said that the directive principle of "equal pay for equal work for both men and women" stipulated in Article 39(d) of the Constitution "means equal pay for equal work for every one and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this court have to be read into the fundamental rights as a matter of interpretation".[29]

Proceeding further the Court pointed out that "the Preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word "Socialist" must mean something. Even if it does not mean "To each according to his

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28 A.I.R., 1982, S.C. 879. The petitioner in this case is a Driver Constable in the Delhi Police Force under the Delhi Administration. His demand is that his scale of pay should atleast be the same as the scale of pay of other drivers in the service of the Delhi Administration, for he discharges the same duties as the rest of the driver in other offices.

29 Id., p.881.

needs', it must atleat mean 'equal pay for equal work'.[30] Finally, the court declared that construing Articles 14 and 16 in the light of the Preamble and Article 39(d), the principle 'equal pay for equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.[31] The principle laid down has far reaching significance. The principle of "equal pay for equal work" is part of the concept of "social justice" enshrined in the Preamble. Here that principle has been rightly construed to be the part of the word "socialist" embodied in the Preamble. So, to the extent the "social justice" looks forward to the creation of an egalitarian society, wherein the "equal pay for equal work" is assured for every one and as between the sexes, it also looks forward to the creation of Socialist Republic of India. Since the concept of social justice pervades many of the provisions of Directive Principles of State Policy, the rule of interpretation that the fundamental rights must be construed in the light of the Preamble and Directive Principles has transformed the social justice into a very vibrant concept in the Constitution.

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30 Id., p.882.

31 Ibid.

As a matter of fact, the two ideas, namely, (1) social justice means egalitarian social order, and (2) social justice pervades many directive principles, have been brought out clearly by Justice Bhagvati in his dissenting opinion in Minerva Milis Ltd. v. Union of India.[32] Referring to the views of Granville Austin, he said that it is in the Directive principles that we find the clearest statement of the socio-economic revolution. The Directive Principles aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves.[33] The Fundamental Rights are no doubt important and valuable in a democracy. But how can there be real democracy without social and economic justice to the common man? Creation of socio-economic conditions in which there can be social and economic justice is the objective of Directive Principles which nourish the roots of our democracy, make it a real participatory democracy and fertilise the static provisions of the Fundamental Rights.[34] Then Justice Bhagwati observes, "the Directive Principles, therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order

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32 A.I.R., 1980, S.C. 1789.

33 Id., p.1847. Granville Austin, The Indian Constitution, Corner stone of a Nation, p.51.

34 Ibid.

with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country".[35]

The above views of Justice Bhagwati have been examined in a subsequent case. It was in Sanjeev Coke Mfg. Co. v. M/S. Bharat Coking Coal Ltd.,[36] this was done. The case relates to the issue on the validity of nationalisation of the coke oven plants belonging to the petitioners. Justice Chinnappa Reddy said that Justice Bhagwati was at great pains to point out that the broad egalitarian principle of social and economic justice for all was implicit in every Directive Principle, and therefore, a law designed to promote a Directive Principle even if it came into conflict with the formalistic and doctrainaire view of equality before the law, would most certainly advance the broader egalitaian principle and the desirable constitutional goal of social and economic justice for all. Justice Reddy continued, "If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31-C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of equality before the

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35 Ibid.

36 A.I.R., 1983, S.C. 239.

law".[37] Thus it is clearly conveyed that "social justice" means egalitarian social order and egalitarianism is implicit in the Directive Principles. The dynamic Directive Principles, in which the social justice, that is, egalitarianism, is implicit, energise the static provisions of the Fundamental Rights. It is, therefore, appropriate to conclude that the Fundamental Rights must be interpreted in the light of the social justice concept which is enshrined in the Preamble and implicit in the Directive Principles.

6. Social Justice: Signature Tune of the Constitution:

Another important case, wherein the Supreme Court discussed the concept of social justice, is People's union for Democratic Rights v. Union of India.[38] This case is also known as Asiad Workers' case. This is a writ petition brought by way of public interest litigation in order to ensure observance of labour laws in relation to workmen employed in the construction work of various projects connected with the Asian Games. In this case, while discussing the role and importance of public interest litigation, Justice Bhagawati refers to reality of the Indian situation.[39] Large number of men,

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37 Id., pp.249-250.

38 A.I.R. 1982, S.C. 1473.

39 Id., p.1477.

women and children who constitute the bulk of our population are today living a sub-human existence. Abject poverty, has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. According to Justice Bhagwati the only solution for making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights.[40] He further says that this task is to be carried by the Legislature and the Executive. But the judiciary can play a role when it has to decide cases coming in public interest litigation.[41] Justice Bhagwati seems to hold that the public interest litigation is a co-operative or collaborative effort on the part of the people, public authorities and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.[42] Then Justice Bhagwati said: "The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their characters as upholders of the established order and status

40 Ibid.

41 Ibid.

42 Id., pp.1477-1478.

quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realisation must come to them that social justice is the signature tune of our Constitution, and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realisation of the constitutional goals".[43]

The aforesaid pronouncements of the Supreme Court in the Asiad workers' case clearly convey an idea that social justice enshrined in the Constitution urges unmistakably remaking of material conditions and restructuring of social and economic order in order to enable the vast masses of the Indian Society, which remained for generations a vulnerable sections of the society, to realise the economic, social and cultural rights and to realise the constitutional goals. In other words, as explained by Justice Bhagwati, social justice envisages a socio-economic revolution by restructuring Socio-economic order, and remaking material conditions to bring into existence a new social order of lasting value to all. The court, therefore, has rightly described the social justice as "the signature tune of our Constitution". Similar views have been expressed by Justice Bhagwati in Bandhva Mukti Morcha v. Union of India[44], wherein

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43 Id., p.1478. (emphasis added)

44 A.I.R., 1984, S.C. 802.

once again he lays emphasis on the need "to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution".[45]

7. Social Justice Stems from Social Morality and Abhors Economic Exploitation.

An interesting discussion on social justice has taken place in D.S. Nakara v. Union of India.[46] Question raised in this case was whether the date of retirement was a relevant consideration for eligibility when a revised formula for computation of pension is ushered in and made effective from a specific date. Would differential treatment to pensioners related to the date of retirement quo the revised formula for computation of pension attract Article 14 of the Constitution and the element of discrimination liable to be declared unconstitutional as being violative of Article 14? The court has answered the question and said that if the pensioners form a class, their pension computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later. In this connection the court has referred to Directive Principles and the Preamble. It has pointed out

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45 Id., p.811.

46 A.I.R., 1983, S.C. 130.

that Article 41 obligates the State to provide, among others, assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Then it referred to the phrase "socialist Republic" in the Preamble and said that "principle aim of a socialist state is to eliminate inequality in income and status and standards of life. The basic frame work of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income".[47]

Old age pension aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. At old age the State shall ensure a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable liesure, relieving the boredom and the humility of dependence. The court said that, "Article 41 aims this and contains the characteristics of a socialist state."[48]

The court has pointed out that the liberalised pension scheme is good, but the arbitrary selection of the criteria for eligibility for the benefits of the scheme dividing the pensioners

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47 Ibid., pp.138-139.

48 Ibid., p.139.

on the basis of a specified date is bad. Hence the court opined that the illegal provision relating to the arbitrary selection of criteria for the eligibility for the benefits of liberalised pension must be severed from the scheme and the liberalised scheme of pension be given effect to. But then, it has been pointed out that rule of severence always cuts down the scope of legislation but can never enlarge it and in the present case the scheme as it stands would not cover pensioners such as the petitioners and if by severance an attempt is made to include them in the scheme it is not cutting down the class or the scope but enlarge the ambit of the scheme which is impermissible even under the doctrine of severability. Further, it is pointed out that there is no precedent so far where the court has included some category within the scope of provision of law to maintain its constitutionality. Saying that the absence of precedent need not deter them the court held that every new norm of socio-economic justice and every new measure of Social justice commenced for the first time at some point of history. If at that time it is rejected as being without a precedent, the law as an instrument of social engineering would have long since been dead and no tears would have been shed. To be pragmatic is not to be unconstitutional. In its onward march law as an institution usher in socio-economic justice. In fact, social security in old age commended itself in earlier stages as a moral concept but in course of time it acquired legal

connotation.[49] According to the court, socio-economic justice stems from the social morality coupled with abhorence for economic exploitation and the advancing society converts in course of time moral or ethical code into enforceable legal formulations.[50]

The views expressed in Nakara case clearly show that socialist state envisaged in the Preamble and the social justice enshrined in the preamble and Directive Principles include social security measures to provide assistance in cases of unemployment, old age, sickness and disablement and other cases of undeserved want. The social justice, according to the court, means 'equitable distribution of national cake'. That is to say, the judiciary has laid stress on the distributive justice aspect of the social justice. Besides, according to the Judiciary the concept of social justice stemmed from the concept of social morality and eventually become an enforceable legal concept and it abhors economic exploitation. In other words, it envisages a Society sans exploitation.

8. Conclusion.

The foregoing analysis of the judicial pronouncement would show that the judiciary discussed all aspects of the

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49 Id., pp.141-142.

50 Id., p.142.

concept of social justice enshrined in the Constitution and explained its various connotations and its importance. First it said that the concept of social justice is antithetic to doctrine of waiver of fundamental rights. Second, social justice, according to the judiciary, is socialism with a doctrinaire approach, for its goal is to bring national wealth and means of production under national control to subserve the common good. At the same time, it is explained that in a mixed economy, interests of private enterprise cannot be stifled unjustly. So, necessarily a just balance must be maintained between conflicting interests. So viewed, socialism becomes more dynamic than doctrinaire. Therefore, as indicated by the judiciary, social justice is dynamic socialism which aims at a just socio-economic order. Third, the judiciary is of the opinion that concern with social justice means concern with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people. In short, social justice orientation imparted to procedures by the Constitution has made them remedial weapons of versatile use. Consequently, procedures are freed from stifling technicalities and access to justice has become a meaningful concept to common man. Fourth, the concept of social justice, envisages creation of a new human order and an egalitarian society, wherein gender justice, worker justice, minorities justice, <u>dalit</u> justice and equal justice among the chronic unequals are assured to

all. An activist role in furtherance of the concept is a constitutional responsibility of the judiciary. Fifth, the dynamic Directive Principles energise the static provisions of Fundamental Rights. So, when the judiciary said that the fundamental rights must be construed in the light of Directive Principles and the Preamble, it virtually conveyed the idea that the fundamental rights must be interpreted in the light of the Social justice. This rule of interpretation has made the social justice a vibrant concept in the Indian constitutional jurisprudence. Sixth, the unique position of the social justice as a constitutional goal has been conveyed by the judiciary when it described the concept as the signature tune of our Constitution. Finally socio-economic justice stemmed from the social morality and then became an enforceable legal formula and it abhors economic exploitation. Besides, the court has not only said that comprehensive social security schemes are within the ambit of social justice concept but also laid stress on the distributive justice aspect of the concept. Thus, meanings attributed to, and the unique role designed for, the concept of social justice enshrined in the Constitution by the judiciary in its various decisions have made the social justice a multi-dimensional vibrant concept of far reaching importance.

CHAPTER IV

DETERMINATION OF BACKWARD CLASSES AND REPORTS OF COMMISSIONS

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DETERMINATION OF BACKWARD CLASSES AND REPORTS OF COMMISSIONS

Socially and educationally Backward Classes of citizens constitute one group of persons who have been designated in the Constitution of India as the "Weaker sections of the people". Naturally, therefore, the Constitution has made provision enabling the State to make protective discrimination in their favour. The relevant provision is embodied in Article 15(4) which says that nothing in Article 15 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". This provision, as its words reveal, is an exception to the main clause, namely, Clause (1) of Article 15 and Clause (2) of Article 29. Clause (1) of Article 15 states that the State shall not discriminate against any citizens "on grounds only of religion, race, caste, sex, place of birth or any of them". This provision is intended to ensure equality to all citizens in the social and economic fields by preventing the State from making any discrimination on any of the grounds mentioned therein. Clause (4) of Article 15, being an exception to both Clause (1) of Article 15 and Clause (2) of Article

29[1], enables the State to make special provisions in favour of socially and educationally Backward Classes of citizens in the social, economic and educational fields. Such special provisions in their favour are necessary to remove their social and educational backwardness and to bring them on par with the other sections of the people.

The term "socially and educationally Backward Classes" has not been defined in the Constitution. The same term is, no doubt, used in Article 340(1) which provides that President may by order appoint a commission to investigate the conditions of "socially and educationally Backward Classes" within the territory of India. The commission so appointed may in its report suggest, among others, steps that should be taken to improve their condition.[2] But even here the definition of the term is not

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1 Article 15(1) States: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

Article 29(2) States: "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".

2 Article 340(1) of the Constitution States: "The President may by order appoint a commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any state to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the union or any state and the conditions subject to which such grants should be made and the order appointing such commission shall define the procedure to be followed by the commission".

furnished. But, the State must have a clear idea as to who actually constitute socially and educationally Backward Classes of citizens before it makes special provisions in their favour. Therefore, it is necessary to know the criteria or units and factors which have to be taken into consideration to determine the "socially and educationally Backward Classes" of citizens, for the effective utilisation of Article 15(4) depends much upon the clear determination of the said classes of citizens for whose benefit and uplift it has been incorporated into the Constitution.

Similarly, the phrase "Backward Classes of citizens" in Article 16(4) has not been defined. The phrase "Backward Class" indicates a weaker section of the society. This provision has been introduced to give protective discrimination to weaker sections, namely, "Backward Classes" of citizens in matter of public employment. Here also question arises as to who can be considered as "backward" and what criterion or criteria should be adopted to determine it.

GENESIS OF ARTICLE 15(4)

Genesis of Article 15(4) throws some light on the problem of selecting the criterion or criteria to determine "the socially and educationally Backward Classes" of citizens. As a matter of fact, Clause (4) of Article 15 was not found in the original Constitution of India. It was introduced into the Constitution by

the Constitution (First Amendment) Act, 1951, to get over the difficulties created by the decision of the court in State of Madras v. Champakam Dorairajan.[3] The decision of the court and subsequent debate in Parliament on the aforesaid first amendment of the Constitution help us to understand the problem to a great extent.

Prior to the commencement of the Constitution of India, Government of Madras issued a Communal G.O. regulating admission to professional colleges, Medical and Engineering colleges, on the basis of religion, caste and race set forth in the said communal G.O. For every 14 seats to be filled by the Selection Committee, candidates were selected on the following basis:

Non-Brahmins (Hindus)	...	6
Backward Hindus	...	2
Brahmins	...	2
Harijans	...	2
Anglo Indians & Indian Christians	...	1
Muslims	...	1
		14

Two Brahmin candidates, one each for Medical and Engineering colleges respectively, who could not get admission despite their good performance in the qualifying examination, challenged the Communal G.O. as being violative of their fundamental rights guaranteed by Articles 15(1) and 29(2) of the Constitution. This was done in the above mentioned Champakam Dorairajan case.[4] The learned Advocate-General, who appeared for the State, contended that the abovesaid fundamental rights have to be read in the light of Article 46 in Part IV of the Constitution, which charges the State with an obligation of promoting 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 of protecting them from social injustice and all forms of exploitation. The Supreme Court, speaking through Mr. Justice S.R. Das, held that the classification in the Communal G.O. was based on religion, race and caste which is forbidden under Article 29(2). The court rejected the argument of the State on the ground that the fundamental rights are "sacrosanct and not liable to be abridged by any Legislative or Executive act or order except to the extent provided in the appropriate Article in Part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights".[4a]

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4 Ibid.

4a Id., p.228.

However, the most important aspect of the decision is the reference to Article 16(4) which might have given a lead to the members of Parliament to bring the First Amendment to the Constitution for the purpose of adding Clause (4) to Article 15. The Supreme Court referred to Article 16, which guarantees equality of opportunity in public employment, and also to Clause (4) of Article 16, which specifically enables the State to make reservations of appointments or posts in Government service in favour of backward classes, and said that if the argument founded on Article 46 were sound then Clause (4) of Article 16 would have been wholly unnecessary and redundant. According to the Supreme Court, omission of a clause in Article 29 similar to Clause (4) of Article 16 was significant, for the intention of the makers of the Constitution might well be that communal consideration for reservation was not desirable in matters of admission into educational institutions maintained by the State or receiving aid out of State funds.[5]

The decision in Champakam Dorairajan case caused a political agitation in the South. The decision also gave a clue as to what should be done to enable the State to help the backward classes of citizens to get admission in educational institutions. So, the Constitution (First Amendment) Act, 1951, introduced Clause

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5 Ibid., p.228. Another case of some significance is Jagwant Kaur v. State of Bombay, A.I.R., 1952, Bom.461.

(4) to Article 15 to enable the State to make special provisions for the weaker sections mentioned therein in matters of admission into educational institutions. The debate in Parliament over the amendment revolved not only around the desirability of providing educational preferences to the Backward Classes but also on the question of identification of the Backward Classes.

Interestingly enough, earlier idea was to add the words "or for the educational, economic or social advancement of any backward class of citizens" to Clause (3) of Article 15. Later it was changed and a separate Clause (4) was decided upon and the Select Committee of the House chose the words as they are now in Article 15(4) because the phrase "socially and educationally backward classes" occur in Article 340 and it wanted to bring them bodily from there. However, main questions were who would decide about the socially and educationally backwardness of the sections of the society? and what criteria would be taken into consideration in coming to such decision? One view was that since the language of Article 15(4) is on the lines of Article 340, the specification of backward classes by the President after the recommendation made by the Commission appointed under Article 340 would be final.[6] This was opposed by a few others.[7] The other view was

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6 These are the views of Thakurdas Bhargava and M.A. Ayyangar. For this refer Parliamentary Debates. Vol.XII-13, (Part II) at Col.9719 and 9817.

7 It was opposed by Hukum Singh and S.P. Mookerjee, Ref. Parliamentary Debates, Vol.XII-13, (Part-II) at Col.9823 and 9824.

that the identification of the backward classes would be within the purview of the State Governments who might be trusted to do their job well.[8]

As regards the criteria to be adopted in determining the backwardness contemplated in Clause (4) of Article 15, members expressed various views. Dr. B.R. Ambedkar, the then Law Minister, observed that the amendment was required because "what are called Backward Classes are....... nothing else but collection of certain castes".[9] Dealing with that issue, Prime Minister Nehru said that "there are groups, classes, individuals, communities....... who are backward. They are backward in many ways - economically, socially, educationally - sometimes they are not backward in one of these respects and yet backward in another.[10] Obviously, Nehru was not referring to caste alone as a criterion to determine backwardness. He was for ending all those "infinite divisions that have grown up in our social life", which, he said, "we may call by any name you like, the caste system or religious divisions, etc. These are of course economic divisions but we realize them and we try to deal with them".[11] Prof. K.T. Shah strongly felt that the backwardness to be remedied was economic, and, therefore,

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8 Parliamentary Debates, Vol.XII-13, (Part-II) at Col.9832-33.

9 Id., p.9006.

10 Id., p.9616.

11 Ibid.

he proposed the word "economically" to qualify the term "backward classes".[12] But, Nehru was not agreeable to it for two reasons. First, the addition of the word "economically" would make Article 15(4) different from the language used in Article 340. Secondly, he felt that the addition of the word "economically" would not help much, for according to him, " 'socially' is a much wider word including many things and certainly including economically".[13] Thus, though Dr. Ambedkar said that backward classes are "collection of castes", predominant view in the House seemed to veer round a comprehensive criteria and not to bog the determination of backwardness down to caste criterion. Backwardness is a social evil, which is sought to be met and solved under Article 15(4).

GENESIS OF ARTICLE 16(4) AND THE VIEWS OF FOUNDING FATHERS:

In the interim report submitted by the Advisory Committee on Fundamental Rights the present Article 16 was shown as Cluase 5 and the "reservation clause" of the present clause (4) of Article 16 was shown then as second paragraph of Clause 5. This second paragraph of Clause 5, which was the "reservation clause", was worded thus: "Nothing herein contained shall prevent the State from making provision for reservations in favour of classes who, in the opinion of the State, are not adequately represented in the

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12 Id., p.9121.

13 Id., p.9830.

public services". The entire Clause 5 was discussed in the Constituent Assembly on the 30th April 1947. The only change brought about then was to rearrange the paragraphs of Clause 5 and number them. First paragraph of Clause 5 was numbered (a) and that dealt with equality of opportunity for all citizens in matters of public employment. The second paragraph, which contained "reservation clause", was given the third place and numbered (c).

Subsequently, a draft was prepared by Shri B.N. Rau, the Constitutional Adviser, on the 7th October 1947. In that draft no substantial change was made in the text of clause 5, which by then was known as section, except some verbal modifications and re-designating the paragraphs as sub-clauses and renumbering them as (1), (2), (3), etc. The "reservation clause" was numbered sub-clause (3) and some significant verbal modification was made therein. This sub-clause (3) in B.N. Rau's draft read thus: "Nothing in this section shall prevent the State from making any provisions for the reservation of appointments or posts in favour of any particular class of citizens who, in the opinion of the State, are not adequately represented in the services under the State". Thus, in B.N. Rau's draft of 7th October 1947 not only sub-clause (3) was elaborated but also the word "particular" qualified the phrase "class of citizens". But, when the Drafting Committee considered this sub-clause (3) of Clause (Section) 5 in B.N. Rau's

Draft, it made only one change in it and that was substitution of the word "backward" for the word "particular". With this solitary change, the Drafting Committee put the Clause (Section) 5 as Article 10 in its Draft of 21st February 1948. So, in the Draft Constitution, Article 10(3) read thus: "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".

It is interesting to note that a few amendments were suggested to Clause (3) of Article 10 of the Draft Constitution. One amendment sought to insert the words "economically or culturally" in Clause (3) after the words "or posts in favour of any",[14] another demanded deletion of the word "backward" from that Clause[15] and yet another desired that the words "Scheduled Castes or" should be inserted in that clause after the words "in favour of".[16] Dealing with them, B.N. Rau in his note said (1) that in view of the fact that the Drafting Committee suggested the insertion of the word "backward" without any further qualification and the expression used in Article 37 was "the weaker sections

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14 This was suggested by R.R. Diwakar and S.V. Krishnamoorthy Rao, B. Shiva Rao, The Framing of India's Constitution, (1968), Vol.IV, p.31.

15 This was suggested by T.S. Ramalingam Chettiar and the Madras Legislative Council, Ibid.

16 This was the suggestion made by Upendranath Barman, Ibid.

of the people" and the one used in Article 301 was "socially and educationally backward classes", there was no great objection to the first amendment except that it was perhaps unnecessary; (2) that the acceptance of the second amendment would mean the grant of wide power to the State to reserve appointments or posts in favour of any class of citizens who were not adequately represented and it was, therefore, for the Constituent Assembly to decide whether the scope of this clause should be so extended, and (3) that the third did not arise as there was no such recommendation to that effect by the Advisory Committee on Minority Rights.[17] Besides, there was a very interesting suggestion by a lawyer from Calcutta that in Clause (3) of Article 10, after the words "shall prevent the State" the words "for a period of fifteen years from the commencement of this Constitution" should be added. He felt that the reservation of posts in favour of backward class of citizens should be allowed only for a period of 15 years from the commencement of the Constitution, lest the people should develop vested interest in "backwardness" and backwardness be perpetuated.[18]

The article came up for consideration before the Constituent Assembly on 30th November 1948. Then, a few

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17 Ibid.

18 Suggested by Atul Chandra Gupta, Id., at p.32.

amendments were suggested to Clause (3) and different views were expressed on matters relating to reservation of appointments in favour of backward class of citizens. A member, Loknath Misra, suggested deletion of Clause (3) from Article 10 of the Draft Constitution, for he felt that reservation of appointments to backward classes might put a premium on backwardness and inefficiency. Besides, he opined that it was not a fundamental right for any citizen to claim a portion of State employment.[19]

As a matter of fact, during the debate in the Constituent Assembly on 30th November 1948, much controversy raged around the word "backward" in Clause (3). Some wanted to delete the clause altogether, some others desired that atleast the reservation should be restricted to a period of ten or fifteen years and yet another group of members expressed their apprehension that the word "backward" might be misconstrued by the State. H.J. Khandekar was of opinion that the word "backward" was vague and might help to sow the seeds of communalism in so important a matter as selection of candidates for public service.[20] A Madras representative, Mohamed Ismail Sahib, pointed out that in Madras the word was defined and bore a technical meaning, according to which more than one hundred and fifty communities, excluding Scheduled Castes were counted under this label. In Madras,

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19 C.A.D., Vol.VII, p.673.

20 C.A.D., Vol.VII, p.691.

therefore, 'backward' meant one of those one hundred and fifty communities, which actually constituted the majority of the population of the province, and not any community that was generally backward. If that meaning was going to be attributed to the word "backward", then, he said, the backward classes found in the minority communities, such as Christian and Muslim Communities, would be kept out of the pale of the Clause (3).[21] According to T. Chenniah, a Mysore representative, the word "backward" in South India referred to socially and educationally backward classes of citizens.[22] Thus, the varied connotations of the word "backward" puzzled certain members who, therefore, thought that it should either be dropped from the text or defined precisely.

The Chairman of the Drafting Committee, Dr. B.R. Ambedkar, dealt with the question of "backward". He gave a lengthy answer to clear the doubts. He said that the use and exact import of the word "backward" must be understood in the context of an attempt made to reconcile the opposing views of undiluted perfect equality of opportunity and of reservation-ridden equality of opportunity in the matter of Government employment. A glance at the Article, he said, would show that the principle of equality of opportunity and the demand for reservations of posts

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21 C.A.D., Vol.VII, pp.692-693.

22 Id., at p.690.

for the communities, which hitherto had no "proper look-in" into the administration, were happily provided for.[23] Then, discussing the idea of reservation, he said that supposing reservations were made for communities, the total of which came to something like 70 per cent of the total posts leaving the other 30 per cent as open to general competition, that would be extremely unsatisfactory from the point of view of the principle of equality, for the reservations must of necessity be confined to minority seats. The exception in favour of reservation, therefore, could not be made, he said, without such qualifying word as "backward". He admitted that the word did not originally find a place in the fundamental rights and the Drafting Committee took the entire responsibility of introducing it.

Then, dealing with the question "what is a backward community?", he pointed out that it was clear from the language of the Draft Constitution that it was left to be determined by each local Government. This provision brought to the fore another question whether the reservation was a justiciable issue. But, Dr. Ambedkar admitted that it was rather difficult to give a dogmatic answer to it. He thought, however, that it was a justiciable matter. In this connection he said: "If the local Government included in this category of reservations such a large

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23 C.A.D., Vol.VII, p.701.

number of seats, I think one could very well go to the Federal Court or the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed, and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner".[24] The Constituent Assembly thereafter adopted only those amendments, which had been accepted by Ambedkar with respect to Article 10, and rejected the rest. The Clause (3) emerged in the form how it is now found in Clause (4) of Article 16. At the revision stage in the Constituent Assembly, Article 10 of the Draft Constitution was put by the Drafting Committee as Article 16 and Clause (3) was renumbered as Clause (4) of Article 16. Thus, the reservation clause came to be known as Clause (4) of Article 16 of the Constitution.

The aforesaid discussion of Clause (4) of Article 16, the reservation clause, in the Constituent Assembly would show that the word "backward" has not been precisely defined, but it has been left to be determined by the State Governments. The State Governments are, however, expected to approach the problem of determining the "backward classes" in a very reasonable way. This is clear from the three points made out in the course of the debate in the Constituent Assembly. They are (1) that the exact

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24 C.A.D., Vol.VII, p.702.

use and connotation of the word "backward" must be understood in the context of an attempt made to reconcile the opposing views of undiluted perfect equality of opportunity in the matter of Government employment, (2) that the reservations of posts are meant for the communities, which hitherto had no "proper look-in" into the administration, and (3) that the reservation of posts must be confined to minority seats. In other words, the State Governments are expected to determine or bring within the fold of "Backward Classes" those classes or communities, which hitherto had no "proper look-in" into the administration and the determination of "Backward Classes" and the scheme of reservations of posts are such that they do not destroy the principle of equality of opportunity.

So viewed, the criteria contemplated by the Founding Fathers to determine the "Backward Classes" for the purpose of reservation clause (4) of Article 16 are strict and stringent in nature.

BACKWARD CLASS COMMISSIONS AND THEIR VIEWS

1. Kaka Saheb Kalelkar Commission:

In 1953, the President of India, acting under Article 340(1) of the Constitution, appointed a Backward Classes Commission under the Chairmanship of Kaka Saheb Kalelkar. The Commission was

asked among others (1) to determine the criteria to be adopted in considering whether any sections of the people of India should be treated as socially and educationally backward classes, (2) to prepare a list of such classes for the whole of India in accordance with such criteria and (3) to examine the difficulties of such Backward Classes and to recommend steps to be taken for the amelioration of their condition.[25] In its report submitted in 1955, the Commission observed that besides the Scheduled Castes and Scheduled Tribes, there were other Communities, castes or social groups which were also socially and educationally backward. In this connection, it interpreted the term "socially and educationally backward classes as relating primarily to social hierarchy based on caste" and said that such an interpretation is not only correct but inevitable and no other interpretation "is possible."[26]

Then by way of explanation the Commission said and made it clear that the members of the commission were not less anxious to eradicate the evils of the caste system nor they were desirous of perpetuating a system which was operating to the detriment of common nationhood. They tried to avoid caste but they found it difficult to ignore caste in the present prevailing conditions. They

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25 See D.D. Basu, Commentary on the Constitution of India, (5th Edn.), Vol.I, p.521.

26 See Report of the Backward Classes Commission (1955), Vol.I, pp.1 and 42.

wished that it were easy to dissociate caste from social backwardness at the present juncture.[27] Despite the articulated wish of the commission to avoid the evils of caste system, it used "classes" synonymously with "castes" and "communities" and prepared the lists of the backward classes by taking "castes as units".[28] Incongruity of making "caste" as a criterion for determining the social backwardness of communities was actually felt by one member of the Commission, P.G. Shah, who said that "if I had a free hand, I would have made economic backwardness the most important criterion for determination of social backwardness of communities and collected more definite data about it".[29]

It is, therefore, not surprising that the Government of India rejected the tests or criteria prescribed by the Commission for determining social and educational backwardness of people. While rejecting the castes, the Government of India stated that the views of the commission were vague and wide to be of much practical use.[30] Thereafter, the Government of India directed the Deputy Registrar General, Government of India, to conduct a pilot

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27 Id., p.41.

28 For this see N. Radhakrishnan, "Units of Social, Economic and Educational Backwardness: Castes and Individual", 7 J.I.L.I. (1965), 263, at p.265.

29 Report of the Backward Class Commission (1955), Vol.III, p.7.

30 See K.P. Krishna Shetty, Fundamental Rights and Socio-Economic Justice in the Indian Constitution, (1969), p.164.

survey and prepare a list of socially and educationally backward classes on the basis of "occupations". But the Deputy Registrar General said in his report that it was impossible to draw any precise and complete list of "occupation", the members of which could be treated as socially backward.[31]

Since the two Commissions failed to suggest satisfactory criteria for determining the social and economic backwardness, the State Governments were authorised to render assistance, until the determination of more satisfactory tests, to those classes of backward people whom the State Government might consider "socially and educationally backward" in the existing circumstances.[32] Consequently some of the states appointed commissions for the purpose of determining tests to ascertain the social and educational backward classes of people in the state who deserve special treatment.

2. Naganna Gowda Committee

The Government of Mysore appointed a Committee under the Chairmanship of Dr. Naganna Gowda to prescribe criteria for determining the backward classes of people, to specify sections

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31 See Report of the Commission for Scheduled Castes and Scheduled Tribes for the year 1960-61, Tenth Report, Part-II, p.366.

32 Basu, op. cit., p.157. Also see Krishna Shetty, op. cit., p.165.

of the people who could be treated as socially and educationally backward and to suggest the exact manner in which the criteria prescribed by it should be followed by the State Government to determine the persons, who should secure preference determined by the Government in respect of admission to technical institution and appointments to Government Service.[33] The Committee submitted its report in 1961. It includes a large number of castes and groups of people within the term "socially and educationally backward classes". The Committee suggested one set of backward communities for reservation in services and another set for the grant of educational concessions. It recommended that fifty per cent of the seats in technical and professional institutions should be reserved for students of backward classes. It also proposed reservation of forty five per cent of all Government vacancies for backward class candidates.

3. Kumara Pillai Commission

The Government of Kerala appointed in 1964 a Commission under the Chairmanship of G. Kumara Pillai to determine sections of the people in the State, who should be treated as socially and educationally backward for the purpose of special treatment by way of reservation of seats in educational institutions. In fact,

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33 For this, See N. Radhakrishnan, "Reservation of Seats for Backward Classes" - Indian Year Book of International Affairs, (1964), p.324.

constitution of this commission was influenced by the report of 1963 submitted by an Evaluation Committee appointed under the Chairmanship of V.K. Vishwanathan. It suggested appointment of an Expert Committee to go into the question of re-classification of backward classes. The Commission submitted its report in 1966. It has recommended that only those who are members of families with an aggregate annual income of Rs.4,200/- and belonging to the castes and communities listed by it, should be considered socially and educationally backward classes for purposes of Article 15(4) of the Constitution. It classified 91 communities as "backward". The castes and communities listed by the Commission are Ezhavas, Muslims, Latin Catholics (other than Anglo-Indians) backward Christians including converts to Christianity from Scheduled Castes and other backward Hindus.[34]

The Kumara Pillai Commission did not accept the idea of determining social and educational backwardness of people solely on the basis of occupation or economic test, for it felt that "in the present circumstances of the State, a wholesale classification of all persons below a certain economic level as socially backward is not justified. Social backwardness, though to a considerable extent depends on economic factors, depends also to a large extent in this State on popular conceptions of the status of a caste or

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34 The Hindu, March 8, 1966.

community".[35] The Commission therefore recommended a means-cum-caste or community test, or what was described as a "blended approach"[36] which took into consideration both economic factors and caste or community, for determination of socially and educationally backward classes in the State.

4. Sattanathan Commission

In 1969, the Tamil Nadu Government constituted a Backward Classes Commission under the Chairmanship of A.N. Sattanathan. The object of the Commission was (1) to review the measures taken by the State Government for the welfare of "Backward Classes" and the betterment of their conditions, (2) to assess the effectiveness of such measures in improving the conditions of backward classes, particularly in matters relating to education, (3) to examine and assess with reference to concessions, privileges and benefits given to them and the improvements in the conditions of the "most backward classes" in education and other matters, and (4) to make recommendations as to the further steps that should be taken by the State Government to improve the conditions of the backward classes in respect of education, including reservation of seats in

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35 Ibid.

36 Ibid.

professional colleges and institutions of higher learning.[37] The State Government classified the backward classes of people into two categories, the "backward classes" and the "most backward classes", and prepared two lists accordingly. Naturally, therefore, the Government instructed the Commission to assess the progress made by each class, particularly in three spheres - education, economic status and employment in Government Service.[38]

The Commission in its report submitted in 1970 has drawn attention to the fact that various classes of people who are ordinarily considered to be forward and a "small minor groups", which did not find a place in the list of backward classes even though some of them appeared to be more or less on the same level of backwardness as backward classes, made written and oral representations to be included in the backward classes list to get the benefit given to the underprivileged.[39] It has also pointed out that most of the caste representatives urged before the Commission for the inclusion of their castes in the Scheduled Castes list as their lot in every respect was as bad as that

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37 Report of the Backward Classes Commission, Tamil Nadu, Vol.I, 1970, p.1.

38 Id., p.2.

39 Ibid.

of any Scheduled Caste.[40]

Secondly, the Commission prepared a caste-based questionnaire and sent them to various organisations, offices, and persons in order to gather informations which were necessary for its purpose.[41] The caste-based questionnaire was, no doubt, criticised by some associations, but the Commission pursued its work undeterred by such criticisms.

Thirdly, it has stated that "caste" is the earliest and most commonly recognised form of social identity and therefore it cannot be easily ignored. In support of this it has said that even the members of the Legislative Assembly and Parliament, Chairmen of Municipal Councils and Presidents of Panchayats spoke of their individual castes after making general observations about the backward people in their constituencies generally.[42]

Fourthly, the Commission has stated that there is a twenty five per cent reservation at present for backward classes in educational institutions. But, in many colleges in the mofussil areas, according to the reports of Principals, actually as many

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40 Id., p.37.

41 Id., pp.5 and 9.

42 Id., p.5.

as sixty to seventy per cent of the students are from backward classes. In view of that, the commission has found it necessary to state clearly that the Government policy on reservation is intended to secure at least twenty five per cent for backward classes and not that admission should be restricted to twenty five per cent.[43] In other words, it subtly suggested the increase in the percentage of seats in the colleges for backward classes in mofussil areas in proportion to the number of students or applicants from the backward classes.

Finally, the Commission has reported that "most backward classes" as a group have little or no progress in education and particularly in the field of Engineering and Medical Education. This point has been made by the Commission on the basis of statistical data collected by it.[44]

From the report of the Tamil Nadu Backward Classes Commission three important ideas clearly emerge. First of all, the State Government and the Commission introduced a new category of persons, namely, the "most backward classes" of people, which is not found in the Constitution. Secondly, the Commission has evidently lent support to the caste-test in

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43 Id., p.64.

44 Id., pp.154 and 157.

determining the social backwardness of people. This is clear from the fact that the Commission not only sent round caste-based questionnaire but also stated unequivocally that caste was the earliest and most commonly recognised form of social identity and it could not be easily ignored. What is more, it gave a vivid picture of representation made by various people on the basis of caste and of emphasis laid by them invariably on castes. The caste-based questionnaire and caste-test, which obviously encouraged people to make representation on the basis of their castes and to lay undue emphasis on their castes, seem to have helped to create a vested interest in castes. So, the entire approach to the problem and treatment of castes as an inevitable form of social identity appears to run counter to the Constitution, which envisages a classless and casteless society. Thirdly, the Commission indirectly suggested reservation of more than twenty five per cent of seats wherever necessary in colleges in favour of backward classes. Needless to say that if the percentage of reserved seats exceed fifty per cent of the total seats, it would violate the spirit of the Constitution and adversely affect the national interest by denying to a greater extent opportunity to talented students.

In this connection, it is interesting to mention the dissenting opinions recorded by two members of the Commission. M.A. Jamal, in his dissenting note, opposed further classification

of backward classes of people into "most backward classes". He pointed out that the Constitution did not recognise any separate sub-class within the Backward Classes. So, he felt that the creation of the new sub-class, namely, the "most backward class" was contrary to the provisions of the Constitution.[45] Further, according to him, any further sub-classification of the Backward Classes would only throw open the flood gate of discrimination, widen the gulf and cause inequality, disparity, discontent and frustration among the people which were already prevailing among them. He, therefore, emphasised the need for the uniform criteria for determining backwardness.[46] Besides this, he opposed the idea of setting apart a particular percentage of seats in educational institutions in favour of the "most backward classes".[47] Another member, Chinnappan, opposed the increased percentage of reservations of seats in favour of Backward Classes and also the list of "most backward classes".[48]

5. Damodaran Commission

In 1967, the Government of Kerala appointed a

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45 Id., p.230.

46 Id., p.233.

47 Id., p.235.

48 Id., p.243.

commission under the Chairmanship of Shri Nettur P. Damodaran to study and recommend, inter alia, factors which should be taken into consideration to decide backwardness of citizens. In its report submitted in 1970, the Commission has identified four main factors, which, according to it, lead to backwardness of citizens. They are (1) lack of requisite educational attainment (test of education), (2) lack of money or wealth (Economic test), (3) lack of ability to appropriate adequate number of appointments (Test of appropriation of appointments), and (4) caste disability, occupational stigma and social taboos acting as depressants in the field of education.[49] As far as the caste factor or test is concerned, the Damodaran Commission has unequivocally declared: "We should approach this problem with dispassionate and open mind of a reformist also. 'Caste disabilities' should not either be exaggerated and perpetuated, or be whittled down with a motive behind. We therefore, suggest that caste should not be the sole or dominent test, but the social and educational backwardness, if any , arising from the practice of caste in the past, and from the pranks of vestiges of caste, if any, in the present, should be taken care of in the test of 'social' backwardness due to historical reasons".[50]

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49 See Report of the Backward Classes Reservation Commission, Kerala (Damodaran Commission) 1970, Vol.I, 139.

50 Id., p.73.

Finally, the Commission has recommended that "only citizens who are members of families each of which has an aggregate annual income, that is to say, income of all members in the family from all sources taken together, of Rs.8,000/- and below (Rupees eight thousand and below) and which belong to any one of the groups of citizens marked I to XII in Appendix XI, will constitute the Backward Classes belonging to the respective groups....... The term 'family' means the applicant, his/her spouse, if any, and the applicants parents if the applicant is residing with and/or dependent on them".[51]

As is evident from the report and recommendations, the Damodaran Commission rejected the caste test and adopted the "blended approach" to determine the social and educational backwardness of the citizens. Besides, by prescribing a family-based income and defining the term "family", the Commission not only tried to thwart attempts by a few well-placed families in each group to corner all the benefits of reservations but also helped to percolate the benefits of reservations to the bottom in each group. In Appendix XI of the Report, the Commission has identified twelve groups of citizens as backward classes.

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51 Id., p.141.

6. Mandal Commission

In 1978, Government of India appointed a Commission under the Chairmanship of Shri B.P. Mandal, which submitted its report in 1980. This report has mentioned a few indicators or criteria of backwardness on the basis of which socially and educationally backward classes may be identified.[52] First of all, it has strongly recommended that caste must be accepted as a unit of identification of "other backward classes" (OBC) among the Hindus. Secondly, according to the report, caste being the basic unit of social organisation of Hindu Society, castes are the only readily and clearly "recognisable and persistent collectivities" and it is of the view that in the Indian context such collectivities can be castes or other hereditary groups.[53] Thirdly, the Commission has also applied some other tests like stigmas of low occupation, criminality, nomadism, beggary and untouchability to identify social backwardness. Inadequate representation in public services has been taken as another important test.[54]

Regarding other backward classes among Non-Hindu Communities, the report says that though the evil of caste system

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52 Report of the Backward Classes Commission, Mandal Commission, (1980), Vol.I and II, p.54.

53 Ibid.

54 Ibid.

has entered other religions such as Islam, Christianity and Sikhism, they still have retained their egalitarian outlook. Therefore, the Commission has to evolve some other rough and ready criteria for identifying Non-Hindu other backward classses.[55] But, finally the Commission has evolved the following rough and ready criteria for identifying Non-Hindu other backward classes: (1) All untouchables converted to any Non-Hindu religion; and (2) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu other backward classes. (Examples: Dholi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.)[56] Thus, in effect, the Mandal Commission has virtually made caste a predominent test to identify not only Other Backward Classes among the Hindu Society but also Other Backward Classes in Non-Hindu religious groups. Besides, it has made caste as a unit or what it calls a "recognisable and persistent collectivities" for dealing with the problem of backwardness. What is more, the Commission totally rejected the economic or poverty test, and said: "As Article 340 of the Constitution speaks of 'socially and educationally backward classes; the application of 'economic tests' for their identification seems to be

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55 Id., p.55.

56 Id., p.56.

misconceived".[57]

It may, however, be pointed out here that the Commission has taken a very narrow view in this matter by focussing its attention on the phrase "socially and educationally backward classes" mentioned in Article 340 of the Constitution. It has obviously overlooked the wholesome concept of socio-economic justice embodied in the Preamble and Article 38(1) of the Constitution and the State's obligation to promote "the educational and economic interests of the weaker sections of the people" stipulated in Article 46 of the Constitution. All these provisions form one group and they have been stipulated for the purpose of achieving gradually the preambular goal of socio-economic justice. If the Commission had made a realistic assessment of all these provisions of the Constitution, it would not have rejected the economic tests.[58]

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57 Id., p.61.

58 There are few more reports submitted by the State Commissions, as for example, Havanur Commission Report of 1975 (Karnataka), Manohar Pershad Commission Report of 1970 (A.P.), Agisam Veerappa Commission Report of 1977 (A.P.), Mungeri Lal Commission Report of 1976 (Bihar), A.R. Bakshi Commission Report of 1976 (Gujarat), Gajendragadkar Commission Report of 1968 (Jammu & Kashmir), J.N. Wazir Commission Report of 1969 (Jammu & Kashmir), B.D. Deshmukh Commission Report of 1964 (Maharashtra), Brish Bhan Committee Report of 1966 (Punjab), Chedi Lal Sethi Commission Report of 1977 (Uttar Pradesh) and recently Venkataswamy Commission Report of 1986 (Karnataka).

CHAPTER V

BACKWARD CLASSES: CRITERIA SUGGESTED BY THE JUDICIARY

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BACKWARD CLASSES : CRITERIA SUGGESTED BY THE JUDICIARY

In the previous Chapter we have analysed the various reports of the Backward Class Commissions and the Criteria suggested by them to determine the "Backward Class" of citizens or "socially and educationally backward classes of citizens". The former phrase is found in Article 16(4) and the latter in Article 15(4). It is also interesting to note that the phrase "socially and educationally backward classes of citizens" in Article 15(4) has been placed in juxtaposition to the phrase "Scheduled Castes and Scheduled Tribes". Such grouping or bunching of the phrases may have some implications. Since the judiciary has an ultimate say in the matter of interpretation of the Constitution, it is necessary to analyse the judicial decisions which have much bearing on the subject.

Social and Educational Backwardness: the Balaji doctrine :

For the purpose of reserving seats in professional colleges in favour of backward classes of citizens, the Government of Mysore issued an order in 1962 classifying 90 per cent of the total population of the State as "backward" solely on the ground of caste. The Government order divided the

backward classes into "backward classes and more backward classes" on the basis of castes and communities, reserved 68 per cent of seats in professional colleges in their favour and allotted different percentage of seats to different categories of backward classes. In issuing this order the State Government was very much influenced by the recommendations made by the Naganna Gowda committee. The validity of this order was challenged before the Supreme Court in Balaji v. State of Mysore[1] on the ground that it violated the provisions of Article 15 and was not saved by Cl.(4) of Article 15.

The main issues before the Supreme Court in the aforesaid case are: (1) What are the criteria for determining or identifying the social and educational backwardness?; (2) What is the role of "caste" in determining social backwardness?; and (3) Is the sub-classification of backward classes into categories valid? While answering these questions, Justice Gajendragadkar has laid down propositions of far reaching importance. First, he has pointed out that Article 15(4) authorises the State to make a special provision in favour of two distinct categories, namely, "socially and educationally backward classes of citizens" and "Scheduled Castes and Scheduled Tribes". The latter category has been defined in sub-clauses (24) and (25) of Article 366,

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1 A.I.R., 1963, S.C., 649.

but the former has not been defined. So, the Court has to see necessarily whether the State has validly determined who should be included in these "backward classes". According to Justice Gajendragadkar, it is fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Besides, he has pointed out that Article 341 provides for the issue of public notification specifying the castes, races or tribes which shall be deemed to be Scheduled Castes. Similarly Article 342 makes a provision for the issue of public notification in respect of Scheduled Tribes. Under Article 338(3), it is provided that 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 Article 340(1), by order, specify and also to the Anglo-Indian Community. This provision, therefore, clearly contemplates that some backward classes may by Presidential order be included in Scheduled Castes and Tribes. This also helps, according to him, to conclude that the Backward Classes, for whose improvement special provision is contemplated in Article 15(4), are "in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes".[2]

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2 Id., p.658.

Secondly, he has stated that the concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Article 15(4). He, therefore, rejects the relative tests to determine the backwardness.[3]

What has to be decided then? According to him, it is not either social backwardness or educational backwardness, but it is both social and educational. In this connection he has laid his third proposition. What is the test to determine social backwardness? Gajendragadkar is of the opinion that the group of citizens to whom Article 15(4) applies are described as "classes of citizens" and not as "castes of citizens". A "class" indicates division of society according to status, rank or caste. In the Hindu social structure, caste unfortunately plays an important part in determining the status of the citizen. This artificial phenomenon arose due to overburdening of the original, functional and occupational basis of caste with considerations of purity based on ritual concepts and it in turn tended to create a feeling of superiority and inferiority and

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3 Ibid.

to foster narrow caste loyalties. Therefore, he says that in dealing with the question as to whether any class of citizens is socially backward or not, "it may not be irrelevant to consider the caste of the said group of citizens."[4] But, the "special provision" contemplated in Article 15(4) is for "classes of citizens" and not for individual citizens as such, and so, though the caste of the group of the citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens is based "solely on the caste of the citizen", it may not be always logical, for the test would inevitably break down in relation to many sections of Indian society like Muslims, Christians, Jains or even Lingayats which do not recognise castes in the conventional sense known to Hindu society. Besides, it may contain the vice of perpetuating the castes. Then, he says that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, "it cannot be made the sole or dominant test in that behalf". According to him, 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. Therefore, his conclusion is that though admittedly social backwardness, which results from poverty, is likely to be

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4 Id., at p.659.

aggravated by considerations of caste to which the poor citizens may belong, it only shows "the relevance of both caste and poverty in determining the backwardness of citizens".[5] A careful reading of the views of Justice Gajendragadkar would show that he has (1) rejected caste as "the sole or dominant test", (2) made abject poverty as the dominant test, and (3) in relation to Hindus, suggested poverty-cum-caste test to determine social backwardness of classes of citizens because consideration of caste is likely to aggravate social backwardness created by abject poverty.

It is also interesting to note that justice Gajendragadkar has mentioned two more factors, which contribute to make classes of citizens socially backward and they are (1) occupations, which are treated as inferior according to conventional beliefs, and (2) place of habitation, particularly rural area where classes of citizens occupy a socially backward position. But, he does not elaborate them, because he rightly feels that the problem of determining who are socially backward classes and of evolving proper criteria for the said purpose is a very complex subject, which needs an elaborate investigation, collection of data and examination of the said data in a rational and scientific way.

Another question, which the Supreme Court was called

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5 Ibid.

upon to decide in Balaji case, was in regard to the educational backwardness of the classes of citizens. The Naganna Gowda Committee Report and the impugned order proceed to deal with this question on the basis of the average of student population in the last three High School classes of all High Schools in the state in relation to a thousand citizens of that community. On the figures supplied to the Committee, which are only approximate figures, the Committee came to the conclusion that the State average of student population in the last three High School classes of all High Schools in the State was 6.9 per thousand. The Committee decided that all castes whose average was less than the State average of 6.9 per thousand should be regarded as backward communities. Further, it held that if the average of any community was less than 50 per cent of the State average, it should be regarded as more backward classes. While accepting the aforesaid "State average test", the State made some changes to include Lingayats, Ganigas and Muslims in the list of backward classes. The Committee had recommended that the Lingayats should not be treated as backward classes. The State has decided otherwise, and in doing so, the State has taken the view that the figures arrived at by the Committee should be corrected to the nearest integer. That is how the State average was raised from 6.9 to 7 per thousand. Even after increasing the State average to 7 the position with regard to Lingayat Community was that its average of students population

was 7.1 per thousand according to Committee's report. Despite this fact, the Lingayats have been held to be educationally backward under the State order. This result has been achieved by adding .1 to the State average and deducting .1 from Lingayat's average. The Ganigas, whose average of student population is 7 per thousand are likewise included in the list of. Backward Classes. In regard to Muslims, the majority view in the Committee was that Muslim Community as a whole should be treated as socially backward. This conclusion was not supported either by data or by reasons. Relying on the basis of the unsubstantiated view of the Committee, Muslims were included in the list of backward classes by the State order.

Dealing with all these matters the Supreme Court, speaking through justice Gajendragadkar, said that assuming that the State average of 6.9 per thousand students has been properly and correctly arrived at by the Committee and assuming further that the State average test to determine educationally backward classes is rational and permissible under Article 15(4), "a Community which satisfied the said test or is just below the said test cannot be regarded as backward classes".[6] But then, the question is when they can be regarded as backward? The Court's answer is that it is only communities which are

6 A.I.R., 1963, S.C., 649 at 660.

well below the State average that can be regarded as educationally backward classes of citizens. When they can be said to be "well below the State average"? The Court's suggestion is that "classes of citizens whose average of student population works below 50% of the State average are obviously educationally backward classes of citizens".[7] So, the Court held that the State was not justified in including in the list of Backward Classes, castes or communities whose average of student population per thousand was slightly above, or very near, or just below the State average. Applying the same reasoning, the court ruled that since the average of student population of Muslim community works out to be at 5 per thousand, it is not so below the State average, the State average of student population being 6.9 per thousand, as to enable the Muslim community to be treated as educationally backward classes of citizens.[8]

Finally, dealing with the sub-classification made by the State order, the court ruled that such sub-classification, Backward Classes and more Backward Classes, is not justified under Article 15(4). The said Article 15(4) authorises special provision being made for really backward classes. In introducing two categories of Backward Classes what the impugned order.

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7 Ibid.

8 Id., p.661.

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 most advanced classes in the State, and that, according to the Court, is not the scope of Article 15(4). The incongruity or unjustness of the method adopted by the impugned order is clear from the fact that nearly 90 per cent of the population of the State is treated as Backward. The order divides the population of the State into most advanced and the rest, and puts the latter into two categories of backward and more backward. So, classification of two categories, according to the court, is not warranted by Article 15(4).[9]

The Balaji decision has, in effect, laid down certain important principles. They are: (1) the special provision stipulated in Article 15(4) is intended not for the benefit of "the less advanced classes" compared to "the most advanced classes" in the State, but, on the other hand, it is intended only for the benefit of "really Backward Classes" and Article 15(4) does not give scope for layers or strata of Backward Classes; (2) the backwardness contemplated in Article 15(4) is both social and educational; (3) the dominant test to determine social backwardness of classes of citizens generally is poverty, that is abject poverty; (4) in relation to Hindus, caste may be a relevant factor to consider in determining social

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9 Ibid.

backwardness of classes of citizens in Hindu social order, for the caste often aggravates the social backwardness resulting from poverty, and therefore, caste-cum-poverty test is the appropriate test to determine the social backwardness of classes of citizens in the Hindu social order; and (5) the educational backwardness of classes of citizens may be determined first by ascertaining the State average of student population in High Schools and then by treating only those communities which are "well below the State average" of student population, that is, those classes of citizens whose average of student population works below 50 per cent of the State average, as educationally backward. In other words, "well below the State average" of student population, is the test to determine the educational backwardness and this "well below the State average" test has been construed to mean "below 50 per cent of the State average". One important conclusion that emerges from all the aforesaid principles or propositions of Balaji case is that since the backwardness of classes of citizens contemplated in Article 15(4) is both social and educational, the comprehensive test to determine the said social and educational backwardness of classes of citizens is poverty-cum-caste-cum-below 50 per cent of the State average of student population test in relation to Hindus and poverty-cum-below 50 per cent of the State average of student population test in relation to others. This test clearly emerges from the Balaji decision, though it is not specifically stated therein, and this can be

rightly described as Balaji doctrine or test to determine social and educational backwardness of classes of citizens contemplated in Article 15(4).

Chitralekha Explains Balaji Doctrine:

Subsequently the Mysore Government issued a new order classifying the people into socially and educationally backward classes on the basis of "economic condition" and "occupation". For the purpose of classification the order took "family" as an unit, and, according to the order, a "family", whose income is Rs.1,200/- per annum or less and persons or classes following "occupations" of agriculture, petty business, inferior services, crafts or other occupations involving manual labour, are, in general, socially, economically and politically backward. The order in determining social backwardness of groups or classes of people ignored "caste". This order was challenged before the Mysore High Court in Vishwanath v. Mysore.[10] The High Court upheld the validity of the Government order. But, relying on Balaji decision, it observed that the scheme adopted by the State was imperfect and that in addition to the "occupation" and poverty tests, the State should have adopted the "caste" and "residence" tests in making the classification.

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10 A.I.R., 1964, Mysore, p.134.

This observation of the Mysore High Court did cast a doubt about the exact scope of the principle laid down by the Supreme Court in Balaji's case. So in Chitralekha v. State of Mysore[11] the Supreme Court was requested to explain and clarify the Balaji ruling and to correct the observations of the High Court, lest the State should be forced to change the criteria for ascertaining backward classes under Article 15(4) of the Constitution. Justice Subba Rao, who delivered the opinion of the Supreme Court, clarified the statement made in Balaji. He referred to observations in Balaji and said that two principles stand out prominently, namely (i) the caste of group of citizens may be relevant circumstance in ascertaining their social backwardness; and (ii) though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the sole or dominant test in that behalf.[12] Proceeding further he said that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without referring to caste. While the court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one

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11 A.I.R., 1964, S.C., 1823.

12 A.I.R., 1964, S.C., 1823 at p.1833.

of the compelling circumstances affording a basis for ascertainment of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons, but if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria.[13]

Further, Justice Subba Rao referred to the provisions of Articles 46, 341, 342 and 15(4) and said that these provisions recognise the factual existence of Backward Classes in our country brought about by historical reasons and make a sincere attempt to promote the welfare of the weaker sections thereof. They shall be so construed as to effectuate the said policy but not to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong. The important factor to be noticed in Article 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said as they have said in the case of the Scheduled Castes and Scheduled Tribes. Though it may be suggested that the wider expression 'classes' is used in Clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes

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13 Ibid.

with castes, nothing prevented the makers of the Constitution to use the expression 'Backward Classes or Castes'. The Juxtaposition of the expression 'Backward Classes' and 'Scheduled Castes' in Article 15(4) leads to a reasonable inference that the expression 'classes' is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a Backward Class or not, his or their "caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong".[14]

Thus, the Supreme Court has clearly laid down in the Chitraleka case that caste is not a sole or dominant test, but one among the few tests, like poverty, occupation, etc., for ascertaining the social backwardness of the people. The explanation given in the Chitralekha case has not disturbed the Balaji doctrine.

Balaji Doctrine Devalued:

The Madras Government prepared a list of backward classes by reference to caste and reserved seats in Medical Colleges in favour of them. This was challenged in Rajendran v. State of Madras[15] on the ground that the reservations were

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14 Id., pp.1833-34.

15 A.I.R., 1968, S.C., 1012.

made in favour of castes solely on caste considerations and hence it violated Article 15(1), which prohibits discrimination on the ground of caste only. The Supreme Court conceded the point that if reservation in question had been based solely on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But, the Court pointed out that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made 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). Besides, the Court pointed out that though in the present case the list of socially and educationally backward classes has been specified by caste does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward class of citizens. What are the factors or criteria which indicate that persons specified in the castes constitute socially and educationally backward classes of citizens? In this connection the Supreme Court refers to an explanation offered in the affidavit filed on behalf of the State of Madras. The explanation has stated that the list of Backward Classes was made as far back as in 1906 and the list has been kept upto date by necessary amendments made therein. It has also been stated that the main criterion for inclusion in the list was the

social and educational backwardness of the caste based on occupations pursued by these castes. Because the members of the caste as a whole were found to be socially and educationally backward, they were put in the list. In short, according to the State Government, the castes included in the list are only a compendious indication of the class of people in those castes and these classes of people had been put in the list for the purpose of Article 15(4) because they had been found to be socially and educationally backward.

The Supreme Court has accepted the explanation of the State Government, and said that in view, however, of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. Then, the court concluded that though the list is prepared castewise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15.[16]

Fact of the matter is that the explanation accepted by the court in the Rajendran case is not based on objective criteria. The Balaji decision has laid down definite tests or

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16 Id., p.1015.

criteria to determine social backwardness and educational backwardness of classes of citizens. It is not known whether those criteria have been taken into consideration in determining the social and educational backwardness of the members of those listed castes. The explanation of the State Government is blissfully silent about them and there is nothing in the Rajendran decision to show that those specific criteria have been taken into consideration. The explanation of the Government about the social and educational backwardness of the members of the listed castes, which is not based on objective criteria or tests, can hardly be a substitute for actual determination of the said backwardness of classes of citizens on the basis of specific tests laid down in the Balaji case. In the Balaji case, mere conclusion of the Naganna Gowda Committee that Muslim Community as a whole should be treated as socially backward unsupported either by data or by reasons was tersely dismissed by the Supreme Court as it was an untenable ground on the basis of which the State could make reservations in favour of the members of the Muslim Community. The State Government explanation regarding the social and educational backwardness of the members of the listed castes accepted by the Supreme Court in Rajendran case is as unsupported by data or reasons and as subjective in nature as the conclusion of the Committee regarding social backwardness of Muslim community which was rejected in Balaji

case. Besides the said explanation was offered much after reservations were made in medical colleges in favour of the listed castes. Acceptance of post-reservation explanation regarding the social and educational backwardness of the listed castes as a justification of the backward class list and reservation is unreasonable and untenable in law, for it renders legal what was illegal at the time of the preparation of backward class list and reservation of seats in favour of them. Inasmuch as the Rajendran decision accepted the post-reservation State explanation about social and educational backwardness of the listed castes as a substitute for the actual application of the specific criteria laid down in Balaji case to determine the said backwardness, the Rajendran rule devalued the Balaji doctrine.

Sagar Rule Revives Balaji Doctrine:

Another important case is State of A.P. v. Sagar.[17] The case came on appeal to the Supreme Court from the decision of the A.P. High Court in Sagar v. State of A.P.[18] The High Court invalidated the Andhra Government's Notification of June, 1966, as modified by an order of July 1966 for the Telengana Region and by an order of August 1966 for the Andhra Region,

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17 A.I.R., 1968, S.C., 1379.

18 A.I.R., 1968, A.P., 165.

reserving seats for backward classes in Medical institutions on the ground that the list was prepared solely on the basis of caste. The main issue before the Supreme Court was whether the list of backward classes based solely on caste was legal?

As a matter of fact, a list of castes prepared in 1963 by the A.P. Government for the purpose of Article 15(4) was struck down by the High Court in Sukhdev v. Government of A.P.[19] Thereafter the list was published under amended rules with some modifications, but the basic scheme of the list was apparently not altered. In other words, the new list also was a list of castes and not of classes.

The affidavits, one filed by the Chief Secretary in the High Court and another one filed by the Directcr of Social Welfare in the Supreme Court, have set out the steps taken for preparing the list of backward classes. In the affidavit of the Director of Social Welfare it is stated that he considered the representations made to him, consulted the Law Secretary and certain publications relating to the study of backward classes and made his recommendations, which were modified by the Sub-Committee appointed by the Council of Ministers and ultimately the Council of Ministers prepared a final list of

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19 (1966) 1 Andh. W.R. 294.

backward classes. But the affidavits do not mention anywhere about the criteria adopted by them for the purpose of determining the backward classes. Therefore, the High Court rightly said that affidavits filed on behalf of the Government do not say what was the material placed before the Sub-Committee or Council of Ministers, from which the court could conclude that the criteria laid down by the Supreme Court have been applied in preparing the list of backward classes. Besides, the State contended that expert knowledge was brought to bear upon the consideration of the relevant materials in the preparation of the list and they were satisfied that the correct tests were applied in the determination of Backward Classes and on that account the list should be accepted by the High Court. The State contention was totally rejected by the High Court.

Approving fully the views of the High Court, Justice Shah said that, as pointed out by the High Court, the materials placed on record do not show that criteria laid down by the Supreme Court were applied to determine the Backward Classes. Application of correct criteria in determining and preparing a list of Backward Classes is not a matter on which any assumption could be made especially when the list prepared is ex facie based on castes or communities. Honesty of purpose of those who prepared the list was not challenged and it was not the issue either. Justice Shah has rightly said that the validity

of a law, which apparently infringes the fundamental rights of citizens, cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen. The test of the validity of a law or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence that guaranteed right is not infringed.[20] Consequently the appeal was dismissed.

The Sagar decision is important in that it refused to countenance the mere explanation or view of the executive that the members of the listed castes are really backward and that the conclusion about their backwardness has been based on the opinion of the experts. Significance of this decision lies in the fact that in this case, unlike in the Rajendran case, the Supreme Court insisted on the evidence of application of the criteria laid down in the Balaji case in determining the backwardness of the members of the listed castes. It has been made clear that neither honesty of purpose of those who prepared the list, nor the satisfaction of the law maker or the executive that what he did was in conformity with the purpose of Article 15(4) would be treated as an effective substitute for the actual

20 A.I.R., 1968, S.C., 1379 at pp.1384-1385.

application of the Balaji criteria or tests in determining the backwardness of classes of citizens for the purpose of Article 15(4). The Sagar decision has, therefore, fully revived the Balaji doctrine, which was earlier badly battered by the Rajendran rule.

Balaji Doctrine gets a short shrift:

The Sagar rule and the Balaji doctrine get a short shrift in Periakarukppan v. State of Tamil Nadu.[21] One of the main issues before the Court in this case was whether the determination of the Backward Classes on the sole basis of caste was constitutionally valid? Dealing with this question, the Supreme Court said that Rajendran's case is an authority for the proposition that the classification of Backward Classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward.[22] The question, however, is how and by what manner those castes could be shown as socially and educationally backward? Obviously with this question in view, the Supreme Court said that "no further material has been placed before us to show that the reservation for Backward Classes with which we are herein concerned is not in accordance with Article

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21 A.I.R., 1971, S.C., 2303.

22 Id., p.2310.

15(4)."[23] In this connection, the Supreme Court pointed out that there are numerous castes in the country which are socially and educationally backward and to ignore their existence is to ignore the facts of life. Therefore, the court said that it is unable to uphold the contention that the impugned reservation is not in accordance with Article 15(4).[24]

It may be remembered that in the Rajendran case the Supreme Court at least referred to the explanation offered by the State Government regarding the social and educational backwardness of the listed castes and accepted it as sufficient for the purpose of Article 15(4). But in the Periakaruppan case the Supreme Court strangely enough adopted a negative approach to the problem when it said that no material had been placed before it to show that the reservation for the backward classes was not in accordance with Article 15(4). This negative approach seemed to have been influenced by the view of the court that there are numerous backward castes in the country, which fact cannot be ignored with impunity. The negative approach would mean that, while listing the castes for the purpose of Article 15(4), the State is not obliged to ascertain or determine the backwardness of the members of those castes by applying the specific criteria or tests. On the other hand,

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23 Id., pp.2310-2311.

24 Id., p.2311.

it is for the party which impugnes the Backward Classes list and reservation made therefor to place all materials before the court to show that the list of Backward Classes and reservation are not in accordance with Article 15(4). If no such material is placed before the Court, then it, according to the negative approach, would mean that list of Backward Classes prepared by the State is deemed to be valid even if it is solely based on castes. The negative approach, therefore, renders futile all efforts made earlier in laying down specific criteria or tests for determination of social and educational backwardness of groups of citizens and nullifies the vital substance of the safeguards provided in Article 15(1).

A Seemingly redeeming feature in Periakaruppan decision:

However, one redeeming feature in Periakaruppan decision is the statement of the Supreme Court that the Government should not proceed on the basis that once a class is considered as a Backward Class it should continue to be Backward Class for all times. Such an approach, according to the Court, would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary.[25] But then,

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25 A.I.R., 1971, S.C., 2303 at p.2311.

who has to decide as to which class of citizens has reached the "take off stage"?. The Court's suggestion is that it is the Government which should always keep under review the question of reservation of seats so that only the classes which are really socially and educationally backward be allowed to have the benefit. The aforesaid views of the Court are really good, provided they are acted upon fully by Governments. But, the entrustment of the review function in this respect to the Government may not instil hope among the people of this country for a better deal under Article 15 in view of the fact that over the years since the commencement of the Constitution not only the number of backward castes and classes increased steadily but the quantum of reservation has been regularly going up.

The Balaji Doctrine gets a boost:

The Balaji doctrine gets a boost cnce again in State of A.P. v. S.V. Balaraman.[26] Backward Class Commission, appointed by the State Government, submitted its report regarding various categories of persons who are to be treated as belonging to socially and educationally backward classes. For the purpose of identifying social and educational backwardness, the Commission adopted four criteria, namely, (1) general poverty of the class

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26 A.I.R., 1972, S.C., 1375.

or community as a whole; (2) occupations, the nature of which must be inferior, unclean, undignified and unremunerative or one which does not carry influence or power; (3) caste in relation to Hindus; and (4) educational backwardness. Applying the aforesaid criteria, the Commission had drawn up a list of Backward Classes and classified them into four groups. The State Government, by its G.O. of 1973, accepted the Commission's list in toto and declared that the castes and communities specified therein are socially and educationally Backward Classes for the purpose of Article 15(4) of the Constitution. Reservation of seats in the Medical colleges was made in favour of Backward Classes specified in the list. The listing of Backward Classes by the Commission and subsequent order of the Government reserving of seats were challenged in the High Court, which held that they were in violation of Articles 15(1) and 29(2) and were not saved by Article 15(4), because the "caste" was taken as the basis in listing the backward classes by the Commission.

The matter, therefore, was brought before the Supreme Court and one of the main issues was whether "caste" could be taken as the basis for the enumeration of backward classes. In order to tackle the issue fully, the Supreme Court examined the various efforts made by the Commission to ascertain social and educational backwardness of the people. As pointed out

by the Court, first, the Commission issued a questionnaire, which referred to various matters regarding the criteria to be adopted for ascertaining the backwardness of persons as well as the information on matters relating to the social and educational backwardness of the persons. Secondly, the Commission called for information from the Heads of all Government Departments regarding number of persons belonging to each class or community employed in their departments. Thirdly, information was sought from the Principals of colleges, including the professional colleges, regarding the number of students belonging to each class or community in the academic year 1967-68. Fourthly, information was also sought from the Head Masters of all the High Schools and Multipurpose High Schools regarding the total number of students belonging to each community who studied in those schools during the last 10 years as well as the number of students class-wise and community-wise who studied in classes VI to XI in 1968-69. Finally, the Commission toured all the Districts and recorded oral evidence on oath from the representatives of a number of communities.

After referring to the aforesaid efforts of the Commission to ascertain the backwardness of people, the Supreme Court made pointed reference to tests applied by the Commission to ascertain educational and social backwardness of the people. Regarding the educational backwardness, as pointed out by the Court, the

Commission adopted the percentage of student population per thousand of particular class or community in standards X and XI with reference to the average student population in the whole state. The Commission worked out an average on the basis of replies received from the 50 per cent of the institutions which itself comes to nearly more than 1100 schools, and, according to it, the average student population in classes X and XI in the State works out to be about 4.55 per thousand. On this basis, the Commission has proceeded to apply the principle that communities whose student population in these standards is "well below the State average" have to be considered as educationally backward. Then, regarding the social backwardness, the court found that after a very exhaustive survey of the trade or occupations carried on by the persons concerned and other allied matters, the Commission has indicated that only such persons belonging to a caste or community, who have traditionally followed unclean and undignified occupation, can be grouped under the classification of Backward Classes.

In this connection the Commission has adverted to the general poverty of the class or community as a whole, the occupation pursued by the class of citizens, the nature of which is considered inferior and unclean, undignified or unremunerative or one which does not carry influence or power and caste in relation to Hindus. The court took much care to peruse closely

the Appendix VI and VII of the Commissions report and said that the traditional occupations of the persons enumerated as backward were of a very low order such as beggars, washermen, fishermen and watchmen at burial grounds.

Thus, after making a close study of the various efforts made by the Commission to ascertain the backwardness of the people and of the tests and criteria adopted by the Commission to determine educational backwardness and social backwardness respectively, the Supreme Court has concluded that though prima facie the list of the Backward Classes, which was impugned in the case, may be considered to be one made on the basis of caste, a closer examination will clearly show that it is only description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Further, 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(4).[27] As far as this conclusion is concerned, the Supreme Court relied on its earlier decision in Triloki Nath Tikku v. State of J & K.,[28] wherein it said that the members

27 A.I.R., 1972, S.C., 1375 at p.1399.

28 A.I.R., 1969, S.C., 1.

of an entire caste or community may in the social, economic and educational scale of values, at a given time be backward and may on that account be treated as Backward Classes, but that is not because they are members of a caste or community but because they form a class. Besides, the Court pointed out that the groups mentioned in the list of Backward Classes have been included therein because they satisfy the various tests, which have been laid down by the Supreme Court for ascertaining the social and educational backwardness of a class.[29] Needless to say that pronouncements in this case are very much in consonance with Balaji doctrine.

Further, in K.S. Jayasree v. State of Kerala[30] the Supreme Court accepted caste-cum-poverty test as a sound basis to determine social and educational backwardness of people for the purpose of Article 15(4). Relying on report of a Backward Classes Commission, the Government of Kerala issued an order in 1975, which is a modification of an earlier order of 1966, to the effect that only citizens who are members of families which have an aggregate income of less than Rs.10,000/- per annum and which belong to the castes and communities mentioned in the annexure to the Government Order will constitute socially

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29 A.I.R., 1972, S.C., 1375 at p.1399.

30 A.I.R., 1976, S.C., 2381.

and educationally backward classes for the purpose of Article 15(4). The petitioner in this case belonged to one of the castes mentioned in the annexure to the G.O., but the annual income of the family, to which she belonged, was more than Rs.10,000/- She failed to get a medical seat and her name could not be considered under the reservation quota. She challenged the validity of the G.O. and contended that there is no reason to exclude an insignificant part of the community on the basis of income alone. The petitioner emphasised that if the socially and educationally backward classes are set out in the annexure, income cannot be the criterion of admission to determine the benefit of Article 15(4).

The Court pointed out that the Commission has found on applying the relevant tests that the lower income group of communities mentioned in its Report constitute the socially and educationally backward classes.[31] According to the Court, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. The special provision is contemplated undoubtedly for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not

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31 A.I.R., 1976, S.C., 2381 at pp.2385-2386.

be exaggerated. Therefore, if the classification is based solely on caste of the citizen, it may not be logical, for social backwardness is the result of poverty to a very large extent. Further it said that caste and poverty are both relevant for determining the backwardness. But neither caste alone, nor poverty alone, will be the determining tests. In this connection the court pointed out that when the Commission has determined a class to be socially and educationally backward it is not on the basis of income alone, and the determination is based on the relevant criteria laid down by the Court. Besides, the Court said that Article 15(4), which speaks of backwardness of "classes of citizens", lays emphasis on "classes of citizens" and not on "castes of citizens". Therefore, the court came to the conclusion that the classification of backward classes based on economic conditions does not offend Article 15(4).[32]

The Jayasree decision is a full fledged reiteration of the Balaji doctrine or tests propounded in the Balaji case and explained in the Chitralekha case. In fact, the language used in Jayasree is reminiscent of the one used in Balaji and Chitralekha. Thus, the Balaji doctrine gets a boost once again

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32 A.I.R., 1976, S.C., 2381 at p.2386. Also refer here to Janaki Prasad Parimoo v. State of Jammu and Kashmir, A.I.R., 1973, S.C. 930. In this case the Supreme Court says that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward classes of citizens in Article 15(4). It fully endorses the test laid down in Balaji case and treats it as the locus classicus on the subject.

in the Balaraman and Jayasree cases and tests laid down in Balaji to determine social and educational backwardness of classes of citizens have become important tests despite occasional aberrations caused to them in the Rajendran and Periakaruppan cases.

Habitation test in the Balaji Case:

In the Balaji case there was a reference to habitation test. Justice Gajendragadkar mentioned place of habitation, particularly rural area, as test or criterion to determine social backwardness of class of citizens. But, he refrained from elaborating it, for he rightly felt that the problem of determining social backwardness of classes of citizens on the basis of habitation test required elaborate investigation and scientific examination of data collected from such investigation.

Habitation test is confined to Hills:

The habitation test has come up for discussion in State of Uttar Pradesh v. Pradip Tandon.[33] The main issue before the Supreme Court in this case is whether the instructions framed by the State Government in making reservations in favour of candidates from rural areas, Hill Areas and Uttarakhand are

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33 A.I.R., 1975, S.C., 563.

constitutionally valid. These reservations were made by the State Government for admissions of students to medical colleges in the State of Uttara Pradesh.

The State contended that the reservations for rural, hill and Uttarakhand areas are for socially and educationally backward classes. In support of this contention the State referred to lack of educational facilities, illiteracy, unsatisfactory economic condition, acute poverty and absence of communication and transportation in rural, hill and Uttarakhand areas. The reservations, according to the State, are considered necessary to attract graduates from those areas and to feed the dispensaries with medical men in adequate number to serve the people inhabiting those areas. Thus, the State classified these rural, hill and Uttarakhand areas as socially and educationally backward areas and also laid emphasis on the need for reservations in favour of citizens hailing from these areas. Apart from these facts, according to the State, the reservations are valid on geographical or territorial basis.

The Supreme Court accepted without hesitation the arguments advanced by the State in support of the reservations made in favour of persons belonging to hill and Uttarakhand areas. The Court said that the hill and Uttarakhand areas in Uttara Pradesh are instances of socially and educationally backward classes of citizens. Analysing the social backwardness

of the said areas, the court said that "backwardness is judged by economic basis that each region has its own measurable possibilities for maintenance of human numbers, standards of living and fixed property".[34] In this connection, the Court pointed out that from an economic point of view the classes of citizens are backward (1) when they do not make effective use of resources, (2) when large areas of land maintain a sparse, disorderly and illiterate population whose property is small and negligible, and (3) when effective territorial specialisation is not possible in the absence of means of communication and technical processes. These facts, according to the court, have made the people in the hill and Uttarakhand areas socially backward classes of citizens.[35]

Then, the court specified the factors which are helpful in determining the educational backwardness in such areas and they are (1) traditional apathy for education on account of social and environmental conditions or occupational handicaps, (2) inaccessibility of the area, and (3) lack of educational institutions and educational aids. So, the court came to the conclusion that people in the hill and Uttarakhand areas "illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have

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34 A.I.R., 1975, S.C., 563 at p.567.

35 Ibid.

neither meaning and values nor awareness for education."[36]

But, the court pointed out that the same cannot be said about the rural areas. According to the Court, some people in the rural areas may be educationally backward, some may be socially backward, there may be a few who are both socially and educationally backward, but it cannot be said that all citizens residing in rural areas are socially and educationally backward.[37]

The State, relying on the propositions laid down in Triloki Nath Tikku v. Jammu and Kashmir,[38] contended that the people of rural areas are socially and educationally backward classes of citizens within the meaning of Article 15(4), for they are grouped together because of their common traits, their occupation, their residence in the rural areas and they are identifiable by such common traits and have for long constituted and continued to constitute a well-known division of Indian Society. The court rejected the argument and said that 80 per cent of the Population in the State of Uttara Pradesh in rural areas cannot be said to be homogeneous class by itself. They are not of the same kind. Th ir occupation is different. Their

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36 Ibid.

37 Id., p.568.

38 A.I.R., 1969, S.C., 1.

standards are different. Their lives are different. Population cannot be a class by itself. Rural element does not make it a class. What is more, "to suggest that the rural areas are socially and educationally backward is to have reservation for the majority of the State".[39]

Then dealing with another contention that it is necessary to have reservation of seats for the people in rural areas in order to attract medical men for service in rural areas, the court said that "the special need for medical men in rural areas will not make the people in the rural areas socially and educationally backward classes of citizens".[40]

Thus, for the foregoing reasons the Supreme Court held that the reservation in favour of candidates from rural areas is unconstitutional, but, on the other hand, it held that reservations for the hill and Utterkhand areas are severable and they are valid. In effect, the Supreme Court accepted the habitation test put forward long back in Balaji case to determine the social and educational backwardness of the people and confined it to hill and other similar inaccessible areas like Uttarakhand in Uttar Pradesh. What is more, in applying the habitation test, the Supreme Court relied mainly on factors which

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39 A.I.R., 1975, S.C., 563 at p.568.

40 Ibid.

are predominently of economic and occupational character.

Later, in State of Kerala v. T.P. Roshana[41] the habitation test has been extended beyond the hill regions to operate on "geographical area" which is considered to be backward. A Backward Class Commission accepted the educational backwardness of the Malabar area of Kerala State and recommended equitable allocation of seats on that footing. Consequently, some seats in the Medical college have been reserved in favour of candidates belonging to Malabar area. In this case, the Supreme court upheld the principle of reservation with weightage for the geographical area of the Malabar District. The reasons adduced in support of the decision are: (1) the Malabar area has been regarded as notoriously backward from the point of view of collegiate education and "geographaic justice", a component of social justice, and the Government has to take note of these comparative imbalances in regulating seat allocations to Medical colleges in the State on equitable basis, and (2) the current conditions warrant the classification of the student community on the zonal basis, but, of course, "not as a legitimation of endless perpetuation but as transient panacea for geo-human handicap which the State must actively strive to undo."[42]

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41 A.I.R., 1979, S.C., 765.

42 Id., p.768.

Extension of habitation test in the Roshana case to determine backwardness of people residing in Malabar District seems to be unreasonable despite the use of catchy phrase "geo-human handicap." What the Supreme Court said about rural areas of Uttara Pradesh in Pradip Tandon case will equally apply to Malabar District of Kerala State. Citizens residing in Malabar District are as a whole not socially and educationally backward. The population of Malabar District cannot be said to be homogeneous class itself, for their occupation is different, their standards are different and their lives are different. District element does not make it a class. Even if the Malabar District is backward from the point of view of collegiate education, the population of the district can hardly be treated as socially and educationally backward class for the purpose of Article 15(4).

A Grand Finale to Balaji Doctrine:

A grand finale to Balaji doctrine has been sung in K.C. Vasanth Kumar v. Karnataka.[43] It has been consecrated in this case. As pointed out by Chief Justice Chandrachud, it is an unusual exercise by the Supreme Court in giving expression to its views without reference to specific facts, for it has been done in

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43 A.I.R., 1985, S.C., 1495.

response to a reference made by the Government of Karnataka seeking opinion of the court on the reservation policy. Since five eminent judges of the Supreme Court gave their opinions after dealing with the subject of protective discrimination in a comprehensive manner, the opinions are of great value.

Chief Justice Mr. Chandrachud is of the opinion that:

(1) In so far as the Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions; and

(2) The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after 50 years of the commencement of the Constitution, which means after 2000 A.D. It is essential, according to him, to prevent the privileged section of the underprivileged society from monopolising the preferential benefits for an indefinite period of time.[44]

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44 Id., p.1499.

After elaborately discussing a number of decisions, Justice Mr. Desai has come to the conclusion that:

(1) the only criterion which can be realistically devised for identifying socially and educationally backward classes is the one of economic backwardness. To this may be added some relevant criteria such as the secular character of the group, its opportunity for earning livelihood, etc., but by and large economic backwardness must be the lode star.

(2) Even with respect to Scheduled Castes and Scheduled Tribes, economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefitted by it and improved their position.[45]

Justice Mr. Chinnappa Reddy has analysed a large number of cases and writings on the subject and said that:

(1) Class poverty, not individual poverty, is the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. Despite individual exceptions, it may be possible and easy to identify social backwardness with reference to caste, residence,

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45 Id., pp.1506 and 1507.

occupation or some other dominant feature. If they reflect poverty, which is the primary source of social and educational backwardness, they must be recognised along with other less primary sources.[46]

(2) Determination of social backwardness of "Backward Classes" by applying the test of nearness to the conditions of existence of the Scheduled Castes and Scheduled Tribes would practically nullyfy the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Scheduled Tribes. Such a test, according to him, would take a substantial majority of the classes who are between the upper classes and Scheduled Castes and Scheduled Tribes out of the Category of Backward Classes and put them at a permanent disadvantage.[47]

Then, Justice Mr. Sen, after a brief analysis of materials on the subject, came to the conclusion that:

(1) the predominant and the only factor for making special provisions under Article 15(4) or for reservations of Posts and appointments under Article 16(4) should be poverty; and

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46 Id., p.1529.

47 Id., p.1515.

(2) Caste or a Sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes and Scheduled Tribes, till such members of Backward Classes attain a state of enlighten-ment and there is eradication of poverty amongst them and they become equal partners in a new social order in our national life.[48]

Finally, Justice Venkataramiah, after a comprehensive survey of the problems, suggests that:

(1) For the purpose of determining beneficiaries of any reservation made under Article 15(4) two criteria must be used and they are (a) the conditions of caste or group or community should be more or less similar to the conditions in which Scheduled Castes and Scheduled Tribes are situated, and (b) the income of the family to which the candidate belongs should not exceed the specified limit; and

(2) For the purpose of Article 16(4), it should also be shown that the Backward Class in question is in the opinion of the Government not adequately represented in the Government services.[49]

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48 Id., p.1530.

49 Id., p.1556.

Thus, it is clear that all the five judges have virtually endorsed the Balaji doctrine to determine the social and educational backwardness of the people. Only with respect to the point that backwardness of "Backward Classes" must be comparable to the backwardness of the Scheduled Castes and Scheduled Tribes, a dissenting voice has been raised by Justice Chinnappa Reddy. But, others have approved the Balaji view. Therefore, as far as the tests to determine the backwardness of people are concerned, the Balaji doctrine has become a locus classicus.

CHAPTER VI

COMPENSATORY DISCRIMINATION IN FAVOUR OF WEAKER SECTIONS IN THE EDUCATIONAL FIELD

CHAPTER VI

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The concept of equality, which demands that equals must be treated equally and those who are similarly situated must be accorded similar treatment,[1] is undoubtedly a salutary legal principle. But, in India a few unfortunate sections were suppressed, socially and economically, for several centuries in the past, and consequently an imbalanced socio-economic order came into existence. In such imbalanced socio-economic order, strict observance of concept of equality would lead to perpetuation of the existing inequality. So, necessarily some initial advantages should be granted to the weaker sections as compensation for the lost opportunities or opportunities which were denied to them in the past. The initial compensatory benefits given to the "weaker sections" or "Backward Classes" would be able to establish an equilibrium or equality in fact between different situations in which two classes, "Backward Classes" and "Forward Classes" are found.

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1 In re special Courts Bill, 1978, A.I.R., 1979, S.C., 478, at pp.508-509. Chief Justice Chandrachud has said that Article 14 is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

Creative Compensatory Discrimination:

The Concept of equilibrium-oriented "equality in fact" was expounded by the Permanent Court of International Justice in its two opinions in German Settlers in Poland[1a] and Minority Schools in Alabania[2] cases. According to the facts of the latter case, the State of Alabania was newly formed after the First World War. Then a large number of Greeks were left within the new State. Attempts were made on international level to secure rights and equality of treatment to the Greek minority Community in Alabania. Finally, on Alabania's admission to the League of Nations in 1921, the Government of Alabania signed a Declaration to the effect that Alabanian Nationals who belong to racial, religious or linguistic minorities "will enjoy the same treatment and security in law and in fact as other Alabanian Nationals. In particular they shall have equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein".

In 1933 the Alabanian Constitution was amended and the amended provisions provided that "instruction and education of

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1a L.C. Green, International Law Through Cases, (1959), p.340.

2 Ibid.

Alabanian subjects are reserved to the State and will be given in State Schools. Primary education is compulsory for all Alabanian Nationals and will be given free of charge. Private Schools of all categories at present in operation will be closed". The Greek minority in Alabania petitioned the Council of the League alleging that these amendments contravened the Declaration of 1921. The Alabanian Government contended that since the measure applied to both the majority and minority, it could not be considered as discriminatory. The League Council referred the matter to the Permanent Court of International Justice for an advisory opinion. The issue before the Court was whether the said constitutional amendments violated the guarantee to the Greek minority community in the Declaration of 1921 of "the same treatment and security in law and in fact as other Alabanian Nationals".

The Permanent Court of International Justice said that the Alabanian majority would not suffer materially by the abolition of private Alabanian Schools. The Greek minority, on the other hand, would lose its rights to be educated in its own language and in its own culture. Then, the Court referred to the crucial clause in the Declaration, which assured the "same treatment and security in law and in fact" to all Alabanian Nationals, and said that the clause implied "a notion of equality which is peculiar to the relations between the majority and

minorities".[3] It pointed out that it may not be easy to define the distinction between "the notions of equality in fact and equality in law; nevertheless, it may be said the former notion excludes the idea of merely formal equality".[4] Further, according to the Court, "equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations".[5] In conclusion, it said that it is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact".[6]

A similar view was expressed by the same Court in its opinion on the German Settlers in Poland[7] when it said that there must be "equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law".

Thus, in the aforesaid opinions, the Permanent Court of International Justice defined and explained clearly "equality

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3. Id., p.343.

4 Id., p.344.

5 Ibid.

6 Ibid.

7 Advisory Opinion No.6, Series A/B, No.44, p.28.

in law" and "equality in fact" which are two aspects of the concept of equality. "Equality in law" has been defined to mean "the absence of discrimination in the words of the law" or the preclusion of "discrimination of any kind". "Equality in law" in this sense has been embodied in clauses (1) and (2) of Article 15 of the Constitution of India. "Equality in fact" has been defined to mean "different treatment in order to attain a result which establishes an equilibrium between different situations". In other words, the concept of "equality in fact" is essentially equilibrium - creating "different treatment" or what Prof. Alexandrowicz calls "protective discrimination".[8]

More or less a similar view has been expressed by Justice K. Subba Rao. According to him, the concept of equality in practice can only be worked out by accepting two principles: (1) to give equal opportunity to every citizen of India to develop his own personality in the way he seeks to do; and (2) to give adventitious aids to the under-privileged to face boldly the competition of life. Though the two principles appear to be conflicting, the harmonious blending of both gives equal opportunities to all citizens to work out their way of life, for doctrinaire insistence of an abstract equality of opportunity leads

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8 C.H. Alexandrowicz, Constitutional Developments in India, (1957), pp.56-64.

in practice to inequality which the doctrine seeks to abolish.[9]

In short, the concept of "equality in fact" means "different treatment", "protective discrimination", "adventitious aids" or "compensatory benefits" in order to attain a result which establishes an equilibrium between different situations. It is exactly this concept of equilibrium-creating compensatory benefit or discrimination, which has been contemplated in Article 15(4) of the Constitution and according to which the State is free to make "special provision for the advancement of any socially and educationally Backward Classes of citizens or for the Scheduled Castes and the Scheduled Tribes". It may also be remembered that Article 15(4) contemplates "protective discrimination" or "compensatory benefits" in favour of the weaker sections in order to attain a result which establishes an equilibrium between different situations, that is to say, to establish equality in fact between "weaker sections" and others who are found in two different situations so as to enable them to face boldly the competition of life. Therefore, Article 15(4) contemplates a creative compensatory discrimination in favour of weaker sections and it is not intended to destroy the equality in law concept stipulated in clauses (1) and (2) of Article 15. Whether the "compensatory discrimination" granted to the weaker

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9 Justice K. Subba Rao, Fundamental Rights under the Constitution of India, (Rt. Hon. V.S. Srinivasa Sastri Lectures) p.23.

sections is creative in nature or destructive in character depends upon factors such as the quantum of compensatory benefits conferred, the classes chosen for such conferment and the duration for which they have been given. It is interesting to analyse how the judiciary approached this aspect of the problem.

The Mysore Government issued an Order in 1962 classifying 90 per cent of the total population of the State into "Backward Classes" and "more Backward Classes" and reserved 68 per cent of seats in professional colleges in favour of the Backward Classes and Scheduled Castes and Scheduled Tribes and alloted different percentage of seats to two different categories of Backward Classes. The validity of this order was challenged by the aggrieved petitioners before the Supreme Court in Balaji v. State of Mysore[10] on the ground that it violated the provisions of Article 15 and was not saved by clause (4) of the said Article. One of the important issues before the Supreme Court was whether the reservation of 68 per cent

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10 A.I.R., 1963, S.C., 649. The petitions in this case were filed under Article 32 to challenge the validity of the order passed by the State Government in 1962. The said order fixed 50 per cent as the quota for other Backward Classes (minus Scheduled Castes and Scheduled Tribes). Out of that 50 per cent quota, 28 per cent was reserved for Backward Classes and 22 per cent for more Backward Classes. The reservations of 15 per cent and 3 per cent were made in favour of Scheduled Castes and Scheduled Tribes respectively. As a result 68 per cent of the seats available for admission to the professional colleges was reserved for the Backward Classes and 32 per cent was only available for the merit pool.

of seats in favour of Backward Classes was reasonable.

The Supreme Court said that in making special provisions in the form of reservations in favour of Backward Classes care should be taken not to exclude admission to higher educational centres 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.[11] Then discussing about the reasonable limit, the Court said that the reasonable limit would be the point of adjustment between the interests of weaker sections of society, which are a first charge on the States and the Centre, and the interests of the community as a whole. The Court then tried to quantify the reasonable compensatory benefits. It said that speaking generally and in a broad way, a special provision should be less than 50 per cent; but how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.[12] On the basis of this formula the Court came to the conclusion that the reservation of 68 per cent directed by the impugned order was plainly inconsistent with Article 15(4) of the Constitution.[13]

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11 Id., p.663.

12 Ibid.

13 Ibid.

The Balaji rule that reservation must be less than 50 per cent is undoubtedly commendable. In the nature of things the rule of less than 50 per cent reservation must of necessity relate to totality of reservations, for both Article 15(4) and Article 16(4) contemplate special provision for reservation in favour of weaker sections specified therein. In a subsequent case, Janardhan Subbaraya v. Mysore State[14], the Supreme Court said that the judgment in Balaji case did not affect the validity of the reservation made in favour of the Scheduled Castes and Scheduled Tribes. The said reservations, 15 per cent and 3 per cent made in favour of Scheduled Castes and Scheduled Tribes respectively, continued to be operative and the fact that the impugned orders had been quashed in Balaji case did not alter the position. The said orders had been quashed therein solely by reference to the additional reservation made by the impugned

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14 A.I.R., 1963, S.C., 702. In this case, the petitioners filed two writ petitions under Article 32 challenging the validity of two orders issued in 1961 and 1962 by the state of mysore regarding reservation of seats in professional colleges. The petitioners had applied for admission to Medical College. They did not get admission. According to the petitioners, they would have secured admission to the Medical College but for the reservation directed to be made by the two impugned orders. They alleged that orders were ultravires. The Supreme Court said the points raised by the petitioners were covered by the decision in Balaji case and therefore the petitioners would succeed and petitions were allowed. The counsel for the state drew attention of the Court to the fact that as a result of decision in Balaji there was some doubt as to whether the reservation made by the impugned orders in respect of Scheduled Castes and Scheduled Tribes was also struck down by the Court.

orders in regard to the socially and educationally Backward Classes.[15] So, the State would be justified in giving effect to the reservation made in respect of the Scheduled Castes and Scheduled Tribes. This decision has cast a shadow of doubt on the totality of reservations remaining within the bounds of 50 per cent.

In State of A.P. v. Balaram[16] the Supreme Court set the record straight. It said that on the quantum of reservation the Balaji judgment had already held that the total of reservation for Backward Classes, Scheduled Castes and Scheduled Tribes should not ordinarily exceed 50 per cent of the available seats. In the case at hand, the Government reserved 25 per cent, 14 per cent and 4 per cent seats in the professional college for the Backward Classes, Scheduled Castes and Scheduled Tribes respectively and the total reservation came to 43 per cent of

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15 Id., p.703.

16 A.I.R., 1972, S.C., 1375. The State of Andhra Pradesh by order issued in 1970 announced reservation of 25 per cent of the Seats in M.B.B.S. Course for candidates belonging to Backward Classes enumerated therein. The reservation for Scheduled Castes and Scheduled Tribes was 14 per cent and 4 per cent respectively. The Backward Classes were determined on the basis of caste. The determination of Backward Classes and the order of the State Government reserving 25 per cent of seats were challenged by the respondent in the High Court, which held that they were in violation of Articles 15(1) and 29(2) and were not saved by Article 15(4). The rationale was that caste was taken as the basis of the listing of Backward Classes. State filed an appeal against it.

the available seats. This was upheld by the Supreme Court on the ground that the quantum of reservation was well within the limits mentioned in the Balaji case.[17] Similar view had been expressed by the Supreme Court earlier in Periakaruppan v. State of T.N.[18] In that case referring to the quantum rule in Balaji, the Court said that the total reservation, which was 41 per cent of seats in the professional colleges made in favour of Backward Classes, Scheduled Castes and Scheduled Tribes, was not excessive.

The Balaji rule regarding the quantum of reservation received a jolt in State of Kerala v. N.M. Thomas[19] and Vasanth Kumar v. State of Karnataka.[20] In Thomas case the question was about the exemption given to members of the Scheduled Castes and Scheduled Tribes, for a limited period, from passing a certain departmental test for promotion from the post of lower division clerk to the post of upper division clerk. The rule

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17 Id., p.1400.

18 A.I.R., 1971, S.C., 2303 at p.2309. In eight Medical colleges in the State of Tamilnadu there were altogether 1125 seats. A few seats out of the 1125 were reserved for certain social categories of students. There was no dispute about it. Then 41 per cent of the seats were reserved for students coming from socially and educationally Backward Classes, Scheduled Castes and Scheduled Tribes. The rest of them were placed in the general pool. Important question in the appeal was whether 41 per cent of reservations for backward classes and Scheduled Castes and Scheduled Tribes was excessive?

19 A.I.R., 1976, S.C., 490.

20 A.I.R., 1985, S.C., 1495.

providing for the exemption was attacked on the ground that it was violative of Article 16(1). One of the arguments against the rule was that the result of application of the rule would be to enable the members of the Scheduled Castes and Scheduled Tribes to claim more than 50 per cent of the posts immediately available for promotion. The Supreme Court by its 5 to 2 decision rejected the argument and upheld the validity of the rule. The High Court had based its conclusion on the ground that the result of the application of the impugned rule was excessive and exorbitant because out of 51 posts, 34 posts were given to the members of the Scheduled Castes and Scheduled Tribes. Chief Justice held that this conclusion of High Court was wrong. He noted that the promotions made in the service as a whole were nowhere near 50 per cent of the total number of posts. The Scheduled Castes and Scheduled Tribes constituted only 10 per cent of the population of the State. Their share in the gazetted service of the State was said to be 2 per cent, namely, 184 out of 8,780. Their share in the non-gazetted appointments was only 7 per cent, namely 11,437 out of 1,62,784. So, the grant of 34 out of 51 promotion posts to the members of the Scheduled Castes and Scheduled Tribes was not excessive and exorbitant.[21] In other words, according to Chief Justice Ray the quantum of reservation must be judged in relation to the total

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21 A.I.R., 1976, S.C., 490 at p.501.

number of posts in the service as a whole. When so judged if it is such as to establish an equation between the percentage of the Scheduled Castes and Scheduled Tribes population in the State and the percentage of their share in the appointments in the services of the State, then the quantum of reservation is valid even if it exceeds 50 per cent of the available seats as it ensures adequate representation.

Supporting the above view, Justice Fazal Ali observed that clause (4) of Article 16 did not fix any limit on the power of the Government to make reservation. Since Clause (4) was part of Article 16 of the Constitution, it was manifest that the State should not be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). But, as to what would be a suitable reservation within permissible limits would depend upon the facts and circumstances of each case. No hard and fast rule could be laid down, nor could the matter be reduced to mathematical formula so as to be adhered to in all cases. Then, referring to the rule that the percentage of reservation should not exceed 50 per cent, Justice Fazal Ali, said that it was a rule of caution and it did not exhaust all categories. Suppose a State had a large number of Backward Classes of citizens which constituted 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 per cent of the jobs for them,

could it be said that the percentage of reservation was bad and violated the permissible limits of clause (4) of Article 16?. The answer, according to him, must necessarily be in the negative, for the dominant object of the provision of Article 16(4) was to take steps to make inadequate representation adequate.[22]

Justice Krishna Iyer expressed his agreement with Justice Fazal Ali that the arithmatical limit of 50 per cent in one year set by some earlier rulings could not be pressed too far and that overall representation in a department did not depend on the recruitment in a particular year, but the total strength of the cadre. He also agreed with the view of Justice Fazal ali regarding the construction of Article 16(4).[23]

In Vasanth. Kumar case,[23a] the judges who constituted the Bench, expressed their individual views on several issues, including the quantum rule. Justice Chinnappa Reddy, has built systematically his arguments against the Balaji rule that the quantum of reservation must remain below 50 per cent of the available seats in any year. First, he said that the question of reservation cannot be viewed as a conflict between the meritarian principle and the compensatory principle, for, according to him, the real conflict is between the class of people

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22 Id., pp.554-555.

23 Supra, n.20.

23a Id., p.537.

who have never been in and those who are entrenched in convenient living.[24] Secondly, there is neither statistical basis nor expert evidence to support the assumptions that efficiency will necessarily be impaired if reservation exceeds 50 per cent[25] Thirdly, on an analogy of Article 16(4), the extent of reservation of seats under Article 15(4) in professional colleges and in other colleges may conveniently be determined with reference to the inadequacy of representation in the various profession and the inadequacy of number of graduates respectively. Naturally, if the lost ground is to be gained, the extent of reservation may even have to be slightly higher than the percentage of population of the Backward Classes.[26] Fourthly, the percentage of reservations is not a matter upon which a court may pronounce with no material at hand. For a court to say that reservations should not exceed 40 per cent, 50 per cent or 60 per cent would be arbitrary and the Constitution does not permit the court to act in an arbitrary manner.[27] Finally, According to him in Balaji the Court thought that generally and in a broad way a special provision should be less than 50 per cent. But the question how much less than 50 per cent would depend upon

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24 A.I.R., 1985, S.C., 1495, at p.1508.

25 Id., p.1509.

26 Id., p.1514.

27 Id., p.1517.

the relevant prevailing circumstances in each case. All that the Court would finally say was that in the circumstances of the case before them, a reservation of 68 per cent was inconsistent with Article 15(4) of the Constitution. Justice Chinnappa Reddy was categorical in holding that the court was not prepared to read Balaji as arbitrarily laying down 50 per cent as the outer limit of reservation.[28]

The Balaji rule regarding the quantum or extent of reservation is clear. It says that total reservation contemplated in the special provision of Article 15(4) should not ordinarily exceed 50 per cent of the available seats. But, the views, expressed in Thomas and Vasanth Kumar cases on the extent of reservation rendered the Balaji rule infructuous. No doubt, the Balaji court said that how much less than 50 per cent would depend on the facts and circumstances in each case. But, it is not the view of Balaji court that how much more than 50 per cent would depend on facts and circumstances of each case. Therefore, the view of Justice Chinnappa Reddy, that the Court is not prepared to read Balaji as arbitrarily laying down 50 per cent as the outer limit of limitation seems to be far from convincing; it not only ignores the vital point in the Balaji rule but also fails to note the fundamental principle explained by the Balaji court in support of its proposition.

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28 Ibid.

The Thomas and Vasanth Kumar courts have tried to side track the Balaji rule on the extent of reservation. They have advanced four specious arguments: (1) the rule that the percentage of reservation should not exceed 50 per cent is a rule of caution and does not exhaust all categories; (2) the question of reservation cannot be viewed as a conflict between the meritarian principle and compensatory principle, but as one between the class of people who have never been in and those who are entrenched in convenient living; (3) Mathematical formula cannot be adhered to in all cases; and (4) the dominant purpose of Article 16(4) is to make inadequate representation adequate and therefore the extent of reservation may have to be determined with reference to the inadequacy of representation of Backward Classes in the services and professions.

The aforesaid arguments are untenable. First, there is nothing in Balaji to indicate that the quantum rule was intended to be a mere rule of caution. The rule was evolved after much deliberations. There is no ambiguity in the language used therein. Secondly, in Balaji case the question of reservation was not viewed either in the light of conflict between meritarian principle and compensatory principle or as a conflict between those who have never been in and those who live in comfort. On the other hand, extent of reservation was decided on the fundamental principle of bringing an adjustment between

the interests of weaker sections of society and the interests of the community as a whole. The _Balaji_ court said that reservations contemplated in Articles 15(4) and 16(4) must be within reasonable limit and that reasonable limit would be the point of adjustment between the interests of weaker sections of society and interests of the Community as a whole.[28a] The _Balaji_ court in its wisdom stipulated less than 50 per cent reservations of the existing seats or posts in any year as the reasonable limit. The _Balaji_ formula is both flexible and rigid. It is flexible because fixation of the quantum less than 50 per cent depends on facts and circumstances of each case. It is rigid because the reservation cannot exceed 50 per cent of the existing seats or posts. It is rendered rigid at the reasonable limit, that is, at the point of adjustment lest the special provision should swallow the main provision and the interests of the weaker sections overwhelm or destroy the interests of community as a whole. Thirdly, to dismiss the said _Balaji_

28a A.I.R., 1963, S.C., 649 at pp.663. The Court said: "A Special provision contemplated by Article 15(4), like reservations of posts and appointments contemplated by Article 16(4), must be within reasonable limits. The interests of the 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 the seats available in all the colleges, that clearly would be subverting the object of Article 15(4)".

rule as a mere mathematical formula of no lasting value is to ignore the reasonable balance it struck between clashing interests in our society. Finally, the dominant purpose theory of making inadequate representation adequate is a dangerous concept. If it is pressed to service fully there may not be open competition in many areas for years on end. Besides, the idea of adequate representation is not found in Article 15(4).

Apart from all these, the pronouncements made in Thomas case and the views expressed in Vasanth Kumar case are of doubtful validity. In Thomas case, a large number of members of Scheduled Castes and Scheduled Tribes were promoted from lower division clerks to the posts of upper division clerks after granting them temporary exemption from passing any of the tests, departmental or otherwise, for a period of four years. It was purely a temporary concession. All along the discussion, the Thomas court had been fully conscious of the temporary concession. All the judges specifically referred to this fact and Justice Krishna Iyer laid stress on it. He said that the rules gave power to Government to extend the time to harijan officials for passing tests prescribed for occupying promotional posts. It did not exempt those hands for ever, but only waived for a specified short term. It had not relaxed the minimal qualifications held necessary for those posts from the point of view of basic administrative efficiency. The Government,

while fixing the longer grace time for passing tests, had regard to administrative efficiency. It had not thrown to the winds considerations of administrative capability and ground the wheels of Government to a halt in the name of "harijan Welfare". Then he said: "Administration runs for good government, not to give jobs to harijans. We must accept the necessary import of the rule as a limited concession to this Weaker group and test its vires on this basis".[29]

A pertinent question that may be asked is whether the decision and various pronouncements, including the one on the extent of reservation made in Thomas case would have been the same if the concession or exemption granted by the government to the officers belonging to the Scheduled Castes and Scheduled Tribes had been unlimited or permanent? Undoubtedly they would not have been the same for the simple reason that the Thomas court was very much influenced by the temporary nature of the concession or exemption granted to harijan officers. This is evident from the emphatic Statement of Justice Krishna Iyer, that the Court accepted the necessary import of the rule as a limited concession to the weaker group and tested its vires on that basis.[30] Therefore, pronouncements made in Thomas case

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29 A.I.R., 1976, S.C., 490, at p.526.

30 Ibid.

regarding the extent of reservation cannot overrule the Balaji rule on the point.

As far as the pronouncements or propositions in Vasanth Kumar case are concerned, they are mere views of the judges expressed by them with a hope that their views would serve as guidelines for evolving suitable tests in the matter of reservations. In fact, Chief Justice Chandrachud said at the beginning that the court was invited by the counsel "not so much as to deliver judgments but to express our opinion on the issue of reservations", which might serve as a guidelines to the commission which the Government of Karnataka proposed to appoint for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and other Backward Classes.[31] Then, he conceded that "a somewhat unusual exercise is being undertaken by the Court in giving expression to its views without reference to facts".[32] Besides Justice Desai said that "this is not a judgment in a lis in an adversary system".[33] H.M. Seervai, the learned author, critically analysed the views of the judges in Vasanth Kumar case and said that the five judgments in the case are

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31 A.I.R., 1985, S.C., 1495, at p.1498.

32 Ibid.

33 Id., p.1507.

"not judgments at all" and they are, according to him, a nullity because in law "they amount to nothing".[34] Therefore, views expressed by the judges in Vasanth Kumar case do not constitute ratio decidendi and hence the Balaji rule regarding the extent of reservation still holds the field.

Time Span for Reservations:

The Constitution does not prescribe any time limit for making reservations in favour of Backward Classes. That does not, however, mean that the reservations may continue to be made indefinitely and weaker sections may continue to remain in that status for perpetuity. The Supreme Court dealt on this aspect of the problem mildly in Periakaruppan v. State of Tamil Nadu.[35] It said that the Government should not proceed on the basis that once a class is considered as a Backward Class it should continue to be Backward Class for all times. Such an approach would defeat the very purpose of the reservation because once a class reached a 'take off' stage, then competition is necessary for their progress.[36] Besides, the Court suggested that the Government should always keep

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34 H.M. Seervai, Constitutional Law of India, Supplement to 3rd Edn., 1988, p.274. An elaborate and critical analysis of the case is found in pp.272-303.

35 A.I.R., 1971, S.C., 2303.

36 Id., p.2311.

under review the question of reservation of seats. Only the classes which are really socially and educationally Backward should be allowed to have the benefit of reservation and reservation of seats should not be allowed to become a vested interest.[37]

But the problem, however, is the problem of determining "the take off stage" of any Backward Class and the stage at which the Government could prevent reservation of seats from becoming a vested interest of any Backward Class. A test suggested by the Supreme Court in Periakaruppan is that when candidates of Backward Classes secure about 50 per cent of the seats in the general pool, it is an indication that time has come for a de novo comprehensive examination of the question.[38]

More light has been shed on this problem by the views expressed by some of the judges of the Supreme Court in Vasanth Kumar v. State of Karnataka.[39] Justice Desai touched the real problem when he said that if a survey is made with reference to families in various castes considered to be socially and educationally backward about the benefits of preferred treatment, it would unmistakably show that the benefits of

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37 Ibid.

38 Ibid.

39 A.I.R., 1985, S.C., 1495.

reservations are snatched away by the top creamy layer of the Backward Castes. He says that this has to be avoided at any cost.[40] But how? The solution suggested by Chief Justice Chandrachud is the "means test". The means test, according to him, would be helpful to prevent the privileged section of the underprivileged society from monopolising preferential benefits for an indefinite period of time.[41] Further he suggests that the policy of reservations in employment, education and legislative institutions should be reviewed every five years. Such quinquennial review would afford an opportunity (1) to the State to rectify distortions arising out of particular facets of the reservation policy and (2) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservation.[42]

As far as reservations in favour of Scheduled Castes and Scheduled Tribes are concerned, Justice Desai said that economic criterion for compensatory discrimination or affirmative action should not be applied, for thousands of years of discrimination and exploitation cannot be wiped out in one generation. Further, he said that even in the case of Scheduled

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40 Id., p.1506.

41 Id., p.1499.

42 Ibid.

Castes and Scheduled Tribes economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefitted by it and their position. In this connection, he asserted that finally reservation must have a time span otherwise concessions tend to become vested interests.[43] But, Justice Desai has not made any specific suggestion regarding the outer limit of the time span for reservation. Whereas, Chief Justice Chandrachud, is more specific in his views on this issue. He said that the reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present, that is, without the application of a means test, for a further period not exceeding fifteen years. In other words, the present position must continue till 2000 A.D. This would mean reservations in favour of Scheduled Castes and Tribes for a period of fifty years after the advent of the Constitution, a period which is reasonably long for the upper crust of the oppressed classes to overcome the effects of social oppression, isolation and humiliation.[44] Proceeding further, Chief Justice Chandrachud states that the means test must be made applicable even to the Scheduled Castes and Scheduled Tribes after 2000 A.D., for it is essential that the privileged section of the underprivileged

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43 Id., p.1507.

44 Id., p.1499.

society should not be permitted to monopolise the doles for an indefinite period of time.[45]

The aforesaid views of Chief Justice Chandrachud and Justice Desai have given some substance to the concept of time span for reservation in favour of, the meaning to, 'take off stage' of the Backward Classes and Scheduled Castes and Scheduled Tribes. As far as Backward Classes are concerned, means test should be applied to them from now on to prevent cornering of the benefits of reservations by the top creamy layer of the Backward Castes. Secondly, there must be quinquennial review of reservations in favour of Backward Classes to rectify distortions, if any, in the policy of reservations and to make the reservation policy more pragmatic and result-oriented. Scheduled Castes and Scheduled Tribes are concerned, the present reservation policy, without any change, must continue till 2000 A.D. Thereafter, means test must be applied to them also to prevent privileged section amongst them from monopolising preferential benefits for an indefinite period of time and there must be quinquennial review of reservations in favour of them as well in the same manner and for similar purposes as it is proposed to be done now in the case of Backward Classes. If these suggestions are carried out fully and if the _Balaji_ rule

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45 _Ibid_.

regarding the extent of reservations is strictly adhered to, the compensatory discrimination contemplated in Article 15(4) may prove to be creative instrument to render social justice to the weaker sections and balancing wheel for reconciling clashing interests in society.

CHAPTER VII

BACKWARD CLASSES AND EMPLOYMENT OPPORTUNITIES

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BACKWARD CLASSES AND EMPLOYMENT OPPORTUNITIES

The "Backward Classes" are the standing monuments of the stark indifference and dire neglect displayed by the society towards a section of its people for centuries. These socially oppressed and poverty-stricken classes of people would be an eye-sore in the egalitarian social order, which the Constitution seeks to usher in. Naturally, therefore in the field of public employment compensatory discrimination has been shown in order to provide them with opportunities, to compete with the members of forward classes of people in an equitable manner.

Article 16(1) of the Constitution states that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". Then Clause (2) of the same Article says that "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". Having thus ensured equality of opportunity in matters of public employment in the above mentioned clauses, Article 16 states in Clause (4) that "nothing in this Article shall prevent the State from making any provision for the reservation of appointment or posts in favour of any backward

classes of citizens, which, in the opinion of the State, is not adequately represented in the services under the State". This job reservation clause enables the State to discriminate and reserve Government jobs in favour of Backward Classes of citizens and to give them adequate representation in the services under the State.

Extent of Reservation and Carry-Forward Rule:

The job reservation clause in Article 16(4) has given rise to some important problems. First problem relating to the meaning of the phrase "Backward Classes" has already been discussed earlier.[1] The second problem has arisen regarding the quantum of reservation[2] permissible under Article 16(4). The question is whether the State is free to make reservations to any extent or is there any limitation on its power to make reservations?. The question has been answered by the Supreme Court in Balaji v. Mysore.[3] It said that the reservations must be confined to minority seats and excessive or extravagant reservation would be unconstitutional. In this connection, the Court said that Article 15(4) is a special provision and a special provision should be less than 50 per cent. On the basis of

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1 Supra Chapters IV and V.

2 Extent of quantum of reservation, particularly under Article 15(4), has been discussed in Chapter VI of this work.

3 A.I.R., 1963, S.C., 649.

this rule, the Court struck down reservation of 68 per cent in technical institutions as plainly inconsistent with Article 15(4). No doubt, this view was expressed by the Supreme Court in regard to reservation under Article 15(4), but it made the proposition of law laid down therein applicable to reservation under Article 16(4) also. It said that what is true in regard to Article 15(4) is equally true in regard to Article 16(4). The Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution.[4] Thus, the court has made clear that not only the reservation of employments for Backward Classes is a justiciable matter but also that when reservation exceeds the reasonable limit, that is, when it is more than 50 per cent of the vacancies in a year, the court would strike down the reservation as unconstitutional.

An attempt was made to qualify the Balaji rule regarding the extent of reservations by adopting a new device known as

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4 Id., p.664.

carry-forward rule. Under this device, unfilled seats in the list of reservation in any particular year were carried forward to the subsequent year or years with an avowed purpose of giving effect to the principle of adequacy of representation in the State service for Backward Class citizens. The validity of the carry-forward rule was questioned in Devadasan v. Union of India.[5] The Government of India, by a Resolution dated September 13, 1950, as modified by supplementary instructions dated January 28, 1952 and office memorandum dated May 7, 1955, reserved a certain percentage of vacancies for Scheduled Castes and Scheduled Tribes. It also adopted the principle of "carry forward", according to which if the reserved vacancies are not filled in a year they are carried forward to the second year and then to the third year.[6] As a result of the "carry-

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5 A.I.R., 1964, S.C., 179.

6 The rule provides that 17½ per cent of the total vacancies in a year will be reserved for being filled from amongst the candidates belonging to Scheduled Castes and Scheduled Tribes. It further provides that if in any year suitable candidates are not available from amongest such classes the reserved posts will be de-reserved, filled by candidates from other classes and a corresponding number of posts be carried forward to the next year. If in the subsequent year the same thing happens, the posts unfilled by candidates from Scheduled Castes and Scheduled Tribes can be carried forward to the third year. In the third year the number of posts to be filled from amongst candidates of Scheduled Castes and Tribes would thus be 17½ per cent of the total vacancies in that year, plus the total unfilled vacancies which have been carried forward from the two previous years. The rule thus permits a perpetual carry-forward of unfilled reserved vacancies in the two years preceding the year of recruitment and provides addition to them of 17½ per cent of the total vacancies to be (Contd........)

forward" rule, nearly 64 per cent of vacancies were reserved in the year in question for Scheduled Castes and Scheduled Tribes. This huge reservation was impugned on the ground that it was violative of Article 16(1) and not permissible under Article 16(4).

The Supreme Court held that Article 16 conferred a right on each individual citizen seeking employment or appointment to an office under the State, and that in order to effectuate that right each year of recruitment must be considered by itself, and the reservation for Backward Classes each year should not be so excessive as to create a monopoly or to interfere unduly with the legitimate claims of other communities.[7] The Court pointed out that Article 16(4) was a proviso to Article 16(1)

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6 (Contd.....)
filled in the recruitment year. The rule has been illustrated thus: Supposing in two successive years no candidate from amongst the Scheduled Castes and Scheduled Tribes is found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved for each of those years would be 18 for each year. Since these vacancies were not filled in those years a total of 36 vacancies will be carried forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Scheduled Tribes. By operation of the carry-forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Scheduled Tribes would be 54 as against 46 by persons from amongst the more advanced classes.

7 Devadasan v. Union of India, A.I.R., 1964, S.C., 179 at p.187.

and a proviso or an exception could not be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under Clause (4) would in effect efface the guarantee contained in Clause (1) or at best make it illusory and meaningless. No provision of the Constitution or of any enactment could be so construed as to destroy another provision contemporaneously enacted therein. Therefore, the over-riding effect of Clause (4) on Clauses (1) and (2) could only extend to making of reasonable number of reservation of appointments and posts.[8] Thus, the Supreme Court rejected the "carry-forward" rule and in so rejecting it effectively prevented attempts to circumvent the decision in Balaji case and to reserve a large number of vacancies for Backward Classes in any particular year under the guise of carrying forward from the previous years the unfilled reserved vacancies.

Later, Devadasan rule was modified in A.B.S. Karamchari Sangh v. Union of India.[9] In order to ensure as far as possible adequate representation to the members of Scheduled Castes and Scheduled Tribes in the Railway Services, the Government adopted a policy of "carry-forward", for up to three recruitment years, of reserved vacancies if enough numbers of candidates from the said groups did not get selected. As a result of the limited

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8 Ibid.

9 A.I.R., 1981, S.C., 298.

carry-forward rule (limited to three recruitment years), one year 29 out of 45 vacancies were filled by members of the Scheduled Castes and Scheduled Tribes on the basis of reservations permitted by the said carry-forward rule. This came to about 64.4 per cent of reservation. This was considered to be excessive. It was challenged on the ground that it was violative of Article 16(1).

The Supreme Court, however, was unable to see how, in practice, by the three-year carry-forward rule the total vacancies would be gobbled up by the members of the Scheduled Castes and Scheduled Tribes virtually obliterating Article 16(1).[10] All that the Court could say was that the Government or the Railway Board should take care to issue instructions to see that in no year should Scheduled Caste and Scheduled Tribe candidates be appointed to substantially more than 50 per cent of the promotional posts. The Court pointed out that some excess would not affect as mathematical precision was different in human affairs, but substantial excess make the selection void. Subject to this rider or condition that the "carry-forward" rule should not result, in any given year, in the selection or appointments of Scheduled Caste and Scheduled Tribes candidates considerably in excess of 50 per cent, the Court upheld the three-year "carry-forward" rule.[11]

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10 Id., p.326.

11 Id., p.327.

The _Devadasan_ Court struck down the "carry-forward" rule on the reasoning that each year of recruitment must be considered by itself and the reservation for Backward Classes should not be so excessive as to interfere unduly with the legitimate claims of other communities.[11a] But, the _Karamchari Sangh_ Court upheld the three-year "carry-forward" rule subject to the condition that the rule should not result, in any given year, in the selection of Scheduled Caste and Scheduled Tribe candidates considerably in excess of 50 per cent of the existing vacancies.[11b] Hence, it is a modification of _Devadasan_ rule.

The important statement in _Karamchari Sangh_ decision, however, is that the three-year "carry-forward" rule should not result, in any given year, in the selection of Scheduled Caste and Scheduled Tribe candidates considerably in excess of 50 per cent. When can the quantum of reservation be said to be considerably in excess of 50 per cent?. The _Karamchari Sangh_ Court said that "some excess" would not affect, but "substantial excess" would void the selection. What is this "substantial excess" rule? The facts in the _Karamchari Sangh_ case showed that the three-year carry-forward rule resulted, in the given year, in the selection of Scheduled Caste and Scheduled Tribe candidates to 64.4 per cent of the promotion

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11a _Supra_, n.5.

11b _Supra_, n.11.

posts. Despite these facts, the Court upheld the selection. If reservation of 64.4 per cent of vacancies in a given year in favour of Scheduled Castes and Scheduled Tribe candidates, which resulted from the application of three-year "carry-forward" rule, is not "considerably in excess of 50 per cent", one would wonder as to where "some excess" ends and "substantial excess" begins.

Reservation at Promotion Stage:

Should the reservation contemplated in Article 16(4) be made only at the stage of recruitment to public service? Can it be extended to the stage of promotion in service? The problem has been posed in General Manager, Southern Railway v. Rangachari.[12] In 1957, the Central Government decided that there should be provision for reservations for Scheduled Castes and Scheduled Tribes in all grades of services filled by promotion through competitive examination limited to departmental candidates, the quantum of reservation being 12½ per cent for Scheduled Castes and 5 per cent for Scheduled Tribes. In April, 1959 the Ministry of Railway issued an order laying down that in the case of any promotion from one class to another and for any promotion from one grade to another within a class, where such promotions were made by "selection" and not on the basis

12 A.I.R., 1962, S.C., 36.

of "seniority-cum-fitness", there should be reservation for the Scheduled Caste and Scheduled Tribes on the same scale as in the direct recruitment. This order was challenged in this case on the ground that Article 16(4) applied only to reservation of posts at the stage of appointment and not to reservation of posts for promotion after appointment and so the order was outside the purview of Article 16(4) and consequently contravened Article 16(1) which guarantees equality of opportunity in matters relating to employment under the State.

The Supreme Court rejected the contention. It held that the impugned order was within the ambit of Article 16(4). In this connection, it remarked that the power of reservation which was conferred on the State under Article 16(4) would be exercised by the State in a proper case not only by providing for reservation of appointment but also by providing for reservation of selection posts. This construction, the court said, would serve to give effect to intention of the Constitution-makers to make adequate safeguards for the advancement of the Backward Classes of citizens and to secure for their adequate representation in the services.[13] This decision has far reaching consequences. It virtually extended the ambit of the reservation clause in Article 16(4) and enabled the State to make reservation both

13 Ibid.

at the stage of recruitments to public service and at the stage of promotion in service from one class to another.

Protective Discrimination Under Article 16(1):

Protective discrimination in the form of reservation of posts or appointments in public service in favour of Backward Classes, including Scheduled Castes and Tribes, has been clearly provided in Clause (4) of Article 16. This Clause has made it possible for the State to make compensatory discrimination in favour of Scheduled Caste and Scheduled Tribe candidates by reserving posts or appointments in State service in their favour notwithstanding the guarantee of equality of opportunity in public employment stipulated in Article 16(1) and prohibition of discrimination on the ground of religion, race, caste, sex, descent, etc., in respect of employment under the State contemplated in Article 16(2). In view of this fact, is there any further scope under Article 16 to make compensatory discrimination in favour of candidates belonging to Scheduled Caste and Scheduled Tribe in respect of employment under the State? The Supreme Court has said in State of Kerala v. N.M. Thomas[14] that there is such further scope under Article 16.

Thomas case came before the Supreme Court due to an

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14 A.I.R., 1976, S.C., 490.

appeal preferred by the State of Kerala against the decision of the High Court of Kerala in Thomas v. State of Kerala.[15] The appeal concerned with the validity of Rule 13AA of the Kerala State and Subordinate Services Rules, 1958. In Registration Department of the state of Kerala the Clerks were divided into two categories, namely Lower Division Clerks and Upper Division Clerks. The former could be promoted to the latter, which is higher position, on seniority-cum-merit basis. To qualify for promotion it was necessary to pass Account Test, Lower Kerala Registration Test and Test in the manual of office procedures. Among those who passed the tests, the promotions went to the most senior Lower Division Clerks. The rules allowed for temporary appointments to the higher posts for a period of two years during which the clerk would have to pass the required tests. This period was extended to four years in the case of clerks belonging to Scheduled Castes and Scheduled Tribes. Despite the said extended qualifying period, the Scheduled Caste clerks had not satisfied the test qualifications and were facing reversion to the lower posts. It was at this stage, in 1972 the State Government introduced a new Rule 13AA. This rul(enabled the Government to pass order exempting for a specified period members belonging to Scheduled Caste or Scheduled Tribe, who are in service, from passing the prescribed

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15 I.L.R., 1974(1) Ker.549.

tests.[16] Immediately thereafter, the Government passed order granting Scheduled Castes and Scheduled Tribes already in service temporary exemption from passing all tests for a period of two years. In 1974 this was extended for a further period to ensure each employee two chances to appear for the required tests. This time the Government made clear that no further extension of time would be given to them to acquire test qualifications. When the test barrier was removed in 1972, of 51 vacancies in the category of Upper Division Clerks, 34 were filled by Scheduled Castes who had not passed the tests, and only 17 were filled by persons who had passed the tests.

The petitioner complained that although he had passed all tests by November 2, 1971, he had not been promoted to the Upper Division, because of the concession given to Lower Division Clerks who were members of the Scheduled Castes and Scheduled Tribes, and who were promoted even though they had not passed the tests. The petitioner, therefore, contended that Rule 13AA and the orders passed thereunder were ultra vires and void for violating Article 16.

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16 Rule 13AA introduced into the Kerala State Subordinate Services Rules, 1958, with effect from 1972 states thus: "Notwithstanding anything contained in these rules, the Government, may, by order, exempt for a specified period, any number of members, belonging to a Scheduled Caste or Scheduled Tribe, and already in service, from passing the tests referred to in Rule 13 or Rule 13A of the said Rules".

The petitioner succeeded in the High Court. The High Court took the view that what had been done in the case was not to reserve posts. Reservations had already been made. What had been attempted by Rule 13AA was to exempt persons possessing necessary qualifications and such exemption was beyond the scope of Article 16(4).[17] But in the appeal preferred by the State of Kerala, the Supreme Court took a different view in the case, now popularly known as Thomas case,[18] and upheld the validity of Rule 13AA.

In Thomas case, the Supreme Court took the view that the temporary exemption given to the members of the Scheduled Castes and Scheduled Tribes from passing the required tests could be justified as a reasonable classification under Article 16(1). Justice Mathew reasoned that the idea of compensatory State action was to make people who were really unequal in their wealth, education or social environment, equal in specified areas.[19] Article 16(1) guaranteed equality of opportunity. Whether there was equality of opportunity could be gauged only by the equality attained in the result. In other words, equality of result was the test of equality of opportunity.[20] Then he

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17 Thomas v. State of Kerala, I.L.R., 1974(1) Ker.549 at 556-557.

18 A.I.R., 1976, S.C., 490.

19 Id., p.516.

20 Id., p.518.

said that Article 16(1) was only a part of a comprehensive scheme to ensure equality in all spheres. It was an instance of the application of the larger concept of equality under the law embodied in Articles 14 and 15. Article 16(1) permitted classification just as Article 14 did.[21]

Justice Mathew stated further that if equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried, viz., even up to the point of making reservation. The State, he said, can adopt any measure which would ensure the adequate representation in public service to the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure does not dispense with the acquisition of the minimum basic qualification necessary for the efficiency of administration.[22]

Justice Krishna Iyer took a similar view. He said that equal justice is an aspect of social justice, the salvation of the very weak and down-trodden, and the methodology for levelling them up to a real, not formal, equality, being the

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21 Id., p.519.

22 Ibid.

accent.[23] Then, he said that reservation based on classification of Backward and Forward Classes, without detriment to administrative standards is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of Backward Classes consistently with efficiency. Clauses (1) and (4) of Article 16 are concordant. Reservation under Article 16(4) confers pro tanto monopoly, but classification under Article 16(1) is ordinarily a lesser advantage. The former is more rigid, the latter more flexible, although they may overlap sometimes.[24]

The principle of reasonable classification introduced under Article 16(1) by Thomas case to justify protective discrimination in favour of members of Scheduled Caste and Scheduled Tribe in matters relating to public employment renders Article 16(4) superfluous. If Article 16(1) easily lends itself to classification to ensure compensatory discrimination in favour of members of the Scheduled Castes and Scheduled Tribes, there is no need for Article 16(4). Article 14 of the Constitution, which guarantees equality before the law and equal protection of the laws,[25] does not contain provision similar to clause (4)

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23 Id., p.529.

24 Id., p.536.

25 Article 14 states: "The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India".

of Article 16. Despite the presence of clause (4) in Article 16, which enables the State to make reservations of posts or appointments in service under the State in favour of Backward Class citizens, if the Thomas proposition that the protective discrimination in favour of the said Backward Class citizens is permissible under Article 16(1) is treated as valid one, it would amount to attributing inaptitude and lack of understanding to framers of the Constitution.

Criticising the Thomas proposition, H.M. Seervai asked one question. "Can any classification be made under Article 16(1) on grounds prohibited by Article 16(2)?". He himself answered the question in the negative. He is of the opinion that no classification based on grounds which the Constitution prohibits, as Article 16(2) does, can be made under Article 16(1) although such classification is possible under the latter provision. This is because the right to equality of opportunity in matters of public employment conferred in positive terms of Article 16(1) is effectively enforced by Article 16(2), which in a negative form prohibits discrimination in matters of public employment on grounds mentioned therein. But for the provisions of Article 16(2), the equality of opportunity in matters of public employment guaranteed by Article 16(1) would be illusory. Therefore the equality of opportunity guaranteed by Article 16 is to be found in clauses (1) and (2) of Article 16 read

together.[26] In short, compensatory discrimination in favour of members belonging to Scheduled Caste and Scheduled Tribe in matters of public employment is not sustainable under Article 16(1), for any theory of classification based on any of the grounds prohibited by Article 16(2) is void.

The theory of classification read into Article 16(1) by the Thomas Court, as pointed out by Marc Galanter, has opened Pandora's box, because the compensatory classification has been made available to succor all the disadvantaged.[27] Immediately after the Thomas case, the benefit of the compensatory classification under Article 16(1) was extended to ex-servicemen and such extension was upheld by the Full Bench of Punjab and Haryana High Court in Jagadish Rai v. State of Haryana[28] on the ground that reservation of posts for ex-servicemen was justified, for they suffered difficulties in competing with civilians for civilian jobs, and the State had an obligation to provide them employment. The High Court justified the classification of ex-servicemen and reservation of Government

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26 H.M. Seervai, Constitutional Law of India, (1983), Vol.I, p.432.

27 Marc Galanter, Competing Equalities, (1984), p.393.

28 A.I.R., 1977, P & H., 56. The State reserved a substantial portion of Government posts for ex-servicemen on the ground that they were handicapped because over the year they have lost opportunities for entering Government Service and have also lost contact with ordinary civilian life. The reservation has been challenged in this case.

posts for them.[29] What is more, in justifying the reservation of Government posts in favour of ex-servicemen, the High Court rejected the notion that reservations have to be justified by Article 16(4) as a relic of the old ways of thinking and said that according to the new idea Articles 15(4) and 16(4) were aimed at achieving the very equality proclaimed and guaranteed by Article 14 and other clauses of Articles 15 and 16.[30]

Thus, the Thomas decision has opened the flood-gate of indiscriminate practice of reservation for numerous groups of citizens in matters of public employment. Justice Krishna Iyer's attempt in Thomas case to confine the benefits of compensatory classification to members of the Scheduled Castes and Scheduled Tribe[31] has already been proved futile. The

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29 Id., p.61.

30 Ibid.

31 A.I.R., 1976, S.C., 490, at 537 and 539. Justice Iyer says that in the present case, the economic advancement and promotion of the claims of the grossly underrepresented and pathetically neglected classes, otherwise described as Scheduled Castes and Scheduled Tribes, consistently with the maintenance of administrative efficiency, is the object of Articles 46 and 335 and reasonably accommodated in Article 16(1). The differentia, so loudly obtrusive, is the dismal social milieu of harijans. Then, Justice Iyer states that not all caste backwardness is recognised in this formula, because, to do so is subversive of both clauses (1) and (2) of Article 16. Further, he says that no class other than harijans can jump the gauntlet of 'equal opportunity' guarantee. Their only hope is Article 16(4). Finally, he says that no caste, however seemingly backward, or claiming to be derelict, can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens.

process set in motion by the Thomas Court may in due course render the right to equality of opportunity in matter of public employment guaranteed by Clauses (1) and (2) of Article 16 meaningless.

Adequacy of Representation:

Adequacy of representation in the services under the State is another important aspect in the realm of reservation policy. What exactly is the purport of the phrase "not adequately represented in the services under the State" in Article, 16(4)? Referring to this phrase, the Supreme Court said in General Manager, Southern Railway v. Rangachari[32] that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to Backward communities. The court observed, "It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the power under Article 16(4) the problem of adequate representation of the Backward Class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of Backward Classes and the claims of other employees as well as the important consideration of the efficiency of administration".[33] A more or less similar view has been

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32 A.I.R., 1962, S.C., 36. For factor See Supra, n.12.

33 Id., p.45.

expressed in C.A. Rajendran v. Union of India.[34] In this case the Supreme Court said that the language of Article 16(4) has to be interpreted in the context and background of Article 335 of the Constitution. In other words, in making a provision for reservation of appointments or posts the Government has to take into consideration not only the claims of the members of the Backward Classes but also the maintenance of efficiency of administration which is a matter of paramount importance.[35]

One thing is clear from the above mentioned judicial pronouncements. Inadequate representation in the services under the State is a condition precedent for the exercise of power under Article 16(4). Does this mean achievement of the goal by a short cut and at the cost of many other values? No. It does not mean that adequacy of representation must be secured by the State for the Backward Class citizens in the shortest period by ignoring completely the interests or claims of other citizens or by total disregard of maintaining efficiency of administration. Besides, it may be said that the concept of adequacy might not, in the nature of things, have aimed at serving numerical adequacy of representation in the service under the State. Numerical adequacy will be a myth in the conglomoration of complex socio-economic forces at work in our land. Such

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34 A.I.R., 1968, S.C., 507.

35 Id., p.512.

numerical adequacy of representation is not secured and maintained at any point of time even by many other classes of citizens who are not backward.

Does Article 16(4) Confer a Right?

Finally, it is asked whether Article 16(4) confers a fundamental right on Scheduled Castes and Scheduled Tribes? This question arose because of an observation made by Subba Rao, J. in the minority judgment in Devadasan v. Union of India.[36] There he said that the expression 'nothing in this article' found in Article 16(4) is a legislative device to express its intention in the most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article.[37] This observation led to an argument subsequently in Rajendran v. Union of India,[38] that the provision

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36 A.I.R., 1964, S.C., 179.

37 Id., p.190.

38 A.I.R., 1968, S.C., 507. The petitioner in this case is a permanent Assistant in Grade IV (Class III, non-gazetted ministerial) of the Railway Board Secretariat Service. The next post to which the petitioner claims promotion is that of the Section Officer in the same service, which is classified as Class II, Grade III, Gazetted. After Rangachari's case, the Union Government reviewed the whole policy of reservation of posts. It was advised that there was no constitutional compulsion to make reservation for Scheduled (Contd......)

contained in Article 16(4) was in itself a fundamental right of Scheduled Castes and Scheduled Tribes. This case arose because of the marked change in the policy of the Union Government. It came to the conclusion that there should not be any special treatment of Government servants belonging to Scheduled Castes and Scheduled Tribes in the matter of promotions from one class to another class in services which require higher degree of efficiency and responsibility. Accordingly, Government of India issued a memorandum dated November 8, 1963, withdrawing reservation made for Scheduled Castes and Scheduled Tribes in posts filled by promotion.

The contention of the petitioner in this case is that the office Memorandum of 1963 violates the guarantee given to Backward Classes under Article 16(4) of the Constitution and is illegal. The main argument is that Article 16(4) is not an exception engrafted on Article 16, but is in itself a fundamental

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38 (Contd........)
Castes and Scheduled Tribes in posts filled by promotion and the question whether the reservation should be continued or withdrawn was entirely a matter of public policy. The Union Government came to the conclusion that there should not be any special treatment of Government servants belonging to Scheduled Castes and Scheduled Tribes in the matter of promotions particularly in promotion to Class I and Class II services which require higher degree of efficiency and responsibility. As a result of this review, the Union Government issued a memorandum dated November 8, 1963, withdrawing earlier circulars, which made reservations and granted concessions for Scheduled Caste and Scheduled Tribe officers in posts filled by promotion.

right granted to Backward Classes and as such it is untrammelled by any other provision of the Constitution. So, the question is whether there is a constitutional duty imposed upon the Union Government to make reservations for Backward Classes both at the initial stage of recruitment and the stage of promotion in the service? The Supreme Court said that the majority in Devadasan[38a] case took the view that Article 16(4) was an exception and it could not be so construed as to render nugatory or illusory the guarantee conferred by Article 16(1). It also pointed out that even the minority judgment of Justice Subba Rao, did not support the contention that Article 16(4) conferred a right on the Backward Classes. Then, proceeding further, the Court held that Article 16(4) did not confer any right on the petitioner and there was no constitutional duty imposed on the Government to make reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. Article 16(4) was an enabling provision and conferred a discretionary power on the State to make a reservation of appointments in favour of Backward Class of citizens which, in its opinion, was not adequately represented in the services of the State. Hence it ruled that the petitioner was unable to make good his submission on this aspect of the case.[39]

38a Supra, n.5.

39 Id., p.513.

Thus it is made very clear by the Rajendran court that Article 16(4) does not stipulate a fundamental right of Backward Class of citizens for reservations of posts and appointments in services under the State. It is only an enabling provision, which permits the State, to grant privileges to Backward Class of citizens in matters relating to Government employment by way of reservation of posts in the public service in their favour. In other words, it is a provision relating to protective discrimination in favour of Backward Class of citizens in matters relating to Government employment.

In Thomas case,[40] however, the Court has made a detour, Justice Mathew has said that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualised in Article 16(1) is a sterile one. It is sterile if it is geared to the concept of numerical equality without taking into account the social, economic and educational background of the members of the Scheduled Castes and Scheduled Tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). On the other hand, it is an emphatic way of putting the extent to which equality of opportunity could be carried, namely, even upto the point of

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40 A.I.R., 1976, S.C., 490. For the facts of the case see supra.

making reservation.[41]

Similar view has been expressed by Justice Krishna Iyer. He is of the opinion that Article 16(4) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition which the forward sections are ordinarily entitled to. Further, according to him, Article 16(4) is an illustration of constitutionally sanctified classification.[42]

The proposition that Article 16(4) is not an exception to Article 16(1) is not only contrary to the intention of the framers of the Constitution but is fraught with dangerous consequences. If Clause (4) of Article 16 had not been put as an exception to clauses (1) and (2) of Article 16 and if it had not been intended to be a mere enabling provision, then there was no need for the framers of the Constitution to put the clause in Article 16. The main and preponderant theme of Article 16 is equality of opportunity and the idea of reservation or compensatory discrimination is subordinate or secondary theme. The former must continue to operate and the latter may be resorted to by the State whenever it deems necessary to render equality of opportunity meaningful to the

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41 Id., p.519.

42 Id., p.535.

Backward Class of citizens. Once this relationship between the two themes is ignored, the purpose of Article 16 will be lost. However, a significant fact is that the Article 16(4) has not been treated as a provision conferring fundamental right on Backward Class citizens. Obviously, there is no duty to make reservation. The provisions of Article 16(4) could not be enforced against the State in case it fails to make reservation in public employment or it withdraws the reservation. In view of this, it is difficult to say that Article 16(4) is not an exception or a proviso to the main theme of equality of opportunity embodied in Article 16.

CHAPTER VIII

LAW, WOMEN AND THEIR POSITION DURING PRE-CONSTITUTIONAL PERIOD

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The position of women vis-a-vis men has been a subject of great controversy and of incessant debate from time immemorial. The controversy may perhaps go on. In India, the Constitution not only guarantees right to equality to women but also affords, by various provisions, sufficient scope to women to compete effectively with men and to expand the horizen of their activities. Incorporation of such provisions into the Indian Constitution was actually necessitated by the unedifying position occupied by women in the Indian society prior to the commencement of the Constitution. It is, therefore, necessary first to analyse the position of women in the ancient Indian legal system in particular, and in the Indian Society in general, and to scrutinise the scope of the constitutional safeguards given to women and the extent to which the benefits of such provisions accrued to them.

The position of women under Hindu jurisprudence may be ascertained from the law relating to institution of marriage, right to property and inheritance. At the same time, it may be noted that the position of women in the Indian Society was the result of the cumulative effect of their status in law and

various social and historical factors. So, all these aspects have to be taken into account in order to assess the position of women, which they occupied prior to the commencement of the Constitution of India, and which virtually made them a "weaker section of the people" within the meaning of the Constitution.

Institution of marriage:

Persons capable of giving girls in marriage: Regarding the institution of marriage, the first thing to be noted is the person or persons who are capable of giving the girl in marriage. Yajnavalkya says, "the father, the paternal grandfather, the brother, a sakulya or member of the same family, the mother likewise; in default of the first the next in order, if sound in mind, is to give the damsel in marriage".[1] Narada lays down a rule to the effect that: "A father shall give his daughter in marriage, or a brother with a father's consent, or a grandfather, maternal uncle, Kinsman or relative. In default of all these, the mother, if qualified, if she is not, the remote relatives should give the girl in marriage".[2] Similarly the Mitakshara School prescribes the order of persons who are

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1 Yajnavalkya (i, 63-64) See N.R. Raghavachariar, Hindu Law (6th Edition, 1970), p.35.

2 Narada (XII, 20-21), See N.R. Raghavachariar, op.cit., p.35.

capable of giving a girl in marriage, and it is (i) the father, (ii) the paternal uncle, (iii) the brother, (iv) other paternal relations of the girl in the order of kinship and (v) the mother.[3] The Dayabhaga School follows the same order with one modification, in that it interposes two persons, namely, (1) the maternal grandfather and (2) the maternal uncle between the other paternal relations of the girl and the mother".[4]

It may be noted that the Hindu jurisprudence is essentially a duty-oriented jurisprudence. So, more often the rules laid down by it stipulate duties. Here also when it laid down the order of persons authorised to give a girl in marriage, it actually imposed on them a duty and not a right. Evidently, therefore, there is no scope for them in the rule to construe the legal authorisation mentioned in it as a right and dispose of the girl in marriage. This is also clear from the phrases "if sound in mind" in Yajnavalkya's rule, and "in default of all these" and "if qualified" in Narada's rule, for they indicate that there are certain factors which disqualify any of the persons mentioned in these rules. The courts have ruled, as pointed out by N.R. Raghavachariar, that "even when a marriage is contemplated by a proper guardian, the court as representing

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3 See N.R. Raghavachariar, op. cit., p.35.

4 Ibid.

the supreme guardian, the sovereign, can interfere to prevent it taking place, if improper and interested motives actuate the guardian's conduct and the marriage is injurious to the girl's interests, though such interference is permissible only in exceptional and extreme cases where that guardian is the girl's father".[5] That "a marriage brought about by force or fraud will be set aside by the court, though it has been performed with the necessary ceremonies, as in such a case there is really a fraud on the policy of religious ceremony"[6] and, what is more, if a suitable husband is chosen for the girl by a natural or legal guardian acting in her interest and with due regard to her welfare, the absence of consent of a guardian with a preferential right will not invalidate the marriage.[7] These pronouncements are undoubtedly in conformity with the letter and spirit of the text of the law. Thus, it is clear that the girl, the performance of whose marriage is entrusted to different persons in the text of the law, is not treated by the law as a mute creature in matters pertaining to her marriage. She is a human being conscious of her interests and with a mind capable of deciding about the choice of husband made by the guardians, and the law makes no mistake in this. In fact, this

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5 Id., at p.37.

6 Ibid.

7 Id., at p.36.

is brought out more clearly in another rule, according to which, if a girl has no competent guardian to give her in marriage, or if having such a guardian that guardian refuses to provide a husband for her, the girl herself can choose and marry a person.[8]

Secondly, it may be noted that all the rules have mentioned "the mother", which means the law treated women at par with men in regard to the capacity to give a girl in marriage. It is true that she comes much later in the order and a few persons precede her in this respect. But that does not mean that her position is inferior vis-a-vis those who precede her in the order, any more than the position of the girl's paternal grandfather vis-a-vis that of her father simply because the latter precedes the former in the order of persons stipulated in the rule of Yajnavalkya. All these rules merely stipulate the order in which the duty devolves on various persons and are not intended to assign particular status to any of them. This duty may be discharged by them in the order mentioned in it, or by any of them, if necessary, by passing the order, provided the action taken is solely in the interest of the girl. This interpretation gets added strength from certain rulings of the courts, which, as summed up by N.R. Raghava-

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8 Yajnavalkya, i-63; Manu, ix-89 and 90; Narada, xii-20 to 22; See N.R. Raghavachariar, op.cit., p.43.

chariar, are that (i) the order of guardianship of the girl for the purpose of giving her in marriage is only directory and it refers only to the ceremonial competence of the persons mentioned and it does not affect the legal right of the mother as the legal guardian to select a husband and give the girl in marriage to him even in the presence and without the concurrence of the girl's paternal grandfather, and (2) that the marriage would be valid even though the girl was given in marriage by the mother without consulting, or the concurrence of, the father.[9]

Age of Marriage: Child Marriage:

As to the age of marriage, there is no precise rule; but there is a suggestion that the husband should be older than the wife.[10] In other words, the ancient law texts neither mention child marriage nor sanction it. However, child marriage came into vogue at later period. It is said that the advent of Buddhism was a turning point in many respects in the social field. Since a large number of young people renounced marriage in order to enter Buddhist hermitage, parents and civic-minded people became alarmed by it and to keep their children out of hermitages a gradual revision of the marriage system began.

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9 See N.R. Raghavachariar, op.cit., p.36.

10 Yajnavalkya, i-52; See N.R. Raghavachariar, op.cit., p.42.

The actual ceremony became divided into two parts, one occuring in the early life of a child and the other after the girl had become a woman.[11] Further, it is said that when the raiders poured in and the Muslim conquerors entered from the North in the 10th century, there followed a long period of bloodshed and bitterness. Efforts were then made to protect women. And for such protection early marriages and later going to husband's home, which had already begun in order to keep young people out of Buddhist hermitages, had further value and became the practice of more people than previously. This was because married women were safer from the cruelty of others than were unmarried women.[12]

Evidently, child marriage came into existence owing to certain historical facts and compelling social conditions generated by them. The practice gradually hardened into usage and then crystalised into custom. Besides this, the growth of caste system seemed to have had a considerable impact on this practice. It is said, and rightly so, that the growth of caste with its inter-caste jealousy aided by the sacerdotal puritanism, established the institution of early marriages with a tendency to become aggravated in later ages, as the doctrine

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11 Manorama R. Modak, India and Her People (London, 1950), p.54.

12 Id., at pp.63-64.

received support from the popular cry "give the girl no chance to go wrong".[13] No doubt, the usage or custom of child marriage robbed the institution of marriage of its elements of consent. But, it must be remembered that in this respect it affected not only the childbride but the child-bridegroom as well. Though it is a reprehensible social phenomenon, one cannot say that it erred on the side of one sex only.

Bridal Price:

Another important thing to be noted is the practice of taking bridal price, which is also known as Kanyasulka. According to this, the father or the guardian of the girl takes a price from the bridegroom before he gives her in marriage. Manu emphatically disapproves this system. He says that no father who knows the law must take even the smallest gratuity for his daughter; for a man, who through avarice takes a gratuity, is a seller of his offspring.[14] He prohibits such transaction even to the last caste.[15] But, surprisingly enough in another place Manu lays down a rule that if one damsel has

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13 Gour, Hindu Code, Vol.I, p.181.

14 Manu, III-24; See Ramesh Chunder Dutt, History of Civilisation in Ancient India, Vol.II, (1972), p.96.

15 Manu IX-98-100; See Dutt, Id., p.96.

been shown and another is given to a bridegroom, he may marry both for the same price.[16] Obviously, he either contradicts himself on this point or he admits the existence of the system in some groups of people and tacitly and inadvertently approves it.

However, the position appears to be clear in Sarasvati Vilasa of Pratapa Rudra Deva. In this work the statement of Bharuchi, one of the six great authorities on the laws,[17] is quoted approvingly; according to it, "by the term Shulkam the price of the bride is spoken of; it exists, however, only in the Asura and other marriages, but that is prohibited".[18] In another place, while discussing the subtle difference between spouse (stri) and wife (patni) Pratapa Rudra Deva refers to Smriti Chandrika, which states "not a purchased spouse; because wifehood (patnitva) does not attach to her who is excluded by the term patni[19] and "that women (nari) who has been bought with a price, is not called a wife (patni), she has no part either in divine things, or in ancestral things: the sages regard

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16 Manu VIII 204; See R.C. Dutt, Id., p.96.

17 The six great authorities are Vijnanayogi, Bharuchi, Apararka, Medhatithi, Asahaya and Chandrika.

18 Hindu Law of Inheritance according to the Sarasvati Vilasa of Pratapa Rudra Deva, Tr. by Thomas Foukes (London, 1881 S. 270, p.56), (hereinafter referred to as Sarasvati Vilasa).

19 Sarasvati Vilasa, S. 596, p.100.

her as a slave".[20] Commenting on the last observation, "the sages regard her as a slave", Pratapa Rudra Deva says that this is intended to show that "since she has not the position of a wife (patnitva), to her belongs the capacity of conferring visible benefits alone, and not the capacity of conferring invisible benefits".[21]

It is, therefore, clear that the ancient law did not countenance the system of taking bridal price. It not only prohibited the system in unequivocal terms, but also made very clear that a girl given in marriage after receiving the bridal price would not attain the position of wife (patnitva) within the meaning of the law, but would be regarded as a slave. Obviously, the law refused to vouchsafe any system which was considered derogatory to the status of women in the society. So, the system of taking bridal price seemed to have been practised by a small section of the people, which was probably at the lowest rung of the social ladder; and that too not because of the clear sanction of the law, but in spite of the unmistakable disapprobation of the system in the texts of law.

Polygamy:

A strange system, however, was polygamy. It is said

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20 Sarasvati Vilasa, S. 497, p.100.

21 Sarasvati Vilasa, S. 498, p.100.

that the ancient texts of law recommended only monogamy.[22] In fact, at one place Manu says: "Let mutual fidelity continue until death". This, according to him, is the highest law for husband and wife.[23] This gives an impression that the law laid down by Manu strongly supports monogamy. But, at another place he says that a wife must not show aversion to a drunken husband, but may show aversion to a husband who is mad or an outcaste, or one afflicted with bad diseases, and then he proceeds to say that a drunken, rebellious or barren wife, or one afflicted with disease, or one who bore female children only may be superseded.[24] He, however, cautions that this superseding does not mean absolute desertion; and the wife must still be kept in the house and maintained.[25] It may be noted here that Manu does not make any of the factors mentioned by him as grounds for divorce. On the other hand, he holds them as grounds for the wife to show her aversion of the husband and for the husband to supersede the wife. In other words, in such specific difficult circumstances a wife may show only aversion of her husband, whereas a husband may supersede her without deserting her absolutely. These rules, besides being

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22 N.R. Raghavachariar, op.cit., p.35.

23 Manu IX, 101, See R.C. Dutt, op.cit., p.114.

24 Manu, IX 78-81, See R.C. Dutt, op.cit., p.114.

25 N.R. Raghavachariar, op.cit., p.35.

unfair to women, seem to lay down a condition for taking a second wife without dissolving the first marriage and to lend support impliedly to the system of polygamy. It is said that the rules of Hindu law, which lay down the condition for taking a second wife during the life time of the first wife, are only directory in nature and not mandatory.[26]

But the fact remains that Hindu law permitted polygamy, Needless, therefore, to say that inasmuch as Hindu law acquiesced in the system of polygamy it adversely affected the position of women in society.

Dissolution of Marriage, Right of Re-marriage and Widow's Re-marriage:

In Hindu law, marriage was considered to be a sacrament,[27] and hence the union between man and woman was considered indissoluble. But, this indissolubility of the union worked against women not only during the life time of their husbands, but after their death as well. This, as far as women were concerned, implied three ideas, namely (1) indissolubility of marriage (2) absence of divorce and remarriage and (3) prohibition of widow marriage. It is interesting to see how

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26 N.R. Raghavachariar, op.cit., p.35.

27 Id., p.34.

the various law-givers of ancient India treated this subject. Manu says that "neither by sale nor by desertion can a wife be released from her husband.[28] This clearly indicates that women are not entitled to either dissolution of their marriage or remarriage. But, interestingly enough, Manu quotes an ancient rule that a wife should wait for her husband eight years, if he went on sacred duty, six years if he went for learning or fame, and three years if he went for pleasure. Interpreting this a commentator says that she was to marry again after that period, and that is the obvious meaning of the old rule.[29]

The old rule quoted by Manu virtually nullifies the concept of indissoluble union between man and woman. It permits dissolution of marriage and grants to women the right to remarry in certain circumstances.

As to widow marriage, Manu expresses his disapproval even though he admits that ancient custom permitted it.[30] He says that a widow must never even mention the name of another man after her husband has died, and again that a second husband is nowhere prescribed for a virtuous woman.[31] But, in another

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28 Manu ix-46, See N.R. Ràghavachariar, op.cit., p.63.

29 R.C. Dutt, op.cit., Vol.II, p.113.

30 Id., p.96.

31 Manu (V.157 and 162; See R.C. Dutt, op.cit., Vol.II, p.96).

place he says that virgin widows could remarry,[32] for, according to him, a virgin widow is worthy to perform with her second husband the nuptial ceremony.[33] Needless to say that this idea of Manu is quite contrary to his known antipathy to widow-marriage. Probably he was compelled to concede this much regarding widow-marriage, which he did rather grudgingly, by the vedic norm which did not prohibit widow-marriage and also by the then existing customs which permitted widow-marriage.

Yajnavalkya, another great jurisconsult, says that a woman who is married a second time is called a remarried woman.[34] Vishnu is of the opinion that a woman who, being still a virgin, is married for the second time, is called a remarried woman, Punarbhu.[35] Parasara goes a step further in permitting the remarriage of a women whose husband is dead, or has lost caste, or has become an ascetic.[36]

The aforesaid rules clearly reject the concept of indissolubility of union between man and woman. They permit widow-marriage, sometimes with qualifications and at other times

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32 R.C. DUtt, op.cit., Vol.II, p.97.

33 Manu (ix.176), See R.C. Dutt, op.cit., Vol.II, p.87.

34 Yajnavalkya (I-67), See R.C. Dutt, op.cit., Vol.III, p.308.

35 Vishnu, (xv.1 and 8), See R.C. Dutt, op.cit., Vol.II, p.308.

36 Parasara (IV.26), for this see R.C. Dutt, op.cit., Vol.II, p.308.

without such qualifications. They also allow dissolutions of marriage in certain situations, and grant right of remarriage to women. Evidently the old rules were not so rigid and so hard on women as those introduced by the subsequent law-givers, codifiers, jurisconsults and commentators. The moment the .igid principle was introduced into the institution of marriage and the doctrine of sacrament was fastened on it, the position of women was stultified and deteriorated progressively then on. Normally, in a society when a rigid principle is introduced, although inadvertently, unguardedly or unwittingly through writings or spoken words of men of consequence, a section of the population, to which it is beneficial, often tries to entrench the principle in the society and to aggrandise its position vis-a-vis the other sections of the population. This is what exactly happened in the Indian Society. Men took advantage of such ideas as "indissolubility of marriage", "marriage as a sacrament", "incapacity of widow to remarry", etc., expressed in certain texts with definite qualifications and not as ultimate rules; and with the help of these ideas they achieved much ascendancy on the social ladder leaving the women at the bottom of it. This attitude eventually generated great injustice to women as far as their married life was concerned.

Practice of Sati:

The practice of sati, or self-immolation of widow on

the funeral pyre of her husband, entered, rather surreptitiously, into the social system of India. This was the most reprehensible custom which adversely affected the status of women. But, as pointed out by a great historian, "there is no allusion to the rite of sati in the literature of India previous to the Puranic period; there is no mention of it in the code of Manu, or even of Yajnavalkya. It is in Puranic literature that we first trace the rise of this custom".[37]

The great scholar, Dr. P.V. Kane, is of opinion that there are no vedic scriptures which could be cited as intro-controvertibly referring to widow burning.[37A] System of "Sati" did not exist in ancient India. According to him, no Vedic passage mentioned any mantra which could be said to have been repeated in very ancient times at such burning, nor the Grahyasutras contained any direction prescribing the procedure of widow burning.[37B] He says that pyre sacrifices were prevalent among the Germans, Slavs and other races, besides the Greeks, and it might have percolated into India through the Kushans, a Central Asian race, which ruled over northern India, Pakistan, Afghanistan and Central Asia in the first Century

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37 R.C. Dutt, op.cit., Vol.II, p.309.

37A Dr. P.V. Kane, History of Dharmasastra, (Ancient and Mediaeval, Religious and Civil Law), 2nd Edn. Vol.II, 1974, Bhandarkar Oriental Research Institute, Poona, p.625.

37B Ibid.

A.D. and which had strong Greek influences.[37C] Once it entered India surrepticiously, it took roots among Brahmins, then among other castes and commentators and digest writers lent support to it with specious arguments and promises of future rewards and heavenly abode for the sacrificing beings. As rightly commented by Dr. Kane, "even in modern times we can secure such writers to support any pet theory of a coterie or clique".[37D] So, it is clear that this heinous crime, which goes by the name "Sati", was not part of the Hindu philosophy. This savage pestilence entered the Hindu way of life surrepticiously, wetted the appetite of male chauvinism, took the toll of many young Hindu widows mercilessly and remained as a canker on the Hindu social system. Besides, it is pointed out, and rightly so, that the practice of self-immolation was not restricted to women or to widows, even in the Puranic age.[38] As a matter of fact, in Malati Madhava, Malati's father makes preparations for mounting the funeral pyre for the grief of his child; In Nagananda, Jimuthavahana's father, mother, and wife resolve to perish on the pyre for the loss of the prince; and in Katha Sarit Sagara, a maiden disappointed in love prepares to enter the pyre.[39] Even in history instances are found about the

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37C Ibid.

37D Id., p.630.

38 Ibid.

39 Ibid.

practice of self-immolation by kings, who perished on the pyre, because they were disgraced in the eyes of their countrymen for submission to Mahmud of Ghazni.[40] Thus, the act of self-immolation was, as opined by R.C. Dutt, "an ostentatious form of suicide when grief or disgrace became unbearable, and life was cheerless and void".[41]

But, what had been an ostentatious form of suicide practised by persons in certain situations without any distinction based on sex, was eventually imposed as an "honourable act on women alone, to be performed on the death of their husbands".[42] Thus, it is only society and men, who dominated it by that time, who recommended it as a meritorious act for women, and law texts do not specifically sanction it. To state the entire position succinctly in the words of R.C. Dutt, "such practice became a settled custom when the Hindus ceased to be a living nation".[43]

It is surprising to note that the "Sati", which is a crime, continued to rule the roost for several centuries, in India. Due to the determinate and consistent efforts of great social reformers like Raja Ram Mohan Roy and Rev. Carey and the

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40 Ibid.

41 Ibid.

42 Id., p.310.

43 Ibid.

statesmenship of Lord Bentinck, it was abolished in British India in the year 1829 and later in the Indian States in 1862 due to the continuous efforts of Lord Dolhousie.

Nearly 150 year after the abolition of "Sati" and that too at the fag end of the 20th century, the pernicious system tried to stage a come back in India is evident not only from the forcible widow burning in September 1987 at a small village in Rajasthan but also from the "Chenari" function, which was held at the place of crime with great fanfare. The whole episode is a sad commentary on progress and modernism. It is also a pointer to the killer and exploitative instinct of the male species. All these are done in the name of religion and the fact that there are some so called religious leaders who lend support to the nefarious practice would show the depth of degradation to which the religion has been forced to descend.

The State of Rajasthan rightly promulgated the Rajasthan Sati (Prevention) Ordinance, 1987, which immediately received the assent of the President of India on 1st October 1987. The Ordinance provides for death penalty for abetters of "Sati" and severe punishment for any attempt to commit "Sati" and glorification of it by organising ceremonies and constructing memorials. The Ordinance is good enough in the circumstances and it is a sort of assurance to the women of this country, who have been rudely shaken by the recent "Sati" event in

Rajasthan, what the State would do to uphold their rights and dignity. But, all the human rights solemnly declared by the United Nations and all the fundamental rights and fundamental duties enshrined in the Constitution of India did not deter a determinate group of individuals from indulging in primitivism, nor those rights and duties helped such people to educate themselves in perspective thinking on human dignity of both men and women. It is also alarming to note that in the midst of scientific growth, an ugly aspect of religious fundamentalism has been rising steadily and has been making its forays into the political arena. This fact forbodes ill to democracy, secularism and human rights and dignity. So, the ordinance alone is not sufficient.

It must be backed fully to the hilt by the political will of the State. Democracy is not counting of votes, nor merely an effort on the part of ruling party to locate and preserve its voting banks. It is a system where all human beings, men and women, feel a sense of participation in the administration and live with dignity. The recent events have shown that women have to be eternally vigilant about their rights and may have to carry on a long drawn out struggle to get their rights to equality and right to human dignity accepted in all fields, political, economic and social.

Wifehood or patnitva

Another concept, which is inextricably linked with the institution of marriage, is wifehood or patnitva. The ancient texts of Hindu law gave women almost equal position with men in their marital relationship. It is said that wife is not merely her husband's helpmate in all worldly affairs but she assists him in the performance of the regular sacrifices, she helps him to gain heaven.[44]

Therefore the wife is "called dharma patni", i.e. as the commentators explain, "dharmartham patni-a wife married for the fulfilment of the sacred law".[45]

Evidently, the secular and religious objects are embodied in the concept of wifehood (patnitva). So, some text writers have drawn a line between "spousehood" and "wifehood" to indicate that the former embodies only the secular object, whereas the latter comprehends both secular and religious objects. A wife (patni) has been treated discreetly as equal to husband in all religious ceremonies.

Pratapa Rudra Deva says that, according to the text of Panini, "The Wife" is she who is married by the Brahma and the other higher marriage rituals, which confer authority

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44 N.R. Raghavachariar, op.cit., p.34.

45 Id., p.35.

in sacrifices. Proceeding further Rudra Deva states that "Na with patni means association in sacrifices".[46] Then the refers to a statement in the Guru's text that the "ownership alone in the wife is a secular thing; not the wifehood, because there is a difference between ownership and wifehood".[47] Probably, "Ownership" here refers to conjugal and other allied matters which are secular. Explaining the meaning of the above-mentioned text, Pratapa Rudra Deva says that "the wife(hood) arises out of association in sacrifices; property arises out of association with a proprietor".[48]

According to Bharuchi, "the term spousehood implies ownership but "wifehood" does not; otherwise when the expiation is made, the wifehood would not exist".[49] What is more, Brihaspati "assigns the precedence to the wife in the ancestral ceremonies of her husband over his brothers and the rest".[50]

Thus, it is clear that the concept of "wifehood", as expounded by the text writers, implied for women almost an equal position with men in many matters pertaining to family life and more especially in matters relating to religious ceremonies. At any rate, it was not an object of unmitigated

46 Sarasvati Vilasa, S. 495, p.100.

47 Id., S. 500, p.101.

48 Ibid.

49 Id., S. 501, p.101.

50 Id., S. 503, p.101.

inferior position, to which they sank later owing to several factors brought into the society by history in its stride.

Property right of women

Under Hindu law, the property of women was divided broadly into categories, namely (1) Stridhana and (2) Woman's estate, Stridhana, according to Manu, Yajnavalkya, and others, consists of several items, namely the property given to a women (1) before the nuptial fire (adyagni), (2) on the bridal procession (adhyavahanika), (3) in token of love (dattam pritikarmani) and (4) by her brother, mother, father, etc., on various occasions.[51]

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51 Vyasa says that "property which is received by an unmarried woman at her marriage, or afterwards, from her father's house or her husband's is termed 'Saudayikam'. Manu says: "Stridhana is declared to be of six kinds; the gift before the matrimonial fire, the gift in the marriage procession, the gift of affection, and that which is received from her brother, her mother, and her father". Katyayana says: "That which is given to women at the time of their marriage in the presence of the fire is termed by the learned as 'The Stridhana made before the fire'. That again, which the woman receives when she is conducted from her father's house is termed "The Stridhana of the marriage procession". Moreover, whatsoever is given from affection, either by her mother-in-law or her father-in-law, when she bows down at their feet, is termed "the gift of affection". Yajnavalkya says: "That which is given by her fath er, mother, husband, or brother, or received before the fire, her supersession fee, etc., is termed Stridhana".

Vijnaneshwara says: "That is shulkam which is received when a maiden is given in marriage".

See Sarasvati Vilasa, Sections 253, 260, 262 and 266, pp.53-55.

Sarasvati Vilasa, S. 259, pp.53-54.

With respect to stridhana property women exercised absolute power. Men had no right over it, except in exceptional circumstances like distress, famine, etc. Eventhough they were allowed to use it in such emergency situations, they were duty-bound to restore it later. It is interesting to note some of the views expressed by the great text writers. Katyayana says that "neither a husband, nor a son, nor a father, nor brothers have power over stridhana, either to receive it, or to dispose of it".[52] Commenting on this, Pratapa Rudra Deva says that the meaning of the above text is that "they have no proprietorship".[53] Proceeding further Katyayana states that "if any of these (i.e. husband, son, father and brothers) shall forcibly consume stridhana, he shall repay it with interest; and he shall also receive punishment. If he consumes it after obtaining her consent out of affection, he shall repay the principal alone when he shall become possessed of property".[54] Another jurisconsult, Devala, declares that man is incompetent to enjoy stridhana of his wife. He states categorically that "her endowment, her personal ornaments, her shulkam are stridhana; she herself alone is the enjoyer of it: the husband, when not in distress, is

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52 Ibid.

53 Id., S. 273, p.56.

54 Id., S. 276, p.57.

incompetent. If he expends it wrongfully, he shall restore it to the woman with interest".[55]

Thus, it is clear that the ancient law texts conceded to women absolute ownership over their stridhana property. Needless to say that this was done in order to make women, to a limited extent, economically independent. This is really remarkable for the age in which it was conceived.

"Women's estate" (of course, in a restricted sense of the term), as pointed out by N.R. Raghavachariar, consists of property inherited by a woman or property which has been allotted to her in a partition in her husband's family.[56] With respect to such property women were given by law only limited interest or limited estate.[57]

As far as inheritance is concerned, it may be noted that the law of inheritance did not exclude women. They inherited property in the conditions laid down by the law texts. But, as explained earlier, they acquired only a limited interest in such property.[58]

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55 N.R. Raghavachariar, op.cit., p.562.

56 For a detailed study, See N.R. Raghavachariar, op.cit., Ch.XIV, pp.561-644.

57 For a detailed study, See N.R. Raghavachariar, op.cit., Ch.XII, pp.484-537.

58 See R.C. Dutt, op.cit., Vol.II, p.99.

Conclusion

The foregoing analysis would show that Hindu jurisprudence conferred on women a qualified status. In the institution of marriage, though certain aspects, namely, concept of indissolubility of marriage, rules relating to polygamy and widow's marriage, etc., have adversely affected their position, other factors, namely, rules relating to persons capable of giving the girl in marriage, wifehood, etc., have secured their freedom to a great extent. It may be noted that women were not treated in law as mere chattels or as mere objects of no consequence. The concept of "wifehood" enunciated by the law-givers virtually enhanced the position of women and made them equal to their husbands especially with respect to religious matters, which were considered essential aspects of human life.

It is true that some of the text writers, more especially Manu, said: "In childhood a female must be subject to her father; in youth to her husband; when her lord is dead, to her sons; a woman must never be independent."[59] Further, it is said that "she must not seek to separate herself from her father, husband, or sons. By leaving them she would make both her own and her husband's family contemptible".[60] But at the same time we come across the following passages in the

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59 Ibid.

60 Id., p.98.

law texts: "The Acharya (Teacher) is ten times more venerable than the Upadhyaya (Sub-teacher), the father a hundred times more than the teacher, but the mother a thousand times more than father".[61] "Women must be honoured and adorned by their fathers, brothers, husbands, and brothers-in-law, who desire their own welfare,"[62] and "where women are honoured there the gods are pleased; but when they are not honoured, no sacred rite yields reward".[63]

These passages and other similar passages and rules embodied in them have given rise to an idea that women were made very much dependent on male relations and then in a sort of homily men were exhorted to treat women with respect and benign consideration. In as much as the exhortation contained in them is hortatory and not mandatory, it hardly helps woman in any appreciable manner to improve her position in the world of men. So, in the ultimate analysis women were made completely dependent on their male relations. This does not seem to be the correct interpretation. It may be noted, as pointed out earlier, that Hindu jurisprudence is a duty-oriented jurisprudence. The passages quoted above stipulate, on the one hand, duties of women towards their male relations, and on the

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61 Ibid.

62 Id., p.99.

63 Ibid.

other, duties of men towards their female relations. All of them are required to perform their part of duties strictly in conformity with rules. If men fail to perform their duties towards their female relations as envisaged in the above-mentioned passages, they cannot expect their female relations to perform their duties towards them as stipulated in other passages of law texts. So, life depends on the mutual performance of duties stipulated in the law texts and that is the essence of the duty-oriented jurisprudence. Therefore, there is nothing in it to suggest that the law had assigned an inferior or servile position to women vis-a-vis their male relations. Besides, the law relating to Stridhana, and to a certain extent the rules relating to women's estate and inheritance, had virtually given women some economic strength.

It may be mentioned here that the institution known to the oldest Roman law is the perpetual tutelage of women under which "a female, though relieved from her parent's authority by his decease, continues subject through life to her nearest male relations, or to her father's nominees, as her guardians."[64] Then, by later Roman law she was completely subordinated to her husband. By any one of the three recognised types of marriages, namely, Confarreation coemption and usus, the husband

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64 Sir Henry S. Maine, Ancient Law, (1905), p.135.

acquired a number of rights over the person and property of his wife.[65] Summing up the entire position succinctly, Sir Henry Maine states: "By the confarreation, coemption and usus, the woman passed in manumviri, that is, in law she became the daughter of her husband. She was included in his patria potestas. She incurred all the liabilities springing out of it while it subsisted, and surviving it when it had expired. All her property became absolutely his, and she was retained in tutelage after his death to the guardian whom he had appointed by will."[66]

Evidently, the ancient Indian law showed greater consideration and indulgence to women than Roman law. Though the status accorded to them by the ancient Indian law was not one of equality with men in all matters, it did not treat them as slave or mere chattel. The qualified status ancient Indian law gave to them is undoubtedly much more edifying than the position conceded to them by Roman law.

However, certain historical factors and the social norms created by men in the wake of such events finally resulted in the deprivation of many of the rights of women. In the early periods education was not limited to boys. The fact that great

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65 Id., pp.136-137.

66 Ibid.

women like Maitreyi, Gargi, Dhammadinna, Mandanna, etc., distinguished themselves as profound scholars would show that women received education without any discrimination.[67] But the advent of Buddhism, by a strange quirk of fate, led to the practice of child marriage,[68] and a long period of bloodshed, bitterness and insecurity that ensued from the coming of first raiders and the plundering of Muslim invaders, which strengthened further the practice of child marriage,[69] virtually deprived women of their valuable right to formal education.[70]

Absolute seclusion of women was unknown in India. But, the insecurity created by the invaders and conquerors from the northern side of India and the fear entertained by men for their women's safety from the raiders gradually led to less freedom for women, and ultimately to their seclusion. Thus the loss of formal education, the system of seclusion and other reprehensible social practices, like sati, polygamy, indissolubility of marriage, etc., eventually robbed women of their valuable rights and subjected them completely to the domination of men. Needless to say that interpretation of law also kept pace with the trends during these periods of social transformation.

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67 R.C. Dutt, _op.cit._, Vol.II, p.170. Also See S.V. Venkateswara, _Indian Culture through the Ages_, pp.111-112.

68 Manorama R. Modak, _India and Her People_, (1960), pp.53-54.

69 _Id._, pp.63-64.

70 _Id._, p.64.

As a matter of fact, the status of women in society had sunk, during the period of a few centuries that preceded independence, to such a low position that one could not help commenting, as Abbe J.A. Dubois did, that the position of women in society was "hardly better than that of slaves."[71] Explaining the position of women further, the author says that "their only vocation in life being to minister to man's physical pleasures and wants, they are considered incapable of developing any of those higher mental qualities which would make them more worthy of consideration and also more capable of playing a useful part in life,"[72] Commenting on the position of women, Dr.Muthu-lakshmi Reddi wrote to Gandhiji that "Indian women, with a few exceptions, have lost the spirit, strength and courage, the power of independent thinking and initiative, which actuated the women of ancient India, such as Maitreyi, Gargi and Savitri".[73] This despicable position of women started "with the decline of the national spirit",[74] and was complete in the later years when "the Hindus ceased to be a living nation."[75] It is thereforee no wonder that Gandhiji often stressed that

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71 Abbe J.A., Dubois, Hindu Manners, Customs and Ceremonies, Tr. Henry K. Beaucham, p.336.

72 Ibid.

73 M.K. Gandhi, Women and Social Injustice, p.8.

74 R.C. Dutt, op.cit., Vol.II, p.309.

75 Id., at p.310.

regeneration of women was one of the urgent requirements to have freedom in its real sense.[76]

No doubt, efforts were made to improve the condition of women in society. The reprehensible system of sati was abolished because of persistent efforts of the great social reformer, Raja Ram Mohan Roy; child marriage was restrained by the Child Marriage Restraint Act of 1929; widow's right to marry was conceded by the Hindu Widows Remarriage Act of 1856; inter-caste marriages were validated by the Hindu Marriage Validity Act of 1949; and a few rights were conceded to women by the Inheritance Amendment Act of 1929 and the Hindu Women's Right to Property Act of 1937. These are some of the important efforts made prior to the commencement of the Constitution to improve the status of women. But, they did not seem to have touched the core of the problem, for some of the heinous crimes like "sati" are reappearing in the so-called advanced modern age. It is highly disturbing factor. The civilisation does not seem to have reached the mature age of enlightenment. So, the problems awaited the Constitution for a lasting solution. Therefore, it is necessary to analyse the relevant constitutional provisions and laws made in pursuance of them to restore to women their legitimate right to equality in all spheres of life.

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76 M.K. Gandhi, op.cit., p.8.

CHAPTER IX

SOCIAL JUSTICE TO WOMEN UNDER THE CONSTITUTION

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Constitutional Safeguards:

The framers of the Indian Constitution bestowed sufficient thought on the position of women in the Indian Social order. This is evident from the provisions of the Constitution, which have not only ensured equality between men and women but also provided specifically certain safeguards in favour of women. The Preamble of the Indian Constitution lays emphasis on, among others, social justice, equality of status and of opportunity and the dignity of the individual. Social justice would be a myth in a society wherein one half of the population consisting of women continues to bear the burden of erstwhile servile or inferior status. Equality of status and of opportunity is a concomitant principle of social justice, for the realisation of the latter is well nigh impossible without the free play of the former. Finally, the dignity of the individual is the result of an uninhibited interaction between the concept of social justice and the principle of equality of status and of opportunity. Inasmuch as the "dignity" of women depends on the happy consummation of these two concepts, the Constitution makers have incorporated sufficient provisions in the body of the Constitution to achieve it.

Article 14 of the Indian Constitution states that "the state shall not deny to any person equality before the law or the equal protection of the laws". This provision guarantees to all persons, including women, the right to equality in law. Then Article 15(1) prohibits the State from discriminating against any citizen on the ground of sex. At the same time, Clause (2) of the same Article says that no citizen shall on the ground of sex 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 the general public.[1] The second Clause obviously ensures social equality to women. The next clause, namely Clause (3) of Article 15, states that "nothing in this article shall prevent the State from making any special provision for women and children". This provision enables the State to make special provisions in favour of women. In other words, it enables the State to discriminate in favour of women. So, this provision has been described by constitutional experts as "protective discrimination" for women. Article 16 of the Constitution ensures equality of opportunity for all citizens, including women, in

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1 For full text of these provisions see Clause (1) and (2) of Article 15 of the Indian Constitution.

matters relating to employment or appointment to any office under the State,[2] and it reinforces this idea when it states further that no citizen shall on the ground of sex be ineligible for, or discriminated against in respect of, any employment or office under the State.[3] Finally, Article 23, which prohibits, among others, traffic in human beings and makes any contravention of the provisions of this Article an offence punishable in accordance with law, guarantees to women a right against exploitation.

Thus, these Articles of the Constitution have assured women the right to equality in law, right to equality in matters relating to government employment, right to protective discrimination and right against exploitation. To state briefly, the Constitution has provided three norms regarding the rights, status and welfare of women, and they are equality, privilege in the form of protective discrimination and safeguard against exploitation. In other words, these provisions of the Indian Constitution truly constitute the palladium of liberty of women in India.

Right to equality:

While the right to equality of women can be discerned

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2 Article 16(1) of the Indian Constitution.

3 Article 16(2) of the Indian Constitution.

from Articles 14, 15 and 16 of the Constitution, a positive duty imposed on the State to secure equal treatment for women in certain matters can be found in Article 39. It states that the State shall direct its policy towards securing for both men and women equally the right to an adequate means of livelihood,[4] and the right to equal pay for equal work.[5] These are the directive principles to which the states are expected to give effect in course of time. Thus, on the one hand, the Constitution prohibits the State from taking any sex-based discriminatory action and, on the other, it imposes a positive duty on the State to strive to secure equality.

The positive duties mentioned above have not been carried out effectively by the State. However, recently some definite moves have been made to secure equal pay for men and women. In September 1975 the President of India promulgated an ordinance, which provided for payment of equal remuneration to men and women workers for the same work or work of similar nature in various sectors of employment in the country. In 1976, this was replaced by the Equal Remuneration Act enacted by Parliament.[6] The Act imposed duty on all employers to pay equal remuneration to men and women workers for same work

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4 Article 39(a)

5 Article 39(d)

6 The Equal Remuneration Act, 1976, (No.25 of 1976).

or work of a similar nature.[7] Besides, it has provided for the setting up of advisory committees to promote employment opportunities for women.[8] In the course of debate some members of Parliament expressed their fear that after this enactment employers might retrench women workers, or restrict their intake into jobs in future on one excuse or the other.[9] The Government, however, did not seem to share this fear fully, probably because they felt that the advisory committees, creation of which was contemplated in the Bill could effectively take care of this aspect of the problem. Thus, finally the law has not only ensured that there would be no discrimination against women in matters relating to wages in any economic sector wherein the Minimum Wages Acts are in force, but also made provisions for the creation of advisory committees to promote their employment opportunities.

Equality in matters relating to voting right has been assured by the Constitution to both men and women. Constitution provides for 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,[9a] and

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7 Id., S.4.

8 Id., S.6.

9 The Hindu, January 31, 1976.

9a Article 325.

then it states that "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".[9b] In other countries women had to fight a long battle to get their right to vote, and in Switzerland women were able to get the right only at the beginning of the seventies of this century. But, in India, the Constitution readily and unhesitatingly accepted the concept of equality in this field and ensured the voting right to women by prohibiting sex-based discrimination in preparing the electoral rolls in the country.

In the field of education, the governing provision is Article 29(2) of the Constitution which states: "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". This provision obviously omits the word "sex". This has given rise to a presumption that if an educational institution discriminates on the basis of sex while admitting students it is not hit by the provisions of Article 29(2). In University of Madras v. Shantha Bai,[10] the High Court of Madras said that the omission of "sex" in Article 29(2) was a deliberate departure from the

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9b Ibid.

10 A.I.R., 1954, Mad. 67.

language of Article 15(1) and its object was to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women students. In another case, Anjali v. State of West Bengal,[11] the High Court of Calcutta stated that, although final opinion on the point was not yet expressed, it was inclined to hold the view that discrimination in regard to the admission of students into educational institutions on the ground of sex might not be unconstitutional. In this connection, it said that "the framers of the Constitution may have thought because of the physical and mental differences between men and women and considerations incidental thereto, exclusion of men from certain institutions serving women only and vice versa would not be hostile or unreasonable discrimination:"[12]

Thus, it is clear that sex can be a valid basis for discrimination in regard to admission of students into educational institutions. What is more, Article 29(2) says that even educational institutions maintained by the State may practise such discrimination. This power conceded to the State by Article 29(2) virtually takes away the effect of Article 15(1) which prohibits the State from making any discrimination on the ground of sex. Education is the most important instrument to bring

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11 A.I.R., 1952, Cal. 825.

12 Id., at 831.

about equality among human beings, and if the sex-based discrimination is permitted in the field of education it would blunt the instrument itself.

It is said that the provisions in Article 29(2) help to establish educational institutions exclusively for women and also for men. This is not in any way beneficial to women. If there is any need for establishing separate educational institutions for women, sufficient scope is provided in Article 15(3) for the State to satisfy any such need. The State may carry out its task in this respect either by reserving a few state maintained educational institutions to women only or by permitting private management to establish educational institutions exclusively for women. Besides, there are certain renowned educational institutions, which were established long ago, and admission into them was confined from the beginning to men students. Article 29(2), which allows them to continue the status quo with regard to admission of students, virtually prevents the admission of women into such prestigious and well-equipped educational institutions. Therefore, Article 29(2) is not only disadvantageous to women but detrimental to their interest as well. The High Court of Calcutta tried to justify this provision by a strange and archaic argument based on "the physical and mental differences between men and women and considerations incidental thereto", which has lost its meaning in the modern world. The right to equality can be made more meaningful for

women if its impact is made to be felt in the educational field, and this can be accomplished by amending Article 29(2) and adding the word "sex" in it between the words "caste" and "language".

After the commencement of the Constitution, Parliament enacted several pieces of legislation relating to institution of marriage, adoption and inheritance, which have brought revolutionary changes in the position of women. The Hindu Marriage Act of 1955, which applies to Hindus as defined in Section 2,[13] states in Section 5(1) that a marriage may be solemnized between any two Hindus if "neither party has a spouse living at the time of the marriage".[14] A marriage solemnized in contravention of the condition contained in Clause (i) of Section 5 is invalid under Section 11 of the Act and on a petition by either party to such marriage, it may be declared null and void. Besides, Section 17 declares that a marriage solemnized in contravention of Clause (i) of Section 5 is void and is punishable as an offence under Sections 494 and 495 of the Indian Penal Code.[15]

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13 Section 2 of the Act gives a wide definition of "Hindu" and it includes Virashaivas, Lingayats, followers of Brahmo, Prarthana and Arya Samaj, Buddhists, Jains, Sikhs, etc.

14 Section 5 of the Act mentions a few more conditions.

15 Sections 494 and 495 of I.P.C. make bigamy an offence punishable with imprisonment of varying terms according to the gravity of the offence.

Thus, Sections 5(i), 11 and 17 of the Hindu Marriage Act of 1955 have been so contrived as to prohibit the age-old practice of polygamy among Hindus, which was the bane of Hindu women, and to impose the system of monogamy on them. The judiciary in this country upheld the validity of these provisions and negatived the contention that they were ultra vires the provisions of Articles 14, 15 and 25 of the Constitution.[16] A similar result is achieved by the provisions of Sections 4(a), 24, 43 and 44 of the Special Marriage Act, 1954, under which any two persons, no matter which religion or religions they follow, may solemnize their marriage.[17]

But the principle of qualified polygamy found in the Muhammadan law remains still unaltered in India. Under the Muhammadan law, a male Muslim may contract four marriages and maintain four spouses at a time, whereas monogamy is strictly imposed on Muslim Women.[18] First of all, this particular principle of Mohammadan law discriminates against women. So, it is discrimination based on sex, which is prohibited by Article 15(1) of the Indian Constitution. Secondly, since this rule is

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16 See Ram Prasad v. State of U.P., A.I.R., 1961, All.334: H.B. Singh v. T.N.H. Ongbi Bani Devi, A.I.R., 1959, Manipur 20; G. Sambi Reddy v. G. Jayamma, A.I.R., 1972, Andhra Pradesh, 1956; See Kumud Desai, "Indian Law of Marriage and Divorce, (1972), pp.52 and 84.

17 See Sections 4(a), 24, 43 and 44 of the Special Marriage Act, 1954.

18 Tyabji, Muslim Law, (Bombay, 1968), p.45.

applicable to Muslims alone, it amounts to discrimination based on religion, which is also contrary to the provisions of Article 15(1). Thus, for these two reasons the rule of Muhammadan law relating to polygamy must be held to be unconstitutional.

However, an argument has been advanced to the effect that different rules relating to marriage stipulated in Muhammadan law and distinction or discrimination resulting therefrom are based on personal law, which is outside the scope of definition of "law" in Article 13(3)(b) and hence outside the scope of Article 15(1) of the Constitution.[19] In other words, if the discrimination is based, or classification is founded, upon personal law, it is not violative of Article 15(1) of the Constitution. This seems to be a doubtful proposition. According to a principle laid down by the judiciary, when persons are classified or grouped together for the purpose of law, all persons found within the classification or so grouped together for the purpose of law, all perons found within the classification or so grouped together must be treated alike.[20] But, all Muslims, men and women, who are grouped together must be treated alike in matters relating to marriage. The discriminatory treatment practised by the Muhammedan law against a section of the people,

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19 State v. Narasu Appa Mali, A.I.R., 1952, Bom. 84; Srinivasa Iyer v. Saraswathi Ammal, A.I.R., 1952, Mad. 193.

20 Ramakrishna Dalmia v. Justice S.R. Tendolkar, (1959) S.C.J. 147; Barbier v. Connolly, 113 U.S. 27, 28, L.Ed. 923 (1885).

namely, women, within the group is in violation of the concept of equality embodied in Article 14 of the Constitution. Besides, this personal law, which practises sex-based discrimination requires the help of the State for its effective implementation or observance. When the State constantly lends its support to the effective obervance of the personal law, the State becomes a party to the practice of sex-based discrimination inherent in the law, which the State is prohibited from doing by Article 15(1) of the Constitution. Apart from this, Article 44 of the Constitution imposes a duty on the State to secure a uniform Civil Code for the citizens of India. This is intended to remove some of the outmoded rules found in various personal laws, which are discriminatory in character, and to treat all citizens without any discrimination as equals.

As was done in the case of "personal law", an attempt has been made in Sant Ram v. Labh Singh[21] to keep "custom" outside the definition of Article 13(3)(b) and consequently outside the scope of the phrase "laws in force" in Article 13(1) of the Constitution. The argument in this case is that the definition of "law" in Article 13(3)(a) cannot be used for purposes of Clause (1) of Article 13 because it is intended to define the word "law" in Clause (2) of Article 13. The phrase "laws in force" which is used in Clause (1) of Article 13 is defined in

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21 A.I.R., 1965, S.C., 314.

Clause (3)(b) of the said Article and that definition alone governs the first Clause of Article 13. Since that definition takes no account of custom or usage, the law of pre-emption based on custom is unaffected by fundamental rights stipulated in Part III of the Constitution. The Supreme Court rightly rejected this contention. It held that both the definitions given in Clauses (3)(a) and (3)(b) of Article 13 control the meaning of the first clause of the Article. In support of this proposition, the Court gave three reasons. First, the definition of the term "law" must be read with the first Clause. If the definition of the phrase "laws in force" had not been given, it is quite clear that the definition of the word "law" would have been read with the first Clause. Second, the definition of the phrase "laws in force" is an inclusive definition and is intended to include laws passed or made by a legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in operation in particular areas or at all. In other words, laws, which were not in operation, though on the statute book, were included in the phrase "law in force". Third, the second clause speaks of "laws" made by the State and custom or usage is not made by the State. Therefore, if the first definition governs only Clause (2) then the words "custom or usage" would apply neither to Clause (1) nor to Clause

(2) and this could hardly have been intended.[22] Thus, the Supreme Court came to an inevitable conclusion that custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force".[23]

The rationale of Sant Ram decision applies equally to personal law. So, the personal laws must be held to be contemplated by the expression "all laws in force" in clause (1) of Article 13 for the simple reason that not only the definition of the term "law" in Clause (3)(a) must be read with the first Clause but also the definition of the phrase "laws in force" in Clause (3)(b) is an inclusive definition and is intended to include all laws passed or made by a legislature or other competent authority before the commencement of the Constitution. However, in a subsequent decision in Krishna Singh v. Mathura Ahir[24] the Supreme Court has stated that Part III of the Constitution does not touch upon the personal laws of the parties.[25] Further, the court said that the court must enforce personal laws of the parties as derived from recognised and authoritative sources, except where such law is altered

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22 Id., p.316.

23 Ibid.

24 A.I.R., 1980, S.C., 707.

25 Id., p.712.

by the usage or custom or is modified by or abrogated by statute.[26] In other words, unaltered and unmodified personal laws are not affected by fundamental rights. This proposition or conclusion is untenable in view of the decision in Sant Ram case. To exclude personal laws from the purview of the Clause (3)(b) of Article 13 is to ignore the purport of inclusive definition of "laws in force" given therein. Besides, exclusion of personal laws from the scope of Article 13 would amount to according a higher status to personal laws vis-a-vis the constitutional law which is opposed to the very concept of fundamentalism of the fundamental law, namely, the Constitution. Therefore, viewed from any angle it is difficult to accept the proposition that personal laws are unaffected by the fundamental rights.

Another interesting provision is Section 494 of the Indian Penal Code, which makes bigamy a punishable offence. But, it has not made it a cognizable offence. This provision has undoubtedly lent some meaning and support to the monogamy principle embodied in the Hindu Marriage Act of 1955 and the Special Marriage Act of 1954 and it would have given greater strength to the monogamy principle if it had made bigamy a cognizable offence. However, one cannot forget the fact that

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26 Ibid.

till the qualified polygamy practised by the Muslims is prohibited, it will be difficult to make bigamy a cognizable offence.

Two other important provisions are embodied in Sections 13 and 15 of the Hindu Marriage Act of 1955. According to Section 13, any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be disolved by a decree of divorce on any one of the seven grounds mentioned therein.[27] Section 15 states that when a marriage has been dissolved by a final decree of divorce, it shall be lawful for either party to the marriage to marry again[28]. These two provisions mark a great step forward as far as Hindu women are concerned, because they have not only rejected the old Hindu concept of indissolubility of marriage but also granted to Hindu women the right to remarry. In effect, they release Hindu women from

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27 The seven grounds mentioned in Section 13 are (i) adultery; (ii) conversion from Hinduism to another religion (iii) unsound mind for a continuous period of three years (iv) a virulent and incurable form of leprosy (v) venereal disease in a communicable form (vi) renouncing the world by entering any religious order; and (vii) seven years absence in the sense that the party has not been heard of as being alive for a period of seven years or more.

28 This section had a proviso, which stated that after the final decree of divorce the parties could marry again only after the lapse of one year from the date of the decree in the court of first instance. This proviso has been deleted by the Marriage Laws (Amendment) Act, 1976. (Act No.68 of 1976). So after this amendment parties could marry soon after the final decree of divorce.

the age-old restrictions and bring them almost on par with men.

Similarly, with respect to persons, whose marriages are solemnized under the Special Marriage Act of 1954, the law makes provisions for divorce on any of the grounds mentioned in Section 27, for divorce by mutual consent,[29] and for remarriage of divorced persons.[30] Since "any two persons"[31] irrespective of their religion or religions, could solemnize their marriage under this Act, the right to petition for divorce and the right to remarry have been extended to all women who bring themselves within the purview of this Act by their marriage. So, to the extent the law goes, the horizon of the liberty of women in India is extended and made almost co-extensive with that of men.

Apart from these, Parliament enacted in 1961 the Dowry Prohibition Act to put an end to the persisting social evil of giving or taking of dowry. This law has not only made the taking or giving of dowry a punishable offence[32] but also declared that any agreement for giving or taking dowry shall be void.[33] One drawback in the law is that the offence has

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29 The Special Marriage Act, 1954, Section 28.

30 Id., Section 30.

31 Id., Section 4.

32 The Dowry Prohibition Act, 1961, Sections 3 and 4.

33 Id., Section 5.

been declared to be non-cognizable.[34] This drawback in the law has given scope for carrying on the dowry system in the society, because it is very difficult to expect persons, who give or take dowry, to bring the issue before a competent court. The entire matter seems to have been left to the good sense of the people. So, persons who refuse to give or take dowry may have the satisfaction that their act has the support of law, and persons who willingly give or who readily take dowry with least compunction need hardly fear the law, for it has no teeth.

A new rule has been incorporated into the Central Civil Service (Conduct) Rules, 1964, prohibiting a Central Government employee from taking or giving dowry and subjecting to disciplinary action any such employee who takes or gives dowry.[35] This has been done in pursuance of a recommendation made by the Committee on the Status of Women in India. But, the new rule covers only a small section of the people in our country. So, though the efforts made by the Government in this direction are commendable, they seem to be half-hearted attempts. Unless the law is made more stringent by making

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34 Id., Section 8.

35 See The Hindu, Feb.14, 1976. The new rule as reported is as follows: "No Government servant shall give or take or abet the giving or taking of dowry or demand directly or indirectly from the parents or guardians of a bride or bridegroom, as the case may be, any dowry. Any violation of the provisions of the new rule will be good and sufficient cause for taking disciplinary action against government servants".

the act of taking or giving dowry a cognizable offence, the social evil of dowry system which got itself stuck like a leech to the institution of marriage cannot be removed completely and the position of women in the society cannot be improved appreciably.

In addition to the above-mentioned law, a few more pieces of legislation have been enacted after the commencement of the Constitution to improve the status of women in India. The Hindu Adoptions and Maintenance Act, 1956 has brought great changes in the law of adoption among the Hindus. Secition 7 of the Act provides that any Hindu male can make adoption of either a son or daughter provided the adopter is of sound mind and is not minor. Further, if the adopter is a married man and his wife is living with him at the time of the adoption the consent of the wife is necessary for its validity. Section 8 of the Act enables a Hindu female to adopt either a son or daughter provided she is of sound mind, has attained majority and either is not married or if married she is a widow or the marriage has been dissolved or the husband has renounced the world or has ceased to be a Hindu or is declared by a court of competent jurisdiction to be of unsound mind.

Then Section 9 of the Act speaks about persons capable of giving a child in adoption. In this connection, it mentions mother's right to give a child in adoption. Though her right

in this respect comes after the father's right, the fact remains that the law has conceded the right to the mother also to give a child in adoption. What is more, when father gives a child in adoption mother's consent is necessary for its validity. Thus, the provision for adopting a daughter, the necessity of the consent of wife for the validity of adoption made by the husband, the right of adoption made by the husband, the right of adoption conceded to Hindu women and the mother's right to give her child in adoption in the absence of the father of the child are the definite improvements effected on the Hindu law of adoption to improve the status of Hindu women in society.

The Hindu Succession Act of 1956 made far-reaching changes in the law with an avowed purpose of improving the position of women and bringing them on par with men. The changes made in the law of succession, as summed up by N.R. Raghavachariar, are that (1) whatever property is inheritd by a woman, whether it be from a male or from a female by whatever school she is governed, is now taken by her as an absolute owner; (2) the new Act lets in numerous females as heir to the property. In addition to the female heirs either let in by the original smritikars and commentators or let in by the Hindu law of inheritance Amendment Act, 1929, or by the Hindu Women's Right to Property Act of 1937, numerous other female heirs have been newly added to the list. Their position

in the line of heirs has been considerably advanced and in the case of widow, mother and daughter their position is elevated to that of the son; and (3) the new Act introduced the principle of simultaneous succession of heirs of different relationships and some of the female heirs taking together along with male heirs, as for instance, in the case of daughters, widows, mother and sons taking the property simultaneously. It is worthy to note that amongst what one may call the first or primary heirs, there are twelve of them, of whom eight are females.[36]

This succinct account of the changes made by the new Act virtually highlights the legislative efforts to improve the position of women in matters relating to succession and inheritance.

Protective discrimination in favour of women

Article 15(3) of the Constitution states that "nothing in this article shall prevent the State from making special provision for women". This is intended to give an initial advantage to women so that they could compete with men in various fields effectively. Since women were suppressed for a very long period, they lost their initiative, confidence in their capacity to face problems and opportunity to equip

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36 N.R. Raghavachariar, op.cit., p.840.

themselves for various types of professions and avocations. It is because of these facts that the Constitution makers considered them weaker sections of the people who required some definite help and initial advantage to compete with men in all spheres of life. Therefore, this provision has been described by various writers as "protective discrimination" and "adventitious aid" for women.

In the Constituent Assembly there was a controversy on this point. A few members held the view that the word "sex" should be deleted from the main provisions of Article 15 so that State could discriminate on the ground of sex and make special provision for women. But, a few other members opposed it and said that the word "sex" must be retained in the general clauses of Article 15 to ensure equality between men and women and a proviso must be appended to it to enable the State to make special provision for women. The latter view finally prevailed and Clause (3) of Article 15 was the result.[36a] The framers of the Constitution took a pragmatic view in incorporating this Clause because they expected that this provision might compensate the loss of opportunities suffered by women during the last several centuries. So, Clause (3) of Article 15 of the Constitution may be described as a compensatory provision for women.

36a B. Shiva Rao (Ed.) The Framing of India's Constitution, (1967), pp.219-220, 289.

The provision in Article 15(3) has enabled the State to make special provisions for women, for example, separate educational institutions exclusively for women, reservations of seats or places for women in public coveyances and places of public resort. Besides, many pieces of legislation conferred benefits on women, to which men are not eligible. The Factories Act of 1948 provides for separate facilities and favourable treatment for women. The Act (1) prohibits employment of women during night and in hazardous occupation;[37] (2) makes safety provision by disallowing them to clean, oil or repair moving machinery or to lift heavy weights;[38] (3) provides for opening of creches for small children of women workers;[39] (4) compels the factory authorities to allow women workers, who have left their young children in the factory creche, to go and feed their babies at stated frequencies,[40] and provides for maternity benefits for women employees.[41] The Mines Act prohibits the employment of women underground,[42] for such employment is considered to be very hazardous to women. Free medical

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37 S.66, The Factories Act, 1948.

38 S.22(2) and S.34(2) of the Factories Act, 1948.

39 S.48, The Factories \ct, 1948.

40 S.48(3)(d) of the Factories Act, 1943.

41 S.5 of Maternity Benefit Act, 1961.

42 S.46 of the Mines Act, 1952.

treatment and maternity bonus are provided for women under the Maternity Benefit Act of 1961.[43] What is more, employment of women during the period of six weeks after delivery is prohibited and dismissal of women workers on ground of pregnancy is also prohibited.[44] Some of these provisions are in the nature of safety measures to prevent the employment of women in dangerous and hazardous jobs, and others are intended to confer certain benefits on them which are necessary for them in view of the additional responsibilities they have to shoulder in life.

Another important provision which discriminates in favour of women is Section 497 of the Indian Penal Code. It states that "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amount to rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both". In such cases the wife shall not be punishable as an abettor. The rationale of this provision obviously is that women have already been treading the thorny paths of man's world and have been subjected to harsher rules of life to which men are not subjected.

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43 S.8.

44 S.12.

But, the discrimination showed in favour of women by Section 497 of the Indian Penal Code was challenged in Yusuf Abdul Aziz v. State of Bombay[45] on the ground that it was contrary to the provisions of Articles 14 and 15 of the Constitution. Relying on the provisions of Article 15(1) of the Constitution, the appellant argued that inasmuch as the discrimination made in favour of women by the impugned Section 497 was based on sex it was unconstitutional. But, the Supreme Court rejected the argument and said that Clause (1) of Article 15 was subject to Clause (3) of the same Article and the impugned section contained a special provision for women within the meaning of Clause (3). Therefore, It was saved by Clause (3) of Article 15. It was further argued that Clause (3) of Article 15 should be confined to provisions which are beneficial to women and could not be used to give them a licence to commit and abet crime. The court promptly replied it stating that no such restriction could be read into the clauses. It held that sex was a sound basis of classification and although there could be no discrimination in general on that ground, the Constitution itself provided for special provisions in the case of women. The two Articles 14 and 15 together validate the impugned provision in Section 497 of the Indian Penal Code.

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45 1954, S.C.R., 930.

Shah Bano Decision and Traumatic change of Law

In the new Code of Criminal Procedure a provision has been made in Section 125, in favour of women. It states that "if any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, a magistrate of the first class may upon proof of such neglect or refusal, order such person to make a monthly allowacne for the maintenance of his wife at such monthly rate not exceeding five hundred rupees on the whole". An explanation attached to it says that "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. This provision is clearly intended to benefit women and as such it discriminates in favour of women. Commenting upon the salutory nature of Section 125, the Kerala High Court has rightly remarked that "it will not be far from truth to say that in the case of marriage and divorce, the society continues to be a man's society. We (High Court) can take judicial notice of the fact that several young girls suffering agony of life with all its privations and penury for no fault of theirs, after their divorce by their husbands, and it is such hard cases that perhaps induced and impelled the supreme law-making body of this country to enact provisions contained in Section 125 of the new code (of criminal procedure)".[46] The High Court said that

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46 Kunhi moyin v. Pathumma, 1976, K.L.T., 87 at p.92.

this provision was a highly salutary one meant to alleviate the sufferings of such women and to cause a little deterrent to erring and callous husbands.[47] Since the Indian society is peculiar in its treatment of women and is considerd to be a man's society, the above mentioned provision is undoubtedly necessary to help women. Needless to say that Article 15(3) has enabled the State to make such protective discrimination in favour of women in this particular matter.

There is, however, another provision in the Criminal Procedure Code, namely , Section 127(3)(b) which states that where any order has been made under Section 125 in favour of a divorced women, the Magistrate shall, if he is satisfied that "the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order". The scope of the provisions of the aforesaid sections has been the subject of much discussion before the Supreme Court in three important cases, namely, <u>Bai Tahira</u> v. <u>Ali Hussain Ficlalli Chotia</u>,[48] <u>Fuzlunbi</u> v. <u>K. Khader vali</u>[49] and <u>Mohd. Ahmed Khan</u> v. <u>Shah Bano Begum</u>.[50]

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47 <u>Ibid</u>.

48 A.I.R., 1979, S.C., 362.

49 A.I.R., 1980, S.C., 1730.

50 A.I.R., 1985, S.C., 945.

In Bai Tahira Case, Justice Krishna Iyer, speaking for the court, describes Section 125 of the Criminal Procedure Code as a benign provision enacted to ameliorate the economic condition of neglected wife and discarded divorcees.[51] He says that this special provision has been made by Parliament under Article 15(3) of the Constitution to help women in distress cast away by divorce.[52] Then, reading the socio-economic justice contents into Section 125, Justice Iyer says that the protection against moral and material abandonment manifest in Article 39 is part of social and economic justice, specificated in Article 38, fulfilment of which is fundamental to the governance of the country.[53]

Then, dealing with the scope of Section 127, Justice Iyer states that it does not rescue the husband from his obligation imposed by Section 125. Payment of mehar money, as a customary discharge, is, no doubt, within the cognisance of the provisions of Section 127. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcee, a subsequent series of recurrent doles need not be given and the husband is liberated. This, according to Justice Iyer, is "the teleological interpretation,

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51 A.I.R., 1979, S.C., 362, at p.363.

52 Id., p.365.

53 Ibid.

the socialogical decoding of the text of Section 127".[54] Amplifying the idea further, Justice Iyer states that the payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom.[55] The proposition that emerges from all these, according to Justice Iyer, is that no husband can claim under Section 127(3)(b) absolution from his obligation under Section 125 towards divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient for maintenance.[55-A]

This is the basic principle underlying the scheme brought into existence by Sections 125 and 127(3)(b) of the Criminal Procedure Code. To put in the words of Justice Iyer, "the key-note thought is adequacy of payment which will take reasonable care of her maintenance".[55-B].

In Fuzlunbi case,[56] Justice Krishna Iyer, has reiterated

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54 Ibid.

55 Id., pp.365-366.

55-A Id., p.366.

55-B Id., p.365.

56 A.I.R., 1980, S.C., 1730.

with greater vehemence the proposition of law he laid down in Bai Tahira case. In Fuzlunbi case the order for maintenance issued under Section 125 was cancelled by a Magistrate on the ground that the husband paid a sum of Rs.500/- by way of mahr to his divorced wife. Referring to this, Justice Iyer says that no one in his senses can contend that the mahr of Rs.500/- will yield income sufficient to maintain a woman even if she were to live on city pavements.[57] Asserting his earlier view in Bai Tahira case about social and economic justice perspective and "adequacy of payment as the key-note thought", Justice Iyer says that even by harmonising payments under personal and customary laws with the obligations under Sections 125 and the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount. The quondam husband will be released from the continuing liability, only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution. This perspective of social justice alone, according to him, does justice to the complex of provisions from Section 125 to Section 127 of Criminal Procedure Code.[58]

The Shah Bano case[59] came before a larger Bench of

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57 Id., p.1731.

58 Id., p.1736.

59 A.I.R., 1985, S.C., 945.

five Judges on reference from a Bench consisting of Justice Murtaza Fazal Ali and Justice Varadarajan, who were inclined to the view that Bai Tahira and Fuzlunbi cases were not correctly decided. After a deep analysis, Chief Justice Chanrachud, who spoke for the Court, rejected the contention that, according to the Muslim Personal Law, the liability of the husband to provide for the maintenance of his divorced wife is limited to the period of iddat despite the fact that she is unable to maintain herself. He says that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Code. So, according to him, there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.[60]

The second argument in the case is that the divorced wife's application under Section 125 is liable to be dismissed because of the provision contained in Section 127(3)(b). This argument has arisen mainly because of the "deferred" Mahr, which is payable to the wife on the dissolution of the marriage by death or by divorce. This argument, according to the Court,

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60 Id., pp.950-951.

raises the question as to whether, under the Muslim Personal Law, any sum is payable to the wife "on divorce". The court has come to the conclusion that since Mahr is payable "in consideration of marriage" and that is an obligation imposed upon the husband as a mark of respect for the wife, it is not a sum payable "on divorce" within the meaning of Section 127(3)(b) even if a part of it, namely, "deferred" Mahr is payed at the time of divorce. In other words, a sum payable to the wife out of respect cannot be a sum payable "on divorce".[61] The Court, therefore, came to the conclusion that the decisions in Bai Tahira and Fuzlunbi cases are correct and that a divorced Muslim wife is entitled to apply for maintenance under Section 125 and that Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce.[62]

The Court, however, pointed out that an error has crept in the Bai Tahira decision because of the statement made in the context of Section 127(3)(b) that "payment of Mahr money, as a customary discharge, is within the cognizance of that provision".[63] Pointing out this, Chief Justice Chandrachud, states that "we have taken the view that Mahr, not being payable

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61 Id., pp.952-953.

62 Id., p.954.

63 A.I.R., 1979, S.C., 362, at p.365.

on divorce, does not fall within the meaning of that provision".[64] The only advancement from the Bai Tahira decision, which is noticeable in the Shah Bano case, is that Mahr is not a sum payable "on divorce" within the meaning of Section 127(3)(b) and, therefore, the court need not take cognizance of the payment of Mahr to determine the adequacy of payment for maintenance, which alone will absolve the husband under Section 127(3)(b) from his obligation under Section 125 towards the divorced wife.

The Shah Bano decision stirred the hornet's nest and the Muslim fundamentalists were up in arms. They vociferously opposed the application of Section 125 of the Criminal Procedure Code to Muslims. In order to appease them, the Muslim Women (Protection of Rights on Divorce) Act, 1986, was passed by Parliament. The crucial Section 3(1)(a) of 1986 Act states that "notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband". Then, regarding the children born to her, Section 3(1)(b) states that fair provision and maintenance be made and paid by her former husband "for a period of two years from the respective dates of birth of such children".

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64 A.I.R., 1985, S.C., 945, at p.954.

Thus, the Muslim husband's obligation to provide for maintenance towards his divorced wife has been confined to iddat period and towards children born to her it has been limited to two years from their dates of birth. Beyond the said limited period, the Muslim husband has no obligation to maintain his divorced wife and her children. When he pays in a lumpsum to his wife during the iddat period the so-called "reasonable and fair provision" and "maintenance" along with his wife's Mahr, his obligation comes to an end and the divorced wife is left high and dry. What is more the Muslim divorcee cannot proceed under Section 125 of the Criminal Procedure Code. Unless her husband agrees that her rights shall be determined under it instead of 1986 Act. These are, to say the least, the highly discriminatory and most unjust provisions and to call the Act, which contains the said provisions, "Muslim Woman (Protection of Rights on Divorce) Act" is misnomer and perverse. It is said, and rightly so, that the husband in Shah Bano sought to escape the application of Section 125 on the ground that provision of maintenance to a divorced wife beyond the iddat period was contrary to Muslim law and "he failed in the Supreme Court but succeeded in Parliament".[65] His success in Parliament is the negation of social justice, which has been repeatedly

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65 See Lucy Carroll, "The Muslim Women (Protection of Rights on Divorce) Act, 1986: A Retrogressive Precedent of Dubious Constitutionality", 28 J.I.L.I. (1986), p.364, at pp.366-367.

stressed in Bai Tahira case by Justice Krishna Iyer when he said that the special provision of Section 125 of Criminal Procedure Code was made by Parliament under Article 15(3) of the Constitution "to help women in distress cast away by divorce" and the legal sanctity of payment is certified by the fulfilment of the social obligation, "not by a ritual exercise rooted in custom". In giving realistic content to social justice concept embodied in Article 15(3) of the Constitution, the Judiciary rose to the occasion in Bai Tahira, Fuzlunbi and Shah Bano cases but Parliament backed out.

Employment opportunity:

Article 16(1) of the Constitution guarantees equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. Then, Article 16(2) states, inter alia, that no citizen shall be discriminated against on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them in respect of any employment or office under the State. This provision, no doubt, ensures equality of opportunity to women in matters relating to government employment.

But, in reality such equality of opportunity has not been conceded fully to women in matters relating to employment. This fact is brought to the fore in two important cases, namely,

Muthamma v. Union of India[66] and Air India v. Nargesh Meerza.[67] Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules 1961 provided that (1) a woman member of the service shall obtain the permission of the Government in writing before her marriage is solemnised, and (2) at any time after the marriage she may be required to resign from service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. In Muthamma case, characterising this Rule 8(2) as one that practised discrimination against woman in traumatic transparency, Justice Krishna Iyer said that if the family and domestic commitments of a woman member of the Service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. Further, "in these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species."[68]

Apart from that, there was Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, which stated that "no married woman shall be

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66 A.I.R., 1979, S.C., 1868.

67 A.I.R., 1981, S.C., 1829.

68 A.I.R., 1979, S.C., 1868, at p.1870.

entitled as of right to be appointed to the service". This rule, according to Justice Krishna Iyer, is in defiance of Article 16. He says that if a married man has a right, a married woman, other things being equal, stands on no worse footing.[69] Describing the rule as a "misogynous posture" and the one which was framed forgetting the fact that "our struggle for national freedom was also a battle against woman's thraldom",[70] Justice Krishna Iyer emphatically states that "freedom is indivisible, so is justice" and that our "founding faith" enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz., our women, "is a sad reflection on the distance between Constitution in the book and law in action".[71]

More or less similar problem arose in Air India v. Nargesh Meerza.[72] Air India Employees Service Regulations provided inter alia, that an Air Hostess shall retire from the services of the Corporation "upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier". But, the retirement age for male employees, namely, Assistant Flight

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69 Ibid.

70 Ibid.

71 Ibid.

72 A.I.R., 1981, S.C., 1829.

Pursers and Flight Stewards, was fixed as 58 years. This was challenged as violative of Articles 14, 15(1) and 16(2) of the Constitution.

Regarding the retirement age, the court pointed out that various circumstances such as incidents, service conditions and promotional avenues Assistant Flight Pursers and Air Hostesses are different. Therefore, though the Air Hostesses and Assistant Flight Pursers are members of the cabin crew, the Air Hostesses are an entirely separate class governed by different set of rules, regulations and conditions of service. Hence the fixation of their retirement age at 35 years is not violative of Article 14, for the retirement age has been fixed on the basis of reasonable classification and there is no hostile discrimination.[73] Besides, the contention that the conditions of service with regard to retirement amounted to discrimination on the ground of sex only and hence violative of Articles 15(1) and 16(2) was overruled by the Supreme Court on the reasoning that it was a discrimination on the ground of sex coupled with other considerations, which is not prohibited by Articles 15(1) and 16(2) of the Constitution.[74]

The second limb of the Regulation regarding the

73 Id., pp.1842-1846.

74 Id., pp.1847-1848.

retirement of Air Hostesses in the event of marriage taking place within four years of the service has also been upheld by the Supreme Court on the ground that it is not unreasonable or arbitrary in nature. In support of this ruling, the court adduced three reasons. First, according to the regulations an Air Hostess starts her career between the age of 19 and 26, and the regulation permits her to marry at the age of 23 if she has joined the service at the age of 19, which is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion of family planning programme. Secondly , if a woman marries near about the age of 23 years, she becomes fully mature and there is every chance of such a marriage proving a success. Thirdly, if the bar of marriage within four years is removed then the Corporation will have to incur huge expenditure in recruiting additional Air Hostesses either on a temporary or on ad hoc basis to replace the working Air Hostesses if they conceive and any period short of four year would be too little a time for the Corporation to phase out such an ambitious plan.[75]

The aforesaid reasons given by the Supreme Court are not only unconvincing but they are callous in nature as well. The first two reasons of the promotion of family planning

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75 Id., pp.1849-1850.

programme and becoming fully mature person with every chance of a successful marriage resulting from such late or postponed marriage could be applied to male employees of the Corporation as well. The first two limbs of the impugned regulation, which have been upheld by the Supreme Court in Nargesh Meerza case, would show that the relic or remnant of male chaunism of yester years still lingers in Indian society and in the laws of the country. This is another sad example of what Justice Krishna Iyer, calls "the distance between Constitution in the book and law in action".

However, the Supreme Court has redeemed its position to certain extent by striking down the third part of the regulation, which stipulated that the Air Hostesses should retire on their first pregnancy. The Supreme Court has pointed out that termination of service of an Air Hostess if she becomes pregnant amounts to compelling her not to have any children and thus interfere with and divert the ordinary course of human nature. The termination of the services of an Air Hostess under such circumstances, according to the court, "is not only a callous and cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorent to the notions of a civilised society".[76] Further, the Supreme Court has said that by making

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76 Id., p.1850.

pregnancy a bar to continuance in service of an Air Hostess, the Corporation seems to have made an individualised approach to a woman's physical capacity to continue her employment even after pregnancy which undoubtedly is the most unreasonable approach.[77]

As a matter of fact, it is this unreasonable and much detested "individualised approach to woman's physical capacity" that has been instrumental in denying women their right to equality of opportunity in numerous fields and also their right to equal pay for equal work. The Constitution prohibits sex-based discrimination. The salutary constitutional stipulation must be given full effect, "individualised approach to a woman's physical capacity" to circumvent the constitutional mandate must be given up and women must be treated as normal human beings like men in all spheres of life, more particularly in the fields of education and employment.

It must be borne in mind that women, like the Backward Class of citizens, have been considered weaker sections by the Constitution because of their long suppression in the society. Owing to deprivation of their right to equality in society for a long period, their position has become so weak that they are not in a position to compete effectively with men the stronger

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77 Id., p.1853.

section. Consequently, though they constitute approximately one half of the population, they are not adequately represented in the services under the State. A special provision in Article 16 for reservation of appointments or posts in favour of women would have helped to mitigate this situation. Therefore, it may be suggested here that in order to render the right to equality of opportunity in government employment more meaningful to women a suitable amendment must be carried out to Article 16 to incorporate in it a special provision for reservation of appointments or posts in government service in favour of women.

CHAPTER X

CONCLUSION AND SUGGESTIONS

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The analysis of semantics of social justice has revealed that the concept of social justice has been given different meanings by various jurists. They have approached the problem from different angles. However, two theories seem to be closer to "corrective and creative process" of social justice, which alone are capable of dismantling the hierarchical social system to pave the way for a new social order contemplated in Article 38(1) of the Constitution. First is the Aristotlean theory of "distributive justice" with a wider connotation of distribution or dispersal of benefits and burdens to all in society without any distinction. The second one is John Rawls' theory of social justice which envisages equal distribution of "all social primary goods", namely, liberty and opportunity, income and wealth, and basis of self- respect, unless an unequal distribution of any or all of them is to the advantage of "the least favoured member of society". More important aspect of the theory is the idea of unequal distribution of social primary goods to benefit or help the least favoured members of society. The least advantaged members of society are none else than members of what the Indian Constitution describes "weaker sections" of the society. In terms of principle the whole theory of John Rawls

means equal liberty, fair equality of opportunity and the "difference principle" or "protective discrimination" in favour of the least favoured members of the society.

The preambular concept of social justice, as explained by eminent members of the Constituent Assembly, means rejection of the existing social structure, promise of social security, provision for equality of opportunity and a smooth and rapid transition from a state of serfdom to one of freedom. In short, it has envisaged a far reaching social changes, a socio-economic revolution, through the mechanism of political democracy and individual liberty. Some members of the Constituent Assembly felt that since the social justice enunciated by them and embodied in the Constitution could be achieved only through socialism and in a socialist State, that fact should be specified in the Constitution. However, at the end, they avoided mentioning specifically socialism or socialist State, for they felt content with the phrase "social justice" which was said to have embodied contents of socialism. After the commencement of the Constitution, the major agrarian reform legislations ran up against conservative stance of judiciary on property rights and on the question of compensation. So, a few amendments were made to the Constitution to enable the State to go forward with agrarian reforms and to facilitate the proper distribution of property and economic rights in the society. Besides, with respect to Preamble the Judiciary changed its view and started using it

as a tool to interpret the provisions of the Constitution. Because of these facts Parliament by the Constitution (Forty-Second) Amendment Act introduced the word "Socialist" into the Preamble. Thus, it has been made clear that preambular concept of social justice envisages not merely the contents of socialism but also its format or what may be called its infrastructure. In other words, the preambular concept of social justice envisions distributive justice-oriented equal dispersal of all social primary goods coupled with protective discrimination in favour of "the least favoured members" of the society to achieve a new social order within the frame work of socialist democratic republic.

Analysis of the views of the Courts on social justice has revealed that they accorded prime importance to it. They described the social justice as "the signature tune" of the Constitution. The Courts discussed all aspects of the concept of social justice and explained its various connotations. First, social justice means socialism, because its goal is to bring national wealth and means of production under State control to subserve the common good. But, at the same time in a mixed economy interests of private enterprise cannot be stifled unjustly. So, necessarily a just balance must be maintained between conflicting interests. With such a role assigned to socialism it became more dynamic than doctrinaire. As indicated by the judiciary, social justice is dynamic socialism which aims at a just socio-economic order.

Second, social justice demands the existence of reasonable and just procedures which are conducive to the pursuit and protection of the rights of ordinary people. Therefore, procedures must necessarily be freed from stifling technicalities in order to render access to justice a meaningful concept to common man. Third, the concept of social justice envisages creation of a new human order and egalitarian society, wherein gender justice, worker justice, minorities justice, dalit justice and equal justice among the chronic unequals are assured. Fourth, the fundamental rights must be construed in the light of Directive Principles and the Preamble, which, in effect, means that they have to be construed in the light of the concept of social justice. It is also said that the dynamic Directive Principles energise the Static provisions of the fundamental rights. This rule of interpretation has rendered the social justice a vibrant concept in the Indian constitutional jurisprudence. Fifth, socio-economic justice stemmed from the social morality and then became an enforceable formula and hence it abhors economic exploitation. Finally, social justice contemplates comprehensive social security schemes and also lays stress on distributive justice. Thus, meanings attributed to, and the unique role designed for, the concept of social justice by the judiciary have made the social justice a multi-dimensional vibrant concept of far reaching importance.

As far as criteria to determine backwardness of people

are concerned, different views were expressed. An examination of debates in Parliament on Clause (4) of Article 15, introduced by the Constitution (First Amendment) Act, showed that Dr. Ambedkar held the view that Backward Classes were "collection of Castes". But, the predominant view in the House seemed to veer round a comprehensive criteria and not to bog the determination of backwardness to caste criterion. Backwardness was considered to be a social evil, which was sought to be mét and solved under Article 15(4).

The genesis of Article 16(4) and scrutiny of debates in the Constituent Assembly over the contents of reservation clause in Article 16(4) revealed two significant ideas. First, the exact use and connotation of the word "backward" must be understood in the context of an attempt made to reconcile the opposing views of perfect equality of opportunity and reservation-promoted equality of opportunity in the matter of government employment. Second, the reservations of posts and appointments in service under the State were meant for communities, which hitherto had no "proper look-in" into the administration. Thus, the State authorities were expected to determine or bring within the fold of "Backward Classes" those classes or communities, which hitherto had no berth in the administration and the determination of Backward Classes and the scheme of reservations of posts were such that they did not destroy the principle of equality of opportunity. The ideas

that emerged from the debates in Parliament and Constituent Assembly over Article 15(4) and Article 16(4) respectively would show that makers of the Constitution did not consider "caste" as a dominant criterion for determining the backwardness of the people.

A close survey of reports submitted by various Backward Class Commissions during the period of 1955 and 1980 has revealed that most of the commissions harped on "caste" as an inevitable test to determine the backwardness of people. The Mandal Commission, which was the latest Commission constituted by the Central Government, made caste as a unit or what it called a " recognisable and persistent collectivities" for dealing with the problem of backwardness. Further, it said that since Article 340 of the Constitution spoke of "socially and educationally backward classes", the application of "economic tests" for their identification seemed to be misconceived.[1] It virtually discarded the economic or poverty test to determine the Backward Classes of people. This view of the Commission is totally at variance with the views of the Constitution makers. The view of the Commission is narrow and the caste test may perpetuate caste system instead of eradicating the social evil

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1 Report of the Backward Classes Commission, Mandal Commission, (1980), Vol.I and II, p.57.

of backwardness.[2]

In Balaji case[3], the Supreme Court examined deeply the problem of determining the socially and educationally backward classes of citizens and laid down the following principles.

1. The backwardness contemplated in Article 15 (4) is both social and educational;

2. The dominant test to determine social backwardness of classes of citizens generally is poverty, that is abject poverty.

3. In relation to Hindus, Caste may be a relevant factor in determining social backwardness of classes of citizens, because the caste often aggravates the social backwardness resulting from poverty. In other words, caste-cum-poverty test is the appropriate test to determine the social backwardness of classes of citizens in the Hindu social order.

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2 Many Scholars criticised the "caste" test prescribed by the Mandal Commission to determine backwardness. Prof. S.K. Agarwala says that "the most common argument that classification according to caste will create a vested interest in the perpetuation of the Caste system has really not been met by the Commission, except its observation that in the Indian context backward 'classes' could only be identified through 'castes'." For this see D.N. Saraf, (Ed.). Social Policy, Law and Protection of Weaker Sections of Society, (1986), at p.52; Prof. V.S. Rekhi says: "The energies of Havanur and Mandal Commissions have been spent in chasing the phantom of caste as the sole determinant". For this see D.N. Saraf (Ed.), op.cit., p.77.

3 See Supra, Ch.V.

4. The educational backwardness of classes of citizens may be determined first by ascertaining the State average of student population in High Schools and then treating only those communities which are "well below the State average" of student population, that is, those classes of citizens whose average of student population is below 50 per cent of the State average of student population would be considered as educationally backward.

One important idea that emerges from the aforesaid principles laid down in Balaji case is that the comprehensive test to determine the social and educational backwardness of classes of citizens is poverty-cum-caste-cum-below 50 per cent of the State average of student population test in relation to Hindus and poverty-cum-below 50 per cent of the State average of student population test in relation to others. This test emerges from the Balaji decision and it can be rightly described as Balaji doctrine or test to determine social and educational backwardness of classes of citizens. This Balaji doctrine or test is in conformity with the views of the makers of the Constitution. Though some aberrations have been caused to Balaji doctrine in some cases, by and large it received much support in other cases. A grand finale to it has been sung in Vasanth kumar case.[4] Thus, as far as the tests to determine the

4 Ibid.

backwardness of people are concerned, the Balaji doctrine has become a locus classicus.

The Balaji case mentioned habitation test to determine social backwardness of class of citizens. But it refrained from elaborating it, for it felt that the problem of determining social backwardness of classes of citizens on the basis of habitation test required elaborate investigation and scientific examination of data collected from such investigation. However, Pradip Tandon[5] court took up the habitation test to determine the backwardness of class of citizens and confined it to hill areas and Uttarkhand areas in Uttar Pradesh. The factors which are said to have made the people in the hill areas socially Backward Classes of citizens are (1) lack of effective use of resources, (2) existence on a large areas of land a sparse, disorderly and illiterate population whose property is small and negligible; and (3) absence of means of communication and technical processes made impossible any effective territorial specialisation. The factors specified by the court to determine the educational backwardness of people in hill areas are (1) traditional apathy of people for education on account of social and environmental conditions or occupational handicaps; (2) inaccessibility of the area; and (3) lack of educational institutions and educational aids. If the aforesaid six factors exist in any remote hill

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5 Ibid.

areas, the habitation test becomes relevant to determine the backwardness of the class of citizen. The Pradip Tandon Court, however, made clear that the same cannot be said about the rural areas, because all citizens residing in rural areas are not socially and educationally backward nor they constitute a homogeneous class by itself as their occupations, standards and lives are different. Despite Pradip Tandon Court's disapproval of the application of the habitation test to rural areas, the T.P. Roshana[6] court extended the habitation test beyond the hill regions to operate on "geographical area", particularly to Malabar district in Kerala State, which is considered to be backward area. This is an unreasonable deviation from the stand taken by the court in Pradip Tandon case, for neither all citizens residing in Malabar district are socially and educationally backward nor they constitute a homogeneous class by itself. Hence Pradip Tandon rule regarding the application of habitation test to determine backwardness of people still holds good and its application is confined to hill areas, provided all the six factors which contribute to the social and educational backwardness of people are found in existence in hill areas.

Compensatory discrimination in favour of weaker sections in the field of education is an important area of study. Equality in law in the sense of absence of discrimination or preclusion

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6. Ibid.

of discrimination of any kind has been embodied in Clauses (1) and (2) of Article 15. Equality in fact in the sense of different treatment in order to attain a result which establishes an equilibrium between different situations has been stipulated in Clause (4) of Article 15. The concept of equality in fact is essentially different treatment in order to attain a result which establishes an equation or equilibrium between two different situations in which the weaker sections and forward communities are found in the society. This, in other words is known as "protective discrimination", "compensatory discrimination" and "adventitious aid". But, whether the compensatory discrimination stipulated in favour of weaker sections is creative in nature or destructive in character depends on two factors, namely, (1) the quantum of compensatory benefits conferred on weaker sections and (2) the duration for which they have been given.

As far as quantum of compensatory benefits is concerned, the Balaji[7] court laid down the following propositions:

1. A special provision contemplated by Article 15(4), like reservation of posts and appointments contemplated by Article 16(must be within reasonable limits.

2. The reasonable limit would be the point of adjustment between the interests of weaker sections of society, which are

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7 See Supra, Ch.VI.

first charge on the States and the Centre, and the interests of the community as a whole.

3. The reasonable compensatory benefits under the special provision should be less than 50 per cent; but how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.

The aforesaid three propositions constitute Balaji rule on the quantum of reservations or compensatory benefits which could be given in any year from the available seats or benefits in favour of weaker sections. The Balaji rule nowhere said that quantum of reservations could ever exceed 50 per cent of the available seats. Its main concern had been to keep the quantum of reservations below 50 per cent of the available seats and this was emphatically conveyed by the statement that how much less than 50 per cent[8] would depend upon the relevant prevailing circumstances in each case.

Nearly thirteen years later, the Balaji rule regarding the quantum of reservations received a jolt, first, in Thomas case[9] and then in Vasanth Kumar case.[10] Four specious arguments advanced by the Thomas and Vasanth Kumar courts to side track

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8 Emphasis supplied.

9 See Supra, Ch.VI.

10 Ibid.

the Balaji rule are that,

(1) the rule that the percentage of reservation should not exceed 50 per cent is a rule of caution and does not exhaust all categories;

(2) the question of reservation cannot be viewed as a conflict between the meritarian principle and compensatory principle, but on the other hand it must be viewed in the light of real conflict between the class of people who have never been in and those who are entrenched in convenient living;

(3) the arithmatical limit of 50 per cent in one year set by some earlier ruling cannot be pressed too far and mathematical formula cannot be adhered to in all cases; and

(4) the dominant purpose of Article 16(4) is to make inadequate representation adequate and therefore the extent of reservation may have to be determined with reference to the inadequacy of representation of Backward Classes in the services under the State.

The above mentioned arguments have been analysed and shown to be untenable and unsustainable in law on the following, among other, grounds:

1. There is nothing in Balaji rule regarding the extent of reservation to indicate that it was intended to be a mere

rule of caution. The rule was evolved after much deliberations and there is no ambiguity in the language used therein.

2. In _Balaji_ case, the question of reservation was not solely viewed either in the light of conflict between meritarian principle and compensatory principle or as a conflict between those who have never even in and those who live in comfort. The extent of reservation was decided therein on the fundamental principle of bringing an adjustment between the interests of weaker sections of society and the interests of the community as a whole.

3. The _Balaji_ court stipulated less than 50 per cent reservations of the available seats or posts in any year as the reasonable limit and as the point of adjustment between the interests of weaker sections of the society and the interests of the community as a whole.

4. The _Balaji_ formula is both flexible and rigid. It is flexible because how much less than 50 per cent of reservation depends on facts and circumstances of each case. It is rigid because the reservations cannot exceed 50 per cent of the available seats or posts. It is rendered rigid at the reasonable limit lest the special provision should swallow the main provision and the interests of the weaker sections overwhelm or destroy the interests of the community as a whole.

5. To dismiss the _Balaji_ rule as a mere mathematical formula

of no lasting value is to ignore the fundamental principle on which it is based and reasonable balance it struck between the interests of weaker sections of society and the interests of the community as a whole.

6. The dominant purpose theory of making inadequate representation adequate is a dangerous concept. If it is pressed to service fully to justify unrestricted reservations, there may not be open competition in many areas for years on end. Hence none of the arguments advanced justified deviation from the Balaji rule. At any rate, Thomas case did not overrule the Balaji rule and Vasanth Kumar propositions are not binding because they were mere views expressed by the judges on the issue of reservations and not part of judgments. The Balaji rule regarding the quantum of reservations, therefore, still holds good.

As far as the duration for which the compensatory discrimination could be continued in favour of weaker sections, there is no clear stipulation. The Periakaruppan Court,[11] however, made a subtle suggestion for prescribing time limit. It said that a Backward Class should not be continued to be treated as Backward Class indefinitely. If done so, it would defeat the very purpose of reservation because once a Backward

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11 Ibid.

Class reaches a stage of progress, which is take off stage, then competition is necessary for their progress. But, there is no precise definition of "take off stage".

The views expressed by the judges in Vasanth Kumar case[12] lent some substance to the concept of time span for reservations. The ideas that emerged from their views are: (1) Means test should be applied to the Backward Classes from now on to prevent cornering of the benefits of reservations by the top creamy layer of the backward castes; (2) There must be quinquennial review of reservations in favour of Backward Classes to make the reservation policy more pragmatic and result oriented; (3) The present reservation policy towards the Scheduled Castes and Scheduled Tribes must continue, without any change, till 2000 A.D.; (4) After 2000 A.D. means test must be applied to the Scheduled Castes and Scheduled Tribes also to prevent privileged section among them from monopolising preferential benefits for an indefinite period of time; and (5) At that time the system of quinquennial review of reservation must be introduced to review reservation in favour of Scheduled Castes and Scheduled Tribes for similar purpose as it is now proposed to be done in the case of Backward Classes.

If the aforesaid suggestions are carried into effect fully

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12 Ibid.

and if the Balaji rule regarding the extent of reservation is strictly adhered to, the compensatory discrimination contemplated in Article 15(4) may prove to be creative instrument to render social justice to the weaker sections.

A close scrutiny of various decisions of Courts on matters pertaining to protective discrimination in favour of Backward Classes in matters relating to public employment has helped to gather a few ideas. First, the Balaji rule[13] regarding the extent of reservations applied to reservations of posts or appointments contemplated by Article 16(4). A new device known as carryforward rule was brought to circumvent the Balaji rule. According to this new device, if the reserved vacancies are not filled in a year they are carried forward to the second year, then to the third year and so on. This led to accumulation of reservations and resulted in huge reservations in a year. The carry-forward rule was struck down by the court on the ground that (1) each year of recruitment must be considered by itself to ensure the right to equality of opportunity in the matter of public employment; (2) the reservation for Backward Classes each year should not be so excessive as to create a monopoly or to interfere unduly with the legitimate claims of other communities; and (3) unlimited reservation of appointments under Article 16(4) would efface the guarantee of

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13 See Supra, Ch.VII.

right contained in Article 16(1). Despite these reasons, the Karamchari Sangh court[14] approved a limited carryforward rule, under which unfilled reserved vacancies in any year could be accumulated up to three recruitment years. This rule has made an unreasonable inroad into the right guaranteed by Article 16(1) and, therefore, it requires a review by a bigger Bench.

Second, the reservation contemplated in Article 16(4) can be made both at the stage of recruitment to public service and at the stage of promotion in service. This proposition is justified on the ground that reservation at the two stages would help to make adequate safeguards for the advancement of the Backward Classes of citizens and to secure for them adequate representation in the services.

Third, protective discrimination in the form of reservation of posts or appointments in public service in favour of Backward Classes, including Scheduled Castes and the Scheduled Tribes has been provided in Clause (4) of Article 16. The Thomas case[15] added a new proposition to the effect that temporary exemption given to the members of the Scheduled Castes and Scheduled Tribes from passing the required tests for Departmental promotions could be justified as a reasonable

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14 Ibid.

15 Ibid.

classification under Article 16(1). The proposition was justified thus: The idea of compensatory State action was to make people who were really unequal in their wealth, education or social environment, equal in specified areas. Equality of opportunity guaranteed by Article 16(1) could be gauged only by the equality attained in the result. Article 16(1) was only a part of a comprehensive scheme to ensure equality in all spheres. It was an instance of the application of the larger concept of equality under the law embodied in Articles 14 and 15. Therefore, Article 16(1) permitted classification just as Article 14 did.

The classification principle introduced into Article 16(1) by Thomas case to justify protective discrimination in favour of members of the Scheduled Castes and Scheduled Tribes in matters relating to public employment is unreasonable and dangerous too. First, it renders Article 16(4) superfluous. Second, if the Thomas proposition that protective discrimination could be accorded in favour of Scheduled Castes and Scheduled Tribes under Article 16(1) is treated as valid, it would amount to attributing inaptitude and lack of understanding to the framers of Constitution who introduced Article 16(4). Third, compensatory discrimination in favour of members belonging to Scheduled Castes and Scheduled Tribes in matters pertaining to public employment is not sustainable under Article 16(1) because any theory of classification based on any of the grounds prohibited by Article

16(2) is void. Fourth, the Thomas proposition has opened the flood-gate of reservations for numerous groups of citizens in matters of public employment.The process set in motion by it may in due course render the right to equality of opportunity in public employment guaranteed by Clauses (1) and (2) of Article 16 redundant. Therefore, it is necessary that Thomas decision must be reviewed by a bigger Bench of the Supreme Court to prevent further inroad into the right to equality of opportunity in public employment guaranteed by Clauses (1) and (2) of Article 16.

Fourth, adequacy of representation was another topic which engaged the attention of the courts. The ideas that emerged from the analysis of decisions of the Courts are that (1) the concept of adequacy of representation cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees; (2) the problem of adequate representation of the Backward Classes of citizens must be fairly and objectively viewed taking into consideration the maintenance of efficiency of administration; and (3) the idea of adequate representation might not, in the nature of things, have been intended to achieve numerical adequacy of representation in the services under the State, for such numerical adequacy of representation is not possible to be secured and maintained perfectly at any point of time even by classes of citizens who are not backward.

Finally, the question was whether Article 16(4) conferred a fundamental right on members of the Backward Classes of citizens? The obvious answer was that it did not confer any such right on the Backward Classes of citizens. It was an exception to Article 16(1) and as such enabled the State to confer privileges on the Backward Classes of citizens by making reservations of posts or appointments in services under the State in their favour.

But, a marked deviation from the aforesaid views was made in Thomas case.[16] It said that Article 16(4) is not an exception to Article 16(1). On the other hand, Article 16(4) is an emphatic way of putting the extent to which equality of opportunity could be carried, namely, even upto the point of making reservations. The Thomas proposition on this issue has been shown to be without substance. Fact of the matter is that the main and preponderant theme of Article 16 is equality of opportunity in the field of public employment and the idea of reservation or compensatory discrimination is subordinate or secondary theme. The former must continue to operate and the latter may be resorted to by the State whenever it deems necessary to render equality of opportunity meaningful to the Backward Classes of citizens. If this relationship between the two themes is ignored, the purpose of Article 16 will be lost.

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16 Ibid.

Besides, the fact that Article 16(4) does not confer fundamental right on Backward Classes of citizens is evident from the fact that no duty has been imposed on the State to make reservations of posts or appointments in Government service in favour of Backward Classes of citizens, nor the provisions of Article 16(4) could be enforced against the State if it fails to make reservations.

As far as women are concerned, the ancient Hindu law treated women with great circumspection. It is true that they were not treated on par with men in matters relating to marriage, dissolution of marriage, right to property, inheritance, etc., but they were not reduced to servile position. The ancient Hindu Law, in fact, gave women a qualified status, which was far better and much more edifying than the position of perfect tutelage and status of manum viri given to women in ancient Roman law. However, certain historical facts of the later period led to crystallisation of restrictive social norms, which effectively deprived women of their valuable rights, such as right to education, right to move freely in public and in society and the right to live after the demise of their husbands. The restrictive social norms and other social practices resulting therefrom reduced the position of women almost to that of a slave. During the last century and the first half of the present century, owing to the inspiring leadership and enlightended views of a few great men like Raja Ram Mohan Roy and others, several

legislative measures were taken, which helped not only to put an end to such reprehensible systems as practices of sati and child marriage but also to alleviate the conditions of women in several spheres of life. But, they touched only the fringe of the problem and did not touch its core.

The Constitution of India unequivocally guaranteed to all, including women, the right to equality. It explicitly prohibited sex-based discrimination. But, at the same time it took into account the reality of the situation arising out of the suppression of women for centuries and treated them as weaker section of the society for purposes of the Constitution and made special provision in Article 15(3) to enable the State to give initial advantage to, and protective discrimination in favour of, women. In consonance with the equlity clause and in pursuance of the protective discrimination provision of the Constitution several legislative measures and executive actions have been taken to improve the position of women. Thus, during the post-Constitution period some definite attempts have been made to improve the position of women in society.

However, one must admit that much more have to be done not only to remove the backlogs created by the centuries-old suppression of women but also to restore to them the status of equality in all spheres of life. First of all, education being an important tool for developing personality of human beings

and a means to achieve socio-economic status in the society, sex-based discrimination in regard to admission of students into educational institutions, which is permissible under Article 29(2) at present, must be removed by a suitable amendment to Article 29(2) in order to ensure equal treatment between men and women in the field of education. No doubt, Article 15(3) enables the State to make special arrangements for women in the educational field also, but an addition of the word "sex" in article 29(2) would enable women to claim admission into some of the prestigious and reputed educational institutions in the country, which are at present exclusively meant for men students. Such an amendment would give a new content to women's right in the field of education and a new dimension to the concept of equality.

Secondly, though laws relating to monogamy and bigamy have brought relief to a large number of women in this country, Muslim women have not been brought within the purview of these laws. Until they are brought within the scope of these laws or until a uniform civil code on these subjects is enacted and applied to all without any discrimination based on religion or personal law, it would be difficult to claim that much has been done for women during the post-Constitution period. Thirdly, an amendment to Article 16 to enable the State to make reservations of posts and appointments in government service for women on the lines of Article 16(4) would go a long way in helping women to compete effectively with men for posts in

government services. The Equal Remuneration Act, 1976, enacted by Parliament in January 1976 contemplates constitution of Advisory Committees to promote employment opportunities for women. The consititution and activisation of such committees in all industrial concerns, firms and business establishments would greatly enhance the employment opportunities of women and consequently the scope for their much needed economic independence.

Thirdly, though sex-based discrimination is prohibited by Articls 15(1) and 16(2) of the Constitution, subtle methods like ingeneously framed rules and regulations and "individualised approach to women's physical capacity" have been used to deny women their right to equality of opportunity in public employment. This must be put an end to.

Finally, though often much emphasis is laid on women's right to equality, in India law relating to domicile has not been changed and married women still take the domicile of their husbands. The courts in India have consistently given effect to the doctrine of unity of domicile.[17] The idea of communicating husband's domicile to his wife immediately upon the solemnisation of marriage and her incapacity during the coverture to acquire a separate domicile of her own is an archaic concept and, at

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17 Allah Bandhi v. U.P., A.I.R., 1954, All 456; Kharimunnisa v. M.P. 19. A.I.R., 1955, Nag.6 etc.

any rate, is inconsistent with the modern notion of independent status of women. This incapacity of married women has been stigmatised by Lord Denning as "the last barbarous relic of a wife's servitude".[18] It may be noted that this incapacity of married women has been mitigated to an extent in the legal systems of the U.S., Germany, Italy and Switzerland.[19] Even in England a great change has been brought about in the law by Section 1 of the Domicile and Matrimonial Proceedings Act of 1973. Section 1 of the Act reads as follows:

Section (1) : Subject to sub-section (2) below, the domicile of a married woman as at any time after coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence she is to be treated as retaining that domicile (as domicile of choice, if it is not her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.

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18 Gray v. Formosa [1962]3, All E.R., 419.

19 Martin Wolff, Private International Law, (2nd Edn., 1950), p.122.

It may be suggested here that if a law is enacted in India more or less on the lines of Section 1 of the above-mentioned Domicile and Matrimonial Proceedings Act of 1973, it would not only remove the existing lacuna in the Indian law but also inject a new content into women's right to equality and their independent status.

Further, it must be said that women are not in any way inferior to men. They are capable of functioning as effectively as men in all spheres of life provided the law is not tilted in favour of men. As a matter of fact, many scholars subscribed to this view. Long ago, Plato said that "no occupation of social life belongs to woman because she is a woman, or to a man because he is a man, but capacities are equally distributed in the sexes and woman should naturally bear her share in all occupations".[20] Another eminent scholar has remarked that only nurture makes the difference between men and women and not nature. In this connection it is pointed out that "legend knows societies in which women specialized in fighting and hunting and men were admitted as in the societies of the bees merely for the act of procreation, after which they would be expelled or killed. In societies of this kind the evolutionary process favours taller, stronger women and more

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20 See Elizabeth Mann Borgese, The Great Ideas Today, (1966), p.15.

delicate men."[21]

A significant statement, however, came from Ellis, who wrote in the 19th century itself, that "modern civilization is becoming industrial, that is feminine in character. For the industries originally belonged to women, and they are apt to equalize men and women.[22]

Proceeding further the author said:

Pregnancy, child birth, and lactation are admittedly physiological facts, and they are handicaps for a woman who wants to compete with men in professional life. But they are handicaps in an individualistic society where the burden of the single patriarchally organized household all fall on her shoulders. They are less so in more 'collectivized' cooperative society-a kibbutze in Israel, a cooperative housing project in Denmark or Sweden where most of these burdens are taken off the shoulders of the individual mother and assumed by the community.[23]

The modern world is fast moving towards more and more industrialisation which has been going on unabatedly and modern

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21 Id., pp.17-18.

22 Id., p.18.

23 Ibid.

societies are gradually discarding their individualistic stance and moving towards cooperative system. These trends are, as pointed out by Ellis, highly favourable to women and to the process of equalisation of opportunities in all spheres of life between men and women. The laws in India after the commencement of the Indian Constitution are trying to keep pace with the modern trends, but they must do much more and become more realistic to catch up with the fast moving modern trends.

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