

**EQUALITY OF OPPORTUNITY IN  
PUBLIC EMPLOYMENT :  
JUDICIAL PERSPECTIVES ON BACKWARDNESS**

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**By**

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### **Declaration**

I declare that the thesis entitled "**Equality of Opportunity in Public Employment : Judicial Perspectives on Backwardness**" is the record of bona fide research carried out by me in the School of Legal Studies, Cochin University of Science and Technology. I further declare that this has not previously formed the basis of the award of any degree, diploma, associateship or other similar title of recognition.

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## Preface

Equality has many facets and equality of opportunity is its most significant aspect. The Constitution of India guarantees non-discrimination and equality of opportunity to all citizens. Many provisions in the Constitution bear testimony to this commitment for an egalitarian social order. The framers of the Constitution devised the technique of protective discrimination through affirmative state action in favour of the backward classes to realise this purpose. Backwardness being an ambiguous, indeterminate and nebulous concept, the judiciary assumes a vital role in ascertaining its meaning and determining its content and scope. This study is an attempt to evaluate the concept of backwardness and equality of opportunity in employment and to assess the judicial perspectives in relation to them.

The thesis consists of ten chapters. The introductory chapter focuses on the objective and relevance of the study. The second chapter examines the jurisprudential basis of protective discrimination for backward classes. The next chapter looks at the historical background. The criteria for determining backwardness and the controversies hovering around them are highlighted in the fourth chapter. The extent and limits of the quantum of reservation are puzzling topics analysed in the fifth chapter. The new idea of "isolated posts" is evaluated in chapter six. The concept of creamy layer, its origin, applicability, criterion and governmental responses are discussed in the next chapter. The impact of marriage, adoption, conversion and migration on backwardness is also a problem of recent origin and is dealt within chapter eight. Enforceability of equality of opportunity in public employment is examined in chapter nine. Conclusions and suggestions are summarised in Chapter ten.

During my study I had immense help from different persons. Professor P. Leelakrishnan, U.G.C. Emeritus Fellow in the School of Legal Studies, Cochin University of Science and Technology, gave me help in more ways than one. I am greatly indebted to him for his advice and keen interest in the work. Amidst his various busy academic work Professor V.D. Sebastian, Dean, Faculty of Law, Cochin University of Science and Technology, had always been enthusi-

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## CHAPTER - I

# INTRODUCTION

Public employment guarantees an opportunity of public participation in the affairs of the State. Though conceptually it may be considered as a new form of property<sup>1</sup> or national wealth<sup>2</sup>, public employment necessitates an equal participation for sharing benefits or powers. Representation of diverse groups and interests is a sine qua non to an efficient administration. For making democracy and unity of the nation real, all sections of the society should have an equal and effective voice in the affairs and governance of the country.<sup>3</sup>

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1. According to Reich, government employment is a new form of property. He says : "Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth : money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale." Charles A. Reich, "The New Property", 73 Yale L.J. 733 (1964).
  2. Justice Chinnappa Reddy holds the view that public employment opportunity is a national wealth in which all citizens are entitled to share and that no class of people can monopolise public employment in the guise of efficiency or other ground. *State of Maharashtra v. Chandrabhan*, (1983) 3 S.C.C. 387 at p. 390. Similarly, Professor Sivaramayya also shares the view that employment constitutes a new form of wealth in India, perhaps, next in importance only to ownership of agricultural land. B. Sivaramayya, "Equality and Inequality : The Legal Framework", in Andre Beteille (Ed.), *Equality and Inequality: Theory and Practice*, Oxford University Press, Delhi, (1983), p. 29 at p. 39.
  3. *Indra Sawhney v. Union of India*, 1992 S.C.C. (L & S) Supp.1 at p. 216 Justice Sawant further said : "The trinity of the goals of the Constitution, viz., socialism, secularism and democracy cannot be realised unless all sections of the society participate in the State power equally, irrespective of their caste, community, race, religion and sex.... "Id. at p. 214.

## 1. *The Backdrop*

The concept of equality of opportunity was a cherished goal of the Indian freedom movement. The inequalities carried on over the centuries and suffered by Indians during the British colonial period were instrumental for a struggle towards this objective.<sup>4</sup> The voices were heard against the westernisation; demands made for due share in public services. Statutory recognition of equality of opportunity in 1833<sup>5</sup> was the direct result of consistent efforts. British policy of uniform representation, without favour to certain high castes or hatred towards others was also the result of the revolt by the latter<sup>6</sup>

A scheme of providing a prescribed percentage of reservation in jobs to Hindus, Muslims, Anglo-Indians or Indian Christians and later depressed classes got recognised in the Province of Madras and other Princely States of South India.<sup>7</sup> The practice of caste/community-wise quota in jobs to backward classes and minorities

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4. J.K. Mittal, "Right to Equality in the Indian Constitution", [1970] *Public Law* 36.
  5. Charter Act of 1833, Section 87 provided that no native nor any natural-born subject of His Majesty would, only on the grounds of religion, place of birth, descent, colour or any of them, be disabled from holding any position, office or employment under the East India Company. This provision was repeated in the Government of India Act 1915 and later in the Government of India Act 1935, Section 298 (1). Even then superior Civil Service was virtually closed to Indians. Promotion was not only denied but rules were also framed so that Indians might be stopped from enjoying a governing position. *Id.* at pp. 59-62.
  6. Parmanand Singh, *Equality, Reservation and Discrimination in India*, Deep and Deep Publications, New Delhi (1985), p. 81.
  7. *Id.* at pp. 81-84.

was established even before the beginning of the twentieth century in southern parts of India.<sup>8</sup> Absence of organised movement in North Indian States was the reason why the idea of reservation became alien to those States.<sup>9</sup> This system of reservation in jobs continued till the attainment of freedom. The Drafting Committee of the Constitution considered the claims of minority communities in public services, but the claims found no favour at the final stage.<sup>10</sup> However, reservation for Scheduled Castes and Scheduled Tribes was retained in the Central Government services.

Those State Governments which had the pre-constitution scheme of reservation for backward class continued it after the commencement of the Constitution. The post-constitution era scintillating with slogan demanding reservation for backward classes at the Centre, resulted in the appointment of the first Backward Class Commission in 1953 called the Kaka Kalelkar Commission under Article 340<sup>11</sup> of

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8. *Ibid*

9. *Id.* at p. 81.

10. The Draft Article 296 (The Present Article 335) of the Constitution prepared by the Drafting Committee provided that "the claims of all minority communities shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services". The expression "claims of all minority communities" was replaced by the "claims of the Scheduled Castes and Scheduled Tribes" at a later stage during the course of the debate. X C.A.D. 229. See also B. Shiva Rao, *The Framing of India's Constitution: Select Documents*, Vol. III (1967), pp. 631-632.

11. The relevant part of Article 340 reads : "*Appointments of a Commission to investigate the conditions of backward classes.* -

1) 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  
*(f.n. contd. on next page)*

the Constitution of India<sup>12</sup>. The Commission's report, however, was rejected. The reason was that the emphasis on caste as the criterion in identifying backward classes "might serve to maintain and perpetuate the existing distinctions on the basis of caste".<sup>13</sup> In due course, the Centre asked all State Governments to draw up their own list for the purpose of reservation of backward classes in educational institutions and jobs. The State Governments appointed Commissions for identifying backward classes. This paved the way for the States to adopt a certain percentage of reservation for those communities.<sup>14</sup>

The Second Backward Class Commission, called the Mandal Commission, was appointed by the Centre in 1979. Determination of the criteria of backwardness, examination of the desirability of reservation in jobs for backward communities and the steps for their advancement were the terms of reference to the Commission.<sup>15</sup> They exhaustively studied the position from many premises including the social dynamics of caste, social justice, merit and privilege and North-South dichotomy of backward classes. Different indices were formulated to constitute the criteria for

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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 conditions 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".

12. For a detailed discussion on this aspect, see *infra* Ch. IV

13. *Supra* n. 3 at p. 343

14. *Id.* at p. 344

15. *Ibid.*

determination of backwardness.<sup>16</sup> The report had to wait for ten years to get the attention of the Central Government, headed by Shri V.P. Singh who took a decision to implement the recommendations with regard to the reservation of 27% of vacancies in civil posts and services<sup>17</sup> in the Central Government.<sup>18</sup> Aftermath of this decision was astounding. The Northern States witnessed widespread violence. On petitions challenging the implementation, the Supreme Court stayed the order of implementation. One year after, the next Government headed by Shri P.V. Narasimha Rao, modified<sup>19</sup> the order, gave preference to poorer sections of backward classes and

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16. *Id.* at pp. 348-353

17. The civil posts and services included public sector undertakings and financial institutions including public sector banks. Para 3 of the O.M. dated, August 13, 1990. *Id.* at p. 356.

18. The Office Memorandum dated August 13, 1990. The relevant portion of it reads : "Subject: Recommendations of the Second Backward Classes Commission (Mandal Report) — Reservation for Socially and Educationally Backward Classes in Services under the Government of India. The Government have carefully considered the report and the recommendations of the Commission. Accordingly orders are issued as follows :

i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

ii) The SEBC would comprise in the first phase the caste and communities which are common to both the lists in the report of the Mandal Commission and the State Governments' lists. A list of such castes / communities is being issued separately". *Id.* at pp. 355-356.

19. The Office Memorandum dated September 25, 1991. The relevant portion of it reads: "... to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said memorandum (of August 13, 1990) with immediate effect as follows:

*(f.n. contd. on next page)*

extended 10% reservation to other economically backward sections of people uncovered by the scheme of reservation. The whole gamut of reservation contained in the two Office Memoranda was subjected to strict scrutiny by a Special Bench of nine Judges of the Supreme Court.<sup>20</sup> The decision discussed several times in the thesis is a landmark in the area of protective discrimination jurisprudence. However, the post-*Mandal* scenario witnesses the emergence of unsettled or unforeseen issues which calls for more and more judicial intervention.

## 2. *Relevance and Objectives of the Study*

Who constitute the backward class ? What is the meaning of backwardness ?

What are the criteria for determination of those categories coming under backward

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- i) Within 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.
  - ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.
  - iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservation are being issued separately". *Id.* at pp. 365-357

20. *Indra Sawhney v. Union of India, supra* n. 3. The Supreme Court, after hearing the several petitions and the respondent Union of India and several States and interveners, delivered six opinions. The leading judgement was delivered by Justice B.P. Jeevan Reddy on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi, JJ., and himself. S.R. Pandian and P.B. Sawant, JJ. wrote separate but concurring opinion. Justices Dr. T.K. Thommen, Kuldeep Singh and R.M. Sahai dissented by their separate judgements.

class ? Should caste or poverty or illiteracy be the criterion ? Can caste alone be the criterion in the determination ? Does reservation based on caste perpetuate the evils of caste system ? Would it be better if poverty be taken as a criterion for identifying backward class ? What is the quantum of reservation ? Who are really the needy and deserving to be designated as backward class ? What is the scope and extent of judicial review in these matters ?

These are some of the significant questions which echoed and re-echoed at various stages of the drafting of the provisions of reservation. The Constituent Assembly had a detailed and prolonged discussion on these aspects. However, there was no consensus on several issues, except on the need for giving adequate representation for certain communities which had not so far been in the affairs of the administration of country. Thus Article 16(4)<sup>21</sup> was incorporated in the Constitution. It reads :

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

With regard to the persons or groups to be included in the backward class it was left to the State Governments concerned. The indeterminacy inherent in the concept of backwardness forced one member to observe that the provision of reservation would be a paradise of lawyers<sup>22</sup> Admitting that this was the fate of every

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21. Article 10 (3) of the Draft Constitution.

22. T.T. Krishnanachary made this observation. VII C.A.D. 698-699.



Constitution, the Constituent Assembly finally reposed its faith in the courts of law.<sup>23</sup> In other words, the framers, wanted to leave controversial and sensitive issues on to the judiciary to examine and decide upon. No wonder that later judicial power became so significant and decisive that it shaped and re-shaped the protective discrimination policies in India. A deep probe into the judicial perspectives on different aspects of backwardness becomes necessarily the objectives of the study.

### 3. *Unsettled Issues : The Problem*

There is a view that the Supreme Court in *Mandal case*<sup>24</sup> could not finally settle the legal conundrums of protective discrimination. The view is developed from the following analysis.

The petitions challenging implementation of the Mandal Commission Report were heard in the first instance by a Constitution Bench and later by a Special Bench of nine judges to whom it was referred. Optimism prevailed on this reference with a hope "to finally settle the legal position relating to reservations", since 'several judgements of the Supreme Court had not spoken in the same voice and final look by a larger Bench should settle the law in an authoritative way'.<sup>25</sup> Does this optimism bear fruits ? If not, what are the unsettled issues still hanging on ? Do new issues emerge ?

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23. Dr. B.R. Ambedkar's reply to T.T. Krishnamachary. *Id.* at p. 700. For a detailed discussion on this topic, see *infra*, Ch. III.

24. *Supra* n. 3

25. This observation was made by the Chief Justice Ranganath Misra, while presiding over the Constitution Bench at the first instance. *Id.* at p. 358.

The fears expressed above are reflected in a Tamil Nadu legislation which creates the quantum of reservation as a puzzle.<sup>26</sup> The legislation prescribed 69% of reservation against the stand of *Balaji* and *Mandal*. Placed into the Ninth Schedule of the Constitution it got insulated from judicial attack.<sup>27</sup> The Karnataka Government too passed a legislation in a similar line. These legislations are a prima facie negation of the 50% limit prescribed by *Mandal* decision. Similarly the Supreme Court did not foresee the applicability of reservation to isolated posts, though a case regarding that issue<sup>28</sup> was decided by the Supreme Court in pre-*Mandal* era which created controversies among High Courts.<sup>29</sup> Now a recent decision of a Constitution Bench of the Supreme Court holding that reservation should not be applicable to isolated posts has become only an addendum to the controversial issue.<sup>30</sup> The impact of marriage, adoption, conversion and migration on backwardness<sup>31</sup> is another significant dimension of the reservation, unnoticed by *Mandal* decision, which grew in the post-*Mandal* period.

The idea of elimination of creamy layer, one of the significant orders of the Court in *Mandal case*, has grown into a major issue<sup>32</sup>, another unforeseen off-shoot

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26. For a detailed discussion, see *infra* Ch. V

27. For a detailed account, see *Id.* at nn. 93-109 and the accompanying text.

28. *Chakradhar Paswan v. State of Bihar*, (1988) 2 S.C.C. 214

29. For details of this aspect, see *infra* Ch. VI.

30. *Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association* (1998), 4 S.C.C. 1.

31. For a detailed discussion on this aspect, see *infra* Ch. VIII

32. See *infra* Ch. VII.

of *Mandal* decision. This is evident in certain State Governments' attempts either to directly circumvent the order of the Court or put much relaxation to the criteria laid down by the Central Government for the elimination of creamy layer. *Mandal* decision did not lay down the right to reservation as a part of fundamental right, though it was held that the provision of reservation was not an exception but a special provision explanatory of the nature of the main provision.<sup>32a</sup> In the light of the judicial activism, the question may arise whether it is possible or not for a citizen, especially one belonging to a backward class, to successfully challenge the action or inaction of the Government in reservation related policies as a matter of fundamental right. These are some unforeseen and unravelled issues in *Mandal*.

#### 4. *Competing Claims : The Judicial Task*

Reservation is an area of conflicting and competing equalities. It is the task of the judiciary to reasonably prune and nicely accommodate the claims within the constitutional contours of equality and rights of the backward classes. No doubt this process involves an inherent tension. The tension is between the broad purposes in the Preamble and other constitutional commitments.<sup>33</sup> The main reason for tension is explained by Galanter in the following words :

"In the Constitution, the compensatory theme appears juxtaposed with the theme of formal equality. The provisions for compensatory preference appear as exceptions within a framework of enforceable fundamental rights

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32a. See *infra* Ch. IX

33. Marc Galanter, *Competing Equalities : Law and the Backward Classes in India*, Oxford University Press, Delhi (1984) p. 377

which attempt to curtail the significance of ascriptive groups and to guarantee equal treatment to the individual."<sup>34</sup>

Thus the group rights are pitted against individual rights to non-discrimination. Moreover, the heart of the principle of protective discrimination<sup>34a</sup> is laid among the unenforceable directive principles. This created the chance of conflict between fundamental rights and directive principles. This constitutional alignments of the antagonistic principles confronted the courts with the problem of weighing, balancing and reconciling them in specific setting. The sweeping language of Articles 15(4)<sup>35</sup> and 16(4) indicates that the framers of the Constitution relied primarily on the discretion of the administrators of the future to effectuate the application of the provisions of reservation. However, the broad discretion given to the executive and legislatures and the very exceptional nature of reservation provisions called for judicial intervention. Moreover, the framers, ultimately, were optimistic in the judicial wisdom of finding out solutions to the then ongoing issues of indeterminacy.

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34. *Id.* at p. 364.

34a. Constitution of India, Article 46 which reads : "*Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections* — 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."

35. *Id.* Article 15(4) reads : "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

The meritocracy versus egalitarianism<sup>36</sup>, immediate advantage of utilisation of talent versus long range interest of removal of inequalities<sup>37</sup> and finally the claims of backward groups versus the claims of other sections<sup>38</sup> are some of the species in this genus of conflicting interests demanding a sustainable settlement.

The situation makes it to travel exploring the philosophical basis of protective discrimination. The courts had already taken up this journey in the past initiated by Justice Subba Rao in *Devadasan*<sup>39</sup>, crossing the different landmarks in *Thomas*<sup>40</sup>, *Soshit*<sup>41</sup>, *Vasanth Kumar*<sup>42</sup>, and *Mandal*<sup>43</sup>. The Court in the *Mandal case* went overseas for sharing the experiences of affirmative action in the United States. The findings of the Court included the realisation of the purpose of protective

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36. E.g. *State of Kerala v. N.M. Thomas*, A.I.R 1976 S.C. 490 at p. 534. *per* Krishna Iyer, J; *Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India*, (1981) 1 S.C.C. 246, *per* Krishna Iyer J. at pp. 266, 270, 274; *K.C. Vasanth Kumar v. Union of India*, A.I.R. 1985 S.C. 1495, *per* Chinnappa Reddy, J. at pp. 1508-1510.

37. E.g., *A. Periakaruppan v. Union of India*, A.I.R. 1971 S.C. 2303 at p. 2309, *per* Hegde .J.

38. E.g., *T. Devadasan v. Union of India*, [1964] 4 S.C.R 680 at pp. 690-691 *per* Mudholkar, J., *M.R. Balaji v. State of Mysore* [1963] Supp. 1 S.C.R. 439 at p. 442 *per* Gajendragadkar .J., *General Manager, Southern Railway v. Rangachari* [1962] 2 S.C.R. 586 at p. 589 *per* Gajendragadkar, J.

39. *T. Devadasan v. Union of India*, [1964] 4 S.C.R. 680

40. *Supra* n. 36

41. *Ibid.*

42. *Ibid.*

43. *Supra* n. 3

discrimination as a measure of equalisation by offsetting historically accumulated inequalities<sup>44</sup> exploding certain myths of the past<sup>45</sup> perceiving that reservation as an explanation to the main provision of equality of opportunity<sup>46</sup>, considering reservation as a part and parcel of the human rights<sup>47</sup> and finally recognising the right to reservation as an aspect of sharing the state power.<sup>48</sup>

In this process of judicial review, several issues got settled but several new issues emerged. The various criteria for determination of backwardness, the principle of quantum, creamy layer, reservation in solitary posts, impact of marriage, adoption, conversion and migration on backwardness and the enforceability of right to reservation are definitely offshoots. The study focusses its attention on the various dimensions of the judicial approach and the problems it created as well as solved.

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44. E.g., *Devadasan Supra* n. 30 at p. 700 *per* Subba Rao, J., at p. 690 *per* Mudholkar, J.
  45. E.g., Chinappa Reddy's observation in *Vasanth Kumar* regarding the fallacy of giving over emphasis to meritocracy, *supra* n. 36 at pp. 1508-1510.
  46. E.g., *N.M. Thomas, supra* n. 36 at p. 519 *per* Mathew, J., at p. 534, *per* Krishna Iyer, J., *Mandal Case, supra* n. 3 at pp. 395, 438-39 *per* Jeevan Reddy, J.
  47. E.g., *Vasanth Kumar, supra* n. 36 at p. 1508 *per* Chinnappa Reddy, J.
  48. *Mandal case, supra* n. 3 at p. 214 *per* Sawant, J., at p. 424 *per* Jeevan Reddy, J.

## CHAPTER - II

# BASIS OF PROTECTIVE DISCRIMINATION TO BACKWARD CLASSES : A JURISPRUDENTIAL ENQUIRY

In a civilised social system, law plays not only the role of guarantor of justice, equality and liberty, but also as a tool for attaining the ends of justice. In this respect the modern democratic state has to adopt objective standards to protect the human rights of its citizens. Equality is one among those cardinal human rights by which the State is mandated to treat the equals equally and unequals unequally when it distributes its own benefits to the people. But who are equals and who are unequals is a thorny issue, for the limited resources are much valuable and required by the various group of people and they have to be distributed justly and fairly. In the Indian constitutional scheme, it had been envisaged by the framers<sup>1</sup> that there should be equality of opportunity is for all citizens in public employments and such equality of opportunity a fundamental right of the citizens.<sup>2</sup> At the same time, the need for some beneficial treatment to the weaker sections<sup>3</sup> of the society was also enshrined with that right. What is the basis of distribution of societal resources to certain sections? The thrust of this Chapter goes with the following enquiry. Is there any jurisprudential foundation for protective discrimination ? If so what is it ? This

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1. For a detailed account of the deliberations of the Constituent Assembly, See Ch. III.
  2. Constitution of India 1950, Article 16 (1) reads : "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".
  3. *Id.*, Article 16 (4) reads:

*(f.n: contd. on next page)*

aspect is assessed from the angle of different theories of justice viz., social justice, distributive justice, equality and equal opportunity and social engineering theory. The responses of Indian courts in this regard are also examined.

### *1. Justice : Meaning and Content*

The concept of justice is even older than that of law.<sup>4</sup> The maxim, *fiat justitia ruat coelum*, i.e., let heavens fall, justice has to be done, is the quintessence of all philosophies the human beings have founded. Justice is considered to be the primary goal of welfare State whose very existence, in turn, rests on the parameters of justice.<sup>5</sup> The principle of justice is neither precise<sup>6</sup> nor well-defined.<sup>7</sup> Justice is a word of ambiguous import<sup>8</sup>. As Alfred Denning said :

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4. S.N.M. Raina, *Law Judges and Justice*, Vedpal Law House, Indore (1979), p. 26.

5. C.K. Allen, *Aspects of Justice* (1958), p. 28.

6. Otto A. Bird rightly said: "A theory of justice may cover much territory and include many topics and sub-topics, its range is vast in that justice is taken often as a kind of umbrella topic covering a wide variety of problems and considerations", *The Idea of Justice*, Frederick A. Praeger, New York (1967). p. 7.

7. Justice Mathew said: "I cannot define it, but know what it is", Upendra Baxi (Ed.), *K.K. Mathew on Democracy, Equality and Freedom* (1978), p. 34. Harold Potter said: "... most men think that they understand the meaning of justice, but, in fact, their notions prove to be vague", *The Quest of Justice*, (1951), p. 3. Alfred Denning said: "... what is Justice? That question has been asked by many men far wiser than you or me and no one has yet found a satisfactory answer", *The Road to Justice*, Stevens and Sons Ltd., London (1955), p. 4. Hans Kelsen said: "No other questions has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was", *What is Justice?* (1957) p. 1.

8. V.R. Krishna Iyer, *Social Justice - Sunset or Sundawn*, Eastern Book Co., Lucknow (1987), p. 28.



"All I would suggest is that justice is not something you can see. It is not temporal but eternal. How does man know what is justice ? It is not the product of his intellect but of his spirit. The nearest we can get to defining justice is to say that it is what the right-minded members of the community — those who have the right spirit within them — believe to be fair."<sup>9</sup>

The traditional definition of justice is underlined in the maxim, *suum cuique tribuere*,<sup>10</sup> to render to each person his or her due. The origin of the concept of justice dates back to the beginning of the human cultural heritage.<sup>11</sup> It was first viewed as a kind of metaphysical and cosmological principle regulating the operation of forces of nature on the elements of universe, securing balance and harmony among all. The notion of justice was explicitly recognised later in the injunction given to judges, as found in ancient Egypt or in Hebrew law, to administer the law impartially, 'to hear the small as well as the great'.<sup>12</sup> However, even the impartial administration of law did not result in complete and real equality. Later, it was recognised that laws which are impartially applied might themselves be unequal. Hence it was felt that differential treatment required justification in terms of relevant differences.<sup>13</sup> This

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9. Alfred Denning, *The Road to Justice*, Stevens and Sons Ltd., London (1955), p. 4.

10. "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*" is the famous precept of Justinian's Institutes which means that justice is the steady and increasing disposition to render every man his due. A.K. Sen, *Justice for the Common Man* (1967), p. 18.

11. Morris Ginsberg, *On Justice in Society*, Penguin Books, England (1965), p. 64.

12. *Ibid.*

13. Julius Stone, *Human Law and Human Justice*, N.M. Tripathi, Bombay (1965), p. 9.

paved the way for removing arbitrary discrimination such as those based on race, colour, religion and sex. Further, the notion of impartiality was extended by applying it to a wider range of rights and duties.<sup>14</sup> Thus, there was a movement from equality in political rights to equality in social and economic rights. Accompanying this transition was a shift of emphasis from 'commutative justice' as a sort of equivalent of exchange or balance of claims and counter-claims between individuals, to 'distributive justice' as a social responsibility assuring to all at least the minimum condition of physical and mental well-being.<sup>15</sup> This doctrine has, ever since the very earliest times, become the possession of the western philosophical tradition through Plato, Aristotle, Cicero, Ambrose, Augustine and above all through Roman Law.<sup>16</sup> This perception contains the distributive element. As Paul Elmore More said, 'it is the act of right distribution'.<sup>17</sup> According to Kelsen, 'the longing for justice is man's eternal longing for happiness. It is happiness that man cannot find alone, as an isolated individual, and hence seeks in society. Justice is social order'. The happiness, as he clarified, is the objective satisfaction of certain needs, recognised by the social authority, the law giver, as needs worthy of being satisfied, such as the need to be fed, clothed, housed and the like.<sup>18</sup>

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14. *Ibid.*

15. *Ibid.*

16. Joseph Pieper, *Justice*, p. 12, as cited in Sudhesh Kumar Sharma, *Distributive Justice under Indian Constitution*, Deep and Deep, New Delhi (1989), p. 22.

17. *Id.* at p. 11.

18. *Ibid.*

The essence of the principle of justice is the 'recognition of each person as an autonomous moral individual, with claims as a person equal to those of another person, equally free and responsible for his own life, work and affairs'.<sup>19</sup> Del Vecchio succinctly explained the same fundamental principle in the following words:

"It demands the equal and perfect recognition, according to pure reason, of the quality of personality *in oneself as in all others*, for all the possible interactions among several subjects."<sup>20</sup>

The principle of justice has another facet of confronting injustice. As Edmond Cahn said, 'justice is not a collection of principles or criteria', but it is 'the active process of preventing or repairing injustice'.<sup>21</sup> Thus, justice has become the end of government<sup>22</sup> and the end of law.<sup>23</sup>

## 2. *Justice and Equality*

Equality as an aspect of justice, has two phases, viz., equality as a means of doing justice and as an end of justice.<sup>24</sup> The concept of equality cannot easily

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19. R.W. Baldwin, *Social Justice*, Pergamon Press, Oxford (1966), p. 15.

20. Giorgio Del Vecchio, *Justice*, University Press, Edinburgh (1952), p. 116. Emphasis in original.

21. Lenore L. Cahn (Ed.) *Confronting Injustice: The Edmond Cahn Reader*, Little, Brown and Co., Boston (1962), p. 381.

22. V.R. Krishna Iyer, *Law Versus Justice: Problems and Solutions*, Deep and Deep Publications, New Delhi (1981), p. 9.

23. V.R. Krishna Iyer, *Social Justice — Sunset or Dawn*, Eastern Book Co., Lucknow (1987), p. 2.

24. Sudhesh Kumar Sharma, *Distributive Justice under Indian Constitution*, Deep and Deep Publications, New Delhi (1989), p. 71.

be defined in absolute terms, because, it depends upon factors such as place, persons, time, subject matter etc., in a particular society. It has multidimensional connotations. Justice Mathew aptly said:

"The claim for equality is in fact a protest against unjust, undeserved, and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges".<sup>25</sup>

To meet justice, justice should be ensured to all citizens. The canon of equality is always an expectation that justice should be there by treating equals equally. But, when the subjects involved in the treatment to attain equality, the justice principle varies based on the claims of different groups, i.e., equals and unequals. Fairness which is the other side of justice principle, in a relative sense, requires various methods of treatment by the State from one person to another depending upon the social necessities. Hence, to attain the real equality, different kinds of approaches are required.

Julius Stone rightly explained the paradox vested in the insistence of formal equality in the following words:

"The simple and ancient but still important truth is that we cannot insist on equality in all respects, of *both* treatment in law *and* positions in fact. For positions in fact, independent of what the law may do, are always unequal. Equal treatment by the law operating on such factual inequalities of powers, talents and personal fortune, would often sanctify or even deepen such factual inequalities".<sup>26</sup>

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25. *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490 at p. 513.

26. Julius Stone, *Human Law and Human Justice*, N.M. Tripathi (P) Ltd., Bombay (1965), p. 334, Emphasis in original. Footnotes omitted.

He underscored the significance of unequal treatment in this context : For removing or reducing factual inequalities by the law must itself resort to unequal treatment of the persons concerned. According to him, the choice is not between equal treatment and the making of distinctions, it is between making (or tolerating) distinctions which can be justified, and making (or tolerating) those which cannot be justified.<sup>27</sup> Justice V.R. Krishna Iyer also expressed the relation between equality and justice in a similar fashion.<sup>28</sup> Regarding the elimination of inequalities, he said

"A community secures justice when its due is meted out so that its cultural life, in esse and in posse, contributed by each of its members, blossoms without the frost-bite or blizzard of governmental or majoritarian inhibitions, prove importantly, if the group, in its collective personality, is weak, suppressed or voiceless, right and justice demand that its desperate inequality be demolished and cultural integrity preserved by affirmative State action, so as to restore, through dynamic measure of equalisation, a broad level of actual equality with the general community".<sup>29</sup>

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27. *Ibid.*

28. "Equality, inseparable from justice, is not a procrustean rigidity totem, but an activist process involving elimination of antecedent disparity and establishment of the vibrant actuality of equal status". V.R. Krishna Iyer, *Law versus Justice: Problems and Solutions*, Deep and Deep Publications, New Delhi (1981), p. 16.

29. *Id.* at pp. 15-16.

### 3. *Distributive Justice*

The contemporary legal philosophers have classified justice into many categories<sup>30</sup> and distributive justice bloomed from the natural law principles of jurisprudence. The substantial connection of justice and equality can be traced out from the philosophy of distributive justice. This concept aims at ensuring a fair division of social benefits and burdens among the members of a society. In the words of Aristotle, the founder of this concept, distributive justice 'is expressed in the distribution of (public assets such as) honour, wealth and other divisible assets of the community'.<sup>31</sup> Aristotle identified justice in this area as some sort of equality among those who have to share the common goods or honours.<sup>32</sup> According to Nicholas Rescher, distributive justice embraces the whole economic dimension of social justice, i.e., the entire question of the proper distribution of goods and services within the society.<sup>33</sup>

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30. E.g., "legal justice" denotes the justice administered between the parties to an action by the courts; "social justice" regulates the rights, privileges and duties of individuals considered as members of society; "restorative justice" restores to a person his or her rights; "distributive justice" attends to the distribution among men of the rights, privileges, immunities, duties and obligations including benefits and burdens which belong to them as members of society; "reparative justice" secures to the deserving man his dues; "retributive justice" gives undeserving man his deserts. Sudesh Kumar Sharma, *supra* n. 23 at pp. 18-19.

31. W.D. Ross, *Aristotle*, Methuen & Co., London (5th edn., 1949), Ch. 7.

32. Upendra Baxi (Ed.), *K.K. Mathew on Democracy, Equality and Freedom*, Eastern Book Co., Lucknow (1978), p. 53.

33. Nicholas Rescher, *Distributive Justice*, Bobs-Merrill Co., New York (1966), p. 5.

The task of a theory of distributive justice is to provide the machinery in terms of which one can assess the relative merits or demerits of a distribution, the assessment in question being made from the moral or ethical point of view. Its objective is to establish a principle by which the assessment of all alternative possible distributions can be carried out.<sup>34</sup> Rescher further said that the evaluation criterion of an adequate theory of distributive justice must be capable not simply of absolute idealization (*i.e.*, of telling us what the ideal is), but also of relative evaluation (*i.e.*, of telling us which of several possible alternatives is to be regarded as the most satisfactory.<sup>35</sup>) Hence the administrators who distribute the benefits ought to know the feasible alternative best methods. In India the State is the major provider of employment opportunities and the State has to adopt various strategies and evaluate many factors for an effective application of distributing its benefits on the basis of some objective standards such as the merit, desert and need of the person.

The philosophy of distributive justice<sup>36</sup> which mandates uneven distribution of benefits among unequals has been transplanted into the Indian Constitution in its Preamble, Fundamental Rights and Directive Principles of State Policy. Articles

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34. *Id.* at p. 7.

35. *Id.* at p. 8.

36. Jeremy Bentham in his work changed the vision of distributive justice when he adopted the theory of utilitarianism. In that he said "the ultimate goal of law and justice is maximum happiness of the maximum people" (pain and pleasure theory). For details see, M. Jeremy Bentham, *The Theory of Legislation*, N.M. Tripathi Pvt. Ltd., Bombay (1975) p.19.

38<sup>37</sup>, 39<sup>38</sup> and 46<sup>39</sup> are guiding stars in this respect, though they do not lay down the principles of eliminating social inequalities and for the distribution of the material resources of the community which would subserve the common good.

In general, to distribute the benefits or employment, merit is considered as the core element to determine the intelligence or ability of a person. But the environment of a person is the significant factor which influences in many ways in contributing or building up of one's intelligence. Due to the existing social

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37. Article 38 reads: "*State to secure a social order for the promotion of welfare of the people* — (1) The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a 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 group of people residing in different areas or engaged in different vocations".
38. Article 39 reads: "*Certain principles of policy to be followed by the State* — 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...."
39. Article 46 reads : "*Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections* — The State shall promote with special care the educational and economic interests of the weaker sections of the people, and , in particular, of Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation".



inequalities in India, to achieve the objective of egalitarianism through distributive justice, the State has to identify various interest, roles, powers and authorities in different sectors of human life.<sup>40</sup>

#### 4. *Equality and Equality of Opportunity As Principles of Distributive Justice*

In the individualistic approach, equality means the equal distribution of benefits of the State without any favourable consideration. This principle can be disputed in the modern jurisprudential point. Friedmann's words are much relevant in this context. He said that the principle of absolute equality between individuals of all classes and races could not be understood in a rigid sense. It did not mean the abolition of the natural differences, which any way, is not within man's power to abolish, but of man-made differences inherent in the organisation of the society. It is the task of law, in democratic societies, to remove those inequalities.<sup>41</sup> The significance of equality content in distributive justice is emphasised in the following definition put forward by Torstein Echoff:

*"Distributive justice is the term I shall use for those principles of justice which apply to situations of allocation. Their central idea is that recipients should be treated equally. Both retributive and distributive justice, then, are connected with equality."*<sup>42</sup>

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40. T.N. Kitchlu, "Scheduled Castes and the Problems of Equality", in Mohammed Imam (Ed.), *Minorities and the Law* (1972), p. 143 at p. 144.

41. W. Friedmann, *Legal Theory* (1960), p. 387.

42. Torstein Eckhoff, *Justice: Its Determinants in Social Interaction*, Rotterdam University Press, Norway (1974), p. 31.

The principle has been tailored into Indian Constitution through Article 14, the saviour of rule of law and distributive justice. The first part of Article 14 warrants that the State shall not deny to any person "equality before the law" and the second part guarantees "the equal protection of the laws".<sup>43</sup> The former is somewhat a negative concept implying the absence of any special privilege in favour of an individual and providing for the equal subjection of all classes to the ordinary laws. The latter is a more positive concept implying the equality of treatment in equal circumstances as well as the unequal treatment of unequals.<sup>44</sup> However, one dominant idea common to both the expressions is that of 'equal justice'.<sup>45</sup>

In a wider perspective equality on a principle of distributive justice amounts to no more than that man should all be treated in the same way, save where there is sufficient reason to treat them differently.<sup>46</sup> The word sufficient reason has a relevance when determining to whom the benefit should be given. The value of equality demands the giving of a favourable treatment to the deprived and the weaker sections of the society to enable them to compete with fairness with the well-to-do and the more advanced members of the society.<sup>47</sup>

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43. Constitution of India, Article 14 reads: "*Equality before law* — The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

44. *State of U.P. v. Deoman*, A.I.R. 1960 S.C. 1125 *per* Subba Rao, J. (as he then was) at p. 1134.

45. Sharma, *supra* n. 24 p. 81.

46. *Id.* at p. 71.

47. *Id.* at p. 79.

While analysing the concept of equality of opportunity in *N.M. Thomas*,<sup>48</sup>

Justice Mathew observed:

"The notion of equality of opportunity is a notion that a limited good shall in fact be allocated on the grounds which do not *a priori* exclude any section of those that desire it.... What, then, is *a priori* exclusion ? It means exclusion on grounds other than those appropriate or rational for the good (posts) in question. The notion requires not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, but that the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them".<sup>49</sup>

Justice Mathew rightly construed the term equality of opportunity by maintaining equality as the main pillar of distributive justice. Accordingly, equality in fact may involve the necessity of differential treatment in order to attain a 'result' which establishes an equilibrium between different situations. In the final analysis, he said:

"Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains in so far as, and only in so far as, each member of a community, whatever his birth or occupation or social

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48. *Supra* n. 25.

49. *Id.* at p. 514.

position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence".<sup>50</sup>

Justice A.P. Sen in a case concerning the restoration of alienated lands of tribal people applied the principle of distributive justice by observing that law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of the society upon the principle of 'from each according to his capacity to each according to his needs'. He further said:

"Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceilings on holdings, both agricultural and urban, or by direct regulation of contractual transaction, by forbidding certain transactions and, perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargaining should be restored their property".<sup>51</sup>

He rightly observed that all such laws might take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of the society.

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50. *Id.* at pp. 515-516. As it is cited by Mathew, J., this idea is taken from R.H. Tawney, *Equality* (1965), pp. 103-104.

51. *Lingappa Pochanna v. State of Maharashtra*, A.I.R. 1985 S.C. 389 at p. 398. The decision, concerning the applicability of distributive justice, was followed by a Division Bench of the High Court of Assam in *Joy Kanta Hira v. State of Assam*, A.I.R. 1988 Gau. 25 at p. 27 *per Saikia Actg. C.J.*

Similarly Justice Krishna Iyer emphasised the need for positive state action with a view to attaining equal partnership of the Scheduled Castes and Scheduled Tribes with others in our society, when he said :

"Re-distributive justice to harijan humanity insist on effective reforms, designed to produce equal partnership of the erstwhile 'lowliest and lost', by State action, informed by short-run and long-run sociologically potent perspective planning and implementation. An uneven socio-economic landscape hardly gives the joy of equal opportunity and development or draw forth their best from man-power resources now wallowing in the low visibility areas of discontented life."<sup>52</sup>

In toto, the concept of equality involves an 'equilibrium creating'<sup>53</sup> or 'equilibrium oriented'<sup>54</sup> compensatory discrimination. The *summum bonum* of the jurisprudential principle of Article 14, the saviour of rule of law and distributive justice, is that the State has to adopt discriminative practices when unequals are involved.

##### 5. *Fair Equality of Opportunity*

According to Rawlsian theory, justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic

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52. *Supra* n. 25 at p. 530.

53. Justice Mathew distinguished between formal equality and actual equality or equality of result in maintaining the equilibrium. See *supra* nn. 49 and 50 and the accompanying text. Justice Krishna Iyer also viewed thus : "Equilibrium in human terms, emerge from release of the handicapped and the primitive from persistent social advantage, by determined creative and legal manoeuvres of arid equality". *Id.* at p. 530.

54. K.P. Krishna Shetty, *Fundamental Rights and Socio-economic Justice in the Indian Constitution* (1969), p. 160.

opportunities and social conditions in the various sectors of society.<sup>55</sup> Rawls in his contractual theory of justice put forward two principles of justice in the following manner:

"First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second : social and economic inequalities are to be arranged so that they are both:

- (a) reasonably expected to be to everyone's advantage, and
- (b) attached to positions and offices open to all." <sup>56</sup>

The first principle, *i.e.*, the principle of equal liberty, envisages that all the citizens of a just society are to have the same basic liberties such as political liberty together with freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of person and right to hold property.

These basic liberties are not to be sacrificed for the sake of increased share of other social goods. The second principle, *i.e.*, the difference principle applies 'to the distribution of income and wealth and to the design of organisations that make use of differences in authority and responsibility, or chains of command. While the distribution of wealth and income need not be equal, it must be to everyone's advantage, at the same time, positions of authority and offices of command must be accessible to all'.<sup>57</sup>

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55. John Rawls, *A Theory of Justice*, Oxford University Press (1973), p. 7.

56. *Id.* at p. 60.

57. *Id.* at p. 61.

The justice principle warrants fair treatment or behaviour by the State. If all are equal, the mathematical formula can be adopted. But when there are undeserved inequalities of birth and natural endowment, the question is : How can these inequalities be redressed ? Rawls correctly answers that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and those born into less favourable social positions.<sup>58</sup> The basic idea according to him, is the principle of redress i.e., 'undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for.'<sup>59</sup>

Rawls's principle of "fair equality of opportunity" is significant in its priority and distributive content. He suggests a serial order of strict priority for the different demands of justice. David Miller explicitly highlights the lexical ordering in the following words:

"An equal liberty has first priority, followed by the demand for fair equality of opportunity. Only when these are fully satisfied can we turn to arranging social and economic inequalities so that they work to the greatest benefit of the least advantaged member of society".<sup>60</sup>

The principle of fair equality of opportunity demands that positions and offices should be opened to all, i.e., they should be allotted on the basis of ability and skill rather than on the basis of birth or influence. The difference principle, which

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58. *Id.* at p. 100.

59. *Id.* at p. 101.

60. David Miller, *Social Justice*, Oxford University Press, London (1976), p.41.

demands that inequalities are arranged so that the worst-off enjoy the maximum benefit possible, will normally ensure that basic needs are fully cared for. This principle forms part of the principle of fraternity.<sup>61</sup>

Rawls's principle of justice is rooted in his basic bedrock of justice that 'all social values — liberty and opportunity, income and wealth, and the bases of self-respect — are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage'.<sup>62</sup>

Dworkin went further by modifying the Rawlsian concept of justice in the following manner. According to him there are two different kinds of rights which individuals may be said to have. The first is the right to equal treatment which is the right to an equal distribution of some opportunity or resource. The second is the

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61. *Id.* at pp. 48-49. The principle of fair equality of opportunity states nothing about the level of reward which may be attached to different positions and office. Similarly the difference principle does not describe how wealth and other goods should be distributed to persons. *Id.* at p. 43.

62. Rawls, *supra* n. 55 at p. 62. Norman E. Bowie, in his new theory of distributive justice criticise Rawls's theory as 'inadequate on theoretical and practical grounds' and added that the problem of distributive justice is to apply and order the relevant values in scarcity situations. He said: "A distribution is just if and only if it results from a correct application and ordering of the relevant values." According to him, this principle is meant to be a necessary and sufficient condition for any just distribution. Norman E. Bowie, *Towards A New Theory of Distributive Justice*, University of Massachusetts Press, Amherst (1971), p. 108. Wolff also criticised the Rawlsian theory of justice as it had not been sought in the right way. Robert Paul Wolff, *Understanding Rawls*, Princeton University Press, New Jersey (1977), p. 210. Rawl's theory is further criticised as an idealistic one dependent on a well ordered society which does not exist. Rakesh Sutahra, "Equality and Ideology", (1985) 2 S.C.C. (Jour.) 1 at p. 5.



right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else,<sup>62a</sup> . The right to "equal concern and respect", according to him, is the most fundamental and even axiomatic of all rights.<sup>63</sup> He said:

"Justice as fairness, rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice".<sup>64</sup>

This right is owed to human beings as moral persons and follows from the moral personality that distinguishes humans from animals. Thus Dworkin emphasises that 'individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them'.<sup>65</sup> Any arrangement for the allocation of social positions and goods has to be on the basis of this right.

Norman Anderson also added one further principle to Rawls' theory that 'the goal of equality of opportunity loses much of its cogency unless all that is feasible is done to put those who are disadvantaged by heredity or circumstances in a position to compete with others on as equal terms as can realistically be attained'.<sup>66</sup>

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62a. Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (1977), p. 180.

63. *Id.* at p. xii.

64. *Id.* at p. 182.

65. *Id.* at p. 180. .

66. Norman Anderson, *Liberty Law and Justice*, Stevens and Sons Ltd., London (1978), p. 140.

The framers of the Indian Constitution had realised the significance of social justice principle when they tailored it into the preambular objectives and a separate chapter was devoted, the directive principles of state policy. As correctly observed by a jurist:

"A re-distribution of resources envisaged by the Directive Principles and the Preamble would certainly be much more radical and wide-ranging in its effect than the Rawls' difference and rational principles ..."<sup>67</sup>.

When there are many barriers on the access to position of authority, what sort of protection could be given to the worst-offs in the process of classifying the higher-ups and lower-downs ? Because, in an egalitarian democratic system, the State is duty bound to protect not only the equals but also unequals. In order to comply with the philosophy of Rawlsian theory of justice, the State has to adopt many tools and techniques to determine who constitute unequals. For that Rawls answered, 'that State can take the position of certain individual representatives and consider how the social system looks upon them'.

#### *6. Social Justice and Its Sociological Perspective*

The administration of justice has a social dimension and society at large has a stake in impartial and even-handed justice.<sup>68</sup> The relevance of the concept of social justice in Indian society is lucidly highlighted by Justice V.R. Krishna Iyer thus:

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67. Jagat Narain, "Judges and the Distributive Justice" in Rajeev Dhavan, *et. al.* (Eds), *Judges and the Judicial Power*, N.M. Tripathi Pvt. Ltd., Bombay (1985), p. 191 at p. 194.

68. V.R. Krishna Iyer, *Justice at Crossroads*, Deep and Deep Publications, New Delhi (1992), p. 120.

"In a democratic system with a socialist slant, afflicted by pervasive, poignant poverty and instant on planned development, social justice has a distinctive hue, 'egalite' a militant quality and human rights a radical thrust".<sup>69</sup>

During nineteenth and twentieth centuries many countries became free from the clutches of colonisation that led to the abandoning of laissez faire principle and embracing welfarism. This paved the way for protecting the individual's rights on the basis of social justice principle. This principle is the concomitant of a just State<sup>70</sup> which strives to promote the welfare of the people by securing and protecting a just social order.<sup>71</sup> Social justice demands the abolition of all sorts of inequalities which result from inequalities of wealth and opportunity, race, caste, religion and title and harmonise the rival claims and interests of different groups and sections.<sup>72</sup> Thus, it,

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69. *Id.* at p. 3.

70. R.G. Chaturvedi, *Justice — Natural, Social, Political and Economic*, The Law book Co. (P) Ltd., Allahabad (1990), p. 12.

71. The Constitution envisages the securing and protecting of social order in which justice - social, economic and political - shall inform all the institutions of the national life (Article 38), the right to adequate means of livelihood (Article 39 (a)), the material resources of the community are distributed to subserve the common good (Article 39 (b)), prevention of concentration of wealth (Article 39 (c)), equal pay for equal work (Article 39 (d)), the health and strength is not abused by sheer force of economic necessity (Article 39 (e)). childhood and youths are protected against exploitation (Article 39 (f)).

72. S.M.N. Raine, *Law Judges and Justice*, Vedpal Law House, Indore (1979), p. 28. The Constitution of India, Article 39 (2) envisages to minimise the inequalities in income, eliminate the inequalities in status, facilities and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations.

in turn, affords equal opportunities to all citizens in social affairs as well as economic activities.<sup>73</sup>

The basic assumption of this principle, according to David Miller, is that a man's sense of justice is affected by the nature of the relationship which he enjoys with other men. That is, the social structure of a particular society generates certain type of interpersonal relationship, which in turn gives rise to a particular way of assessing and evaluating other men, and of judging how benefits and burden should be distributed.<sup>74</sup>

David Miller in his sociological perspective of social justice pointed out the intelligible connection between the structure of a society and its ideas of social justice. He observed that in "primitive societies", where the collectivism or group solidarity as against individualism was the order of the day, the traditional network of close personal relationships produced a commitment to the duties of generosity rather than to any concept of social justice. He emphasised:

"Primitive morality is therefore more concerned to establish what kind of action a person should perform in a given situation than to specify the precise claims which one person has against another. Justice is understandably not a prominent feature of primitive societies, whereas virtues such as generosity and sociability are".<sup>75</sup>

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73. P.B. Gajendragadkar, *Law, Liberty and Social Justice* Asian Publishing House, New Delhi (1965), p. 78.

74. David Miller, *supra* n. 60 at p. 255.

75. *Id.* at p. 272. Primitive men naturally thought of the welfare of the group and subordinate the welfare of particular persons to that general end. *Id.* at p. 260.

Whereas, in "hierarchical societies" of the feudal type, the combination of firmly established social ranking and a degree of personal contact across ranks led to a primary emphasis on justice as the protection of established rights and a secondary emphasis on justice as the relief of the needy. He explained :

"Under feudalism justice is understood, first, as the obligation to respect established rights, and, second, as the obligation to help the needy, within the limits of one's social position: little or no weight is given to the claims of desert".<sup>76</sup>

However, in caste systems, the 'purest types of hierarchical society',<sup>77</sup> the individual is strictly confined within the caste of his or her birth and contact between members of different caste is kept to a minimum and the idea that men naturally belong to different 'breeds', rather than sharing a common humanity, can more easily take root.<sup>78</sup> In that society, claims of need were not at all regarded as a matter of justice.<sup>79</sup>

Later in "market societies," where the social structure is created out of a series of contracts and exchange between otherwise free and equal individuals, a system of mutual interdependence is centred on the market.<sup>80</sup> The men are not bound by

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76. *Id.* at p. 286. The term 'desert' means, 'that which is deserved', 'claim to reward' and 'merit', *Chambers Twentieth Century Dictionary* p. 349.

77. *Ibid.*

78. *Id.* at p. 285.

79. *Id.* at p. 286.

80. *Id.* at pp. 286-287.

obligations of kinship and traditional status as in the primitive society and they have no fixed place in hierarchy and owe no allegiance to any supervisor as in hierarchical society.<sup>81</sup> The impersonal exchange in relationships in this society leads to a new interpretation of justice as the requital or return of desert. This was supported by the view that an individual's abilities, skills and efforts which formed the basis of desert were seen as being within his control and any incapacity and failure of will on his part results not of external circumstances, but rather of inner weakness.<sup>82</sup> Thus, the principle of social justice to each according 'to his merit' develops in this stage.

In the final stage i.e., the transformation of market society into an "organised one" which takes place chiefly by the rise of corporate groups, the concept of individualism gives way to the assumption that social good results from the rational co-ordination of the activities of the altruistic men, rather than from the free play of individualism.<sup>83</sup> Thus the content of desert also changes and the principles of need is reintroduced in terms of social well being as a subsidiary criterion of justice.<sup>84</sup>

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81. Miller said: "Under a market system, men are equal before law. They are free to choose their occupations, to join whatever associations they wish, to buy and sell in the market, to make contracts without restriction, to gain wealth and prestige"

*Ibid.*

82. *Id.* at p. 292.

83. *Id.* at p. 304.

84. Social justice in this context means, first, the reward of desert (as determined by the organisational status of the individual) and, second, the distribution of goods and services according to need. These two aspects are having inherent conflicts. For the idea of rewarding desert presupposes human inequality - differences of reward correspond to

*(f.n. Contd. on next page)*

Miller's emphasis on the proximity between the concepts of need and equality is noteworthy. According to him, the logical extension of the principle of need is the principle of equality, interpreted as the claim that every man should enjoy an equal level of well-being. Equality is achieved by giving first priority to the satisfaction of needs, and then by satisfying as large a proportion of each person's further desires as resources will allow.<sup>85</sup> Thus, principle of need represents the most urgent part of the principle of equality.<sup>86</sup>

While examining the relevance of Miller's concepts of social justice in Indian context, it can be seen that Indian society did not go through the third stage of

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inequalities of status within an organisation, and these in turn correspond to inequalities of skill and talent, whereas the idea of distributing according to need, when this is seen as a matter of justice presupposes a sense of human equality. David Miller, however, visualises that ultimately the members of a group suffering from social dislocation in the market society seek for a new form of community in which they live in close harmony with one another and realise certain moral or spiritual values which leads to the establishment of egalitarian communities embodying the conception of justice as distribution according to need. *Id.* at pp. 315, 331, 339.

85. *Id.*, at p. 144. According to Miller, there are two views in the application of the principle 'to each according to his needs'. According to the first view, it is possible with enough resources to satisfy everyone's needs; and then it has to decide how, from the justice point of view, any surplus should be distributed. The second view is that needs may be expected to expand as fast as resources, and consequently there will be sufficient goods available to satisfy everyone's needs completely; in this case, justice will be taken to mean that the *proportionate* satisfaction of needs, i.e., an equal proportion of each person's needs should be satisfied. *Id.* at p. 134.

86. *Id.* at p. 149.

market society as the western countries had undergone.<sup>87</sup> The present trends of globalisation pushes India only towards a consumer oriented society. However, India tried to enter into the fourth stage of development through its embracel of welfarism. The country's old and obstinate hierarchical set up based on the caste system is yet to be broken. In this state of affairs, as it is observed, over-emphasis of the traditional view of meritarian principle would be quite inappropriate and anomalous.<sup>88</sup>

### 7. *Justice and Social Engineering Theory*

Roscoe Pound, the founder of social engineering theory, viewed that the law is an ordering of conduct so as to make the goods of existence and the means of satisfying claims go round as far as possible with least friction and waste.<sup>89</sup> In his

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87. M.P. Singh, "Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice", 11-12 *Delhi law Review* 39 (1981-1982) M.P. Singh said : "Hierachies of all kinds have not completely disappeared even from the western societies, but the impact of industrial revolution and individualism has dissociated them from hierarchies of birth. Since our society has never passed through the stage of industrialisation of the west and the individualism associated with it, hierarchies based on birth continue to persist". *Id.* at pp. 51-52.

88. M.P. Singh further said: "In a society based on vast and well-rooted inequalities of birth sole application of the meritarian principle will mean nothing but legitimising such inequalities and ensuring lion's share to the privileged few and a very small or no share to the disadvantaged large masses. To minimise the existing inequalities and bring about a just social order we will have to give due recognition to the claims and needs of those unfortunate sections of society which have been denied equal share and equal opportunities for centuries." *Id.* at p. 53.

89. Lloyd, *Introduction to Jurisprudence*, Stevens & Sons Ltd., London (1985), p. 566.



philosophy, the ultimate object of law is justice and it should be met out by balancing conflicting interests. Regarding justice, Roscoe Pound said:

"Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonise, to adjust these overlapping and often securing them directly or immediately, or through securing certain individual interests or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh more in our civilisation with least sacrifice of the scheme of interest as a whole".<sup>90</sup>

According to him the, law is a means for balancing the conflicting interests. The inter-relationship of law and justice had been propounded by him in the following illuminating words:

"... we come to an idea of maximum satisfaction of human wants or expectations. What we have to do in social control, and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can."<sup>91</sup>

The hall-mark of Pound's theory is that the law is an instrument of social engineering through which a balance between social interest and individual interest could be achieved. In balancing of the conflicting and overlapping interests, the experience developed by reason and reason tested by experience have significant role.<sup>92</sup>The elimination of inequalities is one of the cardinal principles of this theory<sup>92a</sup>.

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90. Roscoe Pound, "A Survey of Social Interests", 57 H.L.R. 1 at p. 39 (1943).

91. Roscoe Pound, *Justice According to Law* (1951), p. 31.

92. Roscoe Pound, *Social Control through Law*, Archan Books, (1968), p. 112.

92a. In India the judiciary has adopted this theory while interpreting Parts III and IV of the Constitution. For instance, Justice Krishna Iyer in *N.M. Thomas* said : "Social engineering - which is law in action - must adopt new strategies to liquidate encrusted group injustice ...." *Supra* n. 25 at p. 530.

## 8. *Judicial Responses : An Appraisal*

The first attempt of an enquiry into the jurisprudential basis of protective discrimination was undertaken by Justice Subba Rao in his dissenting judgement in *Devadasan*.<sup>93</sup> He brought forth the idea of giving practical content to the rule of equality of opportunity by the illustration of a horse race.<sup>94</sup> He underscored the need for providing favoured treatment or 'adventitious aids' to backward communities in the following words :

"Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced cl. (4) in Article 16."<sup>95</sup>

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93. *T. Devadasan v. Union of India*, [1964] 4 S.C.R. 680.

94. Subba Rao, J., said : "To make my point clear, take the illustration of a horserace. Two horses are set down to run a race — one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight on a start from a longer distance. By doing so what would otherwise have been a farce of a competition would be made a real one". *Id.* at p. 700.

95. *Ibid.*

Justice Subba Rao's perspective on Article 16(4) as not an exception, but an 'untrammelled' provision<sup>96</sup> was the nascent attempt to harmonise and equalise the ever conflicting values of individual right and social justice.<sup>97</sup> The approach of Justice Subba Rao created a cataclysmic change in framing a theoretical foundation of protective discrimination in later cases. *Thomas*<sup>97a</sup> is an eloquent testimony to prove this. In this case the Supreme Court abandoned the conventional approach towards equality and protective discrimination and took an innovative step. The Court catapulted the exceptional and special provision of reservation<sup>98</sup> on the position of the mandatory clause of equality of opportunity in employment.<sup>99</sup> This approach supplemented the holding of Justice Subba Rao in *Devadasan* and thereby fortified the concept of reservation as a facet of equality of opportunity. In *Thomas*, the concept of equality underwent a drastic but dynamic import. The equality provision of the Constitution was interpreted as forming part of a same mutually supplementary code. Moreover, the provision of reservation was held to be an

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96. Subba Rao, J. said : "The expression 'nothing in this article' is a legislative device to express its intention in most emphatic way that the power conferred there under is not limited in any way the main provision but falls outside it. It has not really carved out an exception but has prescribed a power untrammelled by the other provisions of the Article". *Ibid.*

97. It was the contention of the petitioner that Article 16(1) conferred in individual right on a citizen and cl. (4) of the said Article; which embodies the principle of social justice was an exception to the said right. *Id.* at p. 701.

97a. *Supra* n. 25

98. Constitution of India, Article 16(4).

99. *Id.*, Article 16(1).

explanation<sup>100</sup> or illustration<sup>101</sup> or an emphatic statement<sup>102</sup> of the mandate of general equality of opportunity. By holding that the content of equality should be result oriented and not mere formal equality<sup>103</sup> and it not only necessitates 'progressive elimination of pronounced inequality'<sup>104</sup> but also warrants affirmative governmental action and compensatory measures<sup>105</sup> shows that the Rawlsian principle of redress has been read into the equality provisions<sup>105a</sup> of the Constitution in *Thomas*.

Justice Krishna Iyer's perception of the whole question i.e., whether the distribution according to 'merit of the individuals or according to the 'need' of the depressed groups'<sup>106</sup>, reflects the ever-existing controversy of distributive justice.

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100. *Supra* n. 25 at p. 553, *per* Fazl Ali, J.

101. *Id.* at p. 535, *per* Krishna Iyer, J.

102. *Ibid.*

103. *Id.* at p. 515, *per* Mathew, J. He quoted the following observation of Chandrachud, J. "It is obvious that equality in law precludes discrimination of any kind : whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations". *Ahmedabad St. Xavier's College Society v. State of Gujarat*, A.I.R. 1974 S.C. 1389 at p. 1433.

104. *Supra* n. 25 at p. 537, *per* Krishna Iyer, J.

105. *Id.* at p. 516, *per* Mathew, J.

105a. Krishna Iyer, J., in *Thomas* said : "The distinction would seem to be between handicaps imposed accidentally by nature and those resulting from social arrangements such as caste structures and group suppression. Society being, in broad sense, responsible for these latter conditions, it also has the duty to regard them as relevant differences among men and to compensate for them whenever they operate to prevent equal access to basic, individual advantages enjoyed by other citizens. *Id.* at p. 538.

106. *Id.* at p. 527.

Justice Mathew's view that the basis of allocation of limited goods must be on the principle of proportionate equality and nobody should be excluded from his or her share of representation without appropriate and rational grounds<sup>107</sup>, shows another contour of the complexity of distributive justice.

Justice Krishna Iyer viewed that re-distributive justice should be aimed at providing sufficient environmental facilities for developing the full human potential of the under privileged and this could be accomplished only when the utterly depressed groups could claim a fair share in public life and economic activity including employment under the State.<sup>108</sup> This observation not only accommodates the Rawlsian concept of justice but also brings forth the idea of power sharing.<sup>109</sup> This idea got fortified by Justice Mathew's analysis that equality of opportunity in matters of employment is comprised of the compensatory measures<sup>110</sup> that need to be taken by the State with a view to putting the backward classes on par with the members of the other communities. This would in turn enable them to get their due share of representation in public service.<sup>111</sup> By reading that the result oriented equality

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107. *Id.* at p. 514. See also *supra* n. 49 and the accompanying text.

108. *Id.* at p. 536.

109. Krishna Iyer, J., clearly said : "Our history, unlike that of some other countries, has found a zealous pursuit of government jobs as a mark of share in State power and economic position". *Id.* at p. 532. In another context he said : Public services have been a fascination for Indians even in British days, being a symbol of State power and so a special Article has been devoted to it.

110. Mathew, J., observed that the idea of compensatory state action to make people who were really unequal in specified areas, was developed by the Supreme Court of the United States. This affirmative responsibility of the Government was acknowledged by Part IV of the Indian Constitution. *Id.* at p. 516.

111. *Id.* at p. 518.

of opportunity aims to put backward classes on parity with the forward communities reveals Dworkin's concept of right to be treated as equals.

The Supreme Court further trod on the untravelled terrains of jurisprudence in *Soshit*.<sup>112</sup> Starting from the point of identifying the socio-economic rights as a part of human right,<sup>113</sup> the Court went on to explore the theories of Dworkin and Rawls for their relevance and applicability in the Indian context of protective discrimination.<sup>114</sup> Analysing the Rawls's theory of justice, Justice Chinnappa Reddy said :

"If the statement that 'Equality of Opportunity must yield Equality of Results' and if the fulfilment of Article 16(1) in Article 16(4) ever needed a philosophical foundation it is furnished by Rawls' theory of Justice and the Redress Principle".<sup>115</sup>

Much light was shed by Justice Krishna Iyer on the idea of sharing the State's power.<sup>116</sup> By holding that the special provision of reservation in the Constitution was

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112. *Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India*, (1981)1 S.C.C. 246.

113. *Id.* at p. 261 *per* Krishna Iyer, J.

114. While Krishna Iyer, J., examined Dworkin's socio-jural defence of preference from Polyviou's book *Equal Protection of the Laws*,<sup>r</sup> 360, Chinnappa Reddy analysed John Rawls's theory of social justice. *Id.* at pp. 292-293, 310.

115. *Id.* at p. 310. For further discussion of the application of the theories, see *infra* Ch. V.

116. Krishna Iyer, J., said : "Power, material power, is the key to socio-economic salvation and the State being the ridus of power, the framers of the Constitution have made provision for representation of these weaker sections both in the legislature and the executive." *Id.* at p. 220.

not a jarring note<sup>117</sup> but 'fostered and furthered' the idea of equality of opportunity,<sup>118</sup> the Court re-emphasised its earlier position in *Thomas*. The Court's reformulation of the provision of reservation as a right and not a concession or privilege<sup>119</sup> with a futuristic note that excellence and equality might co-operate fruitfully and need not compete destructively<sup>120</sup>, is a significant attempt to reconcile the ever competing equalities within the single fabric of equality of opportunity in public employment.

Justice Chinnappa Reddy got another opportunity for jurisprudential enquiry in *Vasanth Kumar*.<sup>121</sup> He highlighted the necessity of extending need based justice to backward classes in the following words :

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117. Krishna Iyer, J. said: "Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16 (1). The prescription check Article 16(1) needs, in the living conditions of India, the concrete sanction of Article 16(4) so that those wallowing in the social quagmine are enable to raise to the revels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung. To bury this truth is to sloganist Article 16 (1) and sacrifice the facts of life". *Id.* at pp. 263-234

118. Chinnappa Reddy, J., Said: Article 16 (4) is not in the nature of the exception to Article 16 (1). It is a facet of Article 16 (1) which fosters and furthers the idea of equality of opportunity with special reference to an underprivileged and deprived class of citizens to whom *egalite de droit* (formal or legal equality) is not *egalite de fait* (practical or factual equality). It recognises that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. *Id.* at p. 310.

119. Chinnappa Reddy, J., said : "...it (reservation or preferential treatment) is not a concession or privilege extended to them : it is in recognition of their undoubted Fundamental Right to Equality of Opportunity and in discharge of the Constitutional obligation imposed upon the State to secure to all its citizens, 'justice, social, economic and political', and Equality of status and opportunity 'to ensure' the dignity of the individual' ... ." *Id.* at p. 315.

120. *Id.* at p. 302 *per* Krishna Iyer. J.

121. *K.C. Vasanth Kumar v. State of Karnataka*, A.I.R. 1985 S.C. 1495.

"They (the Scheduled Castes, the Scheduled Tribes and the other socially and educationally backward classes) need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right and not philanthropy. They ask for parity and not charity".<sup>122</sup>

By reading the claim of backward classes into equality as a matter of human and constitutional right,<sup>123</sup> and treating their rights to equality on par with those of others<sup>124</sup>, denotes the Dworkin's concept of right to be treated as equals. Justice Chinnappa Reddy's analysis of the concept of backwardness on a three dimensional view of social inequality as propounded by Max Weber i.e., class, status and power<sup>125</sup> is highly remarkable. He came to the conclusion that though poverty could be found as the culprit cause of the backwardness and the dominant characteristic, the ubiquitous caste system in India aggravated and complicated the matter. This observation

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122. *Id.* at p. 1508. According to Chinnappa Reddy, J., the claim of backward classes to equality as a matter of human and constitutional right was forgotten and their rights were submerged in the American concepts like 'preferential principle' or 'protective or compensatory discrimination'. Unless those superior, patronising and paternalist attitudes were got rid of, it was difficult to truly appreciate the problems involved in the claim of backward classes. *Ibid.*

123. *Ibid.*

124. *Supra* n. 122.

125. *Id.* at p. 1511. According to Max Weber, a person's class-situation is what he shares with others, similarly placed in the process of production, distribution and exchange — i.e. his shared situation in the economic hierarchy. Status seems to depend on social attributes and styles of life, including dress, speech and occupation etc. Power is the participation in the decision making process. *Id.* at p. 1511.



of Justice Chinnappa Reddy brought home a realistic approach of the Indian social milieu and it became a remarkable turning point in identifying and accommodating the caste factor in measuring the backwardness.<sup>126</sup> His attempt to explode the myth of controversy between the meritarian principle and compensatory principle<sup>127</sup> is another significant milestone in the path of the jurisprudential enquiry akin to David Miller's view that meritarian principle should not be overemphasised in an egalitarian society.<sup>128</sup>

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126. Chinnappa Reddy, J., observed : "Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste" *Id.* at p. 1512. This aspect is discussed in detail in, *infra*, Chapter IV.

127. Chinnappa Reddy, J., said : "The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is not enough fruit in the garden and so those who are in want to keep out those who are out." *Id.* at p. 1508.

128. This idea is reflected in the following words of Hegde, J., of the Mysore High Court when he observed : "We have pledged ourselves to establish a welfare State. Social justice is an important ingredient of that concept. The goal cannot be reached if we over emphasise the "merit theory". Advantages secured due to historical reasons cannot be considered as fundamental rights guaranteed by the Constitution. The nation's interest will be best served — taking a long-range view — if the backward classes are helped to march forward and take their places in a line with the advanced sections of the people" *D.G. Vishwanath v. Government of Mysore*, A.I.R. 1964 Mys. 132 at p. 136.

The Supreme Court's jurisprudential enquiry transcended the Indian subcontinent and reached the land of America to share its experience of compensatory discrimination. It was in *Mandal case*<sup>129</sup> that the Court, after analysing the law and judicial decisions in the U.S., held :

"The U.S. Supreme Court has said repeatedly, if race be the basis of discrimination — past and present — race must also form the basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far".<sup>130</sup>

The Court's realisation that race could be taken as a basis of redressal measures was instrumental in a realistic re-examination of the social dynamics of caste in India<sup>131</sup> and arriving at a point of right direction that considerations of caste factor in determination of backwardness would not result in perpetuation of casteism.<sup>132</sup>

The concept of sharing of State's power received a steady movement towards a crystalised doctrine in *Mandal case*.<sup>133</sup> The Court rightly perceived the value of

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129. *Indra Sawhney v. Union of India*, 1992 S.C.C. (L.&S.) Supp. 1.

130. *Id.* at p. 419 *per* B.P. Jeevan Reddy, J., for the majority.

131. The Court referred to the Mandal Commission Report, Chapter IV, "Social Dynamics of Caste". *Id.* at p. 346.

132. *Id.* at pp. 418-422

133. *Id.* at pp. 213-217, P.B. Sawant, J., said : "The employment whether private or public thus, is a means of social revelling and when it is public, is also a means of directly participating in the running of the affairs of the society. A deliberate attempt to secure it to those who were designedly denied the same in the past, is an attempt to do social and

*(f.n. contd. on next page)*

employment in shaping the individual's self-esteem and self-worthiness<sup>134</sup> and if it is a government employment it has an added edge in giving opportunity to participate in the State power.<sup>135</sup> Thus, the Court reached at the right destination by canvassing the need for equal participation of all sections of society in the State power. This reflects the Court's upholding of the values of human worth and egalitarianism.

The above analysis of the judicial response reveals that the Indian judiciary had started its jurisprudential enquiry during the early period of its confrontation with the protective discrimination policies. The fillip of the journey was made by Justice *Subba Rao* in 1964 and the momentum was obtained in *Thomas* later. The Court since then recognised and applied various philosophical and legal thoughts for laying down a solid jurisprudential foundation of protective discrimination, a desideratum to build upon a sound and steady legal system.

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economic justice to them as ordained by the Preamble of the Constitution. *Id.* at p. 214. He further said: "The trinity of the goals of the Constitution, viz., socialism, secularism and democracy cannot be realised unless all sections of the society participat in the State power equally, irrespective of their caste, community, race, religion and sex and all discriminations in the sharing of State power made on those grounds are eliminated by private measures". *Id.* at p. 214.

134. *Id.* at p. 213.

135. *Ibid.*

## CHAPTER III

# BACKWARDNESS : THE CONCEPT IN RETROSPECT

Judges do make law from molar to molecular and interstitially.<sup>1</sup> In the interpretative process they use many techniques and aids. If the language is plain and clear,<sup>2</sup> the judges are not free to interpret the law, but when the law is ambiguous the judges have to find out the legislative intention.<sup>3</sup> Thus they have the power to analyse the historical background of the law.<sup>4</sup> The concept of 'backwardness' is such a compendious term which necessitates historical analysis. The deliberations of the framers of the Constitution have to be examined in ascertaining their intentions with regard to the identification of the real needy who require the beneficial treatment i.e., as to who constitutes the backward classes of citizens. How was the concept of backwardness originated in India? This chapter is an attempt in these directions.

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1. Benjamin N. Cardozo, *The Nature of Judicial Process*, Yale University Press, London (1977), p. 69.
  2. Rupert Cross, *Statutory Interpretation*, Butterworths, London (1976), p. 61; P. St. J. Laugan, *Maxwell on the Interpretation of Statutes*, N.M. Tripathi Ltd., Bombay (1969), p. 28; K. Shanmukham, *N.S. Bindra's Interpretation of Statutes*, The Law Book Company (P) Ltd., Allahabad (1997) p. 432; Guru Prasanna Singh, *Principles of Statutory Interpretation*, Wadhwa and Co., Nagpur (1992), p. 42.
  3. Rupert Cross, *id.* at pp. 35, 129, Maxwell, *id.* at p. 47, Bindra, *id.* at p. 409; Guru Prasanna Singh, *id.* at pp. 6, 158.
  4. *Ibid.*

## 1. CONSTITUTIONAL HISTORY

The equality of opportunity in matters of public employment has been enshrined by the framers in the Constitution<sup>5</sup> with an objective of attaining equality to all citizens. They also empowered the state to make reservation in appointments or posts in favour of any backward classes of citizens which in the opinion of the State of are not adequately represented<sup>6</sup>. The concept of backwardness has been an area of judicial innovation ever since the judiciary confronted with the protective discrimination policies in India. This judicial creativity, however, reflects the very same confusions of the framers of the Constitution with regard to the concept of backwardness.

### (i) *Draft Constitution and the Concept of Backwardness*

The principle of equality of opportunity and the prohibition of discrimination on grounds of religion, race, colour, caste or language had emanated in the drafts of K.M. Munshi and Dr.B.R. Ambedkar. Munshi's Draft Article contained that all citizens were entitled to equal opportunity in matters of public employment and office of power and honour.<sup>7</sup> In Dr. Ambedkar's Memorandum of

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5. Constitution of India, Article 16 (1) reads : "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

6. *Id.*, Article 16 (4) reads : "Nothing in the Article shall prevent the State from making any provision for the reservation of appointments 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".

7. Article III, Clause 5 reads : "All citizens are entitled to equal opportunity; (a) in matters of public employment and office of power and honour", B. Shiva Rao, *The Framing of India's Constitution : Select Documents*, Vol. II, Indian Institute of Public Administration, New Delhi (1967), p. 74.

Draft Article, Clause 6 prevents any disqualification to hold any public office on the basis of religion, caste, creed, sex or social status.<sup>8</sup> The same had been reflected in the draft prepared by K. T. Shah.<sup>9</sup> It is pertinent to note that till this stage the framers of the Constitution had no idea of giving reservation to any particular group of citizens.

(ii) *Minority Committee's Recommendations*

The Sub-committee on Minorities recommended a special provision for minorities to be included in the draft. Heated discussions<sup>10</sup> arose in this aspect among the members and when they failed to reach a consensus, the matter was referred to the Adhoc Committee. To assuage the apprehensions of the Adhoc Committee members, Dr. Ambedkar said that the reservation benefit should be given in the line of property holdings and argued for reservation for minorities.<sup>11</sup> During that time Munshi suggested that reservation should be given to 'classes which in the opinion of the State are not adequately represented'.<sup>12</sup> Instead of the word

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8. Article II, Section 1, Clause 6 reads : "No citizen shall be disqualified to hold a public office, or exercise any trade or calling by reason of his/her religion, caste, creed, sex or social status". *Id.* at p. 86.

9. Preliminary Note on Fundamental Rights, Draft Clause 2 reads : "Every citizen of India has and is hereby guaranteed equal rights and opportunity in respect of education, training, health and employment in any post, office or capacity, irrespective of any differences of birth, sex, wealth, creed or colour". *Id.* at p. 49.

10. B. Shiva Rao, *id.* at pp. 221-24.

11. *Id.* at pp. 223-24.

12. B. Siva Rao, *The Framing of Indian Constitution : A Study*, Indian Institute of Public Administration, New Delhi (1968) p. 194.

'minorities' the member argued that the word 'classes' should be included. One member raised a doubt whether the word 'classes' should be retained for the words 'the protection for minorities'.<sup>13</sup> K.M. Panicker answered to the doubt that the word minority indicated only political minority and not the under-represented among the Hindus.<sup>14</sup> But some members suggested both the words i.e., 'minorities' and 'classes' should be retained.

While the discussion was going on these lines, the following question arose : Who constitute the class ? Is it only Scheduled Castes and Backward Classes or Minorities ? The Chairman of the Advisory Committee, Sardar Vallabhai Patel said that 'class' includes minority also and there was no necessity of specific indication of the word minorities.<sup>15</sup> Finally the Advisory Committee accepted the reservation in favour of 'classes' those who are not adequately represented in the public service.<sup>16</sup> The Advisory Committee's draft was given to the Drafting Committee.

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13. B. Shiva Rao, *The Framing of India's Constitution : Select Documents*, Vol. II (1967), p. 259.

14. *Ibid.*

15. *Id.*, at p. 262.

16. Advisory Committee's Report on Fundamental Rights, Clause 5 reads : "There shall be equality of opportunity for all citizens in matters of public employment and in the exercise of carrying on any occupation, trade, business or profession. 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 public services". *Id.* at p. 296.

The Drafting Committee made one important modification by inserting "any backward classes of citizens" instead of the words "any class of citizens".<sup>17</sup>

The Draft Constitution had been circulated for eliciting public opinion. Different views were aired. Some members expressed the view that before the words 'backward classes', the words 'economically' or 'culturally' should be inserted.<sup>18</sup> Another member expressed the opinion that the words 'Scheduled Caste or' should be inserted before the word backward in Draft Article 10(3).<sup>19</sup> B.N. Rao opposed the proposition to include the words 'economic or cultural', because of the reason that the word 'backward' has an inner content even to include the economic and cultural backwardness also.<sup>20</sup> With the above discussion the matter came upto the Constituent Assembly for the final discussion.

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17. The Draft Constitution prepared by the Drafting Committee, Article 10 reads : "(1) There shall be equality of opportunity for all citizens in matters of employment under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them, be ineligible for any office under the State. (3) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, who in the opinion of the State, are not adequately represented in the services of the State". B. Shiva Rao, *The Framing of India's Constitution : Select Documents*, Vol. III, Indian Institute of Public Administration, New Delhi, (1967), p. 521.

18. R.R. Diwakar and S.V. Krishnamoorthy Rao proposed the addition of words economically or culturally be inserted. B. Shiva Rao, *supra*, n. 12 at p. 196.

19. Upendranath Barman, *ibid*.

20. *Ibid*.



(iii) *Constituent Assembly Discussions*

In the Constituent Assembly, Loknath Misra from Orissa moved an amendment to delete the clause which guaranteed reservation for backward classes on the reasoning that the reservation was a premium to backward classes and it would lead to inefficiency.<sup>21</sup> One member raised a doubt regarding the meaning of the word 'backward'. His doubt was that the word backward was not defined anywhere in the Constitution, but Draft Article 301<sup>22</sup> authorised the President to appoint a Commission to investigate the situations of socially and educationally backward class of citizens. He raised another doubt as to 'who would determine the backwardness, should it be left to the law courts ?' However, he finally expressed his views that the framers of the Constitution i.e., the Constituent Assembly itself should decide who constituted the backward classes.<sup>23</sup>

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21. VII C.A.D., 673.

22. Article 301 reads : "(1) 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 taken 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. (2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper. (3) The President shall cause a copy of the report so presented, together with a memorandum explaining the action taken thereon to be laid before Parliament". B. Shiva Rao, *The Framing of India's Constitution : Select Documents*, Vol. III, pp. 633-34.

23. *Supra*, n. 21 at p. 680.

a) *Term Backward Class and the Controversies*

One member moved an amendment to delete the word backward as there was no word backwardness in the Advisory Committee's Report.<sup>24</sup> Another member expressed the view that the word backward included Scheduled Caste and Scheduled Tribes and another one said that nearly ninety percent of the people are educationally and economically backward and the word backward was so vague to include gorkhas.<sup>25</sup>

The ambiguity inherent in the term backward classes led the members to discuss the issue multidimensionally. A member expressed his concern that this concept was so vague in a sense that even many educationally advanced classes could be included in the backward classes. So, according to him, to limit the scope and not to dump many elite echelons, the word Scheduled Caste should be inserted instead of the term 'backward classes'. However, he reasoned for this line of thought that if the State was not specifically inserting the word Scheduled Caste, the depressed class people could not adequately enter Government service.<sup>26</sup> This connotation was supported by another member who expressed that instead of the word backward class either depressed class or scheduled class should be inserted. He vehemently opposed the generalisation of reservation including religious minorities. According to him only 'Harijans' were to be given reservation, because they were 'really' backward.<sup>27</sup>

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24. Aziz Ahmed Khan, *id.* at p. 682.

25. For detailed discussion see *id.* p. 685.

26. R.M. Nalavade, *id.* at p. 686.

27. Dr. Dharam Prakash, *id.* at pp. 686-87.

Another member pointed out the three layers among the Hindu community, viz., the upper most, the caste Hindus and the lowest known as Scheduled Caste or Harijans. In between the top and the bottom constituted the middle group. Hence, he vehemently recommended that reservation should not be given exclusively for Scheduled Castes but to the middle class also.<sup>28</sup>

A South Indian member expressed the view that the communities that had not enjoyed loaves and fishes of services should not be left out. He requested that the Constitution framers should make a special assurance that Scheduled Castes were protected constitutionally to get into Government service.<sup>29</sup> Further, he said that the Scheduled Castes had been left in lurch and due to their lack of social, economic and educational advancement for years and decades, it was necessary, the Constitution should render justice to them.<sup>30</sup>

A member from Mysore argued for the retention of the word backward classes and reasoned that the backward classes people were suffering from social and economic inequalities.<sup>31</sup> In response to the South Indian member's idea, another member narrated the history that in many times the Federal Public Service Commission failed to act fairly though many suitable candidates from the Scheduled Castes had applied for jobs. He argued that if the Constitution makers left out the reservation benefits only to backward classes, ultimately it would lead to further

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28. Chandrika Ram, *id.* at pp. 687-88.

29. V.I. Muniswamy Pillay, *id.* at pp. 688-89.

30. *Ibid.*

31. T. Channah, *id.* at pp. 680-90.

destruction of Scheduled Castes. He requested that the Constitution makers should specifically insert the word Scheduled Caste either before or after the word backward classes. He reasoned that the word backward was so vague in a way to allow communalism and the recruiting commissions would not be blamed because they would be helpless.<sup>32</sup>

When the discussion was going on regarding whether the word backward class should be retained or not or should the special inclusion of the words Scheduled Caste was necessary, the discussion regarding inclusion of minority also crossed the tables of members of the Constituent Assembly. A minority member from Madras expressed his apprehension based on the backward classes constituted in the Madras Province. In the Madras Province, nearly 150 odd Hindu communities had been included in the backward classes list who were nearer to the majority of that particular province and there was no inclusion of Scheduled Castes in the backward classes list. Hence he submitted before the Assembly members that the minorities should be construed as backward classes and a special provision in the fundamental rights part was to be made for minorities, such as Muslims, Christians and Scheduled Castes.<sup>33</sup>

After hearing the position of backward classes in Madras Province which did not include Scheduled Caste in the list, an East-Punjab member expressed his fear

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32. H.J. Khandekar, *id.* at pp. 691-92. The member expressed the view that the recruiting commission would be helpless or toothless tiger, because of the reason that some irrelevant considerations i.e., contacts and relations with the commission member might invite favouritism and ultimately the Scheduled Caste candidates might be neglected. *Ibid.*

33. Mohammed Ismail Sahib, *id.* at pp. 692-93.

that if Scheduled Castes and Minorities were not protected, then the benefit of reservation would become illusory.<sup>34</sup>

In this context, K.M. Munshi clarified that there was no necessity of including the Scheduled Castes in the backward classes list because the provision was intended to give reservation to the really backward classes which included Scheduled Caste also.<sup>35</sup> He informed the house that the backward classes had been defined in Bombay Province and that list included not only Scheduled Castes and Scheduled Tribes but also other backward classes who were economically, educationally and socially backward. Hence, he suggested that there was no necessity of confining the concept of backwardness only to a particular community.<sup>36</sup>

*b) A Paradise of Lawyers — Criticism of T.T. Krishnamachary*

When the members were in a dilemma as to who should be included or excluded in the backward classes, T.T. Krishnamachary expressed that in future the provision of reservation would be a paradise of lawyers.<sup>37</sup> He was critical of the fact that when

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34. Sardar Hukan Singh, *id.* at pp. 693-94. He doubted that the experience of Madras Province which failed to include minorities and Scheduled Castes, did not reflect the real equality. Adequate protection of the socially vulnerable groups is required for attaining the real equality. He cautioned that if the Constitution does not protect the vulnerable groups then the equality principle would become a teeming illusion in a democracy.

35. K.M. Munshi, *id.* at pp. 695-96. *Ibid.*

36. *Ibid.*

37. *Id.* at pp. 698-99. He said : "My honourable friend Mr. Munshi thinks that this word has fallen from heaven like manna and snatched by the Drafting Committee in all their wisdom. *I say this is a paradise of lawyers.* I do not know if the lawyers who have been on the Committee have really not tried to improve the business prospects of their clan and the opportunities of their community or class by framing a constitution so full of pitfalls." *Ibid.* Emphasis supplied.

the Constituent Assembly took a decision in this particular matter on a former occasion the word 'backward' did not find a place and it was an after-thought which the cumulative wisdom of the Drafting Committee had devised for the purpose of anticipating the possibility of this provision being applied to a large section of the community.<sup>38</sup> According to him the backward class did not mean backward caste. It said only class and not caste. So it should not be confined only to Scheduled Castes or to any particular community. He said that the basis of any future division between 'backward' and 'forward' or 'non-backward' might be on literacy and the ultimate arbitrator would be the Supreme Court in deciding as to what basis the backward class should be identified or who should come under the category of backward classes.<sup>39</sup>

He further clarified his view that this article was very loosely worded, but at the same time there was no need of the fear that the word 'backward' was liable to different interpretations because it would be ultimately interpreted by the supreme authority on some basis such as caste, community, religion, literacy or economic status.<sup>40</sup> He concluded thus :

"So I cannot congratulate the Drafting Committee on putting this particular word in; whatever might be the implication they had in their mind, I cannot help feeling that this clause will lead to a lot of litigation".<sup>41</sup>

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38. *Id.* at p. 699.

39. *Id.* at p. 700.

40. *Ibid.*

41. *Ibid.*

c) *Fate of Any Constitution : Reply to the Criticism by Dr. Ambedkar*

The Drafting Committee Chairman Dr. Ambedkar reacted to the criticism levelled against the Drafting Committee by T.T. Krishnamachary that this provision would be a paradise of lawyers. From the premise of comparative analysis of other Constitutions like the U.S.A. and Canada Dr. Ambedkar concluded that it was the fate of every Constitution,<sup>42</sup> to have judicial interpretations. Dr. Ambedkar answered all the questions and cleared doubts and allayed apprehensions and requested the members to retain the term backward classes in the Constitution. He said that the term backward classes comprised of "certain communities which have not so far had a proper 'look-in' so to say in to the administration".<sup>43</sup> He invited the members' attention to the need for reconciling the conflicting nature of equality i.e., the necessity of equality of opportunity to all citizens. This principle ought to be operative in its fullest extent — 'there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned'.<sup>44</sup> At the

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42. Dr. Ambedkar said : "I am not prepared to say that this Constitution will not give rise to questions which will involve legal interpretation or judicial interpretation. In fact, I would like to ask Mr. Krishnamachari if he can point out to me any instance of any Constitution in the world which has not been a paradise for lawyers. I would particularly ask him to refer to the vast storehouse of law reports with regard to the Constitution of the United States, Canada and other countries. I am therefore not ashamed at all if this Constitution hereafter for purpose of interpretation is required to be taken to the Federal Court. That is the fate of every Constitution and every Drafting Committee". *Id.* at p. 700.

43. *Id.* at p. 701.

44. *Id.* at p. 701.

same time a provision should be made for the entry of 'certain communities which have so far been outside the administration. Dr. Ambedkar explained the puzzling problem of this conflicting interest and the need for a well-balanced approach in the following words :

"...we had to reconcile this formula (generic principle of equality of opportunity) with the demand made by certain communities that the administration which has now — for historical reasons — been controlled by one community or a few communities. That situation should disappear and that others also must have an opportunity of getting into the public services".<sup>45</sup>

However he cautioned that the formula would not lead to the destruction of the rule of equality itself.<sup>46</sup> He said thus :

"...we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the state, then, I am sure, they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain".<sup>47</sup>

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45. *Ibid.*

46. *Id.* at pp. 701-702.

47. *Id.* at p. 702. Dr. Ambedkar went on to add : "Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be

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He further said that the question as to 'what is a backward community' should be left to be determined by each local Government. He went on to add that if the local Government included in the category of reservation such a large number of seats, one could very well go to the Supreme Court and challenge the action of the local Government as to whether it acted in a responsible and prudent manner.<sup>48</sup>

With the above discussion, the Constituent Assembly members accepted the Draft Article 10 (3) and it got renumbered as Article 16 (4) in the present Constitution. The overall assessment of the ideological conflict which arose in the Constituent Assembly proves that there was no clear-cut answer to the question as to who should be considered as backward classes for being entitled to the benefits of reservation under the Draft Article 10 (3). Though the members finally accepted the term backward class, the main discussion centred around the protection of minorities and Scheduled Castes. The past experiences of Bombay and Madras Provinces might have had much significance in defining the concept of backwardness by the framers. There was no doubt that the Scheduled Castes and Scheduled Tribes were really under-represented in every sense and their position — socially,

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completely destroying the first proposition upon which we are all agreed, namely, that there shall be equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities of the total of which came to something like 70 per cent of the total posts under the States and only 30 per cent are retained as the unreserved. Could any body say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely that there shall be equality of opportunity? It cannot be in my judgement". *Id.* at p. 701.

48. *Ibid.*

educationally and economically — was too far behind. There was no disagreement with regard to their protection. But there was no consensus with regard to the groups or sections which were to be classified under backward classes. Moreover, there was no consensus with regard to the factors — such as poverty, caste, religion, occupation etc. — which were to be reckoned with the identification or ascertainment of backwardness. In this context of indeterminacy, however, the Constituent Assembly reposed its faith in the judiciary for framing adequate criteria in those areas. This includes the judicial enquiry even into over-inclusion of castes or groups in the list of backward classes by the Government.

With regard to the limits of reservation the Constituent Assembly had definite idea that the reservation should not go to such an extent of destroying the general rule of equality i.e., not to the level of majority of seats. The question, therefore, relevant in the present context is : Has the judiciary ever taken notice of the vision and expectation of the founding fathers of the Constitution in interpreting and applying the concept of backwardness ? Or has the judiciary ever read into the term backwardness new meanings to on the compelling reason of felt necessities of the time ? The following Chapters in this thesis are attempts, inter alia, of examining these questions.

## 2. INDIAN SOCIAL MILIEU

The peculiarity of Indian society lies in its caste-ridden semi-feudal and hierarchical nature. The origin of backwardness can be traced back to the origin of caste system. The caste is known as *jati* in common parlance and the system of social relations based on caste has been the prime factor in Hindu way of life for

several centuries. The endurance of caste barriers for centuries together has led to the social isolation and economic oppression of a section of society to their misery and penury.

*(i) Meaning of Caste and Its Genesis*

A caste in the Indian context is an endogamous group i.e., its members have to marry within that caste itself. A member born in a caste remains in it for ever. Members of a caste used to have a particular occupation on a hereditary basis. The caste system emerged in the Hindu religion since the Vedic period. According to the origin of caste system, the *Varnashrama*, all men in the world are divided into four types, Brahmin, Kshtriya, Vaishya and Sudra.<sup>49</sup> The Brahmin, the sacerdotal class, was at the top of the hierarchy. The caste system has grown slowly and gradually.<sup>50</sup> E.A.H. Blunt summarises the origin and development of caste system in the following words :

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49. See *Rig Veda*, x.90 at pp. 11-12 as cited in E.A.H. Blunt, *The Caste System of Northern India*, S. Chand & Co., New Delhi (1969), p. 12.

50. Various theories have been propounded for the origin of caste system. J.K. Mittal says that the origin is still an enigma to modern history. According to him the system seems to have been of immemorial antiquity and its origin lost in oblivion. "Right to Equality in the Indian Constitution" [1970] *Public Law* 36 at p. 65. D.N. Majumdar views that a functional division of society was certainly known at the time of *Rigveda* and this was the basis of the origin of caste system. According to him, Manu, the Hindu law giver, says that the caste system is delivered from the person of the Brahma, the Supreme Creator *Races and Cultures of India* (1958), pp. 279, 280-282. *Ibid.* Dhananjaya Keer, is of the view that Vedic Aryans knew no caste system. *Dr. Ambedkar : Life and Mission* (1954), p. 2., K.M. Panickkar also says that Vedas have no sanction for caste system and untouchability. G.S. Ghurye opines that caste is a Bharmanic child of Indo-Aryan  
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"This system, which existed in embryo during the Vedic period, has developed through the ages under the influences of circumstances which combined to make the groups endogamous, until it became the caste system as we know it".<sup>51</sup>

The castes all have, 'as a common characteristic, a spirit of exclusiveness which has the effect of restricting the intercourse of their members both with each other and with members of other castes'.<sup>52</sup> The principal characteristics of the caste system are, heredity,<sup>53</sup> endogamy<sup>54</sup> and restrictions on commensality.<sup>55</sup> Blunt

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culture. *Caste and Races in India*, Popular Prakashan, Bombay (1969), p. 162. *Ibid.* For a detailed discussion of the origin of caste system, see Louis Dumont, *Homo Hierarchicus : the Caste System and its Implications*, Oxford University Press, Delhi (1980), pp. 21-28, 92-98 Celestin Bouglé, *Essays on the Caste System*, Cambridge University Press, Cambridge (1971), pp. 18-24. Suresh Chandra Banerji, *Society in Ancient India*, D.K. Printworld (P) Ltd., New Delhi, (1968) pp. 199-205; Nripendra Kumar Dutt, *Origin and Growth of Caste in India*, Firma K.L. Mukhopadhyay, Calcutta (1968), pp. 12-23; J.H. Hutton, *Caste in India : Its Nature, Functions and Origins*, Oxford University Press, Bombay (1963), pp. 170-191, P. Lakshmi Narasu, *A Study of Caste* Asian Educational Services, New Delhi (1988), p. 9.

51. Blunt, *supra* n. 49 at p. 31.

52. *Id.* at p. 1.

53. Analysing heredity, Blunt says : "A Hindu is born a member of the caste to which his parents belong and all his life remains a member of it. To change one's caste is impossible." *Ibid.*

54. Every member of the caste must marry the member of the same caste and may not marry outside it. *Id.* at p. 2.

55. Every caste lays down with precision rules regarding the acceptance of food and drink by its members from other people, the kind of food that may be so accepted and also the kind of food that may be eaten at all. *Ibid.*

classifies caste into two major varieties<sup>56</sup> and several minor varieties.<sup>57</sup>

*(ii) Definition of Caste*

Sir Edward Gait defines a caste as an endogamous group bearing a common name, membership of which is hereditary, arising from birth alone; imposing on its members certain restrictions in the matter of social inter-course; either following a common traditional occupation, or claiming a common origin, or both; and generally regarded as forming a single homogenous community.<sup>58</sup> According to S.V. Ketkar, a caste is a social group having two characteristics viz., (1) membership is confined to those who are born of members and includes all persons so born; (2) the members are forbidden by an inexorable social law to marry outside the group.<sup>59</sup> Analysing the above definitions of caste, Dr. B.R. Ambedkar says :

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56. The two main varieties of caste includes functional caste, which is composed of persons following the same occupation and the tribal or racial caste which is composed of persons who are, or believe themselves to be, united by blood or race. *Ibid.*

57. Minor varieties are : (1) the sectarian caste, which is composed of persons united by a common belief; (ii) the hill castes which are subject to restrictions much less severe than their neighbours in the plains; (iii) the outlaw castes which were originally as groups of broken man and outcasts who had banded together for purposes of self-defence or of crime, and subsequently became a caste and (iv) the Muhammadan castes. *Id.* at pp. 2-3.

58. Sir Edward Gait, *Encyclopaedia of Religion and Ethics*, as cited in Blunt, *supra*, no. 49 at p. 5

59. S.V. Ketkar, *History of Caste in India*, Cosmo Publications, New Delhi (1979), p. 12.

"Caste in India means an artificial chopping off the population into fixed and definite units, each one prevented from fusing into another through the custom of endogamy. Thus the conclusion is inevitable that *endogamy is the only characteristic that is peculiar to caste*, and if we succeed in showing how endogamy is maintained, we shall practically have proved the genesis and also mechanism of caste".<sup>60</sup>

According to him 'the superposition of endogamy on exogamy' is the basis of creation of caste in India.<sup>61</sup> The characteristics of caste are however rightly summarised by Beteille as a small and named group of persons characterised by endogamy, hereditary membership, and a specific style of life which sometimes includes the pursuit by tradition of a particular occupation and is usually associated with a more or less distinct ritual status in a hierarchical system.<sup>62</sup>

### *(iii) Occupation and Economic Nexus of Caste*

The society of the primitive stages had certain similarities though with much differences from the society at present. Caste structure had close ties with occupation and village economics.<sup>63</sup> At the top of the social system there were

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60. B.R. Ambedkar, "Castes in India", in *Dr. Babashaheb Ambedkar : Writings and Speeches*, Vol. 1, Government of Maharashtra, Bombay (1979), p. 1 at p. 9.

61. *Ibid.*

62. Andre Beteille, *Caste, Class and Power*, Oxford University Press, Delhi (1996), p.46.

63. David G. Mandelbaum, "Social Organisation and Planned Cultural Change in India", in M.N. Srinivas (Ed.), *India's Villages*, Asia Publishing House, Bombay (1960), p. 15 at p.17.

Brahmins. They were priestly and learned class. Then the Kshatriyas who were warriors and governing class. Vaishyas were engaged in business and Sudras were menial or serving class. The last mentioned caste were regarded as low, mainly for the reason that they were not entitled to the sacraments.<sup>64</sup>

The social status of an individual is usually determined by the nature of occupation from which he derives his livelihood. This principle is highly relevant in Indian context. As Blunt correctly puts it :

"Certain occupations and professions are regarded as suitable, other as unsuitable to the rank of life in which he is born and should be followed one of the latter, then the esteem in which he is held is diminished, and he 'loses caste'.<sup>65</sup>

In the ancient times the caste had been classified on the occupational basis such as agriculture, pastoral occupation, learned profession, carrying and peddling, hunting, boating and fishing, trade and industry, singers and dancers, beggars and criminals.<sup>66</sup> For example, a high caste woman must remain in seclusion and her assistance in field works had been forbidden. Similarly, the custom forbids a Brahmin or Rajput to handle to plough.<sup>67</sup> Moreover, the members of the high castes usually possessed certain privileges. The occupational classification of caste

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64. *Supra* n. 62 at p. 99.

65. *Blunt*, *supra*, n. 49 at p.229.

66. *Id.* at pp. 234-35.

67. *Id.* at p. 263.

prevented shifting of occupation or profession as per one's will and choice. This system in turn perpetuated the social and economic inequalities by the domination of the upper caste over the lower ones.

Every caste had its appointed rank and every individual's status in society was governed by the rank of the caste to which he belonged. The status could not be raised. It could, however, be lowered if in any respect a man failed to obey the dictates of custom.<sup>68</sup> The expenditure of a person for his marriage ceremony, trade and industry, caste penalties, repayment of ancestral debt and maintenance of social prestige had been varied from person to person. This is evident from the historical point of view that how in ancient system the members of the high caste usually possessed the economic privileges and advantages.

When a man from a lower strata was forced to divert his entire attention towards earning the livelihood from the field, unskilled, labour or scavenging works he had no chance to get education and to improve his intellectual and moral standards. The upper strata of people who had the easy access to Veda and education developed their skill and personality. They dictated the terms on other's life in an oppressive manner and this resulted in the formation of deprived classes and, in turn, the perpetration of backwardness.

#### *(iv) Religious Practices and Caste System*

Ancient India witnessed Dravidian culture, vedic period, invasion of Aryans and intermingling of Aryans and Dravidians. The main sacraments, spiritual and their allied duties, were shared exclusively by the Brahmins, Kshatriyas and Vysias. The

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68. *Ibid.*



cleaning and low grade works were assigned to Sudras. The caste and religion had certain effect upon each other.<sup>69</sup> The exclusiveness of learning vedas and performing poojas resulted in social isolation of Sudras and they were deprived of learning vedas and getting education which ultimately resulted in less advantageous classes.

The *Varnashrama* system had the classification of caste based on the individual's profession and his place of birth. The lack of liberty to change one's profession or occupation, learning and acquiring necessary education coupled with the less advantageous and unskilled works pushed the Sudra community into the lowest web of the social stratification. Their position was further aggravated by the ideas of untouchability, unapproachability and unseeability which arose out of the ideas of ceremonial and occupational purity.<sup>70</sup> As Mittal rightly points out, the upholders of this system excluded the aborigines and the Sudras from religious and social communion with themselves.<sup>71</sup> The horrendous nature of the so-called purity covered every human activity. The state of affairs is described by Mittal thus :

"A vast section of the populace was debarred from keeping certain domestic animals, using certain metals for ornaments and household

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69. *Id.* at p. 307.

70. J.K. Mittal, *supra* n. 50 at p. 66.

71. *Ibid.* Mittal says : The Brahmins, on account of their being conscious of their superiority over aborigines as their overlords, being victims of their own ideas of ceremonial purity and being concerned with the purity of vedic ritual, prescribed a code of conduct for their own members to prevent the Sudras and aborigines from lowering in any way, their moral standard and introducing their low blood in to them." *Ibid.*

utensils, drawing water from public wells, entering into temples, enjoying services of washermen and barbers, and celebrating festivals with others. On the other hand, that section was obliged to wear a particular dress and footwear, to eat a particular type of food and to occupy dirty, dingy and unhygienic outskirts of towns and villages for habitation. Sometimes even the remnants of meals left after lunch or dinner were refused to untouchables".<sup>72</sup>

Thus a vast section of the society was socially segregated and marginalised and they became to the life of serfdom.<sup>73</sup> It was during nineteenth century there emerged positive efforts, from the part of social reformers, saints and some princes, to eradicate the evils of untouchability.<sup>74</sup> The twentieth century witnessed the British rule in India and the Christian missionaries started conversion of untouchables into Christianity in southern part of India. Even after conversion their plight continued<sup>75</sup> due to the peculiar feature of caste cutting across religions.

The above analysis of the Indian social milieu reveals that the caste system with its gradation and degradation was instrumental in marginalising a vast section of

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72. *Id.* at p. 67.

73. *Id.* at pp. 67-68.

74. *Id.* at p. 68. See also Marc Galanter, "Caste Disabilities and Indian Federalism", 3. J.I.L.I. 295 at p. 208 (1961).

75. Dick Kooiman, *Conversion and Social Equality in India*, Manohar Publications, New Delhi (1989) pp. 9-10. He says : "Since the untouchable groups were held in subjection both by economic force and the stigma of pollution, a decision to shed their old religion implied at the same time an attempt to shake off all economic exploitation". *Id.* at p.9.

Indian population to the sub-human conditions and thereby alienated from the main stream of life. The factors such as low-caste, poverty, illiteracy, low-level occupation and ritual standards prevented them from developing their potential and acquiring skills. They were denied opportunities in every walk of life. The reservation in employment to those sections, was given, for these historical reasons, with a view to eliminating those inequalities and to providing equal opportunity to have a share in the day to day affairs of the administration of the country. Are those factors still relevant in the present day context in ascertaining backwardness ? Or has social mobility procured changes in the social stratification among those sections and if so what is the rationale of identifying the real need for the beneficial treatment ? What is the judicial approach towards these questions ? Some of the following chapters are attempts of enquiry in this direction.

## CHAPTER - IV

# CRITERIA FOR DETERMINATION OF BACKWARDNESS

In the Constituent Assembly, the framers of the Constitution had confronted with the problem as to who were the eligible categories to be selected for reservation.<sup>1</sup> There was much confusion among them with regard to the use of the expression 'backward class' at the beginning and the word 'backward' did not find a place in Article 10(3) as originally proposed by the Assembly.<sup>2</sup> Some members wanted to limit the ambit of reservation only to untouchables or disadvantaged groups, whereas some others viewed that it should cover a broader category of people who were educationally, economically and socially backward irrespective of their religion, race or caste. Ultimately, the expression 'backward classes' was replaced in the Draft Article 10 (3) and that was later renumbered as Article 16 (4)<sup>3</sup> of the present Constitution.

It can be seen that the words 'backward classes' are included in two articles. One by the framers of the Constitution i.e., Article 16 (4) and another by the First Amendment, i.e., Article 15 (4).<sup>4</sup> Article 15 (4) provides reservation for socially

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1. For a detailed discussion of this aspect, see *Supra* Ch. III

2. VII C.A.D. 702.

3. Article 16 (4) reads: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State".

4. Article 15 (4) reads : "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes".

and educationally backward classes or for the Scheduled Castes and Scheduled Tribes, whereas in Article 16 (4) the reservation is guaranteed to 'any backward class of citizens'. Though Article 15(4) is intended for reservation in educational institutions and Article 16(4) is intended for reservation in public employment, the determination of backwardness is synonymously relevant for the two articles.<sup>5</sup>

In this Chapter, the approach of the judiciary towards the determination process is examined as to whether the factors such as caste, income, poverty, education, social and environmental condition, rural and geographical position has been properly analysed by the judiciary and reckoned in the criteria for determination of backwardness ? Did the judiciary successfully prune and accommodate those factors into the wider folding of equality provisions of the Constitution ?

### *1. The Caste-Class Controversy: Earlier Period*

The caste in Indian society was originated from the *varna* system in which people had been classified into different sects based on their occupation. In many commissions' recommendations, caste is considered as the main and even the sole criteria to determine backwardness. The reservation that existed in some of the States in India before independence was also based on community / caste. This system of reservation was put to the acid test of constitutionality by the judiciary after the Constitution came into force.

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5. In this Chapter, in order to analyse the judicial interpretations with regard to the determination of backwardness, the cases relating to both Articles 15(4) and 16 (4) have been taken.

The controversy over the role of caste in the determination of backwardness increased the number of litigations and the thorny issues which confronted with the judiciary during the earlier period were: (a) the role of caste in determining social and educational backwardness; (b) caste-poverty nexus and caste-occupation nexus; (c) the distinction between 'caste' and 'class', since 'class' is used in Article 16(4); and (d) the synonymy of backward class with Scheduled Caste-Scheduled Tribes.

The first case which reached before a Constitution Bench of the Supreme Court challenging the caste/community based reservation in appointment was of *B. Venkataramana v. State of Madras*.<sup>6</sup> In this case, the communal G.O. of the Madras Government made reservations for Harijans, Backward Hindus as well as for other communities, viz., Muslims, Christians, non-Brahmin Hindus and Brahmins. The Court, speaking through Chief Justice Kania, held the G.O. unconstitutional on the reason that the identification of backward classes was on caste/community basis which was not saved by Article 16(4). The Court pointed out that the classes of people other than Harijans and Backward Hindus could not be called as backward classes.<sup>7</sup> The Court's intention was very clear that when the State makes reservation of jobs it has to identify the backward classes on relevant criteria rather than allotting posts on the basis of caste.

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6. A.I.R. 1951 S.C. 229. In *State of Madras v. Smt. Champakam Dorairajan*, A.I.R. 1951 S.C. 226, a similar approach was taken by the very same Bench of the Court on the same day by striking down a classification made on the basis of caste, race and religion for the purposes of admission to educational institutions on the ground that Article 15 did not contain a clause such as clause (4) of Article 16.

7. *Id.* at p. 230.

The tussle between the judiciary and the State Governments over the issue of reservation to backward classes continued and persisted in those States where the principle of reservation was adopted even before independence. A significant instance was in the State of Mysore where this confrontation started in the late 1950's. In *Ramakrishna Singh v. State of Mysore*,<sup>8</sup> the Government of Mysore in 1958 provided reservation of 20% for SCs and STs and 45% for SEBCs and the remaining 35% of seats were kept open for meritorious students in technical, medical and other institutions. In backward class list 184 castes had been identified and it comprised sub-castes of Hindus, Muslims, Christians and Sikhs. Except Brahmins, Baniyas and Kayastas, all other castes of Hindu religion were included in the backward class. The petitioner challenged the 1958 order as such and in particular the identification of backward classes. The High Court had to find out the criteria to determine the social and educational backwardness and the role of caste in this respect. While questioning the Government order, the Court said:

"This ... is more a discrimination against the communities who have been excluded and who represent only 5% of the population of the State than a provision for the backward classes. Besides it is a provision not for socially and educationally backward classes, but for the classes who are comparatively backward to the most forward classes, even if it is assumed that the classes who have been excluded are the most forward classes of the State. This is not what Article 15 (4) of the Constitution contemplates. The object of the Article was not to enable the State to make

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8. A.I.R. 1960 Mys. 338.

a discrimination against the small section of the population or to permit a provision being made for comparatively backward classes, i.e., classes who, compared to the most forward classes are backward".<sup>9</sup>

The petitioner's contention that the backward classes could not be determined on the basis of caste and they must always be determined on territorial, economic, occupational or some such basis had been rejected by the Court when it said:

"It cannot be said that any such rigidity that determination in no case on the basis of caste".<sup>10</sup>

## 2. *Kaka Kalelkar Commission: the Pandora's Box Opened*

To identify the backward classes, Article 340<sup>11</sup> of the Constitution empowers the President to appoint a Commission. In pursuance of that power, the President, in

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9. *Id.* at p. 349.

10. *Id.* at p. 345.

11. Article 340 of the Constitution reads : "*Appointment of a Commission to investigate the conditions of backward classes*: — (1) 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 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.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.



1953, appointed a Backward Class Commission headed by Kaka Kalelkar, known as the First Backward Classes Commission.<sup>12</sup> After considering the social conditions in India and the causes for backwardness of a large section of the people, the Commission adopted the following criteria for general guidance:-

- "i) low social position in the traditional caste hierarchy of Hindu Society.
- ii) inadequate or no-representation in Government service;
- iii) lack of general educational advancement among the major section of a caste or community.
- iv) inadequate representation in the fields of trade, commerce and industry".<sup>13</sup>

After two years, the Commission prepared a list of 2399 castes and communities. Out of these castes only 913 castes accounted for an estimated population of 115 millions (about 32% of the total population of India). Thus about 70% of India's population was considered as backward. The Commission was confronted with the problem of determination of backward classes and the majority members emphasised the importance of caste in this regard. Although the Commission listed the criteria such as literacy, representation in services and trade or industry , the

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12. The terms of reference before the Commission were (1) to determine the criteria to be adopted in considering whether any section of people in the territory of India should be treated as socially and educationally backward class (2) to investigate the conditions of social and educational backward classes and make recommendations. For the relevant portion of the report, see Virendrakumar, *Committees and Commissions in India 1947-73*, Vol. I, D.K. Publishing House, Delhi, (1975), p. 253.

13. *Id.* at p. 255.

main criteria applied by the Commission was the position of caste in the social hierarchy. In order to justify the stand of identification of backward classes, the Commission observed in its report as follows:

"Our society was not built essentially on an economic structure but on the medieval ideas of varna, caste and social hierarchy".<sup>14</sup>

However, the Chairman of the Commission had changed his mind after signing the report and before sending it to the President. In the enclosing letter to the President he vehemently pleaded for rejecting the report on the ground that the reservation on the basis of caste would not be in the interest of the country. He opined that the principle of caste should be eschewed altogether then only it would be, helpful to the extremely poor and deserving members of all communities. At the same time, he added that preferences ought to be given to those who come from traditionally neglected social classes. This opinion of the Chairman opened a Pandora's Box and ultimately resulted in rejecting the report altogether.

### 3. *The Balaji Dictum : The Genesis of Doctrinal Disarray*

*M.R. Balaji v. State of Mysore*<sup>15</sup> involved a Mysore scheme of reserving seats in educational institutions for backward classes. Basing on Nagan Gowda

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14. *Report of Backward Classes Commission*, Vol. I, Manager of Publications, Delhi (1955), p. 39.

15. [1963] Supp. 1 S.C.R. 439.

Committee Report,<sup>16</sup> the Government allotted 68% of the seats in favour of backward classes, Scheduled Castes and Scheduled Tribes. Backward classes were again divided into two categories — 'backward classes' and 'more backward classes'. The validity of this scheme was questioned before the Supreme Court. Though the case was related to Article 15 with certain observations with regard to Article 16, the decision of the Supreme Court is considered as a *locus classicus* in the area of backward class reservation policies. The Court speaking through Justice Gajendragadkar explained the meaning of the term "socially and educationally backward classes" appearing in Article 15(4) that it is not either social or educational but it is both social and educational.<sup>17</sup> With regard to the identification of backwardness, the Supreme Court enunciated certain principles. The Court analysed the role of caste in the evolution of Hindu Society and held that caste may not be irrelevant to consider in the determination of backwardness, but its importance should not be exaggerated. To quote Justice P.B. Gajendragadkar :

"The group of citizens to whom Article 15(4) applied are described as 'classes of citizens', not as castes of citizens.... In the Hindu social structure, caste unfortunately plays an important part in determining the

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16. The State appointed the Committee called the Mysore Backward Classes Committee with Dr. R. Nagan Gowda as Chairman to investigate the problems and advise the Government as to the criteria which should be adopted in determining educationally and socially backward classes. This Committee came to the conclusion that the only practical method of classifying backward classes in the State was on the basis of castes and communities and accordingly it specified the criteria which should be adopted.

17. *Id.* at p. 459.

status of the citizen. Though according to sociologists and vedic scholars, the caste system may have originally begun on occupational or functional basis, in course of time, it became rigid and inflexible. The history of the growth of caste system shows that its original function and occupational basis was later overburdened with considerations of purity on ritual concepts, and that led to its ramifications which introduced inflexibility and rigidity. This artificial growth inevitably tended to create a feeling of superiority and inferiority and to foster narrow caste loyalties. Therefore, 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*. In this connection, it is however, necessary to bear in mind that the special provision is contemplated 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 be exaggerated*".<sup>18</sup>

The Court further observed that if the caste of the group of citizens were made the sole basis for determining the social backwardness of the said group, that test would inevitably breakdown in relation to many sections of Indian Society like Muslims, Christians or Jains which do not recognise castes in the conventional sense known to Hindu Society.<sup>19</sup> According to the Court, if the classification of backward classes was based solely on the caste of citizen, it might not always be logical and

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18. *Id.* at pp. 459-460. Emphasis supplied.

19. *Id.* at p. 460.

may perhaps contain the vice of perpetuating caste themselves.<sup>20</sup> Thus the Court very emphatically concluded :

"That is why we think 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 the dominant test in that behalf*".<sup>21</sup>

*Balaji* denounced the exclusive reliance on caste status in determining social backwardness but it accepted *communities*<sup>22</sup> to be designated as classes. It was further stated by the Court that only those communities which were well-below the State average can properly be regarded as educationally backward classes of citizens.<sup>23</sup>

The Court viewed that social backwardness was on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who were deplorably poor automatically became socially backward and they did not enjoy a status in society and had, therefore, to be content to take a backward seat. The Court went further and said :

"It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may

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20. *Ibid.*

21. *Ibid.* Emphasis supplied.

22. *Id.* at pp. 461, 463-464.

23. *Id.* at p. 464.

belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens".<sup>24</sup>

Though the Court observed that both caste and poverty are relevant in determining the backwardness, it found that the primary index or cause of backwardness is poverty itself and caste considerations aggravates it and not vice versa. In other words caste factor could not be the sole determinant of backwardness, but had to be used in conjunction with some neutral or noncommunal indices of backwardness like poverty, location, occupation etc. The Court also adopted the test of nearness of Other Backward Classes to Scheduled Castes and Scheduled Tribes in determining backwardness.

*Balaji* is a classic example of decision of multi-edged-weapon, a peculiar feature of reservation cases, perhaps, of their nature of competing equalities. This is quite evident in the subsequent court's reliance and quotations of *Balaji* dictum to suit their convenience. Taking a part of the ratio and not following its entirety really made the *Balaji* dictum severely distorted and *Balaji* became fit for all positions. The resultant problem of this judicial approach is thus succinctly explained by a noted academic in the following words :

"The cognitive distortions of *Balaji* has resulted in the emergence of an ambiguous doctrinal frame which presents multiple and competing meanings of castes and classes".<sup>25</sup>

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24. *Id.* at pp. 460-461.

25. Parmanand Singh, "Castes and Classes : The Doctrinal Puzzle from *Balaji* to *Vasanth*", (1986) 1 S.C.C. (Jour.) 36. at p. 37

Similarly Marc Galanter aptly pointed out that much of the confusion over the meaning of castes and classes had been caused by the failure of the courts to clarify the distinction between caste in the sense of corporate group or as a *unit* of classification and caste in the sense of rank or standing as a measure of backwardness.<sup>26</sup> The failure of the courts to clarify this distinction had led to "considerable confusion and in particular it had observed and diffused the original commitment to overcome the heritage of caste distinctions".<sup>27</sup>

#### 4. *Chitralkha to Jayasree : Increasing Vacillations*

As a result of the *Balaji* decision, the Mysore Government issued fresh orders defining the socially and educationally backward classes for the purpose of admission to medical and engineering colleges in the State. This was based on the criteria of economic condition and occupation, but the caste was not at all taken into account. It stated that those who followed occupations of agriculture, petty business, inferior service, crafts or other occupations involving manual labour and whose family income was less than Rs.1,200/- per annum were to be treated as belonging to backward classes.

The order was questioned before the High Court in *D.G. Viswanath v. Govt. of Mysore*.<sup>28</sup> The High Court while heavily relying on *Balaji* held that the Scheme was imperfect and in addition to the occupation and poverty tests, the State should have

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26. Marc Galanter, *Competing Equalities : Law and the Backward Classes in India*, Oxford University Press, Delhi (1984), pp. 189-190.

27. *Id.* at p. 535.

28. A.I.R. 1964 Mys. 132.

adopted the "caste" test as well as the "residence" test in making the classification. The High Court relied only on that part of the decision in *Balaji* which says that caste was not irrelevant to determine backwardness in the case of Hindus.

a) *Chiralekha : A Misreading of Balaji*

The observation of the High Court in *Viswanath* was questioned before the Supreme Court in *Chitrakha v. State of Mysore*<sup>29</sup> as it was not the real import of *Balaji* but it was just opposite to *Balaji*. The Supreme Court, accepted the criteria adopted by the Mysore Government and thus "considered the exact scope" of the observations in *Balaji* and observed that the High Court judgment was in conflict with *Balaji* decision. The Court speaking through Justice K. Subba Rao clarified the position in the following words :

"...we would... make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgement of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances, affording a basis for the 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 criteria.<sup>30</sup>

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29. A.I.R. 1964 S.C. 1823.

30. *Id.* at p. 1833.



On a close scrutiny of *Chitralekha* it can be seen that the observation of the Court is not consistent with *Balaji*. In *Balaji* the caste was considered as not an irrelevant factor though not as a sole criterion. It was considered as a relevant factor in relation to Hindus. In *Chitralekha* neither the Nagan Gowda Committee Report nor *Balaji* was clearly comprehended and analysed by the Court. In the Nagan Gowda Committee Report, it was unambiguously stated in its preamble that the Committee had come to the conclusion that in the then prevalent circumstances, the only practical method of classifying the backward classes in the State was on the basis of caste and communities and this test was accepted by State Government.<sup>31</sup> However the Court in *Chitralekha* "explained" *Balaji* by observing that "even caste can be excluded if other criteria are sufficient to determine backward class".<sup>32</sup> Caste was not a necessary test of backwardness and backwardness could be determined by the individual's economic position. This approach of the Court in *Chitralekha* is really against the spirit of *Balaji* with regard to the idea that Article 15(4) was meant for classes of citizens and not individual citizens as such. Here the Court fused the meaning of caste as a unit of classification and caste status as measure of backwardness<sup>33</sup> when it is observed as follows:

"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 caste also as a unit of social and educational backwardness, they would have said so as they have said in the case of the

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31. For summary of the report, see *M.R. Balaji v. State of Mysore*, *supra* n. 15 at p. 462.

32. *Supra* n.29 at p. 1834.

33. *Supra* n.25 at p. 40.

Scheduled Castes and Scheduled Tribes.... if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression "backward classes or castes".<sup>34</sup>

The Court further clarified that juxtaposition of the expression backward classes and Scheduled Castes in Article 15(4) also lead to a reasonable inference that the expression 'classes' was not synonymous with castes. The Court's "juxtaposition" argument showed that the meaning of "backward classes of citizens" in Article 16(4) was different from the meaning under Article 15(4)<sup>35</sup>

The Court further emphasised that under no circumstances a "class" could be equated to a "caste" though the caste of an individual or a group of individuals might be considered along with other relevant factors in putting him in a particular class. Further the Court made it clear that if in a given situation caste was excluded in ascertaining a class within the meaning of Article 15 (4) of the Constitution, it did not vitiate the classification if it satisfied other tests.<sup>36</sup>

In *Balaji* the Court considered caste as a relevant criterion though not as a sole one, whereas in *Chitrallekha* the Court viewed that caste can be eschewed if other tests are satisfied. But this observation poses the following question. Can a group other than caste be a practicable or viable criterion to determine its backwardness ? When the society is stratified and classified based on caste system, how can the

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34. *Supra* n.29 at p. 1834.

35. *Supra* n.25 at p. 40.

36. *Supra* n.29 at p. 1834.

caste factor be neglected altogether ? Though Article 15(4) contains the word "class" instead of "caste"; the class is nothing but a group of individuals gathered from the castes. Materially caste and class have distinction, but in this context the caste has a considerable say in the identification of backward classes.

(b) *Triloki : Balaji Re-asserted*

In *Triloki Nath v. State of Jammu and Kashmir (I)*,<sup>37</sup> the State Government gave promotion to certain section of teachers to higher grade on the basis of backward communities<sup>38</sup> by overlooking seniority. The question of how to identify the backward classes came before the Supreme Court. The sole test of backwardness, according to the State Government, was the inadequacy of representation in the services of the State and this was based on the difference in the phraseology used in Article 15(4) and 16(4), viz., socially and educationally backward classes in the former and backward classes in the latter. The Court rejected this contention by holding that such an approach would exclude the really backward class of citizens from the benefit of the provision and confer the benefit on a class of citizens who, though rich and cultured, had taken other avocations of life. The Court further held:

"It is, therefore, necessary to satisfy two conditions to attract clause (4) of Article 16 namely (i) a class of citizens is backward, i.e., socially and educationally, in the sense explained in *Balaji's* case; and (ii) the said class is not adequately represented in the State service under the State".<sup>39</sup>

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37. A.I.R. 1967 S.C. 1283.

38. The scheme of reservation was as follows : Out of every 100 gazetted posts, 50 went to Muslims of the entire State, 30 went to Hindus from provinces of Jammu, and the remaining 20 went to Kashmiri Pandits, out of which one or two went to Sikhs.

39. *Supra* n. 37 at p. 1286.

The Court reached this conclusion by relying on *Balaji* in the following manner :

"Though the decision in *M.R. Balaji v. State of Mysore* turned upon Article 15 (4) of the Constitution, the principles laid down therein will equally apply to the facts of the present case".<sup>40</sup>

The endorsement of *Balaji* in *Triloki (I)* is neither correct nor away from judicial fallacy. *Balaji* is a case related to reservation in educational institutions, where as *Triloki (I)* is concerned with reservation in promotion under Article 16(4). In *Balaji* the Court without making a proper analysis of the two articles observed that, "what is true in regard to Article 15(4) is equally true in regard to Article 16(4)". This obiter was followed by later decisions without noting the fact that in *Balaji* Article 16(4) was not at all a matter of dispute. By transplanting the interpretation of Article 15(4) into Article 16(4), i.e., "class" and "caste" distinction and further developing Article 16 (4) to identify backward classes based upon social and educational backwardness of the former article and fusing it with adequacy of the representation and opinion of the State of the latter without making any distinction between the two led to too much confusion and disarray in the determination of backward classes. Since Article 16 (4) had been properly analysed by the framers of the Constitution<sup>41</sup> it can very well be drawn that though caste was not considered as a sole criterion, its relevance was not rejected in the determination of backwardness and Article 16 (4) is controlled by the two operative parts, i.e., "in the opinion of the State" and "not adequately represented in the services." Without noting the

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40. *Ibid.*

41. For a detailed discussion of this aspect, see *supra* Ch. III.

distinction between Article 16(4) and Article 15(4), the Supreme Court proceeded with the gloss expounded in *Balaji* and thereby fell into abiding confusion.

The Supreme Court in *Triloki (I)* ordered the High Court to gather necessary material with regard to the extent of social and economic backwardness of the reserved communities and the criteria applied by the State in this aspect. Later when the matter is brought before the Supreme Court in *Triloki Nath v. State of Jammu and Kashmir(II)*,<sup>42</sup> the Court put the expression "backward class" to a thorough analysis. Speaking through Justice J.C. Shah, the Court made it clear that the expression "backward class" was not synonymous with "backward caste" or "backward community". The Court thus clarified :

"In its ordinary connotation, the expression "class" means a homogenous section of the people grouped together because of certain likeliness or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth, or residence cannot be adopted, because it would directly offend the Constitution".<sup>43</sup>

While quashing the order of promotion as "a scheme of distribution of all posts on community-wise",<sup>44</sup> the Court emphasised that the members of an entire caste or

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42. A.I.R. 1969 S.C. 1.

43. *Id.* at p. 3.

44. *Id.* at p. 4.

community might in the social, economic and educational scale of values at a given time be backward and might on that account be treated as a backward class, but that was not because they were members of a caste or community, but because they formed a class.<sup>45</sup>

The inconsistencies and illogical propositions paved the way for the lower judiciary to decide the cases on its own fashion and that happened in *Desu Rayudu v. A.P.S.C.*<sup>46</sup> In this case the petitioner challenged the classification of backward class on the basis that the State Government failed to take into account the relevant criteria to determine the backward class. The Court went in the line of *Balaji* and observed :

"... the term backwardness is not confined to Hindu backward classes nor does it mean the caste amounts to Hindu only. Determination of backward classes on the basis of caste would therefore be not only derogatory to Articles 15 and 16, but would also go quite contrary to the avowed principles enunciated in the Constitution".<sup>47</sup>

The High Court also could not find the difference between Articles 15 (4) and 16 (4) when it said :

"The argument that caste cannot be the sole or predominant basis for determining the list of backward classes may be good for Article 15, but is

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45. *Id.* at p. 3.

46. A.I.R. 1967 A.P. 353

47. *Id.* at p. 361.

not good for Article 16, is also devoid of any substance. The term backward classes appearing in Article 16 (4) cannot be in our opinion, decided exclusively or predominantly on the basis of caste".<sup>48</sup>

(c) *Rajendran : A Departure from Balaji*

Though the import of *Balaji* and *Chitrlekha* was that caste cannot be the sole criterion to determine backwardness, many State Governments proceeded unheeding to this Supreme Court direction. The social and historical conditions of their States might have warranted themselves to identify the backward classes otherwise. This happened in Tamil Nadu and the identification again became a moot question in *P. Rajendran v. State of Madras*.<sup>49</sup> For the purpose of admission to medical colleges, the Madras Government identified backward classes based on caste and the Supreme Court accepted that classification when it observed in the following words :

"It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens."<sup>50</sup>

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48. *Id.* at p. 362.

49. A.I.R. 1968 S.C. 1012.

50. *Id.* at p. 1015.

The Court examined the history as to how the list of backward classes was made in the State of Madras starting from the year 1906 and how the list had been kept then date and necessary amendments made therein. It had been found 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 castes as a whole were found to be socially and educationally backward, they were put in the list. Later this list was finally adopted for purposes of Article 15 (4) after a thorough examination. Thus the Court summarised :

"In short, the case of the State of Madras is that the caste 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...we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15".<sup>51</sup>

The Court thus, identified caste groups as unit of classification whose backwardness could be measured by different indices and caste standing being only one of these indices.<sup>52</sup> The decision of *Rajendran* is a clear deviation from the earlier judgements especially *Balaji* and *Chitralkha*. Prior to *Rajendran* the Court had quashed many Government orders in which the ascertainments were made mainly

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51. *Ibid.* Emphasis supplied.

52. *Supra* n. 25 at p. 41.



based upon caste. But in *Rajendran* the Court was cognisant by tracing out the historical back drops of castes and its relevance in the concept of backwardness.

(d) *Sagar : A Middle-path*

This inconsistent judicial approaches paved the way for much abiding indeterminacy in the ascertainment of backwardness. But the corrective mechanism of the judicial process, in the due course, helped to remove the doctrinal disarray. In the meantime the Supreme Court took a middle path between *Balaji-Chitrallekha* line of approach and *Rajendran* in *State of A.P. v. P. Sagar*.<sup>53</sup>

In this case the State Government moved an appeal against the decision of Andhra Pradesh High Court<sup>54</sup> before the Supreme Court. The Court while interpreting the concept of class and evaluating the necessity of caste as a criterion to determine backward classes observed in the following manner :

"In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of the class—test solely based upon the caste or community cannot also be accepted".<sup>55</sup>

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53. A.I.R. 1968 S.C. 1379.

54. *P. Sagar v. A.P.*, A.I.R. 1968 A.P. 165, wherein the Andhra Pradesh High Court quashed the classification of backward classes which was determined mainly based on caste. The Court asked the law Secretary to file the affidavit regarding the basis they classified the backward classes; and when it was realised by the Court that the classification was mainly based on caste, by quashing the order of Government the Court directed the State Government, to identify backward classes based on education, literacy, income, standard of living, place of habitation and caste.

55. *Supra* n. 53 at p. 1382.

This approach is more balanced and appropriate. In a society which comprises many castes, the caste has been constituted as an important historical factor in forming backward classes. The caste is nothing but a collection of individuals who constitute a class. But judiciary has many a time adopted an extreme stand either over-emphasising or under-estimating the factor of caste in determining backwardness.

(e) *Periakaruppan* : Followed *Rajendran*

A similar line of approach of *Rajendran* was adopted by the Supreme Court in *A. Periakaruppan v. State of Tamil Nadu*.<sup>56</sup> In this case the Tamil Nadu Government, for the purpose of medical college admission, identified the backward classes mainly on the basis of caste. The petitioner contended that the classification of backward classes based on caste was unconstitutional. The Court quashed the order of State Government by finding that the selection process was arbitrary and upheld the classification of backward classes after a thorough analysis of *Chitrlekha, Sagar* and Backward Class Commission's Report and reached a conclusion in the following manner :

"*Rajendran's case* is an authority for the proposition that the classification of backward classes on the basis of caste is within the purview of Article 15 (4) if those castes are shown to be socially and educationally backward.... There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore

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56. A.I.R. 1971 SC 2303.

their existence is to ignore the facts of life. Hence, we are unable to uphold the contention that the impugned reservation is not in accordance with Article 15 (4)".<sup>57</sup>

From Kaka Kalelkar Commission i.e., even before *Balaji* to *Periakaruppan*, there were two lines of thought existed in the judicial interpretation regarding the role of caste in the determination of backward classes. In *Balaji* the Court did not endorse the idea of Kaka Kalelkar that caste could be a sole criterion in certain circumstances and the trend had been continued and it was reformulated in *Chitralkha*, that caste would be eschewed if other criteria were relevant. While *Triloki Nath* followed *Balaji*, *Rajendran* and *Periakaruppan* endorsed the basis of Kaka Kalelkar Commission after making a scrutiny of the caste in the historical context of the backward classes in State of Tamil Nadu. The Court upheld the classification of backward classes which was mainly based upon caste.

(f) *Balram : A Milestone*

Later in *State of A.P. v. U.S.V. Balram*,<sup>58</sup> the Supreme Court was confronted with a dilemma of which trend should be followed, i.e. whether the line of *Balaji* or *Periakaruppan*. In *Balram*, the Court had to decide upon the validity of the backward class list prepared by the Andhra Pradesh Backward Classes Commission

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57. *Id.* at pp. 2310-2311.

58. (1972) 1 S.C.C. 660. The Andhra Pradesh Government appointed a Commission to identify 25% of the socially and educationally backward classes and the High Court held that the 22% of reservation as unconstitutional because the Commission has merely enumerated various persons belonging to a particular caste as backward classes.

for the purpose of medical college admissions in the State as it was assailed that the list was based exclusively on caste. The Court speaking through Justice C.A. Vaidialingam inclined to *Periakaruppan* and upheld the validity of the list prepared by the Commission in the following words :

"In our opinion, the Commission has taken considerable pains to collect as much relevant material as possible to judge the social and educational backwardness of the person concerned. There was sufficient material to enable the Commission to be satisfied that the persons included in the list are really socially and educationally backward".<sup>59</sup>

The Court further clarified that if an entire caste was found to be socially and educationally backward, their inclusion in the list of Backward Classes by their caste name was not violative of Article 15 (4).<sup>60</sup>

The decision of *Balram* is significant on many counts. It rejected the dictum of *Balaji* with regard to the comparability of Scheduled Castes - Scheduled Tribes with Backward Classes and held that social and educational backwardness must not be exactly similar in all respects between the two sections. Further, it was stated that if the Caste as a whole was found to be socially and educationally backward, it was not a matter that a few individuals in that group might be both socially and educationally above the general average. This is a diametrically opposite approach to *Balaji* and *Chitralekha* whose position was to eliminate the rich from the reserved group. In

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59. *Id.* at pp. 685-686.

60. *Id.* at p. 686.

*Balram*, the Supreme Court strengthened the significance of caste by relying on *Rajendran-Periakaruppan* ratio and accepted the Andhra Pradesh Backward Class Commission's Report. But it was not an end of the controversy.

(g) *Janaki Prasad : A Retreat to Balaji*

Within a year a five-judge Bench of the Supreme Court in *Janaki Prasad Parimoo*<sup>61</sup> reverted to *Balaji - Chitrlekha* approach. The case was relating to reservation in promotion for backward classes under Article 16(4). By relying on the *Balaji* dictum the Court held that the words 'socially' and 'educationally' could be used cumulatively for the purpose of determining backward classes in both Articles 15(4) and 16(4) and the backwardness must be similar to that of Scheduled Castes and Scheduled Tribes. Caste or community would not be the sole test in the determination and the backwardness was ultimately and primarily due to poverty. But at the same time poverty could not be the exclusive test because of the large poverty stricken sections. In the same tone of *Chitrlekha* the Court cautioned the inclusion of advanced sections of backward class into the ambit of reservation. To quote Justice Palakar in this regard :

"The words "advanced" and "backward" are only relative terms — there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as socially and educationally backward".<sup>62</sup>

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61. (1973) 1 S.C.C. 420.

62. *Id.* at p. 434.

(h) *Pradip Tandon : Discarding of Rajendran and Periakaruppan*

The doctrinal approach adopted by the Supreme Court in *Rajendran* and *Periakaruppan* was totally discarded by it within few years in *State of U.P. v. Pradip Tandon*.<sup>63</sup> In this case the reservation for rural, hill and Uttrakhand areas for socially and educationally backward classes in admission to medical colleges in the State was in question. It is significant to note that the Court misquoted *Balaji* and *Sagar* for the proposition that "classification of backwardness on the basis of castes would violate both Articles 15(1) and 15(4)"<sup>64</sup> Chief Justice A.N. Ray's holding that **caste cannot be taken even as one of the criteria for determination of backwardness is a clear error of unmindful of the meaning of the word as 'only' in Article 15 and 16 of the Constitution. He explained his views, thus :**

"Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15 (4) will stultify Article 15 (1)".<sup>65</sup>

According to the Court, when a classification took recourse to caste as one of the criteria in determining backward classes the expression "classes" in that case

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63. (1975) 1 S.C.C. 267.

64. *Id.* at p. 273.

65. *Id.* at pp. 273-274.

violated the rule of *expressio unius est exclusio alterius*. That is, the socially and educationally backward class of citizens were groups other than based on caste.<sup>66</sup>

In *Pradip Tandon*, though the Court was not addressed to a caste based classification, the Court vigorously argued that caste could not be a criterion at all to determine the backward classes. Here, the Court neither followed the ratio of *Balaji* i.e., caste could not be a sole criterion but might not be irrelevant in determining backward classes, nor followed the ratio of *Periakaruppan*, i.e., the caste could be a main criteria if the historical and other factors proved that the caste-group is backward, but propounded a different line. The Court interpreted that class was nothing but a homogeneous group of individuals who were grouped together because of certain likenesses and common traits and who were identifiable by some common attributes. The homogeneity of the class was social and educational backwardness. Neither caste nor religion nor place of birth would be the uniform element of common attributes. The Court neither properly assessed the earlier decisions nor the constitutional provisions.

(i) *Jayasree : A Balanced View*

Chief Justice Ray on the next occasion, corrected this fallacy of *Pradip Tandon* in *K.S. Jayasree v. State of Kerala*<sup>67</sup> wherein the income ceiling prescribed for backward reservation in educational institutions was unsuccessfully challenged by the petitioner. While upholding the means-cum-caste/community scheme of

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66. *Id.* at p. 274.

67. (1976) 3 S.C.C. 730.

reservation, the Court reverted to the *Balaji* position that caste might not be irrelevant in the determination of backwardness, but its importance should not be exaggerated. The Court made it clear that :

"Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests".<sup>68</sup>

The Court, however, did not expressly rely on *Balaji*, though it referred *Chitrallekha* for the proposition that "the classification of backward class based on economic conditions and occupations did not offend Article 15 (4)". Really, the dictum in *Chitrallekha* was that if other factors are relevant to satisfy the test of backwardness, even the caste factor could be excluded in the determination. The Court's opinion in *Jayasree* with regard to the nexus of backwardness and poverty was based on *Balaji*, i.e., poverty was the primary index of backwardness and that was aggravated by considerations of caste.

##### 5. *Vasanth Kumar : Confusion Confounded but Marked a Turning Point.*

In yet another occasion a five Judge Bench of the Supreme Court was called upon to draw the guidelines to a proposed Backward Class Commission of the State of Karnataka in determining "constitutionally sound and nationally acceptable criteria" for identifying socially and educationally backward classes under Articles 15 (4) and 16(4). It was in *K.C. Vasanth Kumar v. State of Karnataka*,<sup>69</sup> the

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68. *Id.* at p. 736.

69. A.I.R. 1985 S.C. 1495.



Supreme Court squandered an opportunity of settling the issues. Even though the Court added much confusion to the existing conundrums, it made a turning point in the determination of backwardness.

The Chief Justice Chandrachud in this case in a brief opinion recommended periodical review of reservation policies and opted for means test. He upheld the comparability test of backwardness between other Backward Classes and Scheduled Castes - Scheduled Tribes<sup>70</sup>. Justice Desai reviewed the case law on the question of ascertainment of backwardness on the basis of caste and focused the existing judicial vacillation in this regard and held that the only criteria which could be realistically devised was one of the economic backwardness. Some relevant criteria such as the secular character of the group, its opportunity for earning livelihood etc., might be added to this, but by and large economic backwardness must be the load star.<sup>71</sup> He was critical of the caste test since according to him it would not only lead to the perpetuation of the caste system but also the exploitation by the upper crust over the lower strata of the same caste. This view, it seems, is taken from the earlier rulings of the Court especially *Balaji*. With a view to destroying the caste structure, Justice Desai opted for economic criterion which would strike at the root cause of social and educational backwardness and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the nation. He further proceeded to say :

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70. *Id.* at p. 1499.

71. *Id.* at p. 1506.

"This approach seeks to translate into reality the twin constitutional goals : One, to strike at the perpetuation of the caste structure of the Indian society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the main stream of life which means eradication of poverty".<sup>72</sup>

Justice A.P. Sen was also of the view that the predominant and the only factor for making reservation should be poverty and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes or Scheduled Tribes till such members of Backward Class attain a stage of enlightenment.<sup>73</sup>

Justice O. Chinnappa Reddy perceived the role of caste in a different footing in the determination of backwardness i.e., caste is the primary index of social backwardness. He brought out the significance of caste in the context of a caste-ridden hierarchical Indian society, its unique and devastating system of gradation and degradation which divided the entire Indian and particularly Hindu society horizontally into such distinct layers as to be destructive of ability, a system which penetrated and corrupted the mind and soul of every Indian citizen.<sup>74</sup> The social status and economic power were so woven and fused in the caste system in Indian rural society and therefore, he, observed :

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72. *Ibid.*

73. *Id.* at p. 1530.

74. *Id.* at p. 1511.

"... if poverty the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. Such, we must recognise is the primeval force and omnipresence of caste in Indian society, however much we may like to wish it away".<sup>75</sup>

Justice Chinnappa Reddy viewed that poverty, caste, occupation and habitation were the principal factors which contributed to brand a class as socially backward. The custom, rituals, habits, festivals, mode of worship etc., were enlightening elements in recognising their social gradation and backwardness.<sup>76</sup> Poverty according to him, was the basic, being the root cause as well as the rueful result of social and educational backwardness. He reiterated :

"There is and there can be nothing wrong in recognising poverty wherever it is reflected as an identifiable group phenomena whether you see it as a caste group, sub-regional group, an occupational group or some other classes".<sup>77</sup>

He denounced the *Balaji* dictum of comparability requirement between backward classes and Scheduled Castes-Scheduled Tribes by holding that it would perpetuate the dominance of existing upper classes and would take a substantial majority of the classes who were between the upper castes and Scheduled Castes

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75. *Id.* at p. 1512.

76. *Id.* at p. 1528.

77. *Id.* at p. 1529.

and Scheduled Tribes out of the category of backward classes and put them at a permanent disadvantage.<sup>78</sup>

Justice E.S. Venkataramiah examined the historical evolution of reservation in the State of Karnataka and thoroughly explained the meaning, history and relevance of caste in Indian society. He rightly found out that the inconsistencies in several earlier decisions of the Supreme Court could have been avoided if caste had been taken into consideration as a relevant test. According to him, the other backward classes were those who belonged to castes/communities which were traditionally disfavoured and which had suffered social discrimination in the past.<sup>78a</sup>

#### 6. *An Evaluation of Vasanth Kumar*

It is significant to note that the Supreme Court in this case could not set right the indeterminacy surrounding to the issues of reservation. Regarding the class-caste controversy, the confusion is found to be confounded by this decision but it opened a new path towards much realisation of the role of caste in Indian social set up. Only two Judges, i.e., Chinnappa Reddy and Venkataramaiah, JJ., defended and underscored the relevance of caste in Indian context and the necessity of its place in the determination of backwardness. Justice Chinnappa Reddy even went to the extent of asserting that the caste is the primary index of social backwardness if poverty is the cause. This is a sharp reversal from *Balaji*. Though Justices Desai and Sen expressed their antagonism in taking caste based test,

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78. *Id.* at p. 1515.

78a. *Id.* at P. 1541-42.

Chandrachud, C.J., did not express any opinion in this regard. However the majority viewed "classes" as historic communities. But there was no consensus on how to measure the backwardness. While Chandrachud, C.J., preferred means-cum-caste/community test, Sen, J., favoured poverty test but said nothing about the exclusion of the well-off members. Justice Desai's deep concern in adopting economic criteria did not visualise the problem of its adoption in a poverty-ridden vast majority. He lost sight of the fact that poverty alone could not procure places in professional colleges because to enjoy reservations one needs at least minimum qualifications.<sup>78b</sup> He also did not notice the limited ambit of Articles 15(4) and 16(4). Out of five Judges majority ( Chandrachud, C.J., Venkataramiah and Sen J.J. ), viewed that Other Backward Classes should be comparable to Scheduled Castes-Scheduled Tribes.

It is to be noted that Justice Chinnappa Reddy denounced the concept of creamy layer for its 'universal nature that in any society either backward or forward, the upper crust snatches away the benefit'. He favoured an upper income ceiling to exclude the "few" members of the castes or social groups who might have progressed far enough and forged ahead so as to compare favourably with the leading forward classes, economically and socially. His view that reservation for backward classes should be in proportion to their population ignores the impossibility of confining the percentage of reservation within reasonable limits.<sup>78c</sup> His equation of social backwardness with low social position, an approach similar to the Mandal Commission, underscored the significance of the stratified social set up and the

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78b. *Supra* n. 25 at p. 43.

78c. *Id.* at p. 46.

relevance of caste in the enduring backwardness. This line of approach is seen as a turning point in the determination of backwardness. His enquiry into the jurisprudential basis of reservation from the theories of Max Weber, John Rawls and R.H. Twanney is quite noteworthy.

#### 7. *Mandal Commission and the Determination of Backward Class*

Neither the State Governments nor the judiciary could clearly lay down the standards for the determination of backwardness and this inconsistency persisted for quite a long time. In 1978 the Janata Government headed by Shri Morarji Desai, appointed a Commission under the chairmanship of B.P. Mandal and five other members. The Commission submitted its report in 1980. The terms of reference of the Commission were as follows:

"(1) to determine the criteria of defining the social and educational backward classes; (2) to recommend steps to be taken for the advancement of socially and educationally backward classes of citizens so identified; (3) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and (4) to present to the President of India a report setting out the facts as found by them and making such recommendations as they think proper".<sup>79</sup>

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79. *Report of the Backward Classes Commission*, Vol.III, Controller of Publications, New Delhi; (1981), p. vii

The Commission deeply dwelt upon the social dynamics of caste in Indian context and how caste modified and influenced the society. The Commission while referring to the Rajani Kothari's work, said that being the unit of social organisation in India, the role of caste was bound to increase under a political system based on adult franchise.<sup>80</sup>

The Mandal Commission analysed the post-constitutional developments, the role of castes and the various political movements. The Commission observed that the pace of social mobility was no doubt increasing and some traditional features of the caste system had inevitably weakened. But what caste had lost on the ritual front, it had more than gained on the political front. This had also led to some adjustments in the power equation between the high and low castes and thereby accentuated social tensions. Whether these tensions rent the social fabric or the country was able to resolve them by internal adjustments, would depend upon how understandingly the ruling high castes handle the legitimate aspirations and demands

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80. The Commission said : "those in India who complain of 'Casteism' in politics", observes Kothari, "are really looking for a sort of politics which has no basis in society". In the process of politicisation, caste has provided a cushion for absorbing the impact of modernist forces without disturbing the social fabric... The interaction of castes and the democratic politics, has produced two results : First, "the caste system made available to the leadership, structural and ideological basis for political mobilisation... Second, the leadership was forced to make concessions to local opinion, take its cue from the consensus that existed as regards claim to power, articulate political competition on traditional lines and in turn, organise caste for economic and political purpose... Politics and society began moving nearer and a new infra-structure started coming into being... Politics affords to the lower castes an opportunity to achieve through politics what they cannot achieve through social instrumentalities". Rajani Kothari, *Caste in Indian Politics* as cited in *id.*, at p. 18.

of the historically suppressed and backward classes.<sup>81</sup> The Commission after surveying the various data<sup>82</sup> prescribed the following criteria for social and educational backwardness :

*"A. Social*

- (i) Castes/Classes considered to be socially backward by others.
- (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.
- (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

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81. *Id.* at p. 20.

82. Various Schedules had been prepared in the field survey comprising household schedules in rural and urban areas, village schedule and town schedule. And a number of village and urban blocks surveyed in each State and out of 406 districts in the country, the Commission covered 405 districts. Household schedules were canvassed in two villages and one urban block in each of these 405 districts. Each household schedule contained 51 questions and there was provision for entering particulars of up to ten members of the household in each schedule. Indicators for backwardness were tested against various cut off points. For doing so, about a dozen castes well known for their social and educational backwardness were selected from amongst the castes covered by the Commission's survey in a particular state. These were treated as control and validation, checks were carried out by testing against indicators at various cut off points. *Id.* at pp. 50-52.



*B. Educational*

- (v) Castes/Classes where the number of children in the age group 5 - 15 years who never attended school is at least 25% above the State average.
- (vi) Castes/Classes where the rate of student drop-out in the age group 5 - 15 years is at least 25% above the State average.
- (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

*C. Economic*

- (viii) Castes/Classes where the average value of family assets is at least 25% below the State average.
- (ix) Castes/Classes where the number of families living in Kuccha houses is almost 25% above the State average.
- (x) Castes/Classes where the source of drinking water is beyond half a kilometre for more than 50% of the households.
- (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average."<sup>83</sup>

The Commission finally identified totally 3473 castes as backward classes and most backward classes. Whereas as the Kaka Kalelkar Commission<sup>84</sup> had identified only 2,399 backward castes or communities for the whole country and prepared 837

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83. *Ibid.*

84. *Supra* n. 9.

castes being classified as most backward. For nearly a decade the Mandal Commission Report was kept idle and it was taken out by the National Front Government headed by Shri V.P. Singh and announced its implementation<sup>85</sup>.

#### 8. *Supreme Court's Decision in Mandal Case*

The announcement<sup>85a</sup> of the National Front Government resulted in a nation wide violence especially in the northern parts of the country. Self immolation of students and mass destruction of public property disturbed the law and order position and the situation was beyond the control of the Government. Ultimately Shri V.P. Singh resigned from his Prime Ministership and later the next Congress Government headed by Shri P.V. Narasimha Rao amended the earlier memorandum by including 10 per cent reservation for economically backward sections of forward castes and giving preference to the poorer sections among the backward class<sup>86</sup>. The

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85. The then Prime Minister announced in Lok Sabha on August 7, 1990, the decision to reserve 27% jobs for Socially and Educationally Backward Classes in Central Government Services and public undertakings. On the basis of the Mandal Commission Report, the reservation would be applicable in the first phase, to castes which are common to both the Mandal Commission lists and those prepared by the State Government. This was being done so that the experience of these States in successfully preparing lists of the social by and educationally backward classes could be used to ensure harmonious and quick implementation of the policy. *Times of India*, Aug 8, 1990.

85a. The Office Memorandum dated 13th August 1990. *Infra* n. 87 at pp. 355-356.

86. Amended Office Memorandum dated 25th September 1991. *Id.* at pp. 356-357.

whole scheme of reservation was challenged before the Supreme Court in *Indra Sawhney v. Union of India*<sup>87</sup> called the *Mandal case*. Regarding the determination of backward classes, the Court framed the following issues :

- "1. What does the expression 'backward class of citizens' in Article 16 (4) mean?
2. Whether backward classes can be identified on the basis and with reference to caste alone ?
3. Whether the backwardness under Article 16 (4) should be both social and educational ?
4. Whether a class, to be designated as a backward class should be situated similarly to the Scheduled Castes - Scheduled Tribes ?
5. Whether the 'means' test can be applied in the course of identification of backward classes ? And if the answer is yes, whether providing such a test is obligatory ?
6. Whether the backward classes can be identified only and exclusively with reference to economic criteria ?
7. Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes ?
8. Whether backward classes can be further categorised into backward and more backward categories ?"<sup>88</sup>

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87. 1992 S.C.C. (L. & S.) Supp. 1. This report has been published in a book form with the same page numbers i.e., Surendra Malik (Ed.) *The Supreme Court Mandal Commission Case, 1992*, Eastern Book Company, Lucknow (1992).

88. *Id.* at pp. 360, 399-435.

The constitutionality of Mandal Commission Report as such had been subjected to different acid tests. The Court examined various ideologies to anchor its decision on a jurisprudential basis. The decision reflects the philosophical perceptions of judges. The special Constitution Bench comprising of nine judges addressed the above core issues with regard to the backwardness and delivered six opinions. The following are the land marks in the determination of backwardness.

(a) *Role of Caste in Identification : Class-Caste Controversy Settled.*

It was argued before the Court that caste was a prohibited ground of distinction under the Constitution and it ought to be erased from the Indian society. It could never be the basis for determining backward classes under Article 16(4). Justice B.P. Jeevan Reddy, for the majority, while ascertaining the meaning of the backward class in the pre-independence India observed that the expression 'class' and 'caste' were used interchangeably and that caste was understood as an enclosed class. He endorsed the views of Dr. B.R. Ambedkar and Shri K.M. Munshi in the Constituent Assembly that the qualifying expression 'backward' was necessary to indicate that the classes of citizens for whom reservations were to be made were those communities which have not been adequately represented in the services under the State.<sup>89</sup>

Heavily relying on the views of Chinnappa Reddy, Desai and Venkataramiah, JJ., in *Vasanth Kumar*<sup>90</sup> Justice Jeeven Reddy observed that caste discrimination was

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89. *Id.* at p. 415.

90. *Supra* n. 69.

still prevalent, more particularly, in rural India. Caste according to him was nothing but a social class — a socially homogenous class and it was also an occupational grouping, with a difference that its membership is hereditary.<sup>91</sup> He further explained

"To repeat, it is a socially and occupationally homogenous class. Endogamy is its main characteristic. Its social status and standing depends upon the nature of the occupation followed by it. Lower the occupation, lower the social standing of the class in the graded hierarchy. In rural India, occupation caste nexus is true even today. A few members may have gone to cities or even abroad but when they return — they do, barring a few exceptions — they go into the same fold again. It does not matter if he has earned money. He may not follow that particular occupation. Still the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions it is his social class —the caste— that is relevant."<sup>92</sup>

He pointed out the caste-occupation-poverty cycle was thus an ever present reality. He continued to observe that all the decisions since *Balaji*<sup>93</sup> spoke of this caste-occupation — poverty nexus. The language and emphasis might vary but the theme remains the same. Any programme designed to eradicate that evil and towards

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91. *Supra* n. 87 at p. 418.

92. *Ibid.*

93. *Supra* n. 14.

betterment of those sections of society must recognise that ground reality and attune its programme accordingly. He emphasized.

"Merely burying our heads in the sand — ostrich — like would not help. One cannot fight his enemy without recognising him. The U.S. Supreme Court has said repeatedly, if race be the basis of discrimination — past and present — race must also form basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far".<sup>94</sup>

Justice Jeevan Reddy made it clear that the methodology for identification of backward class should be left to the authority entrusted in this regard. It could adopt such method<sup>95</sup> or procedure as it thought convenient and so long as its survey covered the entire populace no objection could be taken to it. The authority could start the process either with occupational groups or with castes or with some other groups. He explained the procedure thus :

"It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a *backward class*, for the purpose of clause (4) of Article 16".<sup>96</sup>

Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The approach might

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94. *Supra* n. 87 at p. 419.

95. *Id.* at p. 420.

96. *Ibid.* Emphasis in original.

differ from State to State and region to region. The Court explicitly held that the concept of 'caste' in this behalf was not confined to castes among Hindus. It extended to castes, wherever they obtained as a fact, irrespective of religious sanction for such practice.<sup>97</sup> Thus the Court reiterated that the real object of the identification was to discover and locate backwardness and if such backwardness was found in a caste, it could be treated as backward, if it was found in any other group, sections or class they too could be treated as backward.<sup>98</sup> The majority decision, thus at last settled the caste-class controversy, the two divergent lines of approaches of the earlier decisions, i.e., the one *Balaji-Chitralekha* and the other *Rajendran-Periakaruppan-Balram*.

Treading on a similar track of Justice Jeevan Reddy, Justice Sawant, viewed the question as to whether caste can be used for identification in the following words :

"Any factor - whether caste, race, religion, occupation, habitation etc. — which may have been responsible for the social and educational backwardness, would naturally also supply the basis for identifying such classes not because they belong to particular religion, race, caste, occupation, area etc. But because they are socially and educationally backward classes".<sup>99</sup>

'Class' according to him was a wider term and 'caste' only a species of the 'class'.<sup>100</sup> When the members of an entire caste were backward and on that account

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97. *Ibid.*

98. *Id.* at p. 421.

99. *Id.* at p. 228.

100. *Id.* at p. 229.

were treated as a backward class, the expressions 'backward caste' and 'backward class' become synonymous.<sup>101</sup> In that context a caste could form a separate class. Justice Sawant also highlighted the enduring nature of caste system, of its cutting across religions, thus :

"It is unnatural to expect that the social prejudices and biases, and the notions and feelings of superiority and inferiority, nurtured for centuries together, would disappear by a mere change of religion".<sup>102</sup>

This was because of the caste-occupation bond which resulted in the survival of occupation along with the converts to the new religion. Hence for identifying the backward classes among the non-Hindus, their occupations could furnish a valid test.<sup>103</sup> Justice Pandian too in his concurring opinion expressed his thought on similar lines with Justices Jeevan Reddy and Sawant with regard to the question of accepting caste as a criterion in the determination.<sup>104</sup>

Justice T.K. Thomman in his dissenting view, vehemently opposed the identification only on the basis of caste. But he accepted the majority view that caste might

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101. *Id.* at p. 232.

102. *Id.* at p. 239.

103. *Ibid.*

104. *Id.* at pp. 91-95. Justice Pandian said : "Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established accepted criteria to identify the 'backward class', caste *per se* without satisfying the agreed formulae generally cannot fall within the meaning of 'backward class of citizens' under Article 16 (4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of lower strata — indicating the social backwardness". *Id.* at p. 88.



be a guide in the search of identification just as occupation or residence, but according to him, what was sought to be identified was none but backwardness stemming from historical discrimination.<sup>105</sup>

Thus the majority of judges i.e., seven judges out of nine, realised the relevance of caste in the Indian Social milieu and thereby lifted the anathema attached to the reckoning of caste in the determination of backwardness existed for a quite long time in the judicial process which was the reason for the class-caste controversy. The Court in *Mandal case* could finally and rightly settle the issue of this controversy.

(b) *Acceptance of Caste Factor Will Not Perpetuate Casteism*

Will the acceptance of caste factor in the determination of backwardness perpetuate Casteism ? This question was positively answered by the Court in *Balaji* and had been influencing later decisions. But the question was not put to a serious analysis by the courts. Justice Sawant in *Mandal case* clearly posed the question and categorically answered in the negative.<sup>106</sup> On a comparative analysis of the approach of the United States Supreme Court<sup>107</sup> towards the affirmative action,

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105. *Id.* at p. 149.

106. *Id.* at p. 228.

107. In *Regents of the University of California v. Allan Bakke*, 438 U.S. 265 (1978), the Supreme Court of U.S. held that "if race be the basis of discrimination, race can equally form basis of redressal". In *H. Earl Fulliloe v. Philip M. Klutznick*, 443 U.S. 448 (1980), it was also held that "if the race was the consideration of earlier discrimination in remedial process, steps will almost invariably require to be based on racial factors and any other approach would freeze the status quo which is the very target of all remedies to correct the imbalance introduced by the past racial discriminatory measures". *Id.* at pp. 235-236.

Justices Sawant and Jeevan Reddy held that for redressal of the discrimination due to the consequence of caste system should be based on the caste itself and not otherwise. A different basis would perpetuate the caste system itself instead of eliminating it. Justice Sawant emphasised thus :

"If ... an affirmative action is to be taken to give them the special advantage envisaged by Article 16(4), it must be given to them because they belong to such discriminated castes. It is not possible to redress the balance in their favour on any other basis. A different basis would perpetuate the *status quo* and therefore the caste system instead of eliminating it. On the other hand, by giving the discriminated caste groups the benefits in question, discrimination would in course of time be eliminated and along with it the casteism".<sup>108</sup>

He proceeded further and said that the contention to the contrary was counter-productive and would in fact perpetuate, though unintentionally, the very caste system which it sought to eliminate.<sup>109</sup> Justice Pandian also shared the view of the majority when he said :

"However, painful and distasteful, it may be, we have to face the reality that under the hydraulic pressure of caste system in Hindu Society, a major section of the Hindus under multiple caste labels are made to suffer socially, educationally and economically. There appear no symptoms of

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108. *Supra*, n. 87 at p. 228.

109. *Ibid.*

early demise of this dangerous disease of caste system or getting away from the caste factor in spite of the fact that many reformative measures have been taken by the Government".<sup>110</sup>

He visualised that unless the caste system was completely eradicated and all the socially and educationally backward classes to whichever religion they belonged inclusive of Scheduled Castes and Scheduled Tribes were brought up and placed on par with the advanced section of people, the caste label among Hindus would continue to serve as a primary indicator of its social backwardness.<sup>111</sup>

*(c) Caste is Irrelevant in Certain Situations : Test of Occupation-Cum-Income Without Caste Upheld*

The Court while discussing the identification of backward classes, as stated earlier,<sup>112</sup> held that identification could be started with occupational groups, communities and classes. However it was emphasised that there might be some groups or classes in whose case the caste might not be relevant at all eg., agricultural labourers, rickshaw pullers/drivers/street-hawkers etc., might well qualify for being designated as backward class.<sup>112a</sup>

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110. *Id.* at p. 92-93.

111. *Id.* at p. 93.

112. *Supra* nn. 95, 96, 99-103 and the accompanying text.

112a. *Supra* n. at pp. 432-433.

(d) *Not Both Social And Educational : Differentiated Between Articles 16(4) and 15 (4).*

The earlier decisions of the Supreme Court especially in *Triloki Nath (I)*,<sup>112b</sup> *Janakiprasad Parimoo*<sup>113</sup> and *Vasanth Kumar*,<sup>114</sup> had held that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes mentioned in Article 15(4).<sup>115</sup> The Court speaking through Justice Jeevan Reddy in *Mandal case*,<sup>116</sup> categorically expressed that this assumption had no basis and differentiated the intention of the two articles in the following manner :

"... the backwardness contemplated by Article 16(4) is *mainly* social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social *and* educational."<sup>117</sup>

The Court ascertained the intention of the framers of Article 16(4) and held that its accent was upon social backwardness. It is worth quoting Justice Jeevan Reddy's observation of the Indian scenario in this context :

"It goes without saying that in the Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty —

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112b. *Supra* n. 37

113. *Supra* n. 61.

114. *Supra* n. 69.

115. *Ibid.* In this case out of five judges, four favoured this view.

116. *Supra* 87 n.

117. *Id.* at p. 424. Emphasis in original.

which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle".<sup>118</sup>

It was pointed out by the Court that clause (4) of Article 16 did not contain the qualifying words "socially and educationally" as did clause (4) of Article 15. Moreover, Article 340 did employ the expression "socially and educationally backward classes" and yet that expression did not find place in Article 16(4). The reason, according to the Court, was obvious that "backward class of citizens" in Article 16 (4) took in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which might not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4).<sup>119</sup>

The Court also pointed out that though Article 340 did not expressly refer to reservations in services under the State, the Commission appointed thereunder might recommend reservation in appointments/posts in the services of the State. Article 16 (4), applied to a much larger class than the one contemplated by Article 340.<sup>120</sup> The Court also held that the similarity treatment of Articles 16 (4) and 15 (4) in this aspect would mean and imply reading a limitation into a beneficial provision like Article 16 (4). Moreover, when speaking of reservation in appointments/posts in the

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118. *Ibid.*

119. *Id.* at pp. 423-424.

120. *Id.* at p. 424.

State service — which might mean, at any level, whatsoever — insisting upon educational backwardness might not be quite appropriate,<sup>121</sup> the Court concluded.

Though Justice Pandian appears not to have addressed the question, Justice Sawant's opinion in this aspect is found to be dissenting. He relied on earlier decisions of the Court, especially *Vasanth Kumar*<sup>122</sup> and held that the expression "backward class of citizens" is wider and included in it "socially and educationally" "backward class of citizens" and Scheduled Castes and Scheduled Tribes.<sup>123</sup>

It is significant to note that the Supreme Court had not maintained a dichotomy between Article 15 (4) and 16 (4) regarding determination of backward classes before the *Mandal case*. However the Court in this case rightly distinguished their nature.

(e) *Application of Means-test and Elimination of Creamy Layer Accepted*

The Court viewed the applicability of the means test<sup>124</sup> i.e., imposition of income limit for the purpose of excluding persons from the backwardness, was not a question of permissibility or desirability of such a test but one of proper and more appropriate identification of backward class. According to the Court, the very concept of a class denoted a number of persons having certain common traits which distinguish them from the others and if the connecting link was social backwardness,

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121. *Ibid*, per Jeevan Reddy, J.

122. *Supra* n. 69

123. *Supra* n. 87 at p. 225.

124. For a detailed discussion of the means test, see *infra* Ch. VII.

it should broadly be the same in a given class. The Court speaking through Justice Jeevan Reddy explained thus :

"If some of the members are far too advanced socially (which in the context, necessarily means economically and also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward".<sup>125</sup>

The means test has thus come to stay in the determination of backwardness for the purpose of employment, though this test was made applicable to reservation in admissions to educational institutions from the very early period of implementing the reservation policies.

(f) *Test of Similarity of Scheduled Castes and Scheduled Tribes With Backward Classes Rejected*

The *Balaji* dictum that the backwardness contemplated by Article 15 (4) should be comparable to Scheduled Castes and Scheduled Tribes was rejected by Justice Vaidalingam in *Balram*<sup>126</sup> and Justice Chinnappa Reddy in *Vasanth Kumar*.<sup>127</sup> The Supreme Court in *Mandal case*<sup>128</sup> by following *Vasanth Kumar* clearly specified that the backwardness of Scheduled Castes and Scheduled Tribes should not be a standard for backwardness for all those claiming its protection. It was further held :

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125. *Supra* n. 87 at p. 428.

126. *Supra* n. 58.

127. For a detailed discussion of this aspect, see *supra* nn. 76-78 and the accompanying text.

128. *Supra* n. 87.

"If any group or class is situated similarly to Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such a *priory* notions into the concept of Other Backward Classes".<sup>129</sup>

Thus the Supreme Court corrected yet another *Balaji* holding which was followed by various decisions without noting the distinction between Articles 15 (4) and 16 (4).

(g) *Test of Exclusive Economic Criterion Rejected*

The Court's unanimous view is significant in holding that backward class could not be determined only and exclusively with reference to economic criterion. As discussed earlier,<sup>130</sup> the economic criterion might be a basis along with and in addition to social backwardness, but it could never be the sole criterion.

The question as to whether economic criterion by itself would identify the backward classes under Article 16 (4) was discussed by Justice Sawant more elaborately than Justice Jeevan Reddy. According to him, there were poor sections in all the castes and communities. Poverty ran across all barriers. The nature and degree of economic backwardness and its causes and effects however, varied from section to section of the populace.<sup>131</sup> He pointed out that even the poor among the

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129. *Id.* at p. 430.

130. *Supra* nn.120a and 125 and the accompanying text.

131. *Supra* n. 87 at p. 241.



higher castes were socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness was not on account of social backwardness. The educational backwardness of some individuals among them might be on account of their poverty in which case economic props alone might enable them to gain an equal capacity to compete with others.<sup>132</sup> He continued further and held :

"On the otherhand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. *Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced.* Their social backwardness is the cause and not the consequence either of their economic or educational backwardness".<sup>133</sup>

Justice Sawant, therefore, reiterated that the provision for reservation in appointments under Article 16 (4) was not aimed at economic upliftment or alleviation of poverty, but specially designed to give a due share in the State power to those who have remained out of it mainly on account of their social and, therefore, educational and economic backwardness. That backwardness was both the cause and consequence of non-representation in the administration of the country.<sup>134</sup>

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132. *Ibid.*

133. *Id.* at pp. 241-242. Emphasis supplied.

134. *Id.* at p. 242.

He said that if poverty alone was made the test, the poor among all castes, communities and collectivities and sections would compete for the reserved quota which would result in capturing all the posts in the quota by those who belong to socially and educationally advanced sections. It would also provide for the socially and educationally advanced classes statutory reservations in the services in addition to their traditional but non-statutory cent per cent reservations. It would thus perpetuate the imbalance and the inadequate representation of the backward classes in the service. The economic criterion would thus lead, in effect, to the virtual deletion of Article 16 (4) of the Constitution.<sup>135</sup>

Thus this decision set right the earlier approaches of the Supreme Court especially, Justices Sen and Desai in *Vasanth Kumar*<sup>136</sup> who had held that for a casteless society the exclusive economic criterion was necessary.<sup>137</sup>

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135. *Id.* at p. 243.

136. *Supra*, n. 69.

137. *Id.* at p. 1506, *per* Desai, J., at p. 1531, *per* Sen, J. For similar views, see B. Sivaramayya, "Protective Discrimination and Ethnic Mobilization", 22 J.I.L.I. 480 (1980). He wrote : "Unless the basis of reservations transcends its caste character and assumes a class character, the reservations portend social tensions of considerable magnitude in view of the widespread unemployment and under employment in the country". *Id.* at p. 496; M.A. Baig, "Reservation in Public Employment and Judicial Process", 3 S.C.J. (Jour.) 6 (1989) at p. 12. P.M. Bakshi, "Caste and the Law : Some Recent Explorations", A.I.R. 1985 Jour. 66; P.M. Bakshi, "Reservations for Backward Classes : Some Reflections", 27 J.I.L.I. 318 (1985). N. Nehru Dutt, "Need for Review of the 'Criteria' for Determining Backward Class", A.I.R. 1987 Jour. 101 at p. 104.

(h) *Sub-classification between Backward and More-backward Classes Validated*

Justice Chinnappa Reddy in *Vasanth Kumar*<sup>138</sup> had rejected the *Balaji*<sup>139</sup> dictum of holding that the sub-classification between backward classes and more backward classes was unwarranted under Article 15(4). According to him, if both classes were not merely a little behind, but far behind the most advanced classes, such a classification would be necessary to help the more-backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes might walk away with all the seats.<sup>140</sup> The Court in *Mandal case*,<sup>141</sup> by majority, held that there was no constitutional or legal bar to a State for such a categorisation. However, the Court specified that it is not obligatory on the part of the State to do this categorisation.<sup>142</sup> The question which posed by the Court was :

"If a State makes such a categorisation, whether it would be invalid ?"<sup>143</sup>

Answering in the negative the Court spelt out that such a categorisation was advisable so as to ensure that the more backward among the backward classes obtain the benefits intended for them than leaving the more advanced to avail all the benefits.<sup>144</sup> The Court relied on the four categorisation of backward classes in Andhra Pradesh which was upheld in *Balram*.<sup>145</sup> It was further added by the Court :

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138. *Supra* n. 69.

139. *Supra* n. 15.

140. *Supra* n. 69 at pp. 1516-1517.

141. *Supra* n. 87

142. *Id.* at p. 434.

143. *Id.* at p. 434.

144. *Ibid.*

145. *Supra* n. 58.

"Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State — and so long as it is reasonably done, the Court may not intervene".<sup>146</sup>

Justice Sawant approached the issue from another angle and held that Article 16 (4) permitted classification of backward classes into "backward and more or most backward classes".<sup>147</sup> However, this classification should be on the basis of the degree of social backwardness and not on the basis of the economic consideration alone.<sup>148</sup> He opted for a separate quota of reservation to these categories. He was emphatic in saying that if some individuals and families in the backward classes, however small in number, gained sufficient means to develop their capacities to compete with others in every field, those advanced sections should not be entitled to be a part of the backward classes.<sup>149</sup> He illustrated the yardstick of measuring the advanced sections among the backward classes in the following words :

"... it is necessary to add that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes".<sup>150</sup>

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146. *Supra* n. 87 at p. 434.

147. *Id.* at p. 256.

148. *Ibid.*

149. *Id.* at p. 257.

150. *Ibid.*

Justice Sawant clarified that the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also.<sup>151</sup> Justice Pandian rejected the division of poorer sections and others by the application of means test based on the economic criterion.<sup>152</sup> The decision thus, in this aspect, is an over-ruling of the *Balaji* dictum.

(i) *Preference in favour of "Poorer Sections" of the Backward Classes Upheld*

Clause (1) of the amended Office Memorandum dated 25th September 1991 of the Union Government provided that within the 27 per cent of reservations in civil posts and services under the Government of India reserved for backward classes, preference shall be given to candidates belonging to the poorer sections of the backward classes and in the absence of such candidates unfilled vacancies shall be filled by other backward class candidates. The question before the Court was whether this preferential treatment was sustainable in law ?<sup>153</sup>

The Court, by majority, held that the object of this clause was to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the expression 'poor sections' was meant to refer to those who are socially and economically more backward. The use of the word, poorer, in that context was meant only as a measure of social backwardness. The distinction should be on the basis of degrees of social backwardness. In that sense,

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151. *Id.* at p. 258.

152. *Id.* at p. 130.

153. *Id.* at p. 458.

the Court held that the said classification could not be termed as invalid.<sup>154</sup> The Court also expounded that the meaning and content of 'preference' should be read down to mean a rational and equitable apportionment of the vacancies reserved among them. This was to avoid a situation where if the 'more backward' took away all the available vacancies/posts reserved for backward classes, none would remain for the 'backward' among the other backward classes. Finally, however, the Court left the question of classification as a discretion of the Government in the following words :

"It shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the appointment of reserved vacancies/posts among "backward" and "more backward". On such notification, the clause will become operational".<sup>155</sup>

Justice Sawant did not favour a distinction between poor and poorer sections, but accepted only a distinction between the advanced and the backward sections of the backward class and such advanced sections would be disentitled to the reservation benefits. The reservations could be made only for the benefit of backward or the non-advanced sections of the backward class. According to him, when the backward classes were classified into backward and more or most backward on the basis of the degree of social backwardness (and not on the basis of the economic criteria alone), exclusive quotas of reservations would have to be kept separately for them.<sup>156</sup>

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154. *Ibid.*

155. *Id.* at p. 459.

156. *Id.* at p. 275.

Justice Pandian wrote a dissenting opinion in this aspect. He held that there shall not be any division among the backward classes and the entire 27 per cent of reservation in civil posts and services should be extended to all the socially and educationally backward classes. He struck down the clause providing the preference in the amended Office Memorandum as unconstitutional.<sup>157</sup>

The overall assessment of the majority and minority decisions reveal that the Supreme Court gave a green signal to the Mandal Commission Report, especially its methodology of determination of backwardness. The decision could set right many doctrinal disarray and de-mystified the persistent confusions surrounding several judicial dicta. It broke old grounds and established new ones. Thus, the role of judiciary is profoundly resorted to in the scrutiny of the reservation as to policies whether the criteria adopted by the Governments or Commissions are relevant and reasonable. The decision resulted in the establishment of National and State level Backward Class Commissions and implementation of the creamy layer concept based on the Central Government order. Litigation, however, is still pending before the Supreme Court with regard to the constitutionality of the actions taken by some State Governments which are aimed to evade the Supreme Court orders.

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157. *Id.* at p. 130.

**CHAPTER - V**

**EXTENT AND LIMIT OF QUOTAS :**  
**THE 'QUANTUM' PUZZLE**

When a thing is much demanding and rarely available, the clamour for it among the people will be high. This economic theory of utility<sup>1</sup> is aptly applicable in public employment too. The limited availability of public employment and high proportion of population of forward and backward classes often result in constant friction and this, in turn, leads to re-thinking of shaping the protective discrimination policy in employment with a view to reducing the conflict and reaching a reasonable balance of the competing equalities. The provisions of the Constitution stand silent on the quantum or extent of reservation, though the broad and unrestricted language is used in both Articles 15 (4)<sup>2</sup> and 16 (4)<sup>3</sup>. The judiciary, however, through its interpretative technique creates the doctrine of constitutional limitation on the extent of reservation by putting forth a quantum.

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1. In economics the utility of a good is not conceived to be its usefulness, as judged by any objective standard, but its importance to a consumer. Capacity to excite desire rather than to yield benefits or bestow happiness is the measure of a good's utility. 22 *Encyclopaedia Britannica* 913.
  2. Article 15 (4) reads :  
"Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".
  3. Article 16 (4) reads :  
"Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State".



Article 16 (1)<sup>4</sup> guarantees equality of opportunity in matters relating to public employment. Article 16 (4)<sup>5</sup> empowers the State to make reservation for the backward classes on the basis that they are not adequately represented in any particular service of the State. The language of the provision gives an inference that, based on the facts and circumstances, the State has got a discretionary power to give adequate share in the administration to the backward classes who are not adequately represented so as to maintain an equilibrium. There is no express word limiting the State's wisdom. But when the State deviates from this object, the judiciary being the sentinel of the Constitution comes into the scene and reviews the State action. However, Article 335<sup>6</sup> puts limits on the State's power by prescribing that the State should take into account the maintenance of efficiency of administration when the claims of Scheduled Castes and Scheduled Tribes are considered in appointments. Apart from this there is no express limitation in the Constitution.

### *1. Balaji : Genesis of the Quantum Rule*

While including the reservation provisions in the Constitution, the framers neither visualised the monopolisation of reservation nor prescribed the maximum limit for it.<sup>7</sup> Different States thus followed different levels of

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4. Article 16 (1) reads :

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

5. *Supra* n.3.

6. Article 335 reads : "*Claims of Scheduled Castes and Scheduled Tribes to services and posts* — The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

7. VII C.A.D. 701.

reservation.<sup>8</sup> In 1963 the Supreme Court of India had an opportunity to propound a quantum theory, i.e., drawing an outer limit to the enjoyment of the reservation benefits. In *M.R. Balaji v. State of Mysore*<sup>9</sup>, the Mysore Government provided a scheme of reserving 68% of seats in the educational institutions. In that scheme, 28% of the seats were reserved for Backward Classes, 22% for More Backward Classes, 15% for Scheduled Castes and 3% for Scheduled Tribes. The petitioners, hence, contented that this extent of 68% of reservation was so unreasonable and extravagant that it was not justified by Article 15 (4) of the Constitution and thereby, a fraud on the power conferred by that Article.<sup>10</sup> The Supreme Court quashed the reservation order and held the percentage of reservation to be excessive. Speaking through Justice Gajendragadkar, the Court held:

"A special provision contemplated by Article 15 (4) like reservation of posts and appointments contemplated by Article 16 (4) must be within reasonable limits.... . In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally

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8. Eg., reservation in government jobs for OBCs ranges from 50 per cent in Tamil Nadu and Karnataka to 5 per cent in Punjab and nil in Rajasthan, Orissa and Delhi. C. Rupa *Reservation Policy – Mandal Commission and After*, Sterling Publishers (P) Ltd., New Delhi (1992), p.59.

9. [1963] Supp. 1 S.C.R. 439.

10. *Id.* at p. 448. The State based its order on the report of Dr. Nagan Gowda Committee which was appointed to investigate the problem and advise the Government as to the criteria which should be adopted in determining the educationally and socially backward classes, and the special provisions which should be made for their advancement. *Id.* at p. 446.

and in a broad way, a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case".<sup>11</sup>

In drawing an outer limit of less than 50%, the approach of the Court was significant in its thrusting on the notion that Article 15 (4) was of special and exceptional character and not a provision, which is exclusive in nature so as to ignore the advancement of the rest of the society. In reconciling the conflict the Court rightly identified that the promotion of the advancement of the weaker elements was also in the interests of the society at large. However, if a provision which was in the nature of an exception completely excludes the rest of the society, that clearly was outside the scope of Article 15 (4). That was why the Court said :

"The interests of weaker sections of society, which are a first charge on the States and the Centre, have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making special provisions, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15 (4)".<sup>12</sup>

The Court, thus, cautioned that reservation should not result in the exclusion of deserving and qualified candidates of other communities in the admissions and that would be against the national interest. With the same caution, the Court reiterated its stand in following words:

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11. *Id.* at p. 470.

12. *Ibid.*

"In our opinion, when the State makes a special provision for the advancement of the weaker sections of society specified in Article 15(4), it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements, the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between several relevant considerations. Therefore, we are satisfied that the reservation of 68% directed by the impugned order is plainly inconsistent with Article 15 (4)".<sup>13</sup>

Though this approach of the Court appears to be a well-balanced formula in the judicial process of harmonising the conflicting equalities, there are latent defects. In fact, the case was related to reservation in educational institutions under Article 15(4), but the Supreme Court overstepped its role by applying the quantum theory to matters relating to public employment under Article 16 (4). This raises the question: Can Articles 15(4) and 16(4) be treated in the same pedestal or on equal footing? The Court did not spell out definite limits to reservations, but indicated that "speaking generally and in a broad way, a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case". Is this a rule of general applicability or a rule of caution? Are the concepts of national interest, i.e., the situation of non-exclusion of meritorious students in educational institutions, and the interest of the society at large i.e., the advancement of the weaker sections, one and the same? The

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13. *Id.* at pp 470-471.

ramifications of the *Balaji* decision were multidimensional. The latter developments are a clear testimony to the doctrinal disarray and inconsistent judicial approaches in this area.

*Devadasan: Carry Forward Rule and the Transplantation of Quantum Rule from Article 15 (4) to Article 16 (4).*

In *Balaji*, the Court indicated that the State should perform its tasks objectively and in a rational manner and evolve a formula which would strike a reasonable balance between relevant considerations.<sup>14</sup> The general pronouncement regarding the quantum in *Balaji* received a different dimension in *T. Devadasan v. Union of India*.<sup>15</sup> In this case the petitioner, an Assistant Grade IV in the Central Secretariat, was eligible for the next post of Section Officer (Assistant Superintendent). The U.P.S.C. in 1961 conducted a competitive examination for the post of Assistant Superintendent to fill forty eight vacancies in which 32 vacancies had been reserved and the remaining were kept open. The petitioner challenged that if the Government had limited the usual quota of 17 1/2% reservation in favour of Scheduled Castes and Tribes, he would have had a fair chance of being selected to the post because the number of open vacancies might have been more. Further, the Government in 1952 had adopted the system of "carry forward rule" by which the unutilised quota was carried over to the next succeeding year along with the usual quota of that year. In 1955, this rule was extended to two years. The result was that in the recruiting year in question i.e., in the third year there were 64.4% of available vacancies which were

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14. *Ibid.*

15. [1964] 4 S.C.R. 680.

to be filled up with Scheduled Castes and Tribes. This system of carry forward rule was challenged, as so extensive as to nullify or destroy the rights conferred by clause (1) of Article 16. Relying on the *Balaji* dictum of less than 50% quantum rule and its notion that Article 15(4) and 16 (4) were exceptions to the main clauses, the Court by a majority of four to one struck down the carry forward rule as modified in 1955. Speaking through Justice Mudholkar the Court held:

"Even if the Government had provided for the reservation of posts for Scheduled Castes and Tribes a cent percent reservation of vacancies to be filled in a particular year or reservation of vacancies in excess of 50% would, according to the decision in *Balaji's case*, not be constitutional".<sup>16</sup>

The Court's heavy reliance on the *Balaji* decision was notable in its justification of adopting quantum rule to reservation in employment under Article 16 (4) from the *Balaji* decision concerning with reservation in educational institutions under Article 15 (4). Though *Balaji* decision was on the quantum of reservation in educational institutions, it had some observations of equating both Articles of 15 (4) and 16 (4) with regard to the need for a permissible and legitimate limits on reservation. This obiter was however followed by the majority in *Devadasan* for striking down the modified carry forward rule as excessive and unreasonable. Moreover the Court did not find any difference in the language used in those two provisions.

The Court indicated that the reservations could not be used to destroy or nullify the ideal of equality of opportunity and the overriding effects of clause (4) on clauses

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16. *Id.* at p. 698.

(1) and (2) of Article 16 could only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances.<sup>17</sup> And the method of obtaining adequate representation to the members of backward classes must strike a reasonable balance between the claims of the backward classes and the claims of other employees<sup>18</sup> as pointed out in *Balaji* 's case. The Court emphasised that in order to effectuate the guarantee, each year of recruitment would have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.<sup>19</sup> Thus it was held:

"... the guarantee contained in Article 16 (1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all the citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employments or appointment whenever it is intended to be filled".<sup>20</sup>

The Court did not leave the matter open, but suggested the following formula for striking a balance between the competing claims:

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17. *Id.* at p. 695.

18. *Id.* at p. 694.

19. *Id.* at p. 695.

20. *Id.* at pp. 694-695.

"Where the object of a rule is to make a reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in public services of the State what the State would in fact be doing would be to provide the members of the backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open for a member of a more advanced class to complain that he has been denied equality by the State".<sup>21</sup>

### *3. Justice Subba Rao's Dissent Opened A New Path of Deviation from 50 Percent Formula.*

Justice Subba Rao in his dissenting opinion took a more plausible and different approach to the problem of quantum of reservation in the field of State employment. He very rightly narrated the need for giving practical content to the doctrine of equality by extending certain adventitious aids till such time when the backward communities could stand on their own legs.<sup>22</sup> He construed the expression "nothing

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21. *Id.* at pp. 690-691.

22. Justice Subba Rao viewed that the strict enforcement of the doctrine of equality of opportunity to all citizens in employment would not result in its real attainment, unless a practical content was given to it. He pointed out the famous illustration of a horse race, thus : "Two horses are set down to run a race — one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point.

*(f.n. contd. on next page)*



in this article" in clause (4) of Article 16 as a legislative device to express its intention in a most emphatic way that the power conferred thereunder was not limited in any way by the main provision but fell outside it. It had not carved out an exception, but had preserved a power untrammelled by the other provisions of the Article.<sup>23</sup> He also examined the meaning and content of the word "any" in the expression "any provision" in the above clause and held that it had got widest amplitude and left the nature of the provision to be made by the State in its discretion.

The only limitation on the provision was found in the words "for the reservation of appointments or posts", i.e., whether the provision made was for the reservation of appointments or posts for the backward classes of citizens. The question whether the backward class was adequately represented or not was left to the subjective satisfaction of the State<sup>24</sup>. Turning down the contention that the carry forward rule would amount to destruction of fundamental rights, Justice Subba Rao observed:

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Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case." *Id.* at p. 700.

23. *Ibid.*

24. *Id.* at p. 701.

"As the posts reserved in the first year for the said Castes and Tribes were filled up by non-Scheduled Caste and non-Scheduled Tribe applicants, the result was that in the next selection the posts available to the latter were proportionately reduced. This provision certainly caused hardship to the individuals who applied for the second or the third selection, as the case may be, though the non-Scheduled castes and non-Scheduled Tribes taken as one unit, were benefitted in the earlier selection or selections. This injustice to individuals, which is inherent in any scheme of reservation, cannot, in my view, make the provision for reservation anytheless a provision for reservation".<sup>25</sup>

He further said:

"Unless it is established that an unreasonably disproportionate part of cadre strength is filled up with the said castes and tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of fundamental rights".<sup>26</sup>

It is significant to note that Justice Subba Rao questioned the impropriety of following the ratio of *Balaji* in *Devadasan*. He incisively distinguished the ratio of *Balaji* on the following lines. The quantum of less than 50 percent rule propounded in *Balaji* was a general observation. In that case the State had adopted a wrong criteria for ascertaining the backwardness and on that ground the State committed a fraud on its constitutional power. He thus concluded:

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25. *Id.* at p. 705.

26. *Id.* at p. 706.

These general observations made in the context of admissions to colleges; in my view, be applied in the case of reservation of appointments in favour of recruitment to a cadre of particular service ..... Further, the words used in the observation, viz., "generally" and "broadly", show that the observations were intended only to be a workable guide but not an absolute law even in the case of admissions to colleges".<sup>27</sup>

The approach to the questions of exception-explanation of reservation should be measured not in relation to the particular year but to that of entire cadre strength and the doubts in *Balaji* got a startling momentum towards distinct path in jurisprudence in later cases.

*Through Deviation with Reconceptualisation of Article*

The State of Kerala relaxed the rule 13AA of the Kerala State and Rules 1958 and allowed the senior lower division clerks to get promotion to upper division though they did not pass the qualifying examination. This promotion was given only provisionally in considering their inadequate performance in the services and their overall backwardness. The whole scheme was challenged before the Kerala High Court on the following grounds. Firstly, the percentage of promotion in that particular year was more than 50 percentage and

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27. *Id.* at p. 708.

28. *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490.

secondly, the relaxation of passing the departmental test adversely affected the efficiency of administration in service. The Kerala High Court quashed the scheme of relaxation and in the appeal, the apex court upheld the constitutionality of the Service Rules and set aside the High Court judgement. The Court speaking through Chief Justice A.N. Ray for the majority said:

"The High Court was wrong in basing its conclusion that the result of application of the impeached Rule and the orders is excessive and exorbitant namely that out of 51 posts, 34 were given to the members of the Scheduled Castes and Scheduled Tribes. The promotions made in the services as a whole are no where near 50 percent of the total number of posts.... It is, therefore, correct that Rule 13AA and the orders are meant to implement not only the direction under Article 335 but also the Directive Principles under Article 46".<sup>29</sup>

The majority decision in *Thomas* opened new vistas in the doctrine of equality. It accorded constitutional sanctity for the argument that the extension of a further period for members of Scheduled Castes and Scheduled Tribes in passing the departmental test for promotion need not be subsumed within the ambit of reservation under Article 16 (4) but could be justified as a just and reasonable classification having rational nexus to the object of providing equal opportunity under Article 16 (1).<sup>30</sup> Chief Justice Ray emphasised that if classification was permissible under Article 14, it was equally permissible under Article 16, because both the articles

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29. *Id.* at p. 501.

30. *Id.* at p. 500.

laid down equality. Justice Krishna Iyer, though construed the provision in the same vein, opted for limiting this beneficial innovation of Article 16 (1) only to Scheduled Castes and Scheduled Tribes and not to other backward classes.<sup>31</sup> The majority decision seems to have been greatly influenced by the dissenting views of Justice Subba Rao in *Devadasan* in holding that clause (4) of Article 16 was not an exception, but an emphatic statement of equality of opportunity guaranteed under clause (1) of Article 16.<sup>32</sup> Moreover, the concept of equality under Article 16 could not have a different content from equality under Article 14.<sup>33</sup>

Justice Beg while joining with the majority view in upholding the Kerala scheme valid took a different approach by construing the scheme of exemption as a kind of reservation under Article 16 (4). It was also pointed out that in the present case, the

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31. *Id.* at p. 536 Krishna Iyer, J. said :

"Article 16 (4) covers all backward classes, but to earn the benefit of grouping under Article 16 (1) based on Articles 46 and 335... the twin considerations of terrible backwardness of the type of Harijans endure and maintenance of administrative efficiency must be satisfied". *Id.* at p. 536. He also said : "Not all caste backwardness is recognised in this formula. To do so is subversive of both Arts. 16 (1) and (2). The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search for such a class, we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes. Any other caste, securing exemption from Article 16 (1) and (2) by exerting political pressure or other influence will run the high risk of unconstitutional discrimination. However, Mathew, J., was in favour of extending this benefit to all members of backward classes. *Id.* at p. 519.

32. *Id. per* Fazal Ali, J. at p. 553, Krishna Iyer, J. at p. 535, Mathew, J. at p. 519. However Justice Beg did not participate in this re-conceptualisation.

33. *Id.* at p. 502, *per* Ray, C.J.

backward class employees really constituted less than 50 percent of the total number of government servants of that class, if the overall position was taken into account.<sup>34</sup>

Regarding the constitutional limits of reservation, Justice Fazal Ali observed that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16 (1) of the Constitution indirectly. At the same time Clause (4) of Article 16 did not fix any limit on the power of the Government to make reservations. Since Clause (4) is a part of Article 16 of the Constitution, the State could not be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16 (1). As to what would be a suitable reservation within the permissible limits according to him, would depend upon the facts and circumstances of each case and no hard and fast rule could be laid down, nor could that matter be reduced to a mathematical formula so as to be adhered to in all cases. Thus he said:

"Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent .... *This is, however, a rule of caution and does not exhaust all categories.* Suppose for instance, a State has a large number of backward classes of citizens which constitutes 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 percent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate".<sup>35</sup>

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34. *Id.* at p. 524.

35. *Id.* at pp. 554-555. Emphasis supplied.

Justice Krishna Iyer endorsed the view of Justice Fazal Ali in holding that the arithmetical limit of 50 per cent in any one year could not be pressed too far.<sup>36</sup> Overall representation in a department did not depend on recruitment in a particular year, but on the total strength of the cadre.<sup>37</sup> Justice Fazal Ali upheld the carry forward system as fully in consonance with the spirit of clause (4) of Article 16. He further said:

"In fact if the carry forward rule is not allowed to be adopted it may result in inequality to the backward classes of citizens who will not be able to be absorbed in public employment in accordance with the full quota reserved for them by the Government. Thus if carry forward rule is not upheld, then backwardness will be perpetrated and it would result ultimately in a vacuum. For these reasons, therefore, I am of the opinion that the High Court was in error in holding that the State's action in filling 34 vacancies out of 51 by members of the Scheduled Castes and Tribes was illegal and could not be justified".<sup>38</sup>

It is significant to note that out of five majority judges, only three addressed the question of quantum of preference in *Thomas*. Chief Justice Ray pointed out that the share of Scheduled Castes and Scheduled Tribes in the State's appointments was below their percentage in the State's population. Whereas Justice Fazal Ali viewed that 50 percent limit laid down by earlier decisions was only a rule of caution and did

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36. *Id.* at p. 537.

37. *Ibid.*

38. *Id.* at p. 555.

not exhaust all categories. Justice Krishna Iyer while endorsing the view of Justice Fazal Ali said that the total strength of the cadre should be based for measuring the quantum and not the recruitment in a particular year. Criticising this approach of the Court, Marc Galanter underscored the anomalous situation which was resulted by the *Thomas* verdict in the following words:

"By overturning the High Court's application of *Devadasan* the Supreme Court reopens the question of quantity of preference that is constitutionally permissible. Unfortunately, the question is not well framed by the *Thomas* facts. Kerala's award of two-thirds of a year's promotions to Scheduled Castes appears less a deliberate application of policy than a temporary (and possibly inadvertent) result of a series of earlier unsuccessful measures designed to facilitate SC promotions. The Court's response plunges the whole question into obscurity".<sup>39</sup>

Marc Galanter also aptly said that, 'it is unclear, though, whether it is abandoning the *Devadasan* 50% rule as to all reservations under Article 16 (4), and it is also unclear whether the entire *Balaji* limitation on the extent of preferences and the extent of preferred groups is unsettled'.<sup>40</sup> The inconsistencies of the *Thomas* decision was 'fraught with frightful consequences'<sup>41</sup> as evidenced in later cases.

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39. Marc Galanter, *Competing Equalities : Law and Backward Classes in India*, Oxford University Press, Delhi (1984), p. 419.

40. *Id.* at pp. 419-420.

41. C.L. Anand, *Equality, Justice and Reverse Discrimination in India*, Mittal Publications, Delhi (1987), p. 248.



*Soshit Karamchari Sangh: A Middle Path Between Thomas and Balaji*

In *Soshit Karamchari's* case,<sup>42</sup> the Railway Board gave certain preferential treatment to Scheduled Caste-Scheduled Tribe candidates in promotion based on carry forward rule, provisions for in-service training etc. This was challenged before the Supreme Court. While considering the carry forward issue, Justice Krishna Iyer for the majority (two to one) said that mathematical precision of prescribing a 50 percent limit was difficult in human affairs.<sup>43</sup>

In his realistic approach to the problem, he found that the percentage of Scheduled Caste-Scheduled Tribe reservation based on their population was reasonable. Likewise, going by the actuals, he scrutinised whether the carry forward rule by being increased to three years was going to confer a monopoly upon the Scheduled Caste and Scheduled Tribe candidates and deprive others of their opportunity for appointment and held that from the percentage furnished by the Railway Board it was found that even if carry forward vacancies existed for any number of years there was no prospect, within the reasonable future, of sufficient number of Scheduled Caste and Scheduled Tribe candidates turning up to fill them. Moreover, if sufficient number of candidates from the Scheduled Caste and Scheduled Tribe were not found, applicants from the unreserved communities would be given the appointment provisionally. Thus it was clear that no serious infraction of any individual's fundamental right under Article 16 (1) took place and no monopoly was conceivably

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42. *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 S.C.C. 246.

43. *Id.* at p. 296.

conferred on Scheduled Caste and Scheduled Tribe candidates since they were not available in sufficient numbers to reach anywhere near the percentage reserved.<sup>44</sup>

Though the Court accepted the carry forward rule, it took a slight deviation from the stand of *Thomas* by holding that the carry forward rule should not result considerably in excess of 50 percent in any given year. To quote Justice Krishna Iyer:

"Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced . All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall Scheduled Caste and Scheduled Tribe candidates be actually appointed to substantially more than 50 percent of the promotional posts. Some excess will not affect as mathematical precision is difficult in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the carry forward rule *shall not result* in any given year, in the selection or appointments of Scheduled Caste and Scheduled Tribe candidates considerably in excess of 50 per cent, we uphold Annexure I".<sup>45</sup>

This observation of the Court shows that it adopted a middle path in between *Thomas* on the one side and *Devadasan* on the other. Though Justice Krishna Iyer

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44. *Id.* at pp. 294-295.

45. *Id.* at p. 296.

said in *Soshit Sangh* that he was bound by earlier decisions of the Supreme Court<sup>46</sup> he did not mention the holding of *Thomas* or even his own opinion in that case with regard to upholding a preference to the extent of 62 percent. In *Thomas* the adequacy of representation was the basis of the quantum and even cent per cent reservation would be permissible in a given year until the adequacy of representation is attained. In *Soshit* the Court examined the overall position of Scheduled Castes and Scheduled Tribes in various grades and services, the same approach adopted in *Thomas*. While putting a limit of reservation of nearly 50 percent – with some excess – and not substantial excess on year wise resembles the verdict of *Devadasan* which was greatly influenced by *Balaji* and a clear shift from *Thomas*. At the same time the Court did not take a too rigid stand of *Devadasan* and *Balaji* of their 50 percent or less than fifty percent limit. This is also the influence of *Thomas* to a limited extent. A close scanning of the decision in *Soshit Sangh* shows some startling results of the stand adopted by Justice Krishna Iyer which later added much confusion to the less determinant dicta in this area. He further said:

"Article 16 (4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1)".<sup>47</sup>

He used the expression, "auxiliary" for the amplifying content of clause (4) of Article 16. After saying that Article 14 to 16 form a code by themselves and

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46. Krishna Iyer, J. said : "Most of the submissions made by the counsel for petitioners cannot survive *Rangachari* and *Thomas* and our task is simplified by abiding by the propositions laid down therein, because these twin rulings bind us being Benches of five and seven judges." *Id.* at p. 286.

47. *Id.* at p. 263.

embody the distilled essence of egalitarianism, he analysed Article 16 in the following manner:

"The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination. Article 16 (4) imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16 (1) or as an exception to it".<sup>48</sup>

This observation of viewing Article 16 (4) as an exception or an amplification is a clear deviation from *Thomas* case. However, Justice Krishna Iyer did not distinguish *Soshit Sangh* from *Thomas*, an unhealthy approach which invited scathing criticism.<sup>49</sup>

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48. *Id.* at p. 270. Krishna Iyer, J., said in another occasion : "The success of State action under Article 16 (4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception [Article 16 (4)] as if it were a super-fundamental right to continue backward all the time". *Id.* at p. 264.

49. Paramanand Singh wrote : "Justice Krishna Iyer in *Soshit Sangh* never abandons his theoretical position that he as a judge is bound by precedents. His remarks that : "constitutional propositions on which the whole nation directs its destiny are not like Olympic records to be periodically challenged and broken by fresh exercises in excellence..." and that "to play cross word puzzle with constitutional construction is to profane it..." are indeed valuable but his neat sidestepping of the ratio in *Devadasan* and his inadvertence to the ratio in *Thomas* on the question of the quantum of preferences will only create "crossword puzzle" for the policy-planners and future potential litigants in this troubled area". "Perspectives on *Soshit Sangh* : Some Dilemmas for the Judicial Balancing of Competing Equalities", (1982) 1 S.C.C. (Jour.) 37 at p. 48.

## 6. *A Bombay High Court's Decision : Validity of 80 % Reservation*

In *Shivaji v. Chairman, Maharashtra P.S.C.*,<sup>50</sup> eighty percentage reservation was provided in certain civil service posts, i.e., 34% for Scheduled Castes-Scheduled Tribes and Other Backward Classes and 46% for other economically backward sections. The High Court at Bombay while quashing the 46% of reservation and upholding the other scheme of 34%, said:

"If this is accepted, nothing can prevent the State from making reservation of 25% in respect of each of the 4 or 5 segment of backward classes and swallow up the entire 100% in favour of backward classes. This is exactly what is prohibited by Article 16 (4) as interpreted by the Supreme Court in its various decisions. Such a reservation or reservations even to the extent of 80% as it has been done in the instant case, therefore, destroys the equality of opportunity guaranteed to the citizen under Article 16 (1) of the Constitution".<sup>51</sup>

## 7. *Vasanth Kumar: A Case 'Without a Message'*

The inconsistencies in the quantum rule still continued and the Supreme Court squandered an opportunity to settle those issues. *K.C. Vasanth Kumar v. State of Karnataka*<sup>52</sup> is an eloquent testimony to this state of affairs. The Court was requested to consider all relevant issues regarding reservation and lay down its

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50. A.I.R. 1984 Bom. 434.

51. *Id.* at p. 440, *per* Jahagirdhar, J.

52. A.I.R. 1985 S.C. 1495.

opinion as a guideline for the working of a State Commission in this regard. Out of the five Judge Bench, Chief Justice Chandrachud and Justice Desai did not address the quantum issue. Justice Chinnappa Reddy analysed the *Balaji* decision and held:

"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 reservation should not exceed 40%, 50% or 60% would be arbitrary and the Constitution does not permit us to be arbitrary. Though in the *Balaji* case, the court thought that generally and in a broad way a special provision should be less than 50%, and how much less than 50% would depend upon the relevant prevailing circumstances in each case, the court confessed".<sup>53</sup>

Justice Chinappa Reddy questioned the concept of efficiency as a check to reservation and said that there was no scientific statistical data or evidence of expert administrators who had made any study of the problem to support the opinion that reservation in excess of 50% might impair efficiency.<sup>54</sup> Efficiency must be a guiding factor but not a smoke screen. All that a court might legitimately say was that the reservation might not be excessive. It might not be so excessive as to be oppressive, it might not be so high as to lead to a necessary presumption of unfair exclusion of everyone else.<sup>55</sup>

Justice Sen viewed that the extent of reservation must necessarily vary from State to State and from region to region within a State, depending upon the conditions prevailing in a particular State or region, of the backward classes.<sup>56</sup>

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53. *Id.* at p. 1517.

54. *Id.* at p. 1518.

55. *Ibid.*

56. *Id.* at p. 1531.

Justice Venkataramiah discussed the question of extent of reservation by referring to *Balaji*, *Devadasan* and *Thomas*. While analysing *Thomas*, he said:

"After carefully going through all the seven opinions in the above case, it is difficult to hold that the settled view of this court that the reservation under Article 15 (4) or Article 16 (4) could not be more than 50% has been unsettled by a majority on the Bench which decided this case".<sup>57</sup>

According to him reservation should not exceed 50% including 18% reserved for the Scheduled Castes and Scheduled Tribes and 15% reserved for 'special group', in view of the total population of such backward classes in the State of Karnataka.<sup>58</sup> Thus, as it is rightly observed, the decision in *Vasanth Kumar* conveys no message.<sup>58a</sup>

#### 8. *Mandal Case: A Landmark in Quantum rule*

The whole question of reservation became the epicentre of controversies in 1991 when the Janata Dal Government announced the implementation of the Mandal Commission Report through the official memorandum which contained nearly 50 percentage of reservation. The political uncertainties led to the dissolution of the Lok Sabha and the next Congress Government also announced the implementation of the Report through another official memorandum by enhancing the percentage of reservation from 50 to 60 i.e., providing 10 percent to the economically backward sections of the forward classes. The whole scheme was challenged

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57. *Id.* at p. 1558.

58. *Ibid.*

58a. Parmanand Singh, "Castes and Classes : The Doctrinal Puzzle from *Balaji* to *Vasanth*," (1986) 1 S.C.C. (Jour.) 36 at p. 42.

before a nine Judge Bench of the Supreme Court in *Indra Sawhney v. Union of India*<sup>59</sup>. The Court formulated the following issues with regard to the quantum issue.

- a) Is the 50% enunciated in *Balaji* a binding rule or only a rule of caution or a rule of prudence ? Or, can the extent of reservation in the services of the State exceed 50% ?
  - b) Is the 50% rule, if any, confined to reservations made under clause (4) of Article 16 or does it takes in all types of reservations that can be provided under Article 16 ?
  - c) Further, while applying 50% rule, if any, shall an year be taken as a unit or the total strength of the cadre be looked into ?
  - d) Was *Devadasan* correctly decided ?<sup>60</sup>
  - e) Can the extent of reservation be determined without determining the inadequacy of representation of each class in different categories and grades of services under the State ?<sup>61</sup>
- (i) *Adequacy of Representation is not Proportionate Representation*

It was argued by the respondents that when the population of the other backward class is more than 50% of the total population, the reservation in their

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59. 1992 S.C.C. (L. & S. ) Supp.1: 1992 Supp. (3) S.C.C. 217: A.I.R. 1993 S.C. 477

60. *Id.* at p. 435. [S.C.C. (L. & S. )Supp.1]

61. *Id.* at p. 246.



favour can also be more than 50%.<sup>62</sup> It was also argued that the limits of reservation in Article 16 (4) cannot be fixed on percentage but it must be with the ulterior objective of achieving adequate representation for backward class.<sup>63</sup> Justice Jeevan Reddy, for the majority, interpreted the term adequacy of representation under Article 16 (4) that it did not mean proportionate representation. He thus clarified:

"Principle of proportionate representation is accepted only in Article 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and State Legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant."<sup>63a</sup>

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62. *Id.* at p. 438.

63. This argument was put forward by Dr. Rajeev Dhavan. *Id.* at p. 115. It was also argued that the policy of reservation is in the nature of affirmative action, firstly to eliminate the past inhuman discrimination and secondly to ameliorate the sufferings and reverse the genetic damage so that the people belonging to backward class can be uplifted. When it is the main objective of clause (4) of Article 16 any limitation on reservation would defeat the very purpose of this Article falling under Fundamental Rights, and therefore, reservation if the circumstances so warrant can go even upto 100%. By Ram Jethmalani, *Id.* at p. 114.

63a. *Id.* at p. 438.

The Court considered the opinion of Dr. Ambedkar in the Constituent Assembly that the reservation should be 'confined to a minority of seats'.<sup>64</sup> By distinguishing between the proportionate representation and adequate representation and the ascertaining of the intention of the framers of the Constitution, the Court reached the conclusion that reservation should be within reasonable limits and it shall not exceed 50% of the appointments or posts barring certain extraordinary situations.<sup>65</sup>

(ii) *The 50% limit with certain extraordinary circumstances*

The Court identified certain extraordinary situations where 50 percent rule could be relaxed. However this has to be done in a special case with utmost caution. He thus narrated:

"While 50 percent shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity in this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in the strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out".<sup>66</sup>

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64. VII C.A.D. 693.

65. *Supra* n. 59 at p. 439.

66. *Ibid.*

(iii) *The 50 percent limit is inapplicable to exemptions or relaxations*

Regarding the issue whether the 50 percentage rule is confined to reservations in favour of backward classes made under Article 16 (4) or all other exemptions or concessions provided to backward classes under it, the Court expressed the opinion that the rule of 50 percentage applies only to reservations proper, i.e., reservations in favour of backward classes made under Article 16 (4). The rule should not be – indeed could not – be applicable to exemptions, concessions or relaxations provided to backward classes under Article 16 (4). The Court expounded a distinction between horizontal and vertical reservations in this regard.<sup>67</sup>

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67. Jeevan Reddy, J., observed that all reservations were not of the same nature. He continued : "There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations', the reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16 (4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16)] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations – what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relating to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category, if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains – and should remain – the same." *Id.* at pp. 439-440.

(iv) *Year as a unit and not the total cadre strength*

For the purpose of applying the quantum rule there existed a controversy, i.e., whether the total strength of the particular cadre should be taken into account or the vacancy arising in a particular year should be taken into account. While the Supreme Court took the latter approach in *Devadasan*, the first view was taken in *Thomas*. In *Mandal case* the Court held that for the purpose of applying the rule of 50%, a year should be taken as the unit and not the entire strength of the cadres.<sup>68</sup>

According to the Court, if the entire service/cadre was taken a unit and the backlog was sought to be made up, then the open competition channel had to be choked altogether for a number of years till the quota meant for backward classes is filled up.<sup>69</sup> That might take quite a number of years because the number of vacancies arising each year was not many. Meanwhile, the members of the open competition category would become age barred and ineligible. Equality of opportunity in their

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68. *Id.* at p. 440.

69. *Id.* at p. 441. To substantiate this view, the Court gave the following illustration : "Take a unit/service/cadre comprising of 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of 1000 posts, 500 must be held by the members of these classes, i.e., 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service cadre is taken as a unit and the backlog is sought to be made up, then the open competition has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for them is filled up". *Ibid.*

case would become a mere mirage. The Court, thus, reached the following conclusion:

"It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be".<sup>70</sup>

It is significant to note that in reaching the above conclusion, the Court relied on *Devadasan* for its interpretation of clause (1) of Article 16 as a guarantee to each individual citizen, whereas it took *Balaji* for its interpretation of clause (4) as a special provision.<sup>71</sup>

(v) *Carry forward rule: Devadasan partially overruled*

The decision in *Devadasan* in so far as it struck down the carry-forward rule was held to be not good and Justice Jeevan Reddy, for the majority said that the most that could be done in *Devadasan* case was to quash the appointments in excess of 50%. Relying on the observation of Justice V.R. Krishna Iyer in *Soshit*,<sup>72</sup> the Court

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70. *Ibid.* Emphasis supplied.

71. *Id.* at p. 438. Jeevan Reddy, J., said : "Clause (4) is a special provision — though not an exception to clause (1)". *Ibid.*

72. *Supra* n. 42.

overruled *Devadasan* to the effect that the rule should not result in any given year in the selection or appointment of Scheduled Castes and Scheduled Tribes candidates considerably in excess of 50%.<sup>73</sup> The Court further said:

"We may reiterate that a carry forward rule need not necessarily be in the same terms as the one found in *Devadasan*. A given rule may say that the unfilled reserved vacancies shall not be filled by unreserved category candidates but shall be carried-forward as such for a period of three years. In such a case, a contention may be raised that reserved posts remain a separate category altogether. In our opinion, however, the result of application of carry forward rule, in whatever manner it is operated, should not result in breach of 50 % rule".<sup>74</sup>

This approach of the Supreme Court with regard to the mixing of quantum rule and carry-forward rule is fraught with a latent defect with regard to the claims of Scheduled Castes and Scheduled Tribes. Of course, the argument of the Court regarding the other aspect of quantum rule is logically correct. But regarding the carry-forward formula the system itself reveals that the Scheduled Castes and Scheduled Tribes candidates are not adequately represented and the three years limitation for the lapse of vacancy and the carry-forward formula automatically converts the posts or the vacancies intended for the Scheduled Castes and Scheduled Tribes into those of other communities. If this judicial approach is accepted, in the near future, many of the reserved posts will be lapsed and further, those posts will be

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73. *Supra* n. 59 at p. 443.

74. *Id.* at p. 444.

occupied by other communities. Would it not perpetuate inequality of opportunity and result in reservation remaining as a dead letter of the social justice principles to the downtrodden segments of our society by denying their due share in the State's administration ? Hence, in future, one can reasonably hope that, the court would exclude the carry-forward formula from the quantum rule at least for a few decade so as to attain justice and equality of result to those sections.

(vi) *Quantum depends on the adequacy or representation: Justice Pandian's dissent*

Justice Retnavel Pandian while concurring with the majority took a dissenting approach on the issue of quantum rule. He expressed the opinion against *Balaji* by the following words:

"As to what extent the proportion of reservation will be so excessive as to render it bad must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only upto the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50 % is neither based on scientific data nor on any established and agreed formula. In fact, Article 16 (4) itself does not limit the power of Government in making the reservation to any maximum percentage; but depends upon the quantum of adequate representation required in the services".<sup>75</sup>

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75. *Id.* at pp. 115-116.

The opinion of Justice Pandian is more realistic than that of Justice Jeevan Reddy. Firstly, the quantum issue did not arise directly in *Balaji* and accordingly it may be said that the quantum propounded in *Balaji* is only an obiter dictum and not a *ratio decidendi*.<sup>76</sup> Secondly, in many cases the Supreme Court as well as the High Courts have justified the quantum limits to reservations based on the efficiency of administration. But in no case this phantom of lack of efficiency has been proved scientifically before the courts. Thirdly, the uniform application of the quantum rule throughout India is not feasible because of the existing regional and State disparities. But inevitably the judicial legislation in this aspect has become acceptable due to the executive and legislative inaction.

(vii) *Justice Sawant's different approach*

Justice Sawant, though, concurred with the majority adopted a different approach with regard to the quantum issue. It was he who reformulated the issue in the following manner. Can the extent of reservation of posts in the services under the State exceed 50% of the posts in a cadre or service under the State or exceed 50% of appointments in a cadre of service in any particular year? Can such extent of representation be determined without determining the inadequacy of representation of each class in the different categories and grades of services under the State?<sup>77</sup>

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76. *Id.* at p. 114. This was the argument put forward by Ram Jethmalani on behalf of the Union of India.

77. *Id.* at p. 246.



a) *Exception-explanation has no bearing on the quantum*

Justice Sawant re-examined the exception-explanation controversy and observed that in either case it had no bearing on the percentage of reservations to be kept under it. Even assuming that Clause (4) of Article 16 was an exception, there was no numerical relationship between a rule and its exception, and their respective scope depends upon the areas and situations they cover. How large the area of the exception would be, depend upon the circumstances in each case. Hence, legally, it could not be insisted that the exception would cover not more than 50% of the area covered by the rule.<sup>78</sup>

(b) *Proportionate to the population*

According to Justice Sawant, even if there was no indication of the extent of reservation in Article 16(4), the object of reservation, i.e., to ensure adequacy of representation mentioned there, served as a guide for the percentage of reservations to be kept.<sup>78a</sup> Justice Sawant went further and said:

"Broadly speaking, the adequacy of representation in the services will have to be proportionate to the proportion of the backward classes in the total population".<sup>79</sup>

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78. *Ibid.*

78a. *Id.* at p. 247.

79. *Ibid.* However, Justice Sawant while analysing the extent of judicial review with regard to the percentage of reservation held that it was not necessary and Article 16(4) did not suggest, that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total population. But he  
*(f.n. contd. on next page)*

*(f.n. 79 contd.)*

was much specific that the validity of the percentage of reservation for backward classes would depend upon the size of the backward classes in question. This observation though seems to be self-contradictory to the earlier one, one can reasonably come to the conclusion, by a close scrutiny, that the adequacy of representation is the only guideline laid down by Article 16 (4) and it is in the discretion of the State to keep the reservations at a reasonable level by taking into account all legitimate claims and relevant factors. *Id.* at p. 263.

Justice Sawant referred to the U.S. position<sup>80</sup> where 10% of the business was reserved for the blacks, their population being roughly 10% of the total population and observed that if the reservation was to be on the basis of the proportion of the population in this country, the backward classes being no less than 77½% (Socially and Educationally Backward Classes and Scheduled Castes and Scheduled Tribes taken together) the total reservation would have to be to that extent. He pointed out that 'at present the reservations for SCs/STs are roughly in proportion to their population'.

(c) *Test of adequacy: Effective representation*

Justice Sawant emphasised that the adequacy of representation in administration should be determined on the basis of representation at all levels or in all posts in the administration. It was not only a question of numerical strength in the administration as a whole. That is, as the lower rungs they might be represented adequately or more than adequately in terms of their population ratio. But at the higher rungs, that might not be the position. Therefore, to satisfy the test of adequacy, what was necessary was an effective representation or effective voice in the administration and not so much the numerical presence.<sup>81</sup> It was reiterated:

"The adequacy does not mean a mere proportionate numerical or quantitative strength. It means effective voice or share in power in running the administration. Hence, the extent of reservations will have to be estimated with reference to the representation in different grades and categories".<sup>82</sup>

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80. *H. Earl Fullilore v. Philip M Kluntznick*, 448 U.S. 448: 65 L. Ed. 2d. 902 (1980).

81. *Supra* n. 59 at p. 247.

82. *Id.* at p. 256.

(d) *Validity of excess reservation over 50%*

He also favoured for keeping the reservation in appointments or posts as year-wise. That would, according to him spell out uncertainties and arbitrariness. With regard to the validity of the extent of excess of reservation over 50 per cent, Justice Sawant summarised the position in the following words:

"There is no legal infirmity in keeping the reservations under clause (4) alone or under clause (4) and clause (1) of Article 16 together exceeding 50%. However, validity of the extent of excess of reservation over 50% would depend upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept. Although, further, legally and theoretically the excess of reservations over 50% may be justified, it would ordinarily be wise and nothing much would be lost, if the intentions of Framers of the Constitution and the observations of Dr. Ambedkar, on the subject in particular, are kept in mind. The reservations should further be kept category and gradewise at appropriate percentages and for practical purposes the extent of reservations should be calculated category and gradewise".<sup>83</sup>

Justice Sawant's observations are more balanced in approach than those of Justice Jeevan Reddy and Justice Pandian. His idea that the extent of representation should be calculated on category and grade-wise is especially notable.

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83. *Id.* at p. 256.

(viii) *Below 50 percent rule: Dissenting views of Justice Thommen and Justice Kuldeep Singh*

In *Mandal* case Justice T.K. Thommen in his dissent expressed the opinion that the reservation in all cases must be confined to a minority of available posts or seats so as not to unduly sacrifice merits. Moreover the number of seats or posts reserved under Article 15 or Article 16 must at all times remain well below 50% of the total number of seats or posts.<sup>84</sup> Justice Kuldeep Singh also dissented from the majority and agreed the view of Justice Sahai<sup>85</sup> in this regard and held that the reservation under Article 16 (4) must remain below 50% and under no circumstances be permitted to go beyond 50 percent. Any reservation beyond 50 percent is constitutionally invalid.<sup>86</sup> Regarding the carry forward rule also he maintained the same limit when he said:

"It is for the State to adopt the methodology of providing reservation below 50%. The State may provide the said reservation in respect of the substantive vacancies arising in a year or in the cadre or service. It would be permissible to carry forward the reserved vacancies of one year to the

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84. *Id.* at p. 167.

85. Sahai, J., said : "Reservation being an extreme form of protective measure or affirmative action, it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner, not to exceed 50 per cent." *Id.* at p. 334.

86. *Id.* at p. 195.

next year. It is reiterated that the vacancies reserved in a year including those which are carried forward shall not exceed 50%"<sup>87</sup>

The dissenting views of Justice Thommen and Justice Kuldip Singh show that they preferred the *Balaji* dictum of the "below 50 percent" rule though the later decisions of the Court did not use the terms "below 50 percent", but a general rule of 50 percentage.

Could the decision of the Court in *Mandal case* finally settle the issue of quantum ? A perusal of the judgement shows that it lacks a definite and concrete proposition. Though the majority held that the reservation should not exceed 50% it could not prescribe the maximum permissible limit but allowed in certain exceptional and special circumstances to go beyond 50%. This leeway opened by the majority has a logical similarity with the previous decisions other than *Balaji* and *Devadasan* i.e., *Thomas*, *Shoshit* and *Vasanth Kumar* and the letter and spirit of the Constitution. Since the Constitution is a socio-politico-legal document which has to be interpreted in the light of the existing realities of the society, the Court might have taken such a stand in concluding that the 50 percent quantum rule is not unalterable.

#### *Post-Mandal Scenario : Attempts of States to Circumvent 50% Limit*

It is highly significant to note that the Supreme Court in *Mandal case* prescribed a maximum limit of 50 per cent to the quantum of reservation. Its "irresistible conclusion" that reservations contemplated in Clause (4) of Article 16 should not

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87. *Id.* at p. 196.

exceed 50% is followed by an addenda, viz., while 50 percent shall be the rule, it is necessary to reckon with "certain extraordinary situations inherent in the great diversity of this country and the people", and, therefore, some relaxation in the strict rule might become imperative.<sup>88</sup> However, Justice Jeevan Reddy clearly specified that the peculiar situation such as the population inhabiting in "farflung and remote areas" might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way.<sup>89</sup> Foreseeing the ramifications of further relaxation to the general rule, the Court warned that "extreme caution" should be exercised and "a special case made out" in such a context.<sup>90</sup>

In these state of affairs, however, the post-*Mandal* scenario witnesses certain attempts of State Governments to circumvent the judicial verdict of 50 per cent limit of the *Mandal case*. The first instance is that the State of Tamil Nadu enacted a piece of legislation in 1993 endorsing 69 percent reservation for Backward Classes, Scheduled Castes and Scheduled Tribes in educational institutions and public employment.<sup>91</sup> Later the Karnataka Government followed suit

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88. *Supra* n. 59 at p. 439 *per* Jeevan Reddy, J.

89. *Ibid.*

90. *Ibid.*

91. The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seats in Educational institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1994). A brief survey of the history of quantum issue in Tamil Nadu is as follows : A Commission headed by

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by enacting a new legislation seeking to provide reservation to the extent of 73 per cent.<sup>92</sup>

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A.N. Sattanathan was set up in 1969 to examine and recommend for the welfare of Backward Classes. Its report in 1971 revealed that 9 out of 105 castes listed as backward class managed to create a virtual monopoly for themselves in government services and it was suggested that they should be eliminated from the list. Instead of their elimination, more castes were added to the list and increased the quota for backward classes from 25 per cent to 31 per cent and for the Scheduled Castes and Scheduled Tribes from 16 per cent to 18 per cent. In 1979, an income ceiling was fixed for enjoying the benefits. But soon the Government yielded to vigorous protest from backward class leaders and opposition parties and the order of the income ceiling was withdrawn in 1980 and increased the reservation for Backward Classes to 50 per cent from 31 per cent. Thus total reservation came to 68 per cent. Later Ambasanker Commission's report in 1985 became a source of intense debate in Tamil Nadu. Out of 21 members, 15 members of the Commission advocated that the quotas of 68 per cent commensurate with the population of the reserved communities in the State. In 1989 the Government accepted the demand of the most backward classes (MBCs) and introduced the existing system of 30 per cent reservation for BCs, 20 per cent for MBCs, 18 per cent for the Scheduled Castes and 1 per cent for the Scheduled Tribes. Thus the 69 per cent of reservation came to stay in Tamil Nadu. *The Hindu*, November 10, 1993, p. 1 T.R. Subramaniam, "Reservation Ruckus : Tamil Nadu Government in a Fix", *Frontline*, July 15, 1994, pp. 32-34; Parmanand Singh, "Reservations, Reality and the Constitution : Current Crisis in India", in P. Leelakrishnan (Ed.), *New Horizons of Law*, Department of Law, Cochin University of Science and Technology, Cochin - 22 (1987), p. 284 at pp. 297-98.

92. The Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Seats in Educational Institutions and Appointments of Posts in the Services in the State) Act, 1994. The problem of the increase of 73 per cent quota arose from the Government's decision in 1994 to implement the recommendations of the O. Chinnappa Reddy Backward Class Commission. The report suggested to keep OBC quota at 38 per cent and to remove the two most prominent communities, the Vokkaligas and the Lingayats from the backward class. However, the Government by  
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(f.n.92 contd.)

including rural Vokkaligas and Lingayats, increasing the OBC quota to 50 per cent. The quota for Scheduled Castes and Scheduled Tribes also raised from 18 to 23 per cent. This measure was to replace an earlier Government Order of 1986 fixing the quota as 68 per cent. The Government, however, attempted to increase the OBC quota to 57 per cent and thereby a total of reservation upto 80 percent. This move was abandoned and it kept the quota at the present 73 percent. Ravi Sharma, "In Bind : Moily and the Reservation Muddle", *Frontline*, October 7, 1994, pp. 23-24.

## *Insulation of Ninth Schedule: Quantum of Reservation Becomes a Conundrum*

The Madras High Court's order of accepting the Tamil Nadu scheme of reservation only for that academic year was upheld by the Supreme Court in its interim order, but with a direction that from the next academic year onwards the reservation should be less than 50 per cent. It was during the pendency of this interim order of the Court, the Tamil Nadu Government enacted the legislation endorsing 69 per cent of reservation.<sup>93</sup> It then managed to get the assent of the President of India and placed the enactment in the Ninth Schedule by the Constitution (Seventy-Sixth Amendment) Act, 1994. This is to ensure the protective insulation of the Ninth Schedule from the judicial attack, though the legislation prima facie stands against the interim order of the Supreme Court and its earlier holdings of 50 per cent limit, especially the *Mandal Case*. The questions emerge in this context are : Is the legislation constitutionally valid even though it is put in the Ninth Schedule ? Or what is the scope of judicial review of a legislation put in the Ninth Schedule ?

The Ninth Schedule of the Constitution together with Article 31-B<sup>94</sup> was introduced by the Constitution (First Amendment) Act 1951. It was an aftermath of

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93. *The Hindu*, November 10, 1993, p. 1.

94. Constitution of India, Article 31-B reads : "*Validation of Certain Acts and Regulations* — Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever 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 notwithstanding any judgement, 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 tussle between the judiciary and Parliament. The judiciary had resorted to be over-extensive and over-protective interpretations to the right to property and it became cumbersome to implement agrarian reforms. The inception of the Ninth Schedule was, therefore, necessitated to bypass the judicial barriers, with a solemn objective of entrenching the agrarian reform legislation by providing a sufficient constitutional insulation from judicial interference. Beginning with 13 entries, the Schedule, became a cauldron of 256 entries today. The question of constitutionality of Ninth Schedule in 31B was raised in cases relating to right to property and amendments of the Constitution.<sup>95</sup>

The basic structure theory of *Kesavananda Bharati's case*<sup>96</sup> was a shot in the arm of judiciary to contain the legislative wisdom of putting more and more additions to the entries in the Ninth Schedule. Though *Kesavananda* upheld the validity of Article 31-C and the legislation of the Ninth Schedule till the date of the decision, it ruled that on future occasions the Ninth Schedule legislation would have to pass the test of basic structure theory. Though the Supreme Court in *Indira Gandhi's case*<sup>97</sup> was hesitant to apply the test evolved in *Kesavananda*, the post-emergency decision in *Waman Rao*<sup>98</sup> applied the test. Thus the position is rightly analysed :

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95. E.g., *Sankari Prasad v. Union of India*, A.I.R. 1951 S.C. 458, upheld the validity of Article 31-B.

96. *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1467.

97. *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299.

98. *Waman Rao v. Union of India*, A.I.R. 1981 S.C. 271.

"The notion that Ninth Schedule is an impenetrable fort for judiciary is given up amidst the post-*Kesavananda* regeneration of constitutional values.<sup>99</sup>

#### Constitutional Validity of the Reservation Laws of Tamil Nadu and Karnataka

The reservation laws of Tamil Nadu and Karnataka are manifestly against the majority decision in *Mandal Case*. Justice Jeevan Reddy's categorical stipulation of "extra-ordinary circumstances"<sup>100</sup> for making some relaxation in the strict rule of 50 per cent is clearly absent in these legislation. However Justice Sawant's observation, in his concurring judgement, may open some leeways for disputing the limit of 50 percent quantum, viz., according to him, 'there is no legal infirmity in keeping the reservation exceeding 50% but the validity of the extent of reservations over 50% would depend upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept.'<sup>101</sup>

Justice Sawant brought out the idea that the adequacy of representation in the services, in a broad sense, will have to be proportionate to the proportion of the backward classes in the total population.<sup>102</sup> Moreover, adequacy of representation

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99. P. Ishwar Bhat, "Limits of the Ninth Schedule's Openness", [1995] C.U.L.R. 232 at p. 233.

100. *Supra* nn. 88-90 and the accompanying text.

101. *Supra* n. 83.

102. *Supra* n. 79.

should be determined on the basis of representation "at all levels or in all posts" in the administration. It is not only a question of numerical strength, but an "effective" representation also.<sup>103</sup> He further said :

"The validity of the percentage of reservation for backward classes would depend upon the size of the backward classes in question. So long as it is not so excessive as to virtually obliterate the claims of others under clause 16 (1), it is not open to challenge".<sup>104</sup>

These views may be helpful in defending the reservation laws, but a close scrutiny of the observation of Justice Sawant would definitely reach to the same conclusion of Justice Jeevan Reddy. Justice Sawant was much cautious in this respect when he said

"Although, further, legally and theoretically the excess of reservations over 50% may be justified, *it would ordinarily be wise and nothing much would be lost*, if the intentions of the framers of the Constitution and the observations of Dr. Ambedkar on the subject in particular, are kept in mind."<sup>105</sup>

Thus, Justice Sawant's intention becomes clear from the above observation that for a wise and well balanced approach towards this quantum puzzle, the reservation should not exceed a reasonable limit. It seems paradoxical that Justice Sawant after

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103. *Supra* n. 81 and the accompanying text.

104. *Supra* n. 59 at p. 263.

105. *Supra* n. 83. Emphasis supplied.

observing that the validity of the percentage of reservation for backward classes would depend upon their size in question added further :

"However it is not necessary, and Article 16 (4), does not suggest, that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total population".<sup>106</sup>

This observation appears to be self contradictory to his earlier view. However he clarified the position by holding that the only guideline laid down by Article 16(4) is the 'adequacy of representation in services' and 'within the said limits, it is in the discretion of the State to keep the reservation at reasonable level by taking into consideration all legitimate claims and relevant factors'. Thus one can clearly come to the conclusion that Justice Sawant stood for a reasonable limit of reservation.

Judicial review is a significant aspect of Indian legal system. Courts exercise enormous powers in vivid areas of law and life. Compensatory discrimination is one of such well accepted areas from the very inception of the Constitution. Regarding the scope of judicial review of the quantum of reservation, Justice Sawant's observation in *Mandal case* is highly relevant in this context. He formulated the following question : Will the extent of judicial review be limited or restricted in regard to a demonstrably unreasonable percentage of reservation ? He remarkably answered thus :

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106. *Supra* n. 59 at p. 263.

"... Judicial scrutiny would be available ... if the percentage of reservation is either disproportionate or unreasonable so as to deny the equality of opportunity to the unreserved classes and obliterates Article 16 (1)" <sup>107</sup>

This observation of Justice Sawant is a pointer to the direction that judiciary is the umpire in correcting the excesses with regard to the quantum of reservation.<sup>108</sup> One of the major anomalies in putting the reservation law in Ninth Schedule is that such a law is not at all in conformity with the objectives of Ninth Schedule. It is only with an objective of ousting the judicial review, that legislation is placed in the Schedule. However, Ninth Schedule legislation is not unreviewable by courts. The Supreme Court's decision in *Kesavanada* and *Waman Rao* are notable precedents in this regard. As it is rightly observed :

"A purposive interpretation of Article 31-B would not accommodate misuse of Ninth Schedule mechanism".<sup>109</sup>

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107. *Supra* n. 59 at pp. 264-265. However, Sawant, J., emphasised : "Whether the percentage is unreasonable or results in the obliteration of Article 16 (1), so far as the unreserved classes are concerned, it will depend upon the facts and circumstances of each case, and no hard and fast rule of general application with regard to the percentage can be laid down for all the regions and for all times". *Id.* at p. 265.

108. Justice T.K. Thommen in his dissenting judgement in *Mandal case* also highlighted the need for judicial review in this area, thus "All such programmes (affirmative actions) must stand the test of judicial review whenever challenged. Reservation being exclusionary in character must necessarily stand the test of heightened administrative and judicial solicitude so as to be confined to the strict bounds of constitutional principles," *Id.* at p. 168.

109. *Supra* n. 99 at p. 269.

Indian Judiciary has a pivotal role in reshaping the protective discrimination policies. The framers of the Constitution too had reposed much faith in the judiciary. If the judiciary goes wrong it would be corrected by legislative wisdom. But ousting the jurisdiction itself is questioning the very foundation of the indirect check and balance of the three organs of the State envisaged in the separation of powers of the Constitution. This attempt may be useful as an immediate escape route, but in the long run this would create more problems than find solutions.

Thus from the angles of *Mandal case* and the purposive interpretation of Ninth Schedule, the reservation laws of Tamil Nadu and Karnataka fail in their constitutional validity.



## CHAPTER - VI

# SOLITARY POSTS AND EQUALITY OF OPPORTUNITY

Clause (4) of Article 16 enjoins the State to reserve employment in favour of backward classes and this empowerment is limited to the extent of inadequacy of representation by the operative words in that clause. The object of this limitation is to maintain a reasonable balance between the clauses (1) and (4) of Article 16. Clause (4) of Article 16 does not give any idea other than the adequacy of representation. In the initial stages of the working of the Constitution, various State Governments adopted different proportion of reservation to backward classes and there existed an uncertainty in the executive action on the question of adequacy of representation. It was in *M.R. Balaji v. State of Mysore*<sup>1</sup> that the Supreme Court propounded a principle of quantum rule in order to reconcile the conflict that emerged between clauses (1) and (4) of Article 16. The principle was that reservation should be 'less than 50 percent' even though the inadequacy of the representation of backward classes might be more than that.

In implementing this principle of 50 percent quantum rule the administrators were faced with a peculiar problem. If the total number of vacancies were two or more, then an arithmetical division was possible and the fifty percent could be apportioned to both of the categories under clauses (1) and (4) of Article 16. However, at times vacancy arose for a single isolated post in different fields, then

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1. [1963] Supp. 1 S.C.R. 439.

the issue was : Can reservation be applicable to the single isolated post ? Since Constitution is aimed at protecting both the reserved and non-reserved categories, is it a denial of equal opportunity and a fraud on the Constitution, if the single isolated post is exclusively given to open category ? On the other hand, if it is given to the reserved category, is it a monopoly of reservation and violation of equality of opportunity under Clause (1) of Article 16?

This controversy has been a subject of serious judicial scrutiny. This chapter examines the court's attempts in propounding the two conflicting interests.

### *Carry Forward and Rotation System : Arati Ray's Case*

After the decision of Devadasan,<sup>2</sup> the question regarding the carry forward rule again came before a Five Judge Bench of the Supreme Court in *Arati Ray Choudhury v. Union of India*.<sup>3</sup> The Ministry of Home Affairs of the Union Government issued a memorandum modifying the carry forward rule so as to comply with the *Devadasan* verdict. In pursuance of that memorandum the Railway Board prepared a model roster<sup>4</sup>

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2. *T. Devadasan v. Union of India*, [1964] 4 S.C.R. 680.

3. (1974) 1 S.C.C. 87. The Court consisted of A.N. Ray, C.J. and D.G. Palekar, Y.V. Chandrachud, P.N. Bhagwati and V.R. Krishna Iyer, JJ. The judgment was handed down by Chandchud, J.

4. The roster system runs as follows :

<u>"Point on the Roster</u>	<u>Whether Unreserved or Reserved for</u>
1	Scheduled Castes
2-3	Unreserved
4	Scheduled Tribes

*(f.n. contd. on next page)*

specifying the turns of reserved and unreserved vacancies and thereby 12.5 and 5 percent of reservation was allotted to Scheduled Castes and Scheduled Tribes respectively. The note appended to the roster contained an important explanation, which reads :

"If there are only two vacancies to be filled on a particular occasion, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved. If on this account a reserved point is treated as unreserved, the reservation may be carried forward in the subsequent two recruitment years".<sup>5</sup>

In order to remove the chances of reserved posts being converted into unreserved posts in the case of a single vacancy, the Railway Board modified the reservation rule in the following manner :

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5-8	Unreserved
9	Scheduled Castes
10-16	Unreserved
17	Scheduled Castes
18-20	Unreserved
21	Scheduled Tribes
22-24	Unreserved
25	Scheduled Castes
26-32	Unreserved
33	Scheduled Castes
34-40	Unreserved." <i>Id.</i> at pp. 92-93.

5. *Id.* at p. 93.

"If there is one post to be filled, selection should invariably be held for two posts; i.e., one actual and the other to cover unforeseen circumstances."<sup>6</sup>

Thus based on the carry forward rule, one vacancy out of two posts of Headmistresses, was filled by a Scheduled Caste candidate on a carry forward basis. This was challenged by the petitioner by contending that the carry forward rule was violative of Articles 14 and 16 of the Constitution and the vacancy in the post of Headmistress ought to be treated as unreserved vacancy — since as per the note of the Roster "if there be only one vacancy, it should be treated as unreserved". In repelling the contention, the Supreme Court, speaking through Justice Chandrachud held :

"Such a construction would rob the Rule of its prime significance and will render the carry forward provision illusory. Though each year of recruitment is to be treated separately and by itself, a reserved vacancy has to be carried forward over 2 years, if it is not filled in by the appointment of a reserved candidate. The open class reaped a benefit in 1966-67 when a reserved vacancy was treated as unreserved by the appointment of an open candidate, Smt. Gita Biswas. If the carry forward rule has to be given any meaning the vacancy shall have to be carried forward for the benefit of Scheduled Castes and Scheduled Tribes until the close of the financial year 1968-69. The Kharagpur vacancy was to be filled in on January 1, 1969 and hence it cannot go to the petitioner who, admittedly, does not belong to the reserved class".<sup>7</sup>

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6. *Ibid.*

7. *Id.* at p. 94-95.

The Court went on to add that the construction sought to be put on the Rule by the petitioner would perpetuate a social injustice which clouded the lives of a large section of humanity which was struggling to find its feet. Such a construction was contrary to the plain language of the letter of the Railway Board, intendment of the Rule and its legislative history.<sup>8</sup>

In the present case, the Court had not addressed itself to the question of constitutionality of reserving isolated posts. The question was with regard to the construction of the reservation rules which provided reservation to Scheduled Castes based on a roster with carry forward scheme. There were two posts of Headmistresses in the cadre and the vacancies in that cadre were subjected to reservation. It is apparently visible that the idea behind the roster which specified the turn of reserved and nonreserved was that both the categories of open and reserved had to be accommodated in service in a just and fair manner and none should be dissatisfied and distressed. The Supreme Court rightly endorsed this view. But this scheme of reservation was subjected to too much controversy in later years before the Supreme Court.

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8. *Id.* at p. 95. While analysing the carry forward rule in the present case, the Court said : "... if there be only one vacancy to be filled in a given year of recruitment, it has to be treated as unreserved irrespective of whether it occurs in the Model Roster at a reserved point. The appointment then is not open to the charge that the reservation exceeds 50% for, if the very first vacancy in the first year of recruitment is in practice treated as a reserved vacancy, the system may be open to the objection that the reservation not only exceeds 50% but is in fact cent per cent. But, if "on this account", that is to say, if on account of the requirement that the first vacancy must in practice be treated as unreserved even if it occurs in the Model Roster at a reserved point, "a reserved point is treated as unreserved" the reservation can be carried forward to not more than two subsequent years of recruitment. Thus, if two vacancies occur, say, within an initial span of three years, the first vacancy has to be treated as an unreserved vacancy and the second as reserved". *Id.* at p. 94.

*Grouping of Posts : Raman Nair's Case*

The rules of communal reservation<sup>9</sup> was implemented in Cochin University<sup>10</sup> in the case of teaching staff as a class which included Readers, Lecturers and Teaching Assistants except the post of Professors. The post of Professors was set apart for filling up exclusively on merit. But at the same time the reservation quota against this category was provided additionally in the above category of teaching staff.<sup>11</sup> This mode of reservation was held invalid by the High Court of Kerala.<sup>12</sup> On an appeal before a Three Judge Bench of the Supreme Court, in *Cochin University v.*

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9. Rules 14, 15, 16 and 17 of the Kerala State and Subordinate Service Rules. Rule 14 lays down a rule of rotation in making appointments. Rule 15 indicates that the principle of minimum qualifications to determine whether candidates are suitable for selection is not abandoned. Rule 16 provides for a sub-rotation among sub-groups of major backward classes. This concept is further explained and elaborated in Rule 17.
  10. Section 6(2) of the Cochin University Act, 1971 reads as follows : "In making appointments to posts in any service, class or category under the University, the University shall mutatis mutandis, observe the provisions of Clauses (a), (b) and (c) of Rule 14 and the provisions of Rules 15, 16 and 17 of the Kerala State and Subordinate Service Rules as amended from time to time".
  11. The Syndicate of the University passed a resolution on 7.7.1972. The relevant part of which reads : "Resolved that 1. The rules mentioned under Section 6(2) of the Cochin University Act, 1971 be implemented in the case of teaching staff as a class except in the case of post of Professor which shall be filled up exclusively in consideration of merit; but the reservation quota against this category of Readers, Lecturers, Teaching Assistants, etc., taken collectively".
  12. *Dr. N. Raman Nair v. University of Cochin*, I.L.R. (1974) 1 Ker. 486.

*Dr. N. Raman Nair*<sup>13</sup>, it was contended on behalf of the University that the relevant provision of the Act<sup>14</sup> empowered the University to make changes in the rules of reservation to meet the particular needs in the University so as to enable it to implement the provisions of the Act in the way it thought fit.<sup>15</sup>

The Court rejected the contention and held that the power to apply the rules *mutatis mutandis* did not include the power to amend the substantial provisions in the rules.<sup>16</sup> It was further held that this power would not enable the University to dispense with reservation itself to any particular class or category of service under the University.<sup>17</sup> It was also held that the provision for compensatory quota of reserved appointments in a category of other than that of Professors in lieu of removal of the post of Professors from subjection to the rules was bad since it would alter the scope or ambit of the reservation rule.<sup>18</sup> While analysing the application of the rotation rule to different classes or categories of service, the Court's observation was highly remarkable that nothing was wrong in classifying even the entire teaching staff into one class for the purpose of applying the rule of rotation. Speaking through Justice Beg, the Court thus held :

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13. A.I.R. 1974 S.C. 2319. The Court consisted of M.H. Beg, V.R. Krishna Iyer and N.C. Untwalia, JJ.

14. *Supra* n. 10.

15. *Supra* n. 13 at p.2323.

16. *Ibid.*

17. *Id.* at p. 2324.

18. *Ibid.*

"...it (the reservation Rules of the State Government)<sup>19</sup> does not indicate the manner in which the classification of members of a service under the University has to be made for the purposes of applying these rules. In as much as every statutory power has to be exercised reasonably, we can say that the classification has to be reasonable. Thus, the University may treat all the teaching posts as belonging to one class for the application of the rules. On the other hand it may treat only posts of Readers in all subjects or in a particular subject as a category by itself for the application of these rules. It cannot exempt any class or category, such as Professors from the operation of the rules altogether."<sup>20</sup>

However the Court cautioned that a classification which put all classes and categories of service from the peons to Professors together may, by destroying the distinction between classes and categories of service would run counter to the provisions of the Act.<sup>21</sup>

The analysis of *Raman Nair* reveals that in case of vacancies existing in similar category in different departments, it could be treated as a particular recruiting unit,

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19. *Supra* n.9.

20. *Supra* n. 13 at p. 2322. The Court went on to add : "Only if it so classifies, all posts in a service under the University as to make its classification prima facie unreasonable, could the validity of the classification made by it be assailed. The power is presumed to be exercised reasonably on the strength of facts and circumstances relevant for purposes intended to be achieved by the classification. These purposes have also to pass the test of legality and constitutionality." *Ibid*.

21. *Id.* at p. 2324.



i.e., instead of recruiting distinctively for each department vacancies in different departments could be grouped together basing on similar pay scale and the rotation which is the modality to implement the reservation quota could be followed. In fact, *Raman Nair* did not relate to the question of constitutionality of reserving isolated post, though the respondent's plea was that the post of Reader in Hindi was in itself a particular category was not accepted by the Court. It is quite clear from the decision that whatever may be the basis of classification, it should pass the test of reasonableness. The import of *Raman Nair* is that in case of single vacancies existing in different departments, instead of keeping them as solitary posts, the recruiting authority can adopt the above grouping mechanism.

### 3. *Chakradhar : Jolt to the Clubbing of Posts*

The grouping of posts received a serious jolt from the judiciary after a period of 14 years. The State of Bihar in 1975 created a separate Directorate for indigenous medicine and it sanctioned one post of Director and two posts of Deputy Directors (Homoeopathic and Unani). All these three Class I posts were grouped together in one cadre and the reservation rule<sup>22</sup> applied based on a 50 point roster. Accordingly, the second post in the group i.e., the post of Deputy Director (Homoeopathic) was set apart for Scheduled Caste.<sup>23</sup> The Government later sanctioned one more post of

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22. The Rules laid down that "if in any grade, there is only one vacancy for the first time, then it will be deemed to be unreserved and for the second time also, if there be only one vacancy, then it will be deemed to be reserved". *Infra* n. 24 at pp. 212-218.

23. Thus Chakradhar Paswan was selected to that post. This was challenged by one Kameswar Prasad (4th respondent) before the Patna High Court and the Court viewed that the posts of Director and the Deputy Directors could not be clubbed together for reservation

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Deputy Director (Ayurvedic). Thus, the questions before the Supreme Court in *Chakradhar Paswan v. State of Bihar*<sup>24</sup> were :

- "1. Is the post of Deputy Director (Homeopathic) an 'isolated post' and therefore reservation of the post for a Scheduled Caste candidate amounts to 100 per cent reservation and must therefore be declared to be impermissible under Article 16(4) ?
2. Whether the posts of the Director and the three Deputy Directors could be grouped together for purposes of implementing the policy of reservation, according to the 50 point roster; and
3. Could the posts of Director and three Deputy Directors in the Directorate of Indigenous Medicines, although they are posts carried on different grades, still be clubbed together for purposes of reservation merely because they are Class I posts ?"<sup>25</sup>

First of all the Court examined the last question. It brought out the distinction between 'cadre' and 'service' and rightly held that the grouping of Director and Deputy

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of posts and appointments. Nor could the post of Deputy Directors, which form distinct and separate systems of medicine be grouped for purposes of reservation. Therefore, the reservation to the only post of Deputy Director (Homeopathic) for Scheduled Caste would tantamount to 100 per cent reservation and the order of reserving this post, thereby, infringed the 50 point roster. *Id.* at p. 219.

24. (1988)2 S.C.C. 214. The Court consisted of A.P. Sen and B.C. Ray, JJ. The case was decided on March 8, 1988. For a critique of the case see, P.S. Soman, "Reservation in Isolated Posts : the Problem of Quantum Rule", [1992] C.U.L.R. 242.

25. *Id.* at p. 220.

Directors within a single cadre was wrong since the posts of Director and Deputy Directors were carried on different scales of pay, duties and responsibilities, they constituted two distinct cadres or grades.<sup>26</sup> The Court then examined the second question as to whether the posts of Director and Deputy Directors could be grouped for the purpose of implementing 50 point roster. Answering in the negative the Court said that since the grouping of Director and Deputy Directors within one cadre was wrong, the point of reservation was not in conformity with the 50 point roster. Thus the Court speaking through Justice A.P. Sen observed :

"...according to the 50 point roster, if in a particular cadre a single post falls vacant, it should, in the case of first vacancy, be considered as general. That being so, the State Government would not have directed reservation of the post of Deputy Director (Homeopathic) which was the first vacancy in a particular cadre i.e., that of the Deputy Directors, for candidates belonging to the Scheduled Castes. Such reservation was not in conformity with the principles laid down in the 50 point roster and was impermissible under Article 16(4) of the Constitution and clearly violative of the guarantee enshrined in Article 16(1) of the equal opportunity to all citizens relating to public employment. Clause (4) of Article 16 is by way of an exception of the proviso to Article 16(1)".<sup>27</sup>

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26. *Id.* at pp. 220-221. The Court said that though the posts of Director and Deputy Directors which are Class I posts, they do not constitute one cadre. They are members of the same service, but do not belong to the same cadre. *Id.* at p.220.

27. *Id.* at p. 221. .

The Court then examined the first question and held that the three posts of Deputy Directors pertain to three distinct systems and therefore each of them was an isolated post by itself.<sup>28</sup> The same principle should apply in the case of Director also. The Court heavily relied on *Balaji*<sup>29</sup> and *Devadasan*<sup>30</sup> for the quantum limit of reservation and held that no reservation should exceed 50 percentage even in the circumstance of carry forward rule<sup>31</sup> and that no reservation could be made under Article 16(4) so as to create a monopoly.<sup>32</sup>

#### 4. *Incongruity of Chakradher*

On a close reading of the decision, it can be seen that the decision is selfcontradictory and incongruous. This is evident in the Court's reasoning and conclusion. After holding that each post of Deputy Director is a single post, the Court said :

"It is a moot point whether the isolated posts like those of the Deputy Directors can be subjected to the 50 point roster by the rotational system. We refrain from expressing any opinion on this aspect, as it does not arise in the present case."<sup>33</sup>

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28. *Id.* at p. 221.

29. [1963] Supp. 1 S.C.R. 439.

30. [1964] 4 S.C.R. 600.

31. *Supra* n. 24 at pp. 221-222.

32. *Id.* at pp. 228-229.

33. *Id.* at p. 222.

How could the Court put forth such a question as open since the Court had already decided earlier that reserving the post of Deputy Director (Homoeopathic) being the first vacancy in the cadre of Deputy Directors was not in conformity with the 50 point roster.<sup>34</sup> The fallacy of the judgement lies in the fact that even after deciding the point in question the Court put forth an assumption which leads to the very same result. It reads :

"Assuming that the 50 point roster applies, admittedly, the first vacancy in the cadre of Deputy Directors was that of the Deputy Director (Homoeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. The first vacancy of the Deputy Director (Homeopathic) in the cadre being treated as unreserved according to the roster, had to be thrown open to all. A candidate belonging to the Scheduled Caste had therefore to compete with others".<sup>35</sup>

The Court in *Chakradhar*, however, upheld the validity of roster point wise reservation with carry forward rule subject to the rider that reservation should not exceed 50 percent in any particular year in the following words :

"Once the power to make reservation in favour of Scheduled Castes and Scheduled Tribes is exercised, it must necessarily follow that a roster pointwise for the purpose of vacancies for which reservation has been made, must be brought into effect and in order to do full justice, a carry forward

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34. *Supra* n. 27 and the accompanying text.

35. *Supra* n. 24 at p. 222.

rule must be applied that in any particular year, there is not more than 50 percent reservation.<sup>36</sup>

The Court further said :

"According to 50 point roster, admittedly, the post of Deputy Director (Homoeopathic) was the first vacancy in the cadre of Deputy Directors and therefore it had to be treated as general i.e., unreserved."<sup>37</sup>

Thus, the Court virtually decided the matter of applicability of 50 point roster to the cadre of Deputy Directors, though the question was left open earlier.

Another incongruity in *Chakradhar* can be found in its forgoing the theory of non-applicability of reservation to isolated post. It is quite discernible that the major basis of this theory is from the interpretation of the instructions of Government of India relating to the reservation of posts and appointments for Scheduled Castes and Scheduled Tribes contained in the Brochure on Reservation. Justice Sen quoted the relevant portion of the Brochure in the following words :

"Para 2.4 provides that reservations will be applied to each grade or post separately but isolated posts will be grouped as provided in Chapter 6. Paragraph 6.1 of Chapter 6 which is relevant for our purposes states that in the case where the posts are filled by direct recruitment, 'isolated individual posts and small cadres' may be grouped with posts in the same class for

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36. *Id.* at p. 226.

37. *Ibid.*

purpose of reservation, taking into account the status, salary and qualifications prescribed for the posts in question. For this purpose, it provides that a cadre or a grade or a division of a service consisting of less than 20 posts may be treated as a small cadre. A group so formed shall not ordinarily consists of 25 posts".<sup>38</sup>

It then adds :

"It is not intended that isolated posts should be grouped together *only* with *other* isolated posts".<sup>39</sup>

The Court immediately jumped into the following conclusion :

"That precisely is the situation here. The Government of India instructions clearly show that there can be no grouping of one or more isolated posts for the purposes of reservation".<sup>40</sup>

Is this interpretation in tune with the intentions of the instructions of the Government ? Can it be read that there can be no grouping of one or more isolated posts for the purpose of reservation ? It is crystal clear that the instructions are 'not intended that isolated posts should be grouped together *only* with *other* isolated post ?'.<sup>41</sup> In other words there is no prohibition of grouping of one or more isolated

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38. *Id.* at pp. 222-223.

39. *Id.* at p. 223.

40. *Id.* at p. 223.

41. *Supra* nn. 38-39. Emphasis supplied.

posts. But it conveys the meaning that isolated posts should not be grouped together only with other isolated posts, but as it is clear from the earlier portion,<sup>42</sup> they should be grouped with posts in the same class for purpose of reservation taking into account the status, salary and qualifications prescribed for the post in question. The decision overlooks the opening provision of para 6.1 of Chapter 6 of the Brochure which in clear terms empowers grouping together of isolated individual posts and small cadres if they belong to the same *class*. What para 6.1 prohibits is only grouping together of one isolated posts with *other* isolated posts. Other isolated posts means posts which do not carry the same status, salary and qualifications which do not belong to the same class. The approach of the Supreme Court, however, it is submitted, goes against the very objective of para 6.1 and the spirit of Article 16(4) of the Constitution.

Justice Sen then went on to add :

"To illustrate, Professors in medical colleges are carried on the same grade or scale of pay but the posts of Professor of Cardiology, Professor of Surgery, Professor of Gynaecology pertain to particular disciplines and therefore each is an isolated post."<sup>43</sup>

The paradox lies in the Court's non-observance of the distinction between 'post' and 'vacancy', though the Governmental instructions are clear about the applicability of reservation to vacancies and not to posts.<sup>44</sup>

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42. *Ibid.*

43. *Supra* n. 24 at p. 223.

44. *Supra* nn. 38-39.



On a plain reading of the instructions of the Government, it can be seen that this illustration of Justice Sen is against the intention of the instructions, since grouping could be done with posts in the same class. Moreover, the post of Professors in one discipline might be very few in number. If those disciplines are isolated from grouping, how can the representation of backward class in those higher echelons of service be made adequate ? Moreover, if the single post is treated as unreserved, does it amount to hundred per cent open or just opposite to hundred per cent reservation ? The Court did not go into those questions.

Perhaps the real reason behind such an approach of keeping the posts solitary and thereby to avoid reservation is implicit in Justice Sen's quoting from one of his earlier decisions that high degree of knowledge and skill is required in the medical and similar professions and therefore 'merit alone must be the sole and decisive consideration for appointing' in such services.<sup>45</sup> However the Court did not notice the fact that there is no relaxation in merit for Scheduled Caste and Scheduled Tribe candidates in those areas which call for high degree of expertise like medical, academic or scientific fields. The Court's observation negatively hints that Scheduled Castes and Scheduled Tribes are inefficient in those professions. In his concluding observation, Justice Sen said :

"These principles unmistakably lead us to the conclusion that if there is one post in the cadre, there can be no reservation with reference to that

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45. *Id.* at p. 227. This was a reiteration of Justice Sen's approach in *K.C. Vasanth Kumar v. Union of India*, A.I.R. 1985 S.C. 1495 at p. 1531, which accorded approval later in *Indra Sawhney v. Union of India*, 1992 S.C.C. (L. & S.) Supp. 1 at pp. 456-457, *per* B. Jeevan Reddy, J.

post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post".<sup>46</sup>

The observation of Justice Sen is contradictory to the well established principles of judicial construction. The Court was not called upon to decide on the question of vacancies arising in posts. The question was whether the posts of Deputy Directors were isolated or not. This conclusion is prima facie against the Government instructions and earlier Supreme Court's decision in *Arati Ray*.<sup>47</sup>

Another incongruity is found in Justice Sen's observation of *Arati Ray*. He distinguished *Arati Ray* from the present case on the ground that *Arati Ray* was a case on carry forward rule. Justice Sen said :

"There is one more decision that calls for our attention, namely, that of *Arati Ray Choudhury v. Union of India* where the effect of a carry forward rule resulted in 100 per cent reservation."<sup>48</sup>

This observation is not correct. The case was relating to rotation based carry forward rule of reservation of a vacancy that arose out of two posts of Headmistresses. There was no such question of carry forward rule which resulted in 100 per cent reservation. Really the case was not related to single posts, but was of grouping of two posts of Headmistress as one cadre and applied the rule of reservation to the vacancies arising in that cadre. The Government instructions for implementing

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46. *Id.* at p.229.

47. *Supra* n. 3.

48. *Supra* n. 24 at p. 227.

reservation was also with regard to vacancies arising in posts. The Railway Board could balance the representation of both reserved and unreserved communities and the carry forward rule was to give effect to the adequacy of representation of backward classes.

The misreading of *Arati Ray* and the prohibition of reservation to isolated posts either at the stage of initial appointment or at the occasion of future vacancies together with the prohibition of grouping of isolated post have created much doctrinal disarray in this arena. The Court was also silent on the decision of the Supreme Court in *Raman Nair*<sup>49</sup> a case decided by a Bench of three Judges, which rejected the argument of the nonapplicability of reservation to isolated posts.<sup>50</sup> Thus the decisions in *Chakradhar* became a serious jolt to the grouping of higher posts in the administrative ladder or academic disciplines.

##### 5. *Reliance of Chakradhar and its Impact*

The fall out of *Chakradhar* had resulted in the perpetuation of social injustice,<sup>51</sup> since various High Courts followed the decision. This is quite evident in the decision of a Full Bench of the Karnataka High Court in *Dr. Rajkumar v. Gulbarga University*.<sup>52</sup> In this case the University invited applications for recruitment to the categories of

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49. *Supra* n. 13.

50. *Id.* at p. 2324.

51. See the observation of Chandrachud, J. in *Arati Ray*, *supra* n. 8 and the accompanying text.

52. A.I.R. 1990 Kant. 320. The Court consisted of M. Rama Jois, S.R. Rajasekharan Murthy and M. Ramakrishna, JJ. The judgment was handed down by Rama Jois, J.

teaching posts such as Professors, Readers and Lecturers subject wise. In a majority of the subjects, there was only a single post of Professors, Readers or Lecturers. The University applied the reservation on a 100 point roster.<sup>53</sup> It was contended, from the premise of *Chakradhar* that the single posts could not be subjected to reservation. The Court by relying on the *Chakradhar* verdict accepted the contention and held in the following manner :

"Whatever that may be, in view of the decision in the case of *Chakradhar*, if there is only one post in the cadre of Professor or Reader or Lecturer in any subject, there can be no reservation at all."<sup>54</sup>

The Court could not notice *Raman Nair* nor did assess the real import of *Arati Ray*, though it referred to that case. The Court really was swayed by the impact of *Chakradhar*.

With regard to the methodology of providing reservation to the different cadres of Professors, Readers and Lecturers, the Court endorsed its earlier view<sup>55</sup> that in

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53. The University Notification contained 35 teaching posts of various subjects, out of which only 2 posts were made available for open merit and the other 33 posts were reserved mostly in favour of SCs and STs. This was as a result of the non-availability of candidates from the SC-ST categories in earlier recruitment and therefore to fill up the backlog vacancies. However the vacancies available for general merit were not advertised along with the notification. The Court did not accept that the carry forward system resulted in excessive reservation since the aim of such system was to meet justice to the backward communities. The *Balaji* and *Devadasan* dicta of limits of reservation should be seen in the facts and circumstances of the cases, the Court added. *Id.* at p. 342. But the Court held that the vacancies available for general merit should have advertised along with the notification. *Id.* at p. 344.

54. *Id.* at p. 343, *per* M. Rama Jois, J.

55. *Dr. Krishna v. State of Karnatake*, I.L.R. (1986)1 Kant. 255.

case of teaching cadres though the designation and pay scale of the posts of Professors, Readers and Lecturers in different subjects were one and the same, still having regard to the fact that the posts of Professors, Readers and Lecturers in each of the subject had to be treated as independent unit for the purpose of recruitment and reservation.<sup>56</sup>

Thus it is clear that the Karnataka High Court's opinion in *Raj Kumar* is obsessed with the dicta of *Chakradhar*. This judicial approach resulted in a total set back to the Governmental guidelines in implementing reservation policies in employment. However this approach did not last long.

*Bombay High Court in Bhide Girls Education Society : A Revisit to Arati Ray*

The Bombay High Court's enquiry in to the question of the applicability of reservation to isolated post in *Bhide Girls Education Society v. Education Officer*<sup>57</sup> is remarkable in its perception on *Arati Ray*. The petitioner, a society, was running a Girls' High School at Nagpur. The Government extended reservation to the staff of non-Government school.<sup>58</sup> The question was whether a second vacancy in the post of Headmistress could be given to a Scheduled Caste candidate based on a 50 point roster. Repelling the contention that the roster system was suffering from the vice of excessive reservation, the Division Bench of the Court, after referring to *Arati Ray*, held :

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56. *Supra* n. 52 at p. 343.

57. 1989 Lab. I.C. 1437. The Court consisted of V.A. Mehta and M.S. Ranaprakhi, JJ.

58. Sub rule (10) of R. 9 of the Rules framed under the Maharashtra Employees of Private School (Conditions of Service) Regulation, Act 1977 and the Government Circular letter dated 21st February, 1977. *Id.* at pp. 1441-1444.

"Thus as far as the roster system is concerned, it has been approved. The carrying forward business which has been envisaged under the roster is an answer to the vice of excessive reservation in as much as it neutralises the concept of excessive reservation at a particular point of time in regard to the post. There may be only one post, but if the vacancy occurs to that post periodically, then the one post gives rise to more than one vacancies and that is how the vice of excessive reservation is neutralised".<sup>59</sup>

The Court examined the Government Orders to ascertain the scope of reservation to isolated posts and observed that the legislative policy was made clear enough to include the single posts within the purview of reservation.<sup>60</sup> The Court rejected the concept of hundred per cent reservation in case of reserving an isolated post. It reasoned that in the case of isolated and single vacancy, the first vacancy falling due after the appointed day should be treated as unreserved vacancy irrespective of whether it has been treated as reserved under the roster. If the vacancy was treated as fully reserved, the reservation could be carried forward to a subsequent period and when the second vacancy occurred in the same post, that carried forward quota would justify the conversion of the vacancy into the reserved one.

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59. *Supra* n. 57 at p. 1442, *per* M.S. Ratnaparkhi, J.

60. The Court said : "There was once a debate whether this policy could govern even the single or isolated post as it would amount to a hundred per cent reservation at a time which would suffer from the vice of excessive reservation. This difficulty was considered and a further clarification came as far back as on 21st of February, 1977, where it was declared that the reservation policy would be applicable to all the posts of teachers including that of the Headmistress. It was made known in 1977 itself that the single/ isolated posts would not fall outside the policy of reservation." *Ibid.*

This approach of the Court is a clear reiteration of *Arati Ray* in its correct perspective. The Court, however, went further and examined the scope of 50 per cent limit of reservation and held that in the case of isolated post the reservation was in conformity with the 50 per cent limit in the following words :

"We need not go into a purely hypothecial situation. In the present case, the facts are so clear that there has already been a vacancy in 1979 i.e. after the recruitment year 3.6.1977. For the purposes of roster this vacancy has been filled in as unreserved. Fifty per cent quota from that vacancy remains unfilled and that quota is carried forward to the vacancy occurring next i.e. on 1.10.1984. Thus in no case does the reservation exceed 50 per cent".<sup>61</sup>

Thus, the Court aptly analysed the import of *Arati Ray* and held that the reservation to isolated post would not infringe the 50 percent limit of reservation, nor would it result in hundred per cent reservation.<sup>62</sup>

6. *Kerala High Court in Jose : Rejecting Chakradhar and Following Raman Nair*

In compliance with the Supreme Court's direction in *Raman Nair*<sup>63</sup> the Cochin University followed category wise grouping of teaching staff i.e., Professors, Readers

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61. *Id.* at p.1445.

62. It is significant to note that the decision of the Bombay High Court was not influenced by the Supreme Court's verdict in *Chakradhar*. It may, perhaps, be due to the fact that *Chakradhar* was not brought to the notice of the Court since the case was decided only after two days of *Chakradhar*.

63. *Supra* n. 13.

and Lecturers of all departments or disciplines as one unit for applying the rules of reservation.<sup>64</sup>

In *Jose v. Cochin University*,<sup>65</sup> this grouping was challenged before the Kerala High Court as unconstitutional basing on the Supreme Court's decision in *Chakradhar*.<sup>66</sup> The two-way contentions of the petitioners were that the post of Lecturer or Reader in each department should be treated as independent unit and the post of Lecturer or Reader in each speciality in the particular department was to be treated as an isolated post and therefore a separate unit for the purpose of applying the rules of reservation.<sup>67</sup>

The petitioners heavily relied on *Chakradhar*, *Suresh Chandra Varma*<sup>68</sup> and *Raj Kumar*.<sup>69</sup> But the Court followed the approach of *Raman Nair* which according to the Court, was more appropriate to the facts of the instant case.<sup>70</sup> The Court pointed

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64. This system was reflected in Sub-section (11) of Section 31 of the Cochin University of Science and Technology Act, 1986. It reads : "Communal rotation shall be followed category wise treating all the departments as one unit".

65. 1993 (2) K.L.T. 347. The case was decided on 18th November, 1992.

66. *Supra* n. 24.

67. One of the petitioners questioned the reservation of the post of Lecturer in Microwave and Radar Electronics for Scheduled Caste, Scheduled Tribe community. Another petitioner questioned the reservation of the post of Reader in Theoretical Physics in favour of backward communities. *Supra* n. 65 at pp. 348-351.

68. *Dr. Suresh Chandra Varma v. Nagpur University*, A.I.R. 1990 S.C. 2023.

69. *Supra* n. 52.

70. *Supra* n. 65 at p. 351.



out that apart from the fact that the above decision had dealt with the specific situation of clubbing of posts under the Cochin University for the purpose of applying the communal reservation, it was decision of a Bench of three judges and therefore even if there was any conflict between the above decision and the subsequent decisions of the Supreme Court, (both by Benches of two Judges) the dictum laid down in the first decision would be binding on the Court.<sup>71</sup> The Court distinguished the cases of *Suresh Chandra Varma* and *Raj Kumar* on the facts and circumstances of the cases.<sup>72</sup> The Court also noted that Raman Nair was not referred to either in *Suresh Chandra* or *Raj Kumar*.

Upholding the cadre-wise grouping system of teaching posts and rejecting the concept of isolated post, the Court speaking through Justice K.K. Usha held :

"In the *Cochin University's case (Raman Nair)*, the Supreme Court interpreted the word 'Service' to take in various class or categories of posts within it and it was held that classification which puts the whole teaching staff in one class for the purpose of applying the reservation rule or a classification treating the posts of Readers in all subjects as a single category would be reasonable classification and it would be unassailable.

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71. *Id.* at pp. 351-352.

72. In *Suresh Chandra Varma's* case the Supreme Court held that the appointing authority was bound to show, in the advertisement, the details of the posts and number of posts meant for the reserved and unreserved categories. The method followed by the Supreme Court in *Dr. Suresh Chandra Varma's* case, the Court pointed out. The Karnataka High Court in *Raj Kumar's* case took the view that reservation to the teaching post in the University had to be cadrewise and departmentwise *Id.* at pp. 356-357.

The decision in Cochin University's case is not referred in Dr. Chakradhar Paswan's case. It cannot be assumed that the above case has overruled the three-Judge Bench decision in *Cochin University's* case.... The decision in *Dr. Chakradhar Paswan's* case has to be understood in the facts and circumstances of that case. The issue raised in the present case is, on the other hand, directly covered by *Cochin University's* case".<sup>73</sup>

#### *7. Supreme Court in Bhide Girls Education Society : Reliance on Chakradhar and Rejection of Arati Ray*

In the appeal before the Supreme Court<sup>74</sup> from the Bombay High Court in *Bhide Girls*<sup>75</sup> the contention raised by the appellant society was that the Supreme Court in *Chakradhar* had distinguished *Arati Ray* and the former had squarely laid down that if there was only one post in the cadre, there can be no reservation under Article 16(4) of the Constitution. It was also pointed out that in view of the *Chakradhar* decision the Government of Maharashtra also modified the rules of reservation with the effect that when there was isolated post which arose in the beginning or in future year at the time of promotion, the principle of reservation would not apply and the post would be treated as unreserved post.<sup>76</sup> The Supreme Court having heavily relied

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73. *Supra* n. 65 at p. 356.

74. *Bhide Girls Education Society v. Education Officer, Zila Parishad, Nagpur and others*, 1993 Supp. (3) S.C.C. 527. The Court consisted of N.M. Kaliswal and N.P. Singh, JJ. The case was decided on November 27, 1992.

75. *Supra* n. 57.

76. *Supra* n. 74 at p. 529.

on *Chakradhar* set aside the judgement of the High Court and held that *Chakradhar* concluded the controversy raised in the case before the Court and there could not be reservation in single post.<sup>77</sup>

The issue was further assailed in the review petition before the same two-Judge Bench of the Supreme Court.<sup>78</sup> It was contented by the petitioner that there was a judgement of a three-Judge Bench of the Supreme Court in *Vidyulata Aravind Kakade v. Digambar Gyanba Surwase*<sup>79</sup> in which a view had been taken that reservation applied to isolated posts also and in that decision the judgement of the Constitution Bench in *Arati Ray* had been maintained.

The Supreme Court rejected the contention and held that no opinion was expressed in the three-Judge Bench that *Chakradhar* was not correctly decided. The Court said :

"Thus, we are clearly of the view that *Dr. Chakradhar Paswan case* holds the field and the decision by the three-Judge Bench dated 17-1-1992 does

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77. The Court said : "In our view, the decision given by this court in *Dr. Chakradhar Paswan's case* concludes the controversy raised in the case before us. It is an admitted position that there is only one post of Headmistress in the High School run by the appellant society and as such there cannot be any reservation on such post. We accordingly allow this appeal, set aside the judgment of the High Court and quash the communication addressed by the respondents - the Education Officer - to the appellant society dated 7.5.1987. "*Supra*" n. 74 at p. 529.

78. *Chatana Dilip Motghere v. Bhide Girl's Education Society, Nagpur and others*, 1975 Supp (1) S.C.C. 157. The case was decided on January 22, 1993.

79. C.A. No. 242 of 1992, decided on 17.1.1992, as cited in *id.* at p. 158.

not lay down any law and is not an authority for holding that the principle of reservation has to be applied in case of even one isolated post also".<sup>80</sup>

A close scrutiny of the above mentioned various judicial decisions on isolated posts reveals that there were two lines of approaches in this field viz., the path of *Arati Ray*, *Raman Nair*, *Bhide Girls* (High Court) and *Jose* on the one side and *Chakradhar*, *Krishna* and *Bhide Girls* (Supreme Court) on the other.

#### 8. *Supreme Court's Rejection of Chakradhar and reassertion of Arati Ray*

The above analyses of judgements of the courts show that the issue of reservation to isolated post revolved around the decision of *Chakradhar*. The judiciary however, realised the fallacy of *Chakradhar* and started re-asserting the stand of *Arati Ray*, though this approach could not last long.

In *State of Bihar v. Bageshwari Prasad*,<sup>81</sup> an appeal by special leave from the judgment of High Court of Patna, the question was whether a reserved candidate was entitled to be promoted as Office Superintendent in a supertime scale on the basis of a roster of reservation. The High Court in the impugned judgment had followed *Chakradhar* and held that since the post of Superintendent was a single post, reservation could not be applied. The two-Judge Bench of Supreme Court distinguished *Chakradhar* from this case, upheld the validity of the promotion and

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80. *Supra* n. 78 at p. 158.

81. (1995) 29 A.T.C. 349; 1995 Supp. (1) S.C.C. 432. The Court consisted of K. Ramaswamy and N. Venkatachellaia, JJ. The case was decided on October 6, 1994.

set aside the order of the High Court by holding that the High Court was clearly in error in relying on the ratio in *Chakradhar* which stood entirely on a different situation to hold that the post could not be reserved.<sup>82</sup>

#### 9. From *Madhav* to *PGIMER* Cases

In *Union of India v. Madhav*,<sup>83</sup> a three-Judge Bench of the Supreme Court took such an approach. In the National Savings Scheme Services, the Government had created several posts. Among them the post of Secretary was only one which was a feeder post for promotion as Regional Deputy Director in which category too there were several posts. The Government applied a 40-point roster of reservation rules by rotation to the vacancies in the post of Secretary and thereby point No. 4 vacancy became the turn of Scheduled Tribe. When the vacancy was sought to be filled up by promotion from the category of Superintendents from Scheduled Tribe, the respondent challenged it before the Central Administrative Tribunal at Bombay. The Tribunal, relying on *Chakradhar* quashed the promotion and held that since the post of Secretary is a single post, no reservation could be given to reserved candidates as it would amount to 100 per cent reservation and therefore it was unconstitutional.<sup>84</sup>

The question before the Court in the present case was whether the Government would be justified in law to provide reservation in promotion in a single post by

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82. *Id.* at p. 349.

83. (1997) 2 S.C.C. 332. The Court consisted of K. Ramaswamy, Fazanuddin and G.B. Pattanaik, JJ. The case was decided on September 18, 1996.

84. *Madhav Gajanan Chanbal v. Union of India*, (1993) 23 A.T.C. 465.

rotating the vacancy as per the roster point prepared by the Government. After referring to the preambular objectives of the Constitution such a socio-economic justice, equality of opportunity and of status, dignity of person and their attainment through reservation in employment to Scheduled Castes and Scheduled Tribes, the Court examined the case and the Government measures in the issue. The Court distinguished *Chakradhar* from the present case<sup>85</sup> and followed *Arati Ray*,<sup>86</sup> *Vidhyulata*<sup>87</sup> and *Sabharwal*.<sup>88</sup> The Court did not endorse the Supreme Court's view in *Chetana*.<sup>89</sup> According to the Court, *Chetana* had not correctly appreciated the ratio laid down in *Vidhyulata* and *Arati Ray*. The Court reversed the order of the Tribunal and upheld the rule of reservation to isolated post based on rotation. Justice K. Ramaswamy reiterated the position in the following words :

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85. The Court said : "It is true that in *Paswan's Case*, with a view to provide reservation to the Scheduled Castes to the post of Director which is a single post, was fused with two posts of Deputy Directors which do not carry the same scale of pay. Therefore, this court had pointed out that the cadre would mean the cadre carrying the same scale of pay. Since the Deputy Directors are not carrying the same scale of pay they cannot be fused together for applying the principle of reservation. By implication, this court had accepted that two or more single posts carrying the same scale of pay would be fused to elongate the constitutional objective of providing reservation to a post in the service or office of the State. It was then held that a single post cannot be reserved which amounts to 100 per cent reservation and, therefore, it is violative of Article 16(1) of the Constitution. The further question whether in the same single point post, reservation by rotation could be granted and whether it will be violative of Article 16(1) was left open in that case". *Id.* at p. 336.

86. *Supra* n. 3.

87. *Supra* n. 79.

88. *R.K. Subharwal v. State of Punjab*, (1995)2 S.C.C. 745.

89. *Supra* n. 78.

"Thus, we hold that even though there is a single post, if the Government have applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidates belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the Constitution."<sup>90</sup>

Though in *Madhav*, the Supreme Court accepted the ratio of *Arati Ray*, the Punjab High Court decided a case in the line of *Chakradhar* and against that decision the appeal came before the Supreme Court in *State of Punjab v. G.S. Gill*.<sup>91</sup> In the Department of Industries of the State of Punjab, the post of Assistant Superintendent Quality Marking Centre (Textile) was a single post in that cadre. As per the roster system and in view of *Arati Ray*, a Scheduled Caste candidate was promoted to that post and when it was challenged by the respondent before the High Court both the single Bench as well as the Division Bench of the High Court adopted the view of *Chakradhar* that there could be no reservation to single post and thus this appeal before the Supreme Court. The Court followed *Madhav* and reaffirmed the view of *Arati Ray* that was taken in *Madhav*. The Court, speaking through Justice K. Ramaswamy held :

"Thus it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and

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90. *Supra* n. 85 at p. 338.

91. 1997(3) SCALE 686. The Court consisted of K. Ramaswamy and G.B. Pattanaik, JJ. The case was decided on March 27, 1997.

constitutional. With a view to give adequate representation in public service to reserved category candidates, the opportunity given to them is not violative of Articles 14 and 16(1) of the Constitution".<sup>92</sup>

The Supreme Court, thus, followed *Madhav* in a series of cases. For instance, in *Union of India v. Brij Lal Thakur*,<sup>93</sup> one vacancy in the post of E.C.G. Technician in the grade of Rs.1200-2040 in Central Hospital, Northern Railways was reserved for and filled up with a Scheduled Caste candidate by promotion on the basis of the rule of rotation with 40 point roster. The contention based on the theory of hundred per cent reservation in solitary post, the Central Administrative Tribunal at New Delhi set aside the above appointment and on appeal, the Supreme Court reversed the judgment and reiterated the law laid down in *Madhav*.<sup>94</sup> The Supreme Court's decision in *Suresh Chandra v. J.B. Agarwal*<sup>95</sup> is another instance of reliance of *Madhav*.

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92. *Id.* at p. 691.

93. 1997(3) SCALE 344. The Court consisted of K. Ramaswamy and G.T. Nanavati, JJ. The case was decided on March 17, 1997.

94. The Court said : "...we hold that appointment by promotion to the single post of E.C.G. Technician applying 40 point post and rule of rotation...is not violative of Article 14 and 16(1) of the Constitution. The promotion is legal and valid". *Id.* at p. 345.

95. A.I.R. 1997. S.C. 2487. The Court consisted of K. Ramaswamy and J.B. Pattanaik, JJ and the decision was rendered on April 4, 1997. This appeal by special leave arose from the judgment of the Division Bench of the Delhi High Court which had followed *Chakradhar* and held that reservation would not apply to the promotion post of senior manager (Electrical) having the pay scale of Rs.3000-4500 on the reason that the post was a single one. The Court followed *Madhav* and set aside the High Court's decision.



Similarly in *Post Graduate Institute of Medical Education and Research v. K.L. Narasimhan*<sup>96</sup> the Supreme Court re-emphasised the position of *Madhav*. Application of rules of reservation to Scheduled Castes and Scheduled Tribes in the appointment of faculty members as well as admissions to Post-Graduate course of the Post Graduate Institute of Medical Education and Research at Chandigarh was held as unconstitutional by two single judges in different judgments of the Punjab High Court,<sup>97</sup> based on the theory of hundred percent reservation in solitary posts and loss of proficiency in super specialised areas respectively. On appeal, a three judge Bench of the Supreme Court reversed the judgments. After analysing the cases of *Arati Ray*,<sup>98</sup> *Madhav*,<sup>99</sup> *Sabharwal*,<sup>100</sup> *Brijlal*,<sup>101</sup> *Bagashwari Prasad*,<sup>102</sup> *G.S. Gill*,<sup>103</sup> and *Suresh Chandra*,<sup>104</sup> the Court speaking through Justice K. Ramaswamy held :

"In all these decisions, the ratio laid down by this Court in *Arati Ray Chowdhary Case* was followed. Reservation to a single cadre post,

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96. 1997(4) SCALE 75. The case was decided on May 2, 1997. The Court consisted of K. Ramaswamy, S. Saghir Ahmad and G.B. Pattnaik, JJ.

97. Special Recruitment for Scheduled Castes and Scheduled Tribes to 12 posts of Assistant Professors was notified by the Institute.

98. *Supra* n. 3.

99. *Supra* n. 83.

100. *Supra* n. 88.

101. *Supra* n. 93.

102. *Supra* n. 81.

103. *Supra* n. 91.

104. *Suresh Chandra v. J.B. Agarwal*, (1992)5 S.C.C. 363.

~~applying~~ rule of rotation of 40 point roster, was held valid and constitutional. Clubbing of the posts carrying the same scale of pay or grade is also constitutionally permissible and accordingly clubbing of the single post of Assistant Professors in various disciplines of the appellant carrying the same scale of pay and grade has been held to be constitutionally permissible".<sup>105</sup>

The Court noted the distinction between 'post' and 'vacancy,' though they are usually used interchangeably. It was held that in direct recruitment as well as in promotion the appointment was only to vacant post.<sup>106</sup> The Court further held that when roster was applied and rule of reservation was implemented, it should be in conformity with the roster by the prescribed procedure and appointments of the reserved candidates by the direct recruitment or by promotion would always be only to vacant post earmarked in the roster to the general candidates as well as to the reserved candidates.<sup>107</sup> But with regard to the nature of single post cadre the Court observed that the vacancies were treated as vacant posts. Thus, the Court said :

"Only in a single post cadre by fiction of law successive vacancies are treated as vacant post as per the roster applying the rule of rotation to vacancies and they are filled up as per the roster. This principle guarantees

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105. *Supra* n. 96 at p. 80.

106. *Id.* at p. 83.

107. *Ibid.* The Court observed that the bar of 50% would not apply to special recruitment, but apply only when general recruitment was made on both to the general as well as the reserved candidates in respect of current vacancies. *Id.* at p. 85.

equality of opportunity to the Dalits and Tribes to occupy the higher echelons of service. Otherwise it would be a reverse case of total denial of opportunity to them violating Articles 14, 15(4), 16(1), 16(4) and 16(4A) read with Article 335".<sup>108</sup>

Whether by applying rule of reservation in admission into the superspeciality courses would lead to loss of proficiency or high excellence needed in those highly specialised areas was the question. Answering in the negative, the Court examined this question in the light of the concept of equality,<sup>109</sup> constitutional objective of protective discrimination<sup>110</sup> and judicial role<sup>111</sup>. The Court reasoned that the relaxation

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108. *Id.* at p. 83.

109. The Court referred to the Supreme Court's view, in *Dr. Jagadish Saran v. Union of India*, (1980)2 S.C.C. 768 and *Dr. Pradeep Jain v. Union of India*, (1984) 3 S.C.C. 654, and said : "Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. ... It is therefore necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons ... in order to bring about real equality. *Id.* at p. 87.

110. The Court said : "The object of protective discrimination is to integrate them (Dalits and Tribes) in the national mainstream so as to establish an integral social order with equal dignity of person in which justice — social, economic and political — are enjoyed by them in equal measure with the general members of the society". *Id.* at p. 87.

111. The Court further said : "The faith of the founding fathers of the Constitution in the Supreme Court Judges was so high that they chose to describe Supreme Court Judges as "Worthy Judges" to interpret the Constitution only to sustain the social order, integrate the people in united Bharat to elongate the constitutional rights and ensure the enjoyment of those rights and make these rights available to the Dalits, Tribes, poor, minorities and all sections in equal measure". *Ibid.*

of a lesser percentage of marks to reserved candidates was given only at the stage of admission and there was no relaxation in passing the examination prescribed for such highly specialised courses.<sup>112</sup>

10. *Re-assertion of Chakradhar by a Constitution Bench : Issue settled or unsettled ?*

Reassertion of *Arati Ray* in *Madhav* and the reliance of *Madhav* in later cases could not settle the issue of reservation to solitary posts. The matter again got assailed before a larger Bench of the Supreme Court i.e., a Constitution Bench comprising five judges by way of a review petition of the three-judge Bench in the above P.G.I.M.E.R. Case.

*In Post-Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association*,<sup>113</sup> the particular question of constitutional validity of reservation to a single cadre post either directly or by rotation of roster point was put to a litmus test before the Constitution Bench.<sup>114</sup> The Court did not go into other contentions raised in those batch of petitions<sup>115</sup> and therefore those cases would be

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112. *Id.* at pp. 86, 89.

113. (1998) 4 S.C.C.1.

114. The Bench consisted of S.C. Agarwal, G.N. Roy, Dr. A.S. Anand, S.P. Bharucha and S. Rajendra Babu, JJ. The judgment was handed down by G.N. Ray J.

115. The other contentions were as follows : Reservation could not be and should not be made for posts in higher echelons where merit and experience were essential and also necessary for discharging the duties and responsibilities of such positions in higher echelons of service viz., scientific and technical posts, teaching post of Professors and above, superspecialities in medicine, engineering and defence services. These called for highest level of intelligence, skill and excellence. Reservation therein might not be consistent with efficiency of

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*(f.n.115 contd.)*

administration contemplated by Article 335. By and large, in the higher echelons of service, there was a single post cadre. Moreover, reservation of superspeciality was against the decision of *Indra Sawhney v. Union of India*; 1992 S.C.C. (L & S) Supp. 1. *Supra* n. 113. at pp. 6-7.

placed before the appropriate Bench for disposal on merits in accordance with the decision rendered by the Constitution Bench.

The attack on reservation to solitary posts was multipronged<sup>116</sup> in the review petition. The major contention was that the concept of carry forward or the principle of roster and adequacy of representation did not and could not apply to a single post because only one person could be accommodated against the single post. Another sufficient contention was that in the impugned judgement and in *Madhav* the ratio of the decision of *Arati Ray* was wrongly appreciated and wrongly stated.

The Court made an exhaustive analysis of *Arati Ray* and *Madhav* with a view to finding out the ratio of *Arati Ray* and the foundations of *Madhav*. By following the foot prints of *Chakradhar* the Court in this review petition distinguished *Arati Ray* from this case that the decision of *Arati Ray* did not support reservation in solitary posts. This observation of the Court necessitates a thorough analysis of *Chakradhar* and *Arati Ray*. The Court in this review petition speaking through Justice G.N. Ray held :

"It has not been held in *Arati Ray Chaudhury Case* that for a single post there can be a reservation for Scheduled Castes, Scheduled Tribes or other Backward Classes".<sup>117</sup>

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116. It was further contented that the principle of carry forward reservation presupposed the existence of multi-posts cadre. If there was only one post in a cadre, the vacancy for such single post being filled up, there would be no occasion for carrying forward reservation for filling up such vacancy. Thus the very concept of carry forward or the principle of roster was alien to a single post cadre. By and large, in the higher echelons of service, there was a single post cadre. *Supra* n. 113 at pp. 6-7.

117. *Id.* at p. 17.

The Court went on to add :

"What has been held in *Arati Ray Choudhury Case* is that when there was a vacancy at Adra, according to the model roster, such vacancy was a reserved point and therefore the other vacancy was strictly a reserved vacancy but there being only one vacancy in that particular year of recruitment, such vacancy had to be treated as unreserved and therefore appointment was given to Smt. Biswas, who was not a reserved candidate. Therefore, it had to be compensated by carrying forward the reservation in two subsequent recruitment years when the vacancy in Kharagpur in the financial year 1968-69 arose w.e.f. 31/12/1968".<sup>118</sup>

The above observation is perfectly right in the sense that *Arati Ray* was not a case of single post reservation. But the case was really based on the clubbing of posts of the same cadre and applicability of rotation of roster based reservation to the vacancies arising out of those posts on a carry forward principle. This part of the facts was unnoticed (suppressed?) by the Court in *Chakradhar* decision. This fallacy occurred in this review petition because of the Court's abrupt reliance of *Chakradhar*. The Court did not re-examine the *Chakradhar* decision, though it did the same in *Arati Ray* and *Madhav*. The error is manifestly clear in the very starting sentence of Justice Sen in *Chakradhar* while referring to *Arati Ray*. It reads :

"There is one more decision that calls for our attention, namely, that of *Arati Ray Choudhury v. Union of India* where *the effect of a carry forward rule resulted in 100 per cent reservation*".<sup>119</sup>

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118. *Id.* at pp. 17-18.

119. *Supra* n. 24 at p. 227. Emphasis supplied. See also *supra* n. 4 and the accompanying text.

This observation is clearly erroneous. The case of *Arati Ray* did not have 'the effect of carry forward rule resulted in 100 per cent reservation'. Really the Court in *Arati Ray* rejected the very concept of hundred per cent reservation.<sup>120</sup> Moreover the Court in this review petition did not see the reasoning of Justice Chandrachud in *Arati Ray* for turning down the theory of hundred per cent reservation and upholding the constitutional validity of the Model Roster<sup>121</sup> which provided that if there were only two vacancies to be filled in a given year of recruitment, not more than one vacancy might be treated, as reserved and if there be only one vacancy it should be treated as unreserved irrespective of whether it occurred in the Model Roster at a reserved point. Justice Chandrachud further said :

"The appointment then is not open to the charge that the reservation exceeds 50 per cent for, if the very first vacancy in the first year of recruitment is in practice treated as a reserved vacancy, the system may be open to the objection that the reservation not only exceeds 50 per cent but is in fact cent percent. But, if "on this account," that is to say, if on account of the recruitment that the first vacancy must in practice be treated as unreserved even if it occurs in the Model Roster at a reserved point, "a reserved point is treated as unreserved" the reservation can be carried forward to not more than two subsequent years of recruitment. Thus, if two vacancies occur, say, within an initial span of three years, the first vacancy has to be treated as an unreserved vacancy and the second as reserved."<sup>122</sup>

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120. See *supra* nn. 3-8 and the accompanying text.

121. For the text of the Model Roster see, *supra* nn. 4-6.

122. (1974)1 S.C.C. 87 at p. 94.



Justice Chandrachud rejected the contention based on a particular part of the letter of the Railway Board that "if there be only one vacancy it should be treated as unreserved", and therefore the vacancy at Kharagpur must be treated as unreserved. He categorically stated that such a construction would rob the Rule of its prime significance and would render the carry forward rule illusory. He went on to add :

"The construction sought to be put on the Rule by the petitioner would perpetuate a social injustice which has clouded the lives of a large section of humanity which is struggling to find its feet. Such a construction is contrary to the plain language of the letter of the Railway Board, the intendment of the Rule and its legislative history".<sup>123</sup>

Though the above portion of the judgement was referred to in *Chakradhar*, its relevance was ignored in the review petition. Based on the *Chakradhar* decision Justice Ray reiterated that in *Arati Ray* the Constitution Bench did not lay down that in a single post cadre, reservation was possible with the aid of roster point. But the Court in *Arati Ray* considered applicability of roster point in the context of plurality of posts and in that context the rotation of roster was upheld by the Constitution Bench, Justice Ray added. He said further :

"The Constitution Bench in *Arati* case had made it quite clear by relying on the earlier decisions of the Constitution Bench in *Balaji* case and *Devadasan* case that 100% reservation was not permissible and in no case reservation beyond 50% could be made.... Therefore, the very premise

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123. *Id.* at p. 95.

that Constitution Bench in *Arati* case has upheld reservation in a *single post cadre* is erroneous and such erroneous assumption in *Madhav* case has been on account of misreading of the ratio in *Arati Ray Choudhary case*."<sup>124</sup>

The Court in *Arati Ray* referred to the decisions of *Balaji* and *Devadasan* for prescribing the limit of less than 50 per cent reservation and pointed out that the Government had amended Rules of Railway Board in deference to *Devadasan* to the effect that in any recruitment year, the number of normal vacancies and the carryforward vacancies together shall not exceed 45 per cent of the total number of vacancies. The Court in *Arati Ray* upheld the validity of carry forward rule and rejected the contention of 100 per cent reservation. Similarly the Court in *Madhav* did not hold that *Arati Ray* case had upheld reservation in single post cadre. To quote Justice Ramaswamy's observation in *Madhav*, as shown in the review petition :

"(v) reservation could be provided even to isolated posts on the basis of the rule of rotation by relying on the decision in *Arati Ray Choudhary case*".<sup>125</sup>

It can be seen that there is no misreading of the ratio of *Arati Ray* in *Madhav* as stated by Justice Ray. Really Justice Ray's observation is the result of following the misreading of *Arati Ray* in *Chakradhar*. The decision in *Chakradhar* is

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124. *Supra* n. 113 at p. 21. Emphasis supplied.

125. *Id.* at p. 20.

self-contradictory and incongruous.<sup>125a</sup> Justice Ray as well as the Court which followed *Chakradhar* did not notice those pitfalls. Justice Ray's analysis of *Madhav* in the review petition is not correct. He said :

"It also appears that the decision in *Indra Sawhney* has also not been properly appreciated in *Madhav* decision. In *Indra Sawhney* case it has not been held that there can be reservation in a single cadre post. There is no dispute that a carry forward scheme, provided it does not result in reservation beyond 50%, is constitutionally valid but that does not mean that by the device of carry forward scheme, 100% reservation on some occasions can be made even when the post is only a single cadre post. In *Madhav* decision and *Brij Lal* decision, reliance has been placed on Article 16(4-A) of the Constitution for holding that even in respect of a single post such reservation can be made with the aid of rotation of roster. In our view, Article 16(4-A) relates to reservation in promotional post in the cadre, but the said Article 16(4-A) does not deal with the question of reservation in a single cadre post".<sup>126</sup>

The above observation of Justice Ray could not be discernible from *Madhav*. Justice Ramaswamy's observation in *Madhav* as shown in the review petition is quoted in this context :

"(i) Appointment to an office or post under the State is one of the means to render socio-economic justice; (ii) Article 16(4-A) of the Constitution

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125a. *Supra* nn. 33-50 and the accompanying text.

126. *Supra* n. 113 at pp. 21-22.

introduced in 1995 by the 77th Amendment of the Constitution has resuscitated the objectives of the Preamble to, and Articles 46 and 335 of the Constitution of India to enable the Dalit and Scheduled Tribe employees to improve excellence in the higher echelons of service and a source of equality of opportunity in the matter of social and economic status; (iii) Parliament has removed the lacuna pointed out by the Supreme Court in *Indra Sawhney case* that Article 16(1) and 16(4) do not apply to appointment by promotion but apply to initial appointment. By the 77th Amendment of the Constitution, the legal position enunciated in *Rangachari* decision has been resorted and reservation of promotion to 50% quota as per the *Indra Sawhney Case* is available to members of Scheduled Castes and Scheduled Tribes; (iv) the carry forward scheme has been upheld in *Indra Sawhney Case*".<sup>127</sup>

The Court in the review petition re-established the idea of non-applicability of reservation to single post cadre. This is an effective means of excluding the reservation in higher echelons of service. However, the Court could not see that even in lower category of service there are single posts. The Court was over-anxious about the loss of chances of appointment to the members of other segments of society,<sup>128</sup> a similar approach accepted in *Chakradhar*. This was instrumental in

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127. *Id.* at p. 20.

128. The Court said : "There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and Other Backward Classes and such reservation is not confined to the initial appointment in a cadre but also to the appointment in a promotional post. It cannot however be lost sight of that in the  
(f.n. contd. on next page)

preventing the Court's vision of the other side of the coil. If non-reservation to single post cadre theory is applied, the chances of backward communities to get into many areas of service would be reduced substantially as thereby the constitutional mandate of adequacy of representation would become illusory. The Court's over-anxiety lead to the following conclusion:

"The doctrine of equality of opportunity in clause (1) of Article 16 is to be reconciled in favour of backward classes under clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes *shall not unreasonably encroach upon the field of equality*".<sup>129</sup>

If the goal of equality of opportunity is attained for backward communities, then there will be no scope for reservation. The concept of equality is not a field only to the other sections of the society, but it comprises both forward and backward sections of society.

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anxiety for such reservation for the backward classes, a situation should not be brought about by which the chance of appointment is completely taken away so far as the members of other segments of the society are concerned by making such a single post cent per cent reserved for the reserved categories to the exclusion of other members of the community even when such a member is senior in service and is otherwise more meritorious". *Id.* at p. 22. In *Chakradhar* Justice Sen quoted his earlier observation (as then he was) in *K.C. Vasant Kumar v. State of Karnataka* (A.I.R. 1985 S.C. 1495) that : "The Preamble to our Constitution shows the nation's resolve to secure to *all its citizens* : Justice — social, economic and political. The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all". (1988) 2 S.C.C. 214 at p. 226.

129. *Supra* n. 113 at p. 22. Emphasis supplied.

The *Balaji* dictum of 'interest of the community as a whole' and the 'national interest' construed in favour of non-backward communities was vehemently criticised and its fallacy exposed by Marc Galanter.<sup>130</sup> Significantly the Supreme Court abandoned such a stand in later cases including *Mandal Case*.<sup>131</sup> But the Court in this review petition did not see this change. It was swayed by the fallacy of *Chakradhar*.

The Court went into another erroneous observation that reservation to single post cadre was bound to bring about a situation where such a single post would be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Really the reservation is applied only to vacancies occurring in or 'vacant posts' and the vacancies will be rotated so that there will not be exclusive reservation for backward classes or forward classes. If a vacancy is reserved for a backward class candidate, the next time vacancy in that

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130. Marc Galanter said : "If the courts are to undertake a balancing of interests, surely the public interest is not to be equated with the interests of the sections of the population that do not enjoy reservations....in the case of women, no one doubts that special provisions for the advancement of women are justifiable, even when men are thereby put at a temporary disadvantage. It is presumed that what helps women to assume a productive place in the society is good for the society. The interests of the men are temporarily discomfited by the special treatment of women. Similarly, there is no justification for equating the interests of the advanced classes with those of the nation". *Competing Equalities : Law and the Backward Classes in India*. Oxford University Press, Delhi (1984) p. 416.

131. 1992 S.C.C. (L & S) Supp. 1. The only exception is the minority view of Justice Sen in *K.C. Vasanth Kumar*, *supra* n. 128.

post will automatically be open. The reasoning of Justice Ratnaparkhi of the Bombay High Court in *Bhide Girls*<sup>132</sup> is quite appropriate in showing that reservation to a vacancy in single post conforms to 50 per cent limit and when the next vacancy arise in that post the other 50 per cent of the quota could be filled in by unreserved candidate.<sup>133</sup>

The decision of the Constitution Bench in this review petition is of far reaching consequences. It could not settle the issues of reservation to single post. Significantly, the decision is an indirect jolt to 77th Amendment of the Constitution which provided reservation to promotion to Scheduled Castes and Scheduled Tribes under Article 16(4-A).<sup>134</sup> That is, if there is no reservation to single posts, majority of the promotion posts could be taken away from the ambit of reservation. The Court, though distinguished Article 16(4-A) that it related to reservation in promotional post in the cadre and the said Article did not deal with the question of reservation in a single cadre post, the decision tried to restore the position of *Indra Sawhney* in which the Court had ruled out the scope of reservation in promotion.

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132. *Supra* n. 57.

133. *Supra* nn. 60-61 and the accompanying text.

134. Article 16(4-A) reads: "Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

## CHAPTER - VII

# CREAMY LAYER : THE CONCEPT AND THE DILEMMA

The Constituent Assembly members spared much time on the question as to who should be included in the backward class and they did not express any opinion as to how long the reservation in jobs should be given to the backward classes of people. The general opinion of the framers gives an idea that they never intended that the reservation should be a permanent scheme under the Constitution.<sup>1</sup> But they included a provision<sup>2</sup> in the Constitution with a view to investigating the conditions of socially and educationally backward classes by a Commission appointed by the President of India in this regard and to take adequate steps for their advancement. Two Commissions<sup>3</sup> were appointed by the Central Government and they did not express any opinion about the exclusion of advanced sections within backward classes from the purview of further enjoyment of reservation benefits. The constitutional chaos, social tension, communal disharmony and political upheaval that resulted out of the announcement of the implementation of the Mandal Commission Report, brought back all the questions relating to reservation to the Supreme Court's attention. It was in *Mandal case*<sup>4</sup> that the Supreme Court directed the Central and

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1. VII C.A.D. 701-702.

2. Constitution of India, Article 340.

3. Kaka Kalelkar Commission in 1953 and Mandal Commission in 1979.

4. *Indra Sawhney v. Union of India*, 1992 S.C.C. (L.&S.) Supp.1.



**State Governments to formulate a policy for elimination of creamy layer from the socially and educationally backward class of citizens.<sup>5</sup> Though the specific direction on this issue is new in *Mandal case*, the concept of creamy layer had its germination way back in the early period of judicial confrontation with the policy of reservation<sup>6</sup>. An analysis is undertaken, in this Chapter, to review the pre and post - *Mandal* decisions relating to the concept of creamy layer, the implementation of the Supreme Court's direction and the peculiar position in Kerala, from the angle of constitutional ethos, social acceptability and legal technicality.**

Article 14, the fulcrum of the rule of law warrants the State to act positively by adopting reasonable discriminative practices with an objective of providing perfect equality or equality of result. When discriminatory practices are adopted the State is constitutionally bound to assign reasons for such practices. The reasons may be based on the historical facts, different social conditions and future expectations of various groups. When there is a substantial change in the social status of the people, the State is not expected to adopt the same classification which was adopted in the past. The State has to adopt new reasonable classification to suit the changing needs and circumstances. The approach of the State should not be arbitrary. This is echoed in William Alstyne's words when he said :

"A privilege, benefit, opportunity or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary"<sup>7</sup>.

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5. *Id.* at p. 476

6. See *infra* nn.10-12 and the accompanying text.

7. William W. Van Alstyne, "The Doctrine of the Right Privilege Distinction in Constitutional Law", 81 H.L.R. 1439 at p. 1454 (1967-68)

This observation is profoundly significant in the determination of backward classes in India. The competing claims are between the persons those who really deserve the benefit of reservation and who do not deserve but desire to get the reservation.

When the affirmative action of the State changes a person's status either socially or educationally or both, the issue arises is : Can such a person be eliminated from the category of socially and educationally backward classes ? In this context the following ancillary questions also emerge. Whether reservation is only meant for the individual's socio-economic backwardness or of the backward class as such ? Is reservation meant for extinguishing the social stigma or is it coupled with uplifting the socio-economic backwardness ? In excluding an individual from the backward class, whether one has to be compared with the unreserved class, i.e., forward or with backward class ?

1. *The Germination of the Concept of Creamy Layer : The Pre-Mandal Era*

The Mandal Commission did not make a differentiation between the most advanced section and others among the backward classes for the purpose of denying the reservation benefits to those advanced sections. Neither the Central Government nor the State Governments could eliminate the creamy layer from the backward class in the field of job reservation, though there were some futile efforts on the part of certain State Governments in this direction.<sup>8</sup>

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8. *Infra* nn. 85-104; 137-151 and the accompanying text.

Though the first use of the expression "creamy layer" appears to be in *N.M. Thomas*<sup>9</sup>, by Justice Krishna Iyer, the judiciary had sown the seed of the concept during the very early period of its confrontation with the policy of reservation. The *Balaji*<sup>10</sup> dictum was instrumental in forming the idea of denying the reservation benefits to the advanced sections of backward classes. It was in *Chitrlekha*<sup>11</sup> that the Supreme Court speaking through Justice K. Subba Rao spelt out clearly the concept. The Court in this case examined the various constitutional provisions intended for the advancement of the backward classes and observed :

"They (those constitutional provisions) 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."<sup>12</sup>

The Court analysed the import of *Balaji* and re-emphasised that eventhough caste might have some relevance in ascertaining the backwardness it could not be either the sole or dominant criterion. The Court went further :

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9. *State of Kerala v. N.M.Thomas*, A.I.R. 1976 S.C. 490. Justice Krishna Iyer said: "... the danger of 'reservation', it seems to me, is three fold. Its benefits, by and large, are snatched, away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake". *Id.* at p.531.

10. *M.R. Balaji v. State of Mysore*, [1963] Supp. 1 S.C.R. 439.

11. *R. Chitrlekha v. State of Mysore*, A.I.R. 1964 S.C. 1823.

12. *Id.* at p.1833.

"This interpretation... helps the really Backward classes instead of promoting the interests of individuals or groups who, they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced".<sup>13</sup>

The Court pointed out the following illustration in this regard :

"... take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, and effective minority may be socially and educationally far more advanced than another small sub-caste the total number of which is far less than the said minority".<sup>14</sup>

The Court continued :

"If we interpret the expression "classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not".<sup>15</sup>

Three years later in 1967 the High Court of Kerala in *Hariharan Pillai*,<sup>16</sup> followed the *Balaji* and *Chitralkha* and emphasised the need for denying the benefits to the well-off sections of backward classes in the following words :

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13. *Id.* at p.1834.

14. *Ibid.*

15. *Ibid.*

16. *Hariharan Pillai v. State of Kerala*, 1967 K.L.T. 266.

"It may be true to say that the Ezhavas, Muslims and Latin Catholics belong to communities that are socially and educationally backward. However the possibility of their being a section large or small in these communities who are advanced and who are not backward, socially, economically or educationally, cannot be ruled out. If there is such a section no reservation can be made in favour of the members of that section".<sup>17</sup>

The concept had been further fortified in *A. Periakaruppan*<sup>18</sup> in which the Supreme Court warned that reservation should not be allowed to become a vested interest. It was held 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. The Court went further and said :

"Such an approach would defeat the very purpose of reservation because once a class reaches a stage of progress which some modern writers call as take-off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation".<sup>19</sup>

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17. *Id.* at p.279.

18. *A. Periakaruppan v. State of Madras*, A.I.R. 1971 S.C. 2303.

19. *Id.* at p.2311.

While explaining the concept further in *Balram*<sup>20</sup> the Supreme Court pointed out that if a situation arose wherein the candidates belonging to the groups included in the list of backward classes, were able to obtain more seats on the basis of their own merit, it could only be stated that it was the duty of the Government to review the question of further reservation of seats for such groups. The Court thus clearly stated :

"If once a class appears to have reached a stage of progress, from which it could be safely inferred that no further protection is necessary, the State will do well to review such instances and suitably revise the list of Backward Classes".<sup>21</sup>

Similarly, while reiterating the very same idea in *Janaki Prasad*,<sup>22</sup> the Supreme Court felt the need for keeping off the advanced sections from the ambit of reservation in the following words:

"In identifying backward classes, therefore, one has to guard oneself against including therein section which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated. In this connection, it must also be remembered that State resources are not unlimited and, further, the protection given by special reservation must be balanced against the constitutional right of every citizen to demand equal opportunity".<sup>23</sup>

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20. *State of A.P. v. U.S.V. Balram*, (1972) 1 S.C.C. 660.

21. *Id.* at p. 690.

22. *Janaki Prasad v. State of Jammu & Kashmir* (1973) 1 S.C.C. 420.

23. *Id.* at p.435.

The idea of limiting the reservation benefits to the really needy sections among the backward classes as well as the demand for denying those benefits to the well-off sections was aired in the above judicial decisions. The high water-mark of this approach was reached in *Janaki Prasad*<sup>24</sup> that the special protection must be balanced against the 'constitutional right of every citizen to demand equal opportunity'. Later Justice Krishna Iyer in *N.M. Thomas*<sup>25</sup> coined the words 'creamy layer'. In his characteristic style he said that it was a danger of reservation when the benefits were 'snatched away by the top creamy layer of the backward caste or class thus keeping the weakest among the weak always and leaving the fortunate layers to consume the whole cake'. This observation is a casual remark unconnected to the issues of the case. Justice Krishna Iyer repeated the same words in *Soshit Sangh*<sup>26</sup> in another fashion.

"Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf".<sup>27</sup>

Both *Thomas* and *Soshit Sangh* were cases of Scheduled Castes and Scheduled Tribes. But all the other cases were relating to reservation to backward classes. In *Thomas* Justice Krishna Iyer intended the concept to be applicable to backward class or caste, where as in *Soshit* he was specific in applying it to Scheduled Castes and Scheduled Tribes.

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24. *Supra* n.22.

25. *Supra* n.9.

26. *Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 S.C.C. 246.

27. *Id.* at p.300.

After *Thomas and Soshit*, judges adopted the term 'creamy layer'. In *K.C. Vasanth Kumar*<sup>28</sup>, case the concept of creamy layer received a significant contour when Justice Chinnappa Reddy scathingly criticised it. He said:

"That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself ?".<sup>29</sup>

However, Justice Desai viewed the concept from the traditional angle of eliminating those upper crust, which exploited the lower strata.<sup>30</sup> Similarly Justice Venkataramiah perceived that by adopting the elimination of the more advanced sections would release the really backward castes, groups and communities from the strangle-hold of the advanced groups.<sup>31</sup> He favoured a 'means test' in determining

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28. *K.C. Vasanth Kumar v. State of Karnataka*, A.I.R. 1985 S.C. 1495.

29. *Id.* at p. 1525.

30. Justice Desai said : "In fact the upper crust of the same caste is verily accused of exploiting the lower strata of the same caste". *Id.*, p.1504. He said further: "If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefit of preferred treatment, it would unmistakably show that the benefits of reservations are snatched away by top creamy layer of the backward castes. This has to be avoided at any costs". *Id.* at p.1506.

31. Justice Venkitaramiah said: "... the benefit of reservation would invariably be eaten up by the more advanced sections and the really deserving sections would practically go without any benefit ... . In that event the whole object of reservation would become frustrated". *Id.* at p. 1556.



the backwardness.<sup>32</sup> Chief Justice Chandrachud also opted for adopting a means test in determining the backwardness.<sup>33</sup>

Two years later, after *Vasanth Kumar*,<sup>34</sup> the question of creamy layer came before the Andhra Pradesh High Court in the context of an enhancement of the quantum of reservation to 65% including both OBCs and SC-STs. It was in *V. Narayana Rao v. State of A.P.*<sup>35</sup>, the State Government put a ceiling of Rs. 12,000/- and thereby excluded all the families with or more of that income, with a view to reaching the benefits to the deserving and the needy and to disallow the benefits to be lapped up by the creamy layer among the backward classes. The Court speaking through Justice Jeevan Reddy, as he then was, upheld the concept of creamy layer but questioned the justification for excluding the family of even a class IV employee, where only one member of the family is employed.<sup>36</sup> According to him an income limit of Rs. 12,000/- was unreasonably low. The Court, thus, reached the following conclusion:

... we must affirm that any limit so placed cannot be arbitrary and fanciful, but must be a fair and reasonable one in all the circumstances prevailing, keeping in mind the overall objective underlying Articles 15, 16 and 46".<sup>37</sup>

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32. *Ibid.*

33. *Id.* at p.1499.

34. *Supra* n.28.

35. A.I.R. 1987 A.P. 53. For a critique of the decision, see A. Reghunadha Reddy, "Judicial uncertainty over Quantum of Reservation", 15(3&4) Indian Bar Review 296.

36. *Id.* at p. 86.

37. *Ibid.*

At last, the Supreme Court of India in *Mandal case* <sup>37a</sup> directed the Central and State Governments to formulate definite criterion for excluding the creamy layer from the socially and educationally backward classes and thus it has become the principle which has to be adhered to in implementing reservation.

## 2. *Creamy Layer and the Mandal Case*

In 1990 the National Front Government headed by Mr. V.P. Singh notified <sup>38</sup> the implementation of Mandal Commission Report. But due to the political instability and the dissolution of the Lok Sabha the Government could not implement it. The next Congress Government headed by Mr. P.V. Narasimha Rao re-notified the order of implementation with certain modifications that in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide 10 per cent reservation for economically backward sections of forwardcastes.<sup>39</sup> It is pertinent to note that there was no reference to the exclusion of any category of people namely, the creamy layer in the Commission Report.

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37a. *Supra n. 4.*

38. The Office Memorandum dated August, 13, 1990. The relevant portion of the order reads as follows: "(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC. (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation will be issued separately". See *supra* n. 4 at pp.355-356.

39. The Office Memorandum dated September 25, 1991. The relevant portion of it reads as follows: "(i) Within 27% of vacancies in civil posts and services SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other  
(f.n. contd. on next page)

The Mandal Commission Report as such and the two notifications were challenged before the Supreme Court in *Mandal case* i.e., *Indra Sawhney v. Union of India*.<sup>40</sup> The petitioners argued, *inter alia*, that the benefits of reservation are often snatched away or eaten up by the socially and economically advanced top creamy layer of backward class who are no longer suffering from the vice of social backwardness as a result of their social development. They are in no way handicapped. Moreover, their high professional qualifications and placement in the public services empower their children to compete with the socially advanced section of people. Hence they should not be allowed to compete with the children of socially underprivileged and avail the quota of reservation.<sup>41</sup> In other words, they are lapping up all benefits of reservation meant for that class, without allowing the benefits to reach the truly backward members of that class.<sup>42</sup> It was also argued that the children of persons holding the posts in All India Services, professionals such as doctors, engineers, advocates etc, should not be given reservation benefit.<sup>43</sup>

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number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates. (ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations. (iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately". *Id.* at p.357.

40. *Supra* n.4.

41. *Id.* at p.126.

42. *Id.* at p.427.

43. *Id.* at p.126.

The Supreme Court, by majority, in its Constitution-Bench comprising of nine judges <sup>44</sup> accepted the exclusion of creamy layer. In order to analyse the feasibility of excluding the creamy layer from backward class it is relevant to examine the following questions:

- 1) What are the criteria to be adopted in determining the creamy layer ? Or is the economic criterion be the sole criterion to determine the creamy layer ?
- 2) Can a distinct approach by the Central and State Governments be possible in determining creamy layer ?
- 3) Is it appropriate to equate the Scheduled Castes and Scheduled Tribes along with other Backward Class for the purpose of identifying and excluding the creamy layer ?
- 4) After excluding the creamy layer, if no sufficient number of reserved candidates are available from the backward class, can the persons excluded on the basis of creamy layer be given the reservation benefit in the reserved quota ?
- 5) Does Article 16 (4) permit the classification of backward classes into backward class and more backward class or permit any similar classification ?

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44. B.P. Jeevan Reddy, M.H. Karia, C.J., M.N. Venkatachaliah, A.M. Ahmadi, S.R. Pandian, P.B. Sawant, Dr. T.K. Thommen, Kuldip Singh and R.M. Sahai, JJ.

(i) *Basis of elimination should not merely be economic unless it necessarily means social advancement*

Justice Jeevan Reddy, for the majority, approached the concept of creamy layer from the angle of 'proper and more appropriate identification' of backward class rather than the 'permissibility or desirability of such a test of elimination'.<sup>45</sup> He viewed that the connecting link in a backward class was the social backwardness and if some of the members were far too advanced socially, which necessarily meant economically and educationally, the connecting thread between them and the remaining class snapped. They would be misfits in the class and only after excluding them, the class would be a compact one. Such exclusion really would benefit the truly backward.<sup>46</sup>

In drawing line of exclusion, he emphasised that, the basis should not merely be economic, unless the economic advancement was so high that it necessarily means social advancement.<sup>47</sup> He said thus:

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45. *Id.* at p. 428

46. *Ibid.*

47. *Ibid.* Justice Jeevan Reddy's illustration is noteworthy : "A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the backward class ? Are his children in India to be deprived of the benefit of Article 16 (4) ? Situation may, however, be different, if he rises so high economically as to become — say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs.36,000/- may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere". *Ibid.*

"While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement"<sup>48</sup>

(ii) *High position like IAS or IPS*

The Court pointed out that certain positions like IAS or IPS or any other All India Service, would carry social advancement. The children of the occupants of those positions would get full opportunity to realise their potential. He said:

"It is but logical that in such a situation, his children are not given the benefit of reservation. For, by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit".<sup>49</sup>

(iii) *Capacity to compete with others: Criteria for measuring the forwardness of backward class*

Justice Sawant in his separate but concurring opinion examined the inherent difficulties in eliminating the creamy layer. While answering to the question, what is meant by sufficient capacity to compete with others, Justice Sawant observed:

Is it the capacity to compete for Class IV or Class III or higher class posts? A Class IV employee's children may develop capacity to compete for Class

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48. *Ibid.* Emphasis in original.

49. *Id.* at p. 429.

III posts and in that sense, he and his children may be forward compared to those in his class who have not secured even Class IV posts. It cannot, however, be argued that on that account, he has reached the "creamy" level. If the adequacy of representation in the services as discussed earlier, is to be evaluated in terms of qualitative and not mere quantitative representation, which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also".<sup>50</sup>

According to him, such capacity will be acquired only when the backward sections reach those levels or atleast near those levels. Till that time, they could not be called forwards among the backward classes and taken out of the backward classes.<sup>51</sup>

(iv) *Comparable to forward class*

Justice Sawant clarified that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes.<sup>52</sup> He rightly reiterated the position thus :

"The correct criterion for judging the forwardness of the forwards among the backward classes is to measure their capacity not in terms of the

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50. *Id.* at p. 258.

51. *Ibid.*

52. *Id.* at p. 257.

capacity of others in that class, but in terms of the capacity of the members of the forward classes, as stated earlier. If they cross the Rubicon of backwardness, they should be taken out from the backward class and should be made disentitled to the provisions meant for the said classes".<sup>53</sup>

In his realistic approach to the problem, Justice Sawant further pointed out that the mere fact that some from the backward classes who were more advanced than the rest in the class or scored more in competition with the rest of them and thus gained all the advantages of the special provisions, was no ground for classifying the backwards into backwards and most backwards. This phenomenon was evident among the forward classes too, he added.<sup>54</sup>

v) *Sub-classification of backward and more backward accepted.*

Endorsing the view of Justice Chinnappa Reddy in *Vasantha Kumar* that the sub-classification of the backward classes into backward and more backward was necessary to help the more backward classes, Justice Jeevan Reddy held that there was no constitutional or legal bar to such a categorisation. He said:

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53. *Id.* at p. 258. Justice Sawant's observation is very relevant in this context. "It is the capacity or lack of it to compete with others on equal terms which merits such classification. The remedy therefore, does not lie in classifying each backward class internally into backward and more backward, but in taking the forward from out of the backward classes altogether. Either they have acquired the capacity to compete with others or not. They cannot be both." *Ibid.*

54. *Ibid.*



"It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law".<sup>55</sup>

Justice Sawant also held that such classification would depend upon each case and separate quota should be prescribed for each of them.<sup>56</sup> He was more specific, however, that no distinction could be made in the backward classes as poor and poorer sections. The distinction could be made only between the advanced and backward sections of the backward classes based on the capacity to compete with the forward classes and such advanced sections should be disentitled to reservations under Article 16 (4)<sup>57</sup>

vi) *Preference of poorer sections to others among backward classes upheld.*

The Court examined the question whether Clause (1) of the second Office Memorandum<sup>58</sup> was sustainable in law. It provided for the preference in favour of "poorer sections" of the backward classes over the other members of the backward classes. The Court speaking through Justice Jeevan Reddy rejected the notion of

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55. *Id.* at p. 435.

56. *Id.* at p. 261.

57. *Id.* at pp. 274-75.

58. Dated September 25, 1991 *Supra* n. 39, subparagraph (i).

economic basis for the sub-classification and clarified that the expression poorer sections was meant to refer to those who were socially and economically more backward and the word 'poorer' in the context was meant only as a measure of social backwardness.<sup>59</sup> He upheld its validity. Justice Jeevan Reddy further examined the meaning and context of the expression 'preference'. He held that the expression preference must be read down to mean an equitable apportionment of the vacancies reserved among them. The Court, however, put the discretion of making such a classification on the Government in the following words:

"It shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the apportionment of reserved vacancies/posts among 'backward', and, "more backward". On such notification, the clause will become operational".<sup>60</sup>

Justice Sawant went further and examined the preference given to the more backward classes and held that if the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward might take away all the posts leaving the backward with no posts. The backward would neither get the post in the reserved quota nor in the general category for want of capacity to compete with the forward class.<sup>61</sup> He, therefore, opted for

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59. *Supra* n. 4 at p. 458.

60. *Id.* at p. 459.

61. *Id.* at pp. 260-61.

separate and exclusive quotas to be prescribed for each of them.<sup>62</sup> According to him no distinction could be made in the backward classes as poor and poorer sections thereof and the distinction could be made only between advanced and the backward sections of the backward classes.<sup>63</sup>

vii) *Constitutional obligation*

Justice Sawant pointed out that some individuals and families in the backward classes found to have gained sufficient means to develop their capacities to compete with others in every field and legally they were not entitled to be any longer called as the backward classes. To continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally, violating the equality provisions of the Constitution. Moreover, to rank them with rest of the backward classes would equally violate the right to equality of the rest in those classes since it would amount to treating the unequals equally. He emphasised that the object of the special constitutional provisions was not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Thus the exclusion of the creamy layer was not only permissible but obligatory under the Constitution, he added.<sup>64</sup>

Justice Jeevan Reddy, viewed the matter from another angle and observed that the exclusion would make the class truly backward class and would more appropri-

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62. *Ibid.*

63. *Id.* at p. 274.

64. *Id.* at pp. 256-257.

ately serve the purpose and object of clause (4) of Article 16.<sup>65</sup> The exclusion test thus would be one of proper and more appropriate identification of the backward class.<sup>66</sup>

viii) *Dissenting views of Justice Pandian*

a) *One swallow does not make the summer: Backward class should not be segregated and thrown over-night out*

Justice Ratnavel Pandian in his concurring judgement with the majority adopted a dissenting approach towards the issue of elimination of creamy layer. The test of elimination of creamy layer according to him, though appeared to be attractive and reasonable, was the question whether those individuals belonging to any particular caste, community or group which satisfied the test of backward class should be segregated, picked up and thrown over night out of the area of backward class.<sup>67</sup> He said:

"One should not lose sight of the fact that the reservation of appointments or posts in favour of 'any backward class of citizens' in the Central Government services has not yet been put in practice in spite of the impugned OMs. It is after 42 years since the advent of our Constitution, the Government is taking the first step to implement this scheme of reservation for OBCs under Article 16 (4). In fact, some of the States

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65. *Id.* at p. 429.

66. *Id.* at p. 428.

67. *Id.* at p. 126.

have not even introduced policy of reservation in the matter of public employment in favour of OBCs".<sup>68</sup>

Justice Pandian pointed out the counter argument of the respondents that within 42 years, only a very minimal percentage of backward classes had stepped into All India Services or any other public services by competing in the main stream along with the candidates of advanced classes despite the fact that their legs were fettered by social backwardness and hence it would be very uncharitable to suddenly deprive their children of the benefit of reservation under Article 16 (4) merely on the ground that their parents had entered into government services especially when those children were otherwise entitled to the preferential treatment by falling within the definition of "backward class".<sup>69</sup>

He further pointed out that 'those children so long as they are wearing the diaper of social backwardness should be given sufficient time till the Government realises on review that they are completely free from the social backwardness and have equated themselves to keep pace with the advanced classes'.<sup>70</sup>

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68. *Ibid.*

69. *Id.* pp. 126-127.

70. Justice Pandian relied on *State of A.P. v. U.S.V. Balram* (1972) S.C.C. 660, in holding the view that even if a few individuals in a particular caste, community or group were socially and educationally above the general average, neither that caste nor that community or group could be held as not being socially backward. He also relied on the observation of Justice Chinnappa Reddy in *K.C. Vasanth Kumar* (*Supra* n. 28), for the counter argument of creamy layer. *Supra* n. 29.

Justice Pandian's observation is based on the premise that social transformation requires a considerable period of time within the backward class so as to acquire the ability to compete with the forward sections. Few individuals' upliftment is not to be considered in this regard. This view, it seems, reflects the Indian social realities. But when the State has a limited number of employment opportunities, it has to distribute them among the most needy. Because need is a common phenomenon which prompts everyone to seek aids from the distributor, but the extent of need relatively varies from person to person. Is not the children born of employed parents getting some better opportunity than others in the same class, though not all ? Therefore, it can be seen that Justice Pandian's view suffers from this defect.

b) *No judicial supremacy : Need for judicial restraint*

Justice Pandian further analysed the propriety of Indian judiciary in interfering into governmental policy decisions. He said that the Office Memorandum did not speak of any creamy layer test and the Government had not thought it prudent to eliminate some few individuals who having become above the general average and entered in the civil services.<sup>71</sup> He advocated the need for judicial restraint in this area in the following words :

"I have my own doubt whether the judicial supremacy can work in the broad area of social policy or in the great vortex of ideological and philosophical decisions directing the exclusion of any section of the

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71. *Id. at* p. 128.

people from the accepted list of OBCs on the mere ground that they are all 'creamy layers' which expression is to be tested with reference to various factors or make suggestions for exclusion of any section of the people who are otherwise entitled for the benefit of reservation in the decision of the Government so long that decision does not suffer from any constitutional infirmity".<sup>72</sup>

c) *Pseudo communities should be weeded out*

Justice Pandian examined the respondent's plea that some pseudo communities have smuggled into the backward classes and they should be removed from the list of OBCs lest those communities would be eating away the major portion of the reservation which was meant only for the true and genuine backward classes. He upheld this plea and further observed that such exercise must be done only by the Government on proper verification. He thus said:

"... it is for the Government to review the lists at any point of time and take a decision for the exclusion of any pseudo community or caste smuggled into the backward class or for inclusion of any other community which in the opinion of the Government suffers from social backwardness".<sup>73</sup>

d) *The Court was not called upon to lay down the test of creamy layer*

Justice Pandian finally concluded by saying that the Court was not called upon to lay a test or give guideline as to who were all to be eliminated from the listed groups of the Mandal Commission Report. He further said :

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72. *Ibid.*

73. *Id.* at p. 129.

"... there is no necessity to lay any test much less 'creamy layer test'. I find no grey area to be clarified and consequently hold that what one is not free to do directly cannot do it indirectly by adopting any means. Therefore, the argument of 'creamy layer' pales into insignificance".<sup>74</sup>

Justice Pandian viewed that all SEBCs in the list of the Mandal Commission which had been accepted and approved by the Government should be given equal reservation opportunity in availing the benefits of the 27% of reservation.

e) *Preference to poorer sections unconstitutional*

Justice Pandian held unconstitutional the amended part of the Office Memorandum stating that the poorer sections among the backward classes are firstly allowed to avail the benefit of reservation and the others to avail only the unfilled vacancies. He thus struck down that part of the Office Memorandum.<sup>75</sup>

Justice Pandian's observations resemble his strong dissenting views with regard to the concept of creamy layer and its elimination, the lone voice of critique to the majority view.

ix) *Convergence of opinion*

There is a convergence of opinion from both the majority as well as minority in the issue of creamy layer. This consensus emerged with regard to this issue is a significant development in the judicial approach towards the protective

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74. *Id.* at p. 130.

75. *Id.* at p. 130.



discrimination policy. Out of the total nine judges (6:3) only one judge - Justice Pandian wrote a dissenting note. Justice R.M. Sahai in his minority judgement canvassed the need for disentitling those individuals among the backward classes who had achieved the social status or economic affluence.<sup>76</sup> According to him the exclusion of creamy layer was a social purpose and the economic ceiling could be determined by the appropriate State.<sup>77</sup>

Giving much thrust on the economic factor, Justice T.K. Thommen, in his minority judgement, joined with the majority view. He said :

"The wealthy and the powerful, however socially and educationally backward they may be by reason of their ignorance, do not require to be protected, for they have the necessary strength to lift themselves out of backwardness."<sup>78</sup>

According to Justice Thommen, if the persons had the necessary financial strength in spite of any social backwardness to raise themselves, they should not be given the constitutional protection. He held that reservation should be limited to

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76. *Id.* at p. 330.

77. *Id.* at pp. 330-331. Justice Sahai said : "Income apart, provisions should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, stand shall eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class." *Id.* at p. 330.

78. *Id.* at p. 159.

those who were totally unable to join the main stream of upward mobility because of their utter helplessness arising from social and educational backwardness and aggravated by economic disability.<sup>79</sup> Therefore he added that, weeding out and excluding those persons who had attained a certain pre-determined economic level was required.<sup>80</sup> Holding that reservation should be based solely on economic criteria, Justice Kuldeep Singh in his minority judgement upheld the validity of the amended Office Memorandum which adopted the means test and gave preference to poorer sections.<sup>81</sup>

The importance of the decision in *Mandal case* is that the majority as well as the minority accepted the means test in reservation of jobs with only one exception, i.e., Justice Pandian. At the same time, the Supreme Court rejected the sole test of economic criterion in the determination of backwardness with only one exception i.e., Justice Kuldeep Singh.

### 3. *Elimination of Creamy Layer and the Dilemma*

From the realistic point of view the opinions of Justice Pandian and Justice Sawant are remarkable in the sense that they gave emphasis to the quantitative and qualitative representation of backward classes in government services through the idea developed by the majority is appreciable in many respects, it is beset with a dilemma. Access to governmental benefit and the modus operandi to avail it, are

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79. *Ibid.*

80. *Ibid.*

81. *Id.* at pp. 199, 204-205.

considerably based on person's good family background including financial background. From the sociological angle it can be seen that persons who get jobs would be in a good position to develop their children with better intelligence and thereby would acquire better calibre than those in the same group. But are those children able to compete with the children of forward sections of the forward class ? They might definitely be better than their fellow persons, but they might not be in a position to compete with the forward sections of the forward class. This is the catch-22 situation. It is significant to note in this context that the amended Office Memorandum included the provision that within the 27 percent of reservation, preference should be given to candidates belonging to the poor sections of the backward class and in case sufficient number of such candidates are not available, unfilled vacancies should be filled by other backward class candidates.

Though Justice Jeevan Reddy upheld the validity of this amended provision, he left open to the Government to distinguish or not between the poor sections and the other. The Court did not direct the Government, as in the case of creamy layer, to act in this regard. The result is that the Central Government has not yet proceeded to notify the proposed distinction. Therefore, the present position is that those who are weeded out under the banner of creamy layer have no more chance to compete with the reserved category but to seek the open competition channel which is very tough in their case. Thus the unfilled category of posts among the backward classes goes to the open quota, an indirect reduction of opportunities for the backward classes.

#### 4. *Post-Mandal Scenario*

The *Mandal case* was decided on November 16, 1992 and the Supreme Court ordered that the Creamy layer should be eliminated within four months from the date

of the judgement. The Central Government, in response to this direction, issued an office memorandum for implementing the exclusion of creamy layer on Sept' 8, 1993. In the creamy layer category the following persons/sections are included.<sup>82</sup> The sons and daughters of persons holding Constitutional posts,<sup>83</sup> Group A/Class I Officers of the All India Central and State Services, Group B/Class II officers of the Central and State Services (Direct Recruits); Group A and Group B employees of public sector undertakings, sons and daughters of persons who are in the rank of Colonel and above in the Army and equivalent posts in Navy and Air Force and Para Military Forces with some exceptions; sons and daughters of professional class and those engaged in trade and industry such as doctor, lawyer, chartered accountant, income tax consultant, financial or management consultant, dental surgeon, engineer, architect, computer specialist, film artist and other film professional, author, playwright, sports person, sports professional, media professional or any other vocations of like status and the sons and daughters of agriculture property holding, engaged in trade, business and industry, property owners of agriculture holdings, plantations and vacant land/buildings in urban areas. The income/wealth limit is prescribed as of Rs. 1 lakh.

In the above seen scheme, the constitutional post, Group A and B service posts are easily identifiable by mere verification of the holder of the post. The persons

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82. Appendix I. Persons/sections excluded from Reservation (Schedule to G.I., Dept. of Per. & Trg., O.M. No. 36012/22/93 Esst. (SCT) dated 8/9/1993).

83. The constitutional posts are as follows: President of India, Vice-President of India, Judges of the Supreme Court and of the High Courts, Chairman and Members of UPSC and of the State Public Service Commission, Chief Election Commissioner, Comptroller of Auditor General of India and persons holding constitutional positions of the like nature". Schedule of the O.M. *Ibid.*

coming under the category of property owners, professional class and wealthy people are to be identified very meticulously. The logic behind the inclusions of the above category are many. For instance the persons who are holding constitutional and civil service posts have a very good employment and needless to say, their children have a better access in developing their personality and their environment will be more conducive to acquire more knowledge and ability than those who have no such circumstances.

The criteria for excluding the persons engaged in industry are based on the reason that their income is attractive and they are practising skilled profession, not the profession followed by their ancestors such as scavenging, field work and labour works, etc. Amongst the agricultural landholders only the holder of irrigated lands is taken for calculating the income/wealth. Lastly, the means test was accepted as a criterion. Here the sole aim is that a person who has money can get everything in a market economy including education and employment. Hence, the overall idea is that the above referred categories have a proximate and substantial relation with the prevention of enjoyment of reservation benefits to the creamy layer of the backward class.

##### *5. Responses of the State Governments*

The Central Government implemented the Supreme Court's direction in its letter and spirit, but it was not so by all the State Governments. It is significant to note that in *Mandal case*, during the course of the argument, the States of Tamil

Nadu, Bihar and Kerala strongly opposed the exclusion of creamy layer.<sup>84</sup> There were attempts on the part of several states to evade from the court orders after the Central Government's order of implementation. This is evident in the following legislation.

a) *Bihar - U.P. Legislation: Ashok Kumar Takur's case*

The States of Bihar and Uttar Pradesh enacted the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and Backward Classes) (Amendment) Ordinance, 1995 and U.P. Public Service (Reservation of Scheduled Castes and Scheduled Tribes and Other Backward Classes) Act, 1994 respectively. The constitutional validity of the criteria for determining the creamy layer in the two legislation was challenged before the Supreme Court in *Ashok Kumar Takur v. State of Bihar and Others*.<sup>85</sup>

The State of Bihar through the 1995 Ordinance amended the Bihar Act of 1992 by adding a Schedule which contained the son or daughter of persons excluded from the purview of reservation. They are as follows:

- 1) persons holding constitutional posts;<sup>86</sup>
- 2) officers who are directly recruited in Class I Services of the Central Government or State Government or an Undertaking or an institution fully

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84. *Supra* n. 4 at p. 427.

85. 1995 (5) SCALE 34.

86. Son or daughter of the President of India, the Vice-President of India, the Chief Justice and Judges of the Supreme Court of India, the Chief Justice and Judges of the High Courts, the Chairman and Members of the Union Public Service Commission and the Chief Election Commissioner. *Id.* p. 124.

or partially financed by them;<sup>87</sup>

- 3) persons engaged as doctor, advocate, chartered accountant, tax consultant, financial consultant, architects or other professionals;<sup>88</sup>
- 4) persons engaged in trade or commerce;<sup>89</sup>
- 5) industrialist;<sup>90</sup>
- 6) agricultural land-holder;<sup>91</sup>
- 7) persons other than the person specified above.<sup>92</sup>

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87. This category of people will be excluded only if whose income from salary is Rs. 10,000/- or more per month; and whose wife or husband is atleast a graduate; and either husband or wife owns a house in an urban area; and whose mother or father also been directly recruited to Class I services. *Ibid.*

88. The said person's average income from all sources for three consecutive financial years is not less than Rs. 10 lakh per annum and whose wife or husband should be a graduate and whose family owns immovable property at least of Rs. 20 lakhs. *Id.* at p. 125.

89. Whose average income from all sources for three consecutive financial years is not less than Rs. 10 lakhs per annum, and whose wife or husband is at least a graduate; and whose family owns immovable property at least worth of Rs. 20 lakhs. *Ibid.*

90. Whose level of investment in running unit or units is more than Rs. 12 crores; and such unit or units are engaged in commercial production for at least five years; and his wife or husband, as the case may be, is at least a graduate. *Ibid.*

91. Whose average income from all sources other than agriculture for three consecutive financial years is not less than Rs. 10 lakhs per annum; and whose wife or husband, as the case may be, is at least a graduate, and who, or his wife, or her husband as the case may be, is atleast a graduate, and who, or his wife or her husband as the case may be, owns house at least of Rs. 20 lakhs in an urban area. *Ibid.*

92. Whose main source of income is other than animal husbandry, fisheries, poultry, weaving, craftsmanship, handicraft and artisanship; and whose average income from all sources for three consecutive financial years is not less than Rs. 10 lakhs per annum; and whose wife or husband as the case may be is at least a graduate; and whose family owns immovable property at least of Rs. 20 lakhs. *Ibid.*

under the serial 1 to 7 of this Schedule, his/her son or daughter shall not be excluded.<sup>93</sup>

In the same tone of Bihar Ordinance, the State of U.P. passed an Ordinance which contained the following categories of creamy layer. Sons and daughters of Officers of IAS, IPS, Indian Forest Service and other Central Service, whether directly recruited or promoted U.P. Civil Service, U.P. Police Service, State Service, only direct recruit,<sup>94</sup> Group A/Class I Officers of any Department or Ministry of Government of India or Educational, Research or other institutions; Group A/Class I Officer in any Department or Institution of State Government; an officer of defence forces or Paramilitary forces not below the rank of Colonel or equivalent; persons engaged in profession as a doctor surgeon, engineer, lawyer, architect, chartered accountant, media and information professional, management and other consultant, film artist and other film professional, running educational institution or coaching institutes or engaged in business as a share broker or in entertainment business;<sup>95</sup> Business man,<sup>96</sup> industrialist,<sup>97</sup> a person whose holding is within limit fixed under the U.P. Imposition of Ceiling on Land Holdings Act 1960;<sup>98</sup> and of any other person not mentioned in aforementioned categories.<sup>99</sup>

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93. The Ordinance further contained the following : The level of income and the value of property shall be modified taking into account the variation in money value every three years or less period, as the situation may demand; and an affidavit filed by the father or the mother of the candidate, or in case of their death by the candidate himself, shall be deemed to be decisive in respect of income, value of property and educational qualification. *Ibid.*

94. This is applicable only when the income from salary of such member of service is Rs. 10,000/- or above per mensem; and the spouse who is atleast a graduate; and he or his spouse owns a house in urban area. *Id.* at p. 126.

95. His average income from all sources should not be less than Rs. ten lakhs per year for three consecutive financial years; and spouse at least a graduate; and his family property (immovable) should be worth of twenty lakhs. *Ibid.*



The Ordinances of both states provided multiple conditions in all categories such as Rs. Ten thousand per month for persons of IAS, IPS etc., the spouse to be a graduate, holding property or owning house in urban area, Rs. Ten lakhs per year for professionals etc.<sup>100</sup> The Supreme Court relying on *Mandal case*<sup>101</sup> held that the criteria for identifying the creamy layer laid down by States of Bihar and U.P. was violative of Article 16 (4), wholly arbitrary and violative of Article 14 and against the law laid down by the Supreme Court in *Mandal case*. Further the Court directed that for the academic year 1995-96, the States of U.P. and Bihar should follow the criteria laid down by the Government of India.<sup>102</sup> The Court, speaking through Justice Kuldip Singh, reasoned that the multiple conditions attached to almost every category had no nexus with the object sought to be achieved and since the conditions were not severable from the main criteria, the above two criteria as a whole had to be struck down.<sup>103</sup>

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96. Provided whose average income for three consecutive financial years is not less than Rs. 10 lakhs per annum; and spouse at least graduate; and holding of immovable family property worth at least 20 lakhs. *Ibid.*

97. Provided whose level of investment in running units is over Rs. 10 crore and such units are engaged in production for at least five years; and the spouse at least a graduate. *Ibid.*

98. Provided he has an income of ten lakhs in a year from sources other than agriculture, and his spouse at least a graduate; *Id.* at p. 127.

99. Whose income from all sources for three consecutive financial years is not less than Rs. ten lakhs per annum; spouse at least a graduate and immovable family property worth Rs. 20 lakhs. *Ibid.*

100. *Supra* nn. 87-99.

101. *Supra* n. 4.

102. *Supra* n. 85 at pp. 127-128.

**Justice Kuldip Singh, reasoned that the multiple conditions attached to almost every category had no nexus with the object sought to be achieved and since the conditions were not severable from the main criteria, the above two criteria as a whole had to be struck down.**<sup>103</sup>

The Court very rightly pointed out the incongruity of the two ordinances with the law laid down in *Mandal case* in the following words:

"This Court in *Mandal case* has clearly and authoritatively laid down that the affluent part of a backward class called 'creamy layer' has to be excluded from the said class and the benefit of Article 16 (4) can only be given to the "class" which remains after the exclusion of the creamy layer

It is difficult to accept that in India where the per capita national income is Rs. 6929 (1993-94), a person who is a member of the IAS and a professional who is earning less than Rs. 10 lakhs per annum is socially and educationally backward. We are of the view that the criteria laid down by the States of Bihar and Utter Pradesh for identifying the 'creamy layer' on the face of it is arbitrary and has to be rejected".<sup>104</sup>

The *Mandal* decision brought forth a tough task to some of the States. Out of the political compulsions, they wanted to evade the hard core of the Supreme Court decision, i.e., they wanted to put high economic ceiling with added conditions for the creamy layer. But at the same time they wanted to escape from the contempt proceedings from the Court. This is quite evident in U.P. and Bihar instances.

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103. *Ibid.*

104. *Id.* at p. 124.

## 6. *Kerala Scenario : A Historical Overview*

Another notable instance of evading the *Mandal* decision is the State of Kerala, where it went to the farthest point by enacting a new legislation to bypass the verdict. When this was brought to the notice of the Supreme Court, the Court took a suo moto contempt proceedings against the State and later appointed a Commission to identify and ascertain the creamy layer among backward class in Kerala. At this juncture, therefore, it is necessary to examine the approaches adopted by the State towards this issue from a historical perspective.

### (a) *Kumara Pillai Commission : Adoption of Means Test in Admissions to Educational Institutions*

In pursuance of the High Court decision in *State of Kerala v. Jacob Mathew*,<sup>105</sup> a Commission under the Chairmanship of Sri Kumara Pillai was appointed in 1974 and the terms of reference were as follows :

The Commission shall enquire into the social and educational conditions of the people and report on that sections of people in the State of Kerala (other than Scheduled Castes and Scheduled Tribes) should be treated as socially and educationally backward and therefore deserving of special treatment by way of reservation of seats in educational institutions. They shall also recommend what the quantum of such reservation should be and the period during which it may remain in force."<sup>106</sup>

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105. 1964 K.L.T. 298.

106. G.O. No. 243/64/(PD) dt. 8.7.64.

The Commission ascertained the social and educational backward classes based on many documents and reached a conclusion that 4% of Muslims and 5% of Ezhavas were above the income limit and it was suggested that the persons who were above certain income limit should be excluded from the purview of backwardness. It was stated by the Commission thus :

"Members of family in this State which have an aggregate income of Rs.4,200/- and above per annum from all sources put together, cannot be considered to belong to any socially backward class whatever may be the caste or community to which they belong".<sup>107</sup>

The Commission's Report was accepted and in 1966, the income ceiling had been raised from Rs.4,200/- to Rs.6,000/- by an order of the State Government<sup>108</sup> prescribing that persons those who are coming above the income ceiling was not entitled to get the backward class reservation in the medical college admissions. This was challenged before the Kerala High Court in *Shameen v. Principal, Medical College, Trivandrum*.<sup>109</sup> The petitioner a member of Muslim community, a backward class within the State, argued that the classification of backwardness on the basis of poverty and the fixation of income ceiling was arbitrary and irrational.<sup>110</sup>

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107. Report of the Commission for Reservation of Seats in Educational Institutions, Kochi (1965), p. 36..

108. G.O.P. 208/66/Edn. dt. 2.5.66.

109. 1975 K.L.T. 260.

110. The petitioner pointed out that though she scored more marks prescribed for Muslim community, she was denied admission on the basis of income ceiling. Along with the petitioner some other persons belonging to Vanika Vysya and Thiyya communities also

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*(f.n.110 contd.)*

challenged the validity of the Government order and in all those cases the petitioners had scored more marks than the minimum marks prescribed for the said communities. It was also argued by the petitioner that the Commission has taken an arbitrary decision without taking into account the necessary ingredients of the criteria which constituted the backwardness. *Id.* at pp. 260-61

The Court speaking through Justice K.K. Narendran, did not accept the contention of the State that poverty is the sole criteria which eliminates one person from the social and educational backwardness and held that the governmental scheme was unconstitutional on the following reasons :

"The test of poverty cannot be the determining factor of social backwardness .... The listed communities and castes are those who are treated as backward classes for the purposes of reservation in public services under Article 16(4) of the Constitution. What has been done in Ext. P1 is to take a few members of those communities out on the basis of their income and to treat the rest as socially and educationally backward classes. The basis of this differential treatment is poverty and poverty alone. This cannot be the determining factor for determining the social and educational backwardness under Article 15(4) of the Constitution."<sup>111</sup>

Justice Narendran held that the fixation of income ceiling was arbitrary. He viewed that a person having Rs.6,000/- at that time could not maintain his family and his college going children, because the living standard required a higher sum than what was prescribed by the Government.<sup>112</sup> Justice Narendran though touched on the living standards in maintaining family and educating children, reached this decision by overseeing the relevance of economic criteria in determining backwardness.

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111. *Id.* at p. 268.

112. *Id.* at p. 269.

Against this decision of the Single Bench an appeal was preferred to the Division Bench in *State of Kerala v. Krishnamumari*.<sup>113</sup> The Court reformulated the cardinal issue thus : Should social and educational backwardness of the castes resulting from historical reasons be perpetual and the caste as a whole treated as socially and educationally backward even if there be a group of persons in the castes who are not socially and educationally backward ? Should all the members of such a community always remain backward ?<sup>114</sup>

Answering the above questions in the negative the Court speaking through Chief Justice Govindan Nair held :

"If a group in those castes/communities were able to advance socially, and educationally and economically, to make reservation for them would be to deprive the chances of the really socially and educationally backward classes of people in those communities/castes.... The Competition is between the more advanced section of the castes and the less advanced".<sup>115</sup>

The Court upheld the fixation of income limit valid, but reminded the Government to review the amount of Rs.6,000/- as it was too low. Thus the Court concluded :

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113. 1975 K.L.T. 851. The Court consisted of P. Govindan Nair C. J., and T. Kochu Thomman, J.

114. *Id.* at p. 859.

115. *Id.* at p. 18. 859-860. The Court said that the Commission had material before it and it had not been influenced by extraneous or irrelevant consideration. *Ibid.*

"The order of the Government was in 1966 and nearly a decade is now coming to close after the figure of Rs.6,000/- was fixed. We are sure that this matter will engage the attention of the Government and that it will take appropriate factors into consideration in deciding whether the figure should remain at Rs.6,000/- or should be altered. This is a matter which should engage the attention of the Government. But we are not prepared to say that the figure Rs.6,000/- was fixed arbitrarily".<sup>116</sup>

The Report of the Kumara Pillai Commission and the action taken on it by the Kerala Government reveal that persons who are advanced economically need not be allowed to enjoy the benefit of reservation and with a view to giving the real benefit of reservation to the needy, the economically affluent persons had to be excluded from the group in which those persons belonged.

In pursuance of the above decision of the High Court, the Kerala Government raised the income ceiling to Rs.10,000/- for obtaining reservation in professional college admissions. This was challenged in *K S. Jayasree v. State of Kerala*.<sup>117</sup> In this case the petitioner, who belonged to Ezhava community argued that the income ceiling had no relevance in the determination of backwardness of the person and thus it was violative of Article 15(4) of the Constitution. On the other hand it was contended by the Government that it had classified the Ezhava community according to the Backward Class Commission's Report in which it had been stated that among Ezhava community there were different stratification and the social stigma was

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116. *Id.* at p. 861.

117. (1976) 3 SCC. 730.



**attached only to the lowest strata and the major chunk of benefit of reservation in employment and education had been swallowed by the upper strata and hence the income ceiling was rational one in determining the backwardness. The Supreme Court, speaking through Chief Justice A.N. Ray, accepted the argument of the State and approved the validity of the order prescribing the income ceiling. He held thus :**

"In ascertaining social backwardness of the class of citizens, caste and poverty are both relevant for determining the backwardness but neither caste nor poverty alone will be the determining factor".<sup>118</sup>

Since the Court could see that there is a substantial relation to the persons who are above the income limit have got better ways and means of access to the governmental services than the lower strata, it upheld the validity of the income ceiling. It is pertinent to note that the judicial interpretation is backed by earlier decisions of the Supreme Court, especially the *Balaji*.<sup>119</sup>

(b) *Income limit has not been adopted in job reservation : Early period.*

The struggle for getting an entry into the public service of the Government of Kerala by different communities has a chequered history. It goes back to the *Malayali Memorial*,<sup>120</sup> a Petition of Rights prepared and submitted to the Maharaja in 1891 by

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118. *Id.* at p. 736.

119. *Supra* n. 10

120. *Malayali Memorial* is the name of a monster petition - a Petition of Rights Signed by 10038 non-Brahmin-Hindus, Christians and Muslims of Travancore and submitted to the Maharaja in 1891. P.N. Chopra, T.K. Ravindran and N. Subramanian, *History of South India*, Vol. III., S.Chand & Co. Ltd., New Delhi (1979), p. 219. M.J. Koshy, *Genesis* (f.n. contd. on next page)

non-Brahmins in the erstwhile Travancore against the monopoly of the Tamil Brahmins in the administration. Few years later, another mass petition called *Ezhava Memorial*<sup>121</sup> signed by Ezhavas, a major backward community in the State, sought for removal of their social disabilities, and right to employment in public services. Thus after a long struggle and incidents, it was during 1930's that a former judge of the High Court of Travancore Dr. C.D. Nokes was appointed to enquire into the backwardness of categories and the adequacy of their representation in public service. On the basis of the report of the Committee, the Government formulated the policy of reservation to backward classes in 1935.<sup>122</sup> In the meantime, however, there was reservation for backward classes in the erstwhile Malabar District as early as in 1921.<sup>123</sup>

Another Committee was constituted in 1951, after the formation of the erstwhile State of Travancore-Cochin to enquire into the reservation in Government services.<sup>123a</sup> In pursuance of the report of the Committee, the Government issued

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*of Political Consciousness in Kerala*, Kerala Historical Society, Trivandrum (1972), p. 30; A. Sreedhara Menon, *Cultural Heritage of Kerala*, S. Viswanathan Pvt. Ltd., Madras (1996), p. 281; A. Sreedhara Menon, *A Survey of Kerala History*, S.P.C.S., Kottayam, Kerala (1967), p. 345.

121. *Ezhava Memorial* was signed by 13176 Ezhavas under the leadership of Dr. P. Palpu in 1896. Ezhavas were engaged in agriculture, toddy tapping, coir-making and other productive occupation. But on account of their caste inferiority they were treated as a sort of serf-class denying them the right to way, right to education, right to public employment etc. P.N. Chopra et.al. at p. 220; A Sreedhara Menon, *Cultural Heritage of Kerala*. (1996) p. 281.

122. *Supra* n. 16 at pp. 277-278 per P. Govindan Nair, J.

123. The Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act 1995. 1996 (1) K.L.T. (Act) 3 at p. 4.

123a. The terms of reference assigned to the Committee were as follows : " a) who are the backward classes and what percentage of recruitment should be reserved for them and  
(f.n. contd. on next page)

*(f.n.123 a. contd.)*

b) who are the scheduled castes and tribes and what percentage of recruitment reserved for backward communities should be specifically reserved for scheduled tribes." *Supra* n. 122 at n. 228.

After the formation of the Kerala State in 1956, the Government felt that there were certain differences in the rules of reservation in the erstwhile Travancore-Cochin and Malabar areas of the State and thus unified these rules of reservation in 1957 by enumerating the groups of citizens who were to be considered as backward classes for the purpose of Article 16(4) with certain subsequent modifications to the rules. Thus, based on these principles, the Government framed the statutory Rules 14 to 17 of General Rules under Part II of the Kerala State and Subordinate Service Rules 1958 for reservation to backward classes of citizens in appointments and posts in the services under the State.<sup>125</sup>

These Rules were challenged before the Kerala High Court in *Hariharan Pillai v. State of Kerala*.<sup>126</sup> The petitioner in this case was applicant for the Munsiff selection made by the State Public Service Commission. He argued that he was denied selection and persons who were having less rank in the selection list were selected because of the reason that the rules provided reservation of appointments on the ground only of religion/caste and the rules were violative of equal opportunity enshrined in Article 16(1) and 16(2) of the Constitution. While repelling the contention and upholding the validity of the rules, Justice P. Govindan Nair, for the Full Bench of the Court, traced the history of reservation in Kerala and held :

"...the data that has been relied on, like the report of the Committee

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124. *Ibid.*

125. *Supra* n. 123 at p. 3.

126. *Supra* n. 16.

constituted by the Travancore Government before 1935 and that of the Committee that considered the question in 1957 as well as the census report of 1941, which have been relied on, have all become quite obsolete and out of date now. It is essential that the data must be collected periodically".<sup>127</sup>

The Court further observed that the provisions in Article 15(4) and 16(4) of the Constitution were only transitory and the action taken under that must be modulated from time to time and that could be done only if surveys were made at regular intervals and detailed information collected.<sup>128</sup>

It is significant to note that the Court in this case emphasised the idea of removing the well off sections from the backward classes.<sup>129</sup> The decision is an eloquent testimony to the bearing of seeds that later germinated into the concept of creamy layer.

(c) *Report of the Administrative Reforms Committee*

With a view to reviewing the working of the administrative machinery and to

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127. *Id.* at p. 281.

128. The Court thus concluded : "While I am not for interfering with the selection made on the basis of the principles that have more or less been in force for more than two, perhaps three, decades, I am not for continuing the system without the matter being looked into afresh". *Ibid.*

129. *Supra* n. 17 and the accompanying text. Justice V.P. Gopala Nambiar in his dissenting opinion opted for striking down the rules as unconstitutional. *Id.* at p. 289.

suggesting, *inter alia*, measures to improve the efficiency of administration,<sup>130</sup> the Administrative Reforms Committee was constituted under the chairmanship of Sri E.M.S. Namboodiripad, the then Chief Minister of the State in 1957.

While examining the method of recruitment to Government services, the Committee considered the question of reservation of posts for backward communities in the service and observed that the basis of assessment of the backwardness was 'not entirely satisfactory'. Moreover, among the backward classes, there were "relatively advanced" communities and the truly backward, and the latter had a feeling that the benefit of the reservation generally went to the former.<sup>131</sup> The Committee therefore, suggested for limiting the representation benefits only to the individuals among the backward class, who fell below a prescribed economic level.

Thus the Committee's report was the first step towards the recognition of economic backwardness as the index for giving State protection.<sup>132</sup> The report generated an intense debate between the forward and backward sections of people in Kerala.<sup>133</sup> While the former argued that the sole basis of reservation should be the economic criterion, the latter stood for caste as the sole basis.

(d) *Nettoor Commission Report*

In pursuance of the decision in *Hariharan Pillai*,<sup>134</sup> the Government of Kerala

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130. *Report of the Administrative Reforms Committee, Government of Kerala*, Vol. I. Part 1, (1958), pp. 1-2.

131. *Id.* at p. 97.

132. *Id.* at p. 98.

133. E.M.S. Namboodiripad, "The Marxist Definition : Class and Caste in 'Creamy Layer' Controversy", *Frontline*, October 20, 1995, p. 112 at p. 113.

constituted a Commission under the chairmanship of Sri Nettoor P. Damodaran in 1967. The objectives of the Commission was to assess the main factors which led to backwardness and the basis for classifying sections of people into backward and non-backward; and thereby make suggestions as to (i) what classes of citizens should be treated as backward for the purpose of reservation in jobs, (ii) which of such classes were not adequately represented in the services under the State and (iii) what should be the quantum of reservation and the period for which the reservation of 40% for backward classes was to remain in force.<sup>135</sup>

The Commission recommended the adoption of economic test in the ascertainment of backwardness with regard to the reservation in jobs and thereby an income cut off was prescribed. Though this recommendation was accepted in principle by one Government, the report was later rejected in toto by another<sup>136</sup> because of strong protests from backward communities.

(e) *The New Kerala Legislation - An Evading Attempt of State Government from Mandal verdict*

By the application of the means test in admission to professional colleges, the economically advanced section of the backward classes were excluded from the purview of such reservation in the State of Kerala way back from 1966 onwards. This was as a result of a judicial verdict<sup>137</sup> and thereby the Government was forced to

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134. *Supra* n. 126

135. *Report of the Backward Classes Reservation Commission, Government of Kerala*, Vol. I (1970), p. 5.

136. E.M.S. Nampoodiripad, "Caste Conflicts v. Growing Unity of Popular Forces", 14 *Economic and Political Weekly* 335 at p. 336 (1979).

implement the report of a Commission. However this income ceiling was not adhered to so far in the matter of job reservation and the Government could not implement the Nettoor Commission Report. It was the *Mandal case*<sup>138</sup> which brought the State Government into a piquant situation. In this case, the Supreme Court unambiguously specified in its order that within four months, the Government of India should specify the basis of applying the relevant and requisite socio-economic criteria to exclude the socially advanced persons/sections i.e., the creamy layer from other backward classes. The Court, however, gave six months period to States having reservation already in operation to evolve such criteria.<sup>139</sup> This direction of the Court was complied with by the Union of India and most of the States and Union Territories. The State of Kerala sought an extension of one year period to comply with the directions.<sup>140</sup> The counsel of the State during the proceedings for the extension of time informed the Court that a State Commission for backward classes was appointed by virtue of a statute and that was the reason for delay in implementing the order. The Court did not find any merit in the statement and ordered further :

"... the existence of the Act or the appointment of a State Commission under the State Act cannot stand in the way of implementation of this Court's direction and even if there was any doubt in that behalf the period of over two years is more than sufficient, to say the least. The impression which this inaction gives out is that the State of Kerala has not taken the

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137. *Supra* n. 105.

138. *Supra* n. 4.

139. *Id.* at p. 475.

140. *Indra Sawhney v. Union of India*, A.I.R. 1997 S.C. 597.



directions of this Court seriously".<sup>141</sup>

The Court's tone of admonition is significant when it said further :

"Before we take any drastic action for the non-implementation of this Court's direction we would like to wait for one month to enable the State of Kerala to implement this Court's direction. If that is not done, the State of Kerala will be compelling this Court to take drastic action in that matter".<sup>142</sup>

Even after the expiry of that period of one month, it was noticed by the Court that the State did not take any steps in this regard and then the Court issued show cause notice for contempt of court.<sup>143</sup> When the matter came before the Court after few more months, Kerala had enacted a legislation namely, the Kerala State Backward Classes (Reservation of Appointments or Post in the Services under the State) Act 1995. The counsel of the State by inviting the attention of the Court towards this legislation pleaded for reviewing the contempt of court proceedings. Finding that even then there was no fruitful action on the part of the State to identify

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141. *Id.* at p. 598.

142. *Ibid.*

143. While the matters came before the Court after a few more months and found that the order was unheeded, the Court said : " We are far from happy about the manner in which the process of implementation of this Court's order has been dealt with by the State Government. We are also unhappy that despite the issuance of the contempt notice the State Government did not realise the urgency of implementing the order. Various State Governments have already done so and we fail to see why the State of Kerala has not been able to do so". *Id.* at pp. 598-599.

**the creamy layer, the Court was compelled to consider the relevant scope, ambit and extent of its power to punish for contempt in this regard. The services of a senior counsel were requisitioned to assist the Court in the purpose. Petitions challenging the constitutional validity of the Act passed by the State Legislature were also filed before the Court. There occurred a change in the Government after the election and the counsel for the State failed in making any positive suggestions regarding the steps taken by the Government to identify the creamy layer but prayed for further extension of time.**

*(f) The Supreme Court's direction and the appointment of Justice K.J. Joseph Commission*

Finally the Court, out of sheer exhaustion and having regard to the fact that the constitutionality of the Kerala Act of 1995 is pending disposal before the Court, decided to get the information regarding creamy layer themselves through a High Level Committee. Thus the Court directed the Chief Justice of Kerala High Court to appoint a retired judge of the High Court to be the Chairman of the High Level Committee who would induct not more than four members from various walks of life to identify the creamy layer among "the designated other backward classes" in Kerala and forward the report to the Court within three months. Justice K.J. Joseph Commission thus, came into existence.<sup>144</sup>

The Commission collected evidence from different walks of life regarding the

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144. The members of the Commission are K.A. Arvindaksha Menon, a retired District Judge, K.P. Mohammed, O.C. Vincent and K. Asokan, all retired Government employees.

**identification of the creamy layer.** The Commission found that 40% of reservation earmarked for OBC's under the State Government services has been satisfied. Of these the Ezhavas topped in the list with 15 per cent followed by Latin Catholics and Muslims. Yet the Commission could not ascertain whether this 40 per cent OBCs get their appointments through community reservation or merit owing to non-availability of relevant records.<sup>145</sup>

(g) *The Kerala Legislation : An Evaluation*

The Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act 1995<sup>146</sup> was enacted with a view to continuing and validating the existing system of job reservation for the backward classes and thereby circumventing the mandate of *Mandal Case* of excluding the creamy layer sections from the purview of job reservation. The aims and objective part of the Act contains a brief history of reservation from the pre-constitutional period to till date in the State.<sup>147</sup> The necessity of this legislation is clearly stated in the Act as follows :

"... in the opinion of the State Government the backward classes of

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145. *The Indian Express* (Cochin edn.) May 15, 1997, p. 1. However, it was found by the Commission later that, of the 350 State Government departments, the OBCs were over-represented in 249 departments against their statutory reservation of 40 per cent. In 38 Government departments, where the caste-wise split list were available the Ezhava Community was over-represented in 26 departments. The Latin Catholic, Dheevara, Nadar and Muslim Communities were over-represented in 10 departments each and Viswakarma in 23 departments, *Indian Express* July 12, 1997, p. 1.

146. Act 16 of 1995. For the text of the Act, See 1996 (1) K.L.T. (Act) 3.

147. The Act traces how the backward class got established their right to reservation in Government jobs in the erstwhile state of Travancore in 1935 to the present State of  
(f.n. contd. on next page)

citizens who constitute the majority of the total population of the State are not adequately represented in the services under the State in proportion to their population and if, in the circumstances, the existing system of reservation to the Backward Class of citizens in appointments or posts is not continued as such, their social backwardness will further deteriorate resulting in failure on the part of the State to achieve Social equality among citizens".<sup>148</sup>

According to the Government, the existing system of reservation should be continued for ensuring their social status, welfare and adequate participation in the administration. The thrust of the Act is evident in sections 4 and 6. Section 4 reads :

*"Reservation of appointments of posts in the services under the State :-* Notwithstanding anything contained in any law or in any judgment, decree or order of any court or other authority having regard to the social and educational backwardness of the Backward Classes of citizens, the system of reservations as in force on the date of commencement of this Act, as laid down in rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958 in appointments and posts in the services under the

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Kerala in 1957 and the latest developments. The Committee on the welfare of Backward Classes constituted by the Legislative Assembly in 1993 already reported that 'the backward classes are still not adequately represented in the services under the State in proportion to their population' i.e., the backward class could not even secure the percentage of reservation in appointments and posts set apart for them in the services under the State. *Ibid.*

148. *Id.* at p. 4 (K.L.T.)

State for the Backward Classes of citizens, shall continue as such, for the present".<sup>149</sup>

Section 6 reads :

"*Validation* - Notwithstanding anything contained in any judgment, decree or order of any court or other authority, the reservation of appointments or posts in the services under the State for the Backward Classes of citizens made, on the basis of the system of reservation as in rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958, shall for all purposes, be deemed to be and to have always been validly made, in accordance with law, as if this Act had been in force at all material times when such reservations had been made".<sup>150</sup>

The earlier section, i.e., Section 4 is intended to uninterrupted continuance of the existing system of reservation which is indirectly meant to nullify the Supreme Court's decision in *Mandal case* for excluding the creamy layer sections from the ambit of reservation. The latter section i.e., Section 6 attempted to validate the existing system of reservation with a similar objective removing the 'eclipse' of *Mandal* verdict. The above sections are preceded by a declaration i.e., Section 3 which reads :

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149. *Id.* at pp. 5-6.

150. *Id.* at p. 6.

- "a) That there are no socially advanced sections in any Backward Classes who have acquired the capacity to compete with forward classes; and
- b) that the Backward Classes in the State are still not adequately represented in the service under the State and they continue to be entitled to reservation under clause (4) of Article 16 of the Constitution".<sup>151</sup>

These sections are made with a deeming provision of retrospective operation from 2nd November 1992. The retrospective operation is a clear indication of evading the *Mandal* verdict. It is significant to note that the Joseph Commission has found out the reservation for backward classes in the State service has been reached to the full extent of its prescribed percentage. In the light of this finding, how can the State argue that the backward classes are not adequately represented? Thus one can reasonably come to the conclusion that the present legislation fails in its purpose and validity.

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151. *Id.* at p. 5.

## CHAPTER - VIII

# IMPACT OF MARRIAGE, ADOPTION, CONVERSION AND MIGRATION ON BACKWARDNESS

When the Indian Constitution was framed to envisage the protection to the backward class of citizens under Articles 15(4) and 16(4), the framers did not speak as to whether a person could acquire backwardness.<sup>1</sup> Many fundamental rights such as, right to equality<sup>2</sup>, the freedom of movements<sup>3</sup>, right to reside and settle in any part of the territory of India<sup>4</sup>, practice and propagate any religion,<sup>5</sup> abolition of untouchability<sup>6</sup>, and prohibition of forced labour<sup>7</sup> have been guaranteed in the Constitution with a view not only to assuring basic right to individual citizens of a free democratic society, but also to establish an egalitarian society viz., to remove the wide gulf of disparities which existed among the various communities, to make social mobility, to promote fraternity assuring the dignity of the individual and thereby to secure the unity, integrity and secularism of the nation.<sup>7a</sup> Towards

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1. For details of the historical aspects of backwardness, see *supra*, Ch. III.

2. Constitution of India, Articles 14 to 18.

3. *Id.*, Article 19 (1) (d).

4. *Id.*, Article 19 (1) (e).

5. *Id.*, Article 25.

6. *Id.*, Article 17.

7. *Id.*, Article 24.

7a. *Id.*, Preamble.

attaining these objectives, marriage, adoption, conversion and migration have a significant role. However, in the exercise of these personal/constitutional law rights, there is bound to be a conflict between these rights and the constitutional goal of providing reservation to backward classes of citizens. How can this conflict be reconciled? Can a person acquire backwardness through marriage, adoption, conversion or migration? If yes, under what circumstances? If no, why? In other words, what is the impact of the exercise of these rights on backwardness?

## I. MARRIAGE

For the social existence in general, and the well being of an individual in particular, marriage is recognized as a civil right in a legal system. From the ancient times, marriage was considered as a sacrament which was subjected to divine rituals and holy ceremonies. But due to the influence of modern civilisation and liberation movements, now two grown up, mentally sound man and woman can arrange their matrimonial life in the form of a civil contract by their free exchange of wills.<sup>8</sup> This principle has even been ensured under the Universal Declaration of Human Rights, 1948.<sup>9</sup>

Equality between men and is been an enshrined right and without any limitations of race, religion and nationality. Both the individuals have the right to marry and to

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8. The Special Marriage Act 1954, S.4.

9. The Universal Declaration of Human Rights, Article 16 (1) reads : "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and of its dissolution", For the text, see Ian Brownlie (Ed.), *Basic Documents on Human Rights*, Clarendon Press, Oxford (1992), P.24.



form a family. When this matrimonial right is exercised by an individual in the form of intercaste marriage i.e., from lower or upper caste, the question of social status of the married girl will arise in the context of determination of backwardness for conferring the benefits of reservation in jobs or in admissions to educational institutions. The nature and effect of marriage of a girl from an upper caste to a backward caste boy, a girl from one religion to a boy of another religion and the status of children born out of such marriages are of seminal importance in this context.

(i) *N.E. Horo's Case : Early Period*

What is the social status of a Christian non-tribal (non-Munda) lady marrying a Hindu tribal man ? This question was echoed before the Supreme Court early in 1970's in *N.E. Horo v. Johan Ara*.<sup>10</sup> The Court speaking through Justice A.N. Grover observed :

"...it is proved that once the marriage of a Munda male with a non-Munda female is approved or sanctioned by the Parha panchayat they become members of the community... . If a non-Munda woman's marriage with a

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10. A.I.R. 1972 S.C. 1840. In this case the respondent's nomination paper for a reserved parliamentary constituency in the State of Bihar was rejected by the Returning Officer on the ground that she being a non-Munda could not become a Scheduled Tribe (Munda) after marriage: The Patna High Court accepted the respondent's plea that she became a member of Scheduled Tribe after marriage due to the observance of ceremonies and her acceptance as a member of the tribal community. Hence the appeal before the Supreme Court.

Munda male is valid it is difficult to say that she will not become a member of the Munda tribe".<sup>11</sup>

The Court further held that the concept of tribe was bound to undergo changes, when numerous social, economic, educational and other like factors in a progressive country started showing their impact. The Court continued :

"It is noteworthy that a Hinduised Munda and a Munda converted to Christianity can inter-marry and conversion to Christianity has not become an obstacle in the way of such marriage among the Mundas".<sup>12</sup>

In this case the Supreme Court did not address the socio-legal aspect of marriage between two individuals and its effect on the acquisition of backwardness for the purpose of benefit under Article 16 (4) of the Constitution. However, the Court based its conclusion only on the approval by such marriages the community and thereby the married non-tribe lady had been assimilated in the tribal community.

(ii) *Conflicting Decisions of High Courts*

Though the apex court's decision in *N.E. Horo*<sup>13</sup> was to be followed by the High Courts in India, conflicting decisions emerged due to the disarray created by the decision. Some High Courts very well distinguished with the Supreme Court's decision, while some others brought out new interpretations and novel approaches to the issue.

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11. *Id.* at p. 1849.

12. *Ibid.*

13. *Supra* n. 10.

(a) *Urmila Ginda : Delhi High Court*

The decision of Delhi High Court in *Urmila Ginda v. Union of India*<sup>14</sup> was the first instance of this kind of deviation from *N.E.Horo's* case.<sup>15</sup> In this case the petitioner, a girl, basically belonged to a higher caste and married a scheduled caste (Chamar) man in 1969. The petitioner applied for the post of Russian to English translator and stood second in the selection list, but she was not finally appointed. The post was a reserved post and since, she by birth, being a member of a higher caste, she was denied the claim to the post reserved for Scheduled Caste. Relying on the ratio of *N.E. Horo*<sup>16</sup> she challenged the denial on the ground that she should be treated as a scheduled caste lady by virtue of her marriage to a scheduled caste man. The Court distinguished the Supreme Court's opinion in *N.E. Horo* that in that case the lady was allowed to claim the benefit because of the reason that her marriage was approved by the tribal community and she had become one among them whereas in the instant case, the Court rejected the contention of the petitioner and observed that the petitioner was a higher caste Hindu who was not subject to any backwardness either social or educational.<sup>17</sup> The Court examined the constitutional purpose of the special provision of reservation and held :

"...the State would not be able to make any reservation at all in respect of backward classes or for Scheduled Caste or Scheduled Tribes except to

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14. A.I.R. 1975 *Del* 115.

15. *Supra n.* 10.

16. *Ibid.*

17. *Supra n.* 14 *at p.* 116.

the extent permitted, i.e. for helping social and educational advancement of members of such classes, caste or tribes. In other words, the Constitution does not enable the State to make any special provision de hors Article 15; it cannot make any except to the extent necessary for making special provision for the advancement of socially and educationally backward classes".<sup>18</sup>

The Court, therefore, concluded :

"The petitioner cannot obviously seek to take advantage of any special provision made by the State for the advancement of such classes or persons, because she is not one of them — she is the high caste Hindu who was not subject to any such backwardness either socially or educationally".<sup>19</sup>

The opinion of the Court is constitutionally right, but the reason appears to be practically wrong. According to the Constitution, the reservation is intended to a person who could not enjoy the benefits of the State because of his less potential to compete with well-off individuals and if such uniform competition is allowed that will be a competition between unequals and a person who met out social backwardness will be forced to be defeated. The cause of the defect will be not because of his

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18. Ibid.

19. Id. at p.116. The Court cautioned "...whether a person belonging to a higher caste can claim to be appointed to such a reserved post only by reason of marriage, it seems necessary to even think of the possibility of the same being abused." Id. at p.117, per S. Rangarajan, J.

inherent intellectual inability but because of this environmental and social factors prevailing in the society. Hence, constitutionally, the Court is right in saying that a higher caste lady could not become a lower caste because of her marriage. But the reason given by the Court that there is no social backwardness attached upon her after marriage seems to be wrong. Justifying its stand based on the reason reveals that the reason is a myth. Since the society is still evaluating a person from his occupation, habitation and marital relationship to an extent it can be said that a woman after marriage certainly undergoes some social disabilities either from her own basic caste or from the society as such. In *Urmila's case* regarding the non-justiciability of her contention, the Court further said :

"It seems to me that to permit a lady like the petitioner belonging to a higher caste to compete for a seat reserved for such socially and educationally backward class of people, merely by reason of her marrying a person belonging to such a caste, might even defeat the provision made by the State in favour of such socially and educationally backward classes by reserving certain posts for them. The special provision reserving a seat for Scheduled Castes would be nullified if a person not subject to educational or other backwardness is allowed to compete with those who are so handicapped".<sup>20</sup>

The ratio of this case is not consistent with the earlier decisions of the Supreme Court and this paved the way for judicial uncertainty on this issue and in subsequent

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20. Id. at pp. 116-117.

cases the opinion emerged in two opposite directions, one in the line of Supreme Court in *N.E. Horo* and the other in the line of Delhi High Court *Urmila*.

(b) *From Kunjamma Alex to Valsamma Paul : the Kerala High Court's Conflicting Views*

Later the Kerala High Court in *Dr. Kunjamma Alex v. Public Service Commission*<sup>21</sup> confronted this issue. The petitioner, a lady who originally belonged to a Syrian Catholic married a Latin Catholic man and applied for the post of Assistant Surgeon in Health Services Department and her name found a place in the supplementary rank list of Latin Catholic candidates selected for the above said post. But later the Public Service Commission cancelled the selection on the reason that the petitioner belonged to a Syrian Catholic which was not a backward community in Kerala and caste could not be changed by marriage. The petitioner challenged this order of the Commission on the ground that after her marriage with a Latin Catholic man she became a Latin Catholic, i.e., a backward class. The Single Bench Court speaking through Justice P. Subramonian Potti examined the impact of marriage between two persons belonging to different castes and analysed the socio-religious aspects of marriage and upheld the claim of the petitioner in the following words :

"Evidently there is no ecclesiastical prohibition to the change over from the Syrian Catholic rites to the Latin Catholic rites on the marriage of a Syrian Catholic woman. Whether in any particular instance the bride who

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21. 1980 K.L.T. 18.

is a non-Latin Catholic has adopted the Latin rites would necessarily be a question of fact. But the fact remains that it is possible for her to adopt it either at marriage or thereafter during matrimony".<sup>22</sup>

The Court noted that the marriage was solemnised in a Latin Catholic church in accordance with the rites observed therein. The Judge concluded that by reason of the said marriage a change of community had taken place in regard to the petitioner and she had become a member of her husband's community, namely Latin Catholic. Against the findings of the Single Judge an appeal was filed by the Kerala Public Service Commission<sup>23</sup> which was dismissed by the Division Bench confirming the Single Bench decision.<sup>24</sup>

Based on the decisions of the High Court, a lady belonged to Syrian Catholic who was married to a Latin Catholic man, approached the High Court for getting a reserved post of Lecturer in Cochin University. The University appointed her in the reserved quota. This was opposed by another lady candidate belonging to Latin Catholic who claimed for the above post in the place of the first lady. By a common judgement,<sup>25</sup> the single Bench of the High Court held that the lady who originally

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22. *Id.* at pp. 21-22.

23. *Public Service Commission v. Dr. Kunjamma Alex*, 1981 K.L.T. 24, the Court consisted of Balakrishna Eradi, C.J. and Bhaskaran, J.

24. *Id.* at p. 25.

25. *Valsamma Paul v. Cochin University*, 1992 (1) K.L.T. 436.

belonged to Roman Catholic was not entitled to claim the post of Lecturer on the ground that she would not become a member of backward community simply by marriage alone. Speaking through Justice Sreedharan, the Court said :

"Even if third respondent is treated as a member of Latin Catholic community by marriage, she will not become entitled to the benefits under Rules 14 to 17 of the General Rules... Social and educational backwardness is the result of very many factors. It cannot be acquired by a simple ceremony of marriage".<sup>26</sup>

Against this decision, by way of writ appeal, the issue came to the Full Bench of the High Court in *Valsamma Paul v. Rani George*.<sup>27</sup> The Court speaking through Justice Shanmugham held that by reason of marriage a change of community did not take place and thereby the appellant could not become a member of her husband's community ie., Latin Catholic. The Court referred to the various High Court and Supreme Court decisions on this point and unequivocally held that eventhough Canon Law permitted marriage between Syrian Catholics and Latin Catholics and thereby a person could become Latin Catholic by marriage, it was not relevant for the purpose of claiming the benefits of reservation. The Court thus said :

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26. *Id.* at pp. 440-441. The Court proceeded to add : "If the third respondent wants to claim the benefits of those provisions, she must not only show that she has become a member of that community but should also establish that she has been subjected to the disabilities and handicaps suffered by the members of such socially and educationally backward communities as has been held in the decision reported in A.I.R. 1986 S.C. 733. (*Soosai v. Union of India*) *Id.* at p.441.

27. 1995 (1) K.L.T. 329. The Court consisted of M.M. Pareed Pillai, Ag. C.J., T.V. Ramakrishnan and P. Shanmugham JJ.



"The appellant who was born in the Syrian Catholic community and continued to have the advantage of the society of Syrian Catholics, cannot suddenly become a member of the backward class on marriage. It will naturally be defeating the purpose of reservation but also denying the benefits available to a really backward community".<sup>28</sup>

The decision of the Court, thus, settled the confusion created by its earlier judgements and categorically stated that the social backwardness is attached only with a person's birth and not by any interim arrangements. At this juncture, it is to be noted that the Delhi High Court as well as Kerala High Court travelled a judicial path deviating from the Supreme Court's decision in *N.E. Horo*.

(c) *Ameena Shapir's Case : The Madras High Court Followed N.E. Horo*

In *K.S. Ameena Shapir v. State of Tamil Nadu*,<sup>29</sup> the Madras High Court followed the Supreme Court's decision in *N.E. Horo* and deviated from the path of Delhi High Court in *Urmila*. In this case the petitioner by birth was a higher- caste Hindu married a man from Muslim community after embracing Islam. The

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28. *Id.* at p. 340. The Court reiterated : "By the device of marriage or adoption a person cannot be permitted to change his class from forward to backward and thereby claiming the benefits of reservation. The special provision intended for the advancement of socially and educationally backward classes of citizens who are not adequately represented in the services of the State cannot be defeated by including themselves either by alliance or by any other mode of joining into the community. That will be making a mockery of the constitutional exercise of identification of socially and educationally backward classes of citizens" *Ibid.*

29. 1983 Lab . I.C. 1674.

petitioner's husband belonged to Muslim Labbai Community which was a backward community in Tamil Nadu. Her application for the post of a tutor in the reserved category was denied by the Public Service Commission on the reason that marriage did not entitle her the backward class reservation. The Madras High Court after analysing the Supreme Court and High Court decisions, took the view that the petitioner became a backward class member because of her marriage. The Court speaking through Justice Mohan held :

"It is well settled that even in International Law, a wife (*SIC* on) of her marriage acquires the nationality of her husband, unless the Municipal law prevents such an acquisition. In this case, the petitioner, who was originally a Hindu...embraced Islam and married Janab Shapir. By reason of such marriage which is recognised by Muslim law, she became a Muslim".<sup>30</sup>

The Court further said that a wife must belong not only to the religion to which her husband belonged, but to the community as well. The Court thus, based its reasoning that the husband's community alone should prevail after the marriage.<sup>31</sup> According to the Court, intercaste marriage is one of the tools of abolishing the caste system. The Court's vision for a casteless society, which is another ground for this decision, is stated as follows :

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30. *Id.* at pp. 1677-1678.

31. *Id.* at p. 1678.

"Nobody can have any quarrel with such promotion of inter-caste system, since more they are encouraged, speedier will be the establishment of a casteless society".<sup>32</sup>

Disagreeing with the line of reasoning in *Urmila*,<sup>33</sup> the Court further posed the following question :

"If this theory is accepted (ratio of *Urmila*), then what will happen to the children born out of this wedlock ? Are they to be considered backward or forward ? Are they to be considered as High Caste Hindus or Scheduled Castes ? I should go to the extent of saying that even if a high caste woman marries a person belonging to the Scheduled Caste, just for the sake of obtaining a reserved post, what is wrong in it ? For more than 2000 years people belonging to the Scheduled Caste were treated as chattels in this country.... No person would normally be happy to be called a member of the Scheduled Caste; it may be that it would enable a person to get a few jobs, or a few leaves but what about the social stigma ?"<sup>34</sup>

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32. *Id.* at p. 1677. The Court said : "These are days when both the Centre and State Governments are not only advocating but also earnestly desiring to establish a casteless society. The first step, as the policy as announced would indicate, is the abolition of the caste system. It is in that regard encouragement is given by the Government of Tamil Nadu by instituting prizes for those who get married inter-caste.... If this background is kept in mind, since it forms the hard core of reality of the situation, as it obtains today, I do not think that there will be any difficulty in appreciating the stand of the petitioner." *Id.* at p. 1677.

33. *Supra* n. 14.

34. *Supra* n.29 at pp. 1679-1680.

The Madras High Court failed to analyse the question to whom and for what reservation is aimed by the Constitution. Reservation is not intended to a person for erasing the social stigma through marriage, but it is for curing the disabilities and handicaps of backward classes. Persons born in backward class and grown in backward class suffer the ills of backwardness and therefore the reservation benefit should only be given to them and it should not be given simply because a person married a backward class person. The decision in this case by the High Court as well as the earlier decision of the Supreme Court in *N.E. Horo* are wrong and against the intention of the framers of the Constitution.<sup>35</sup> The Madras High Court adopted an extreme stand to justify its reasoning basing on private international law<sup>35a</sup> to show that the nationality status of wife would be that of her husband. Comparing the acquisition of nationality with the attainment of backwardness is basically illogical and wrong. The reason is that in the private international law the nationality is important in deciding the matrimonial status, rights and duties, whereas the issue of backwardness is to be ascertained for the conferment of rights to reservation benefits which is intended for socially and educationally backward sections of the society. The Court's doubting as to the social status of offsprings born out of intercaste marriage i.e., whether backwardness can be attributable to them also flowed from the very same illogicality. As the Kerala High Court rightly held the children born out of intercaste marriage need not suffer the ills of backwardness.<sup>36</sup> The factors such as, the place in which the child was born and brought up, whether he/she

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35. See *supra* Ch. III.

35a. *Supra* n. 29 at p. 1680.

36. *Sapna Jacob v. State of Kerala*, 1992 (2) K.L.T. 819.

has undergone the handicaps as in the case of other backward class people etc., have a significant role in attributing backwardness in such situations.

(d) *Neelima's Case : Departure from Supreme Court and Madras High Court Decisions*

But when the Andhra Pradesh High Court was confronted with the issue in *D. Neelima v. Dean, P.G. Studies, A.P. Agrl. University, Hyderabad*,<sup>37</sup> it did not follow the Madras High Court or the Supreme Court but added logical strength to the latter decisions of Kerala and Delhi High Courts. In this case, the petitioners were girls, belonging to forward castes. After their graduation they married backward community persons and sought admission to post-graduate courses in reserved quota.<sup>38</sup> This was opposed by the Government.<sup>39</sup> The prime contention of the petitioners before the High Court of Andhra Pradesh was that on marriage they went into the family of their husbands by snapping all their parental ties and pursuantly became members of their husbands' caste and hence they are entitled to the reservation envisaged under Article 15 (4) of the Constitution. The Division Bench formulated the issue into three questions :

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37. A.I.R. 1993 A.P. 229.

38. One of the petitioners was born in Reddy community who married a Scheduled Tribe (Erukala) and the other was Vysya by caste married a person belonging to Bestha (Fishermen) community — a backward class. *Id.* at pp. 230-231.

39. The Commissioner of Tribal Welfare filed a Statement before the High Court that as per circular No. 35/1/72/Ru(Sct) dated 2.5.75 the Government of India directed that the guiding principle to decide the caste of an individual is to find out the caste in which he or she was born and not the caste of the person, whom he or she married. *Id.* p. 231.

Does a girl on marriage become a member of her husband's family, snapping all her parental ties ? Does a girl on marriage acquire the caste or tribe of her husband ? and Will acquisition of caste or tribe of the husband by virtue of marriage cloth the wife the right to reservation envisaged by Article 15 (4) of the Constitution ?<sup>40</sup>

After analysing the Hindu traditional marriages and the Hindu Marriage Act, 1955, the Court held that on marriage a girl becomes a member of her husband's family and acquires his Gotra and Sapindaship ceasing all her ties with her parental family.<sup>41</sup> Regarding the acquisition of backwardness by her marriage the Court expressed the following view :

"...on marriage the bride acquires the caste or tribe of her husband and the question whether there was acceptance for such acquisition of caste or tribe from the members of that caste or tribe, as the case may be, is irrelevant in as much as this is not an acquisition on reconversion to Hinduism nor a change *ever simpliciter*, but by virtue of her marriage".<sup>42</sup>

Relating to the question whether acquisition of caste or tribe of the husband would entail the wife the benefit of reservation, the Court held that after having completed their graduation they had their marriages and by virtue of that, they made a claim for reservation in the matter of admission to the post-graduate course. They had not undergone the stresses and strains nor were they before their marriage back-

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40. *Id.* at p.234.

41. *Id.* at p.236.

42. *Id.* at p.239, *per* Bhaskar Rao, J.

ward either socially or educationally, being members of the so called forward castes. The environmental conditions and circumstances in which they lived till their marriage were different and distinct from those suffered by those who were socially and educationally backward.<sup>43</sup>

Thus Court concluded that those who claimed the beneficial treatment under Article 15 (4) because of their marriage were not entitled to it, since they were far better than those who born in the Scheduled Tribe, or Backward Class communities. The Court went further and held :

"...if they were to be permitted to invoke the benefit and protection available to the classes of persons who really suffer from environmental disadvantages and incidental stresses and strains, it amounts to letting the purpose of reservation to whittle down, besides permitting entry of citizens better, if not, equally, placed as those constituting creamy layer".<sup>44</sup>

The Andhra Pradesh High Court very rightly reached the conclusion that it was not appropriate to treat a girl who married a backward class boy to be a backward class citizen for the purpose of reservation because of the reason that she had enjoyed better environmental facilities before her marriage than those who belonged to backward communities.

From the above analysis it can be seen that from *Urmila* to *Neelima*, the High Courts of Kerala (latter decision), Delhi, Andhra Pradesh maintained a trend in

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43. *Id.* at pp. 245-246.

44. *Id.* at p.247.

contravention to *N.E.Horo*, decided by the Supreme Court. But the Madras High Court followed the *N.E. Horo*. This cleavage of opinion and the resultant inconsistencies in the existing law paved the way for the Supreme Court's final word in *Valsamma Paul v. Cochin University*.<sup>45</sup>

(iii) *Valsamma Paul's Case : The Supreme Court's Decision*

The appellant by birth was a Syrian Catholic, a forward community who married a Latin Catholic, a backward class fishermen community. She applied for a lecturer post reserved for Latin Catholic in Cochin University. The University considered her position in the backward community because of her marriage with a backward class man and thereby she was appointed to that post. This appointment was challenged by a Latin Catholic lady who was another candidate but could not get the post. The Single Bench of the High Court<sup>46</sup> held that the appointment was unconstitutional. Against that an appeal was moved before the Division Bench<sup>47</sup> and the Division Bench confirmed the Single Bench judgement which doubted the earlier decision of a Division Bench of the High Court in *Dr. Kunjamma Alex case*.<sup>48</sup> Thus the appeal before the Supreme Court.<sup>49</sup> The Court put the question on a wider canvass, viz., whether a candidate, by marriage, adoption, conversion or obtaining a false certificate of social status would be entitled to an identification as such

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45. 1996 (1) SCALE 85.

46. *Supra*. n.25.

47. *Supra*. n.27.

48. *Supra*. n.23.

49. *Valsamma Paul v. Cochin University*, 1996 (1) SCALE 85.



member of the class for appointment to a post reserved under Article 16(4) or for an admission in educational institution under Article 15(4)?

The appellant contended that due to her marriage, she had subjected herself and suffered all the environmental disabilities to which her husband was subjected to and therefore she was entitled to the same treatment as was available to Latin Catholic (Fishermen) to which she was transplanted by marriage according to Canon Law.

The Supreme Court clarified that when a member is transplanted into Dalits, Tribes and OBCs, he/she must of necessity also undergo same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation.<sup>50</sup> In this case, the Court examined the position of the appellant i.e., whether she had undergone any of such handicaps and held :

"A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be".<sup>51</sup>

The Court went on and held :

"Acquisition of the status of Scheduled Caste etc., by voluntary mobility into these categories would play fraud on the Constitution, and would

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50. *Id.* at p.99.

51. *Ibid.*

frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution".<sup>52</sup>

The Court rightly accepted the contention of the appellant that she became a member of her husband's caste.<sup>53</sup> However, it also held that mere recognition by the community would not give the benefit of reservation<sup>54</sup> and it is not at all relevant for the purpose of her entitlement to the reservation for the reason that she as a member of forward caste, had advantageous start in life and after her completing education she married a Latin Catholic.<sup>55</sup>

The Court rightly expressed the view that simply by marriage and communal acceptance a person can not entitle the constitutional benefits ensured to backward class. This interpretation is logically sound and constitutionally acceptable. Had

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52. *Ibid.*

53. The Court thus held : "It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted". *Id.* at p.98.

54. The Court also said that recognition of the community was not a pre-condition for married status. It follows : "It is common knowledge that with education or advance of economic status, young men and women against the wishes of parents and in many a case consent or recognition would scarcely be given either or both of the parties or parents of both spouses".*Id.* at p.98.

55. *Id.* at p. 100.

the Court accepted the contention of the appellant, it would have become a fraud on the Constitution and ultimately allowing competition between unequals. When a person is competing either for a seat in an educational institution or for any post seat in public employment, the candidate's merit is ascertained on the basis of his overall performance and certain relaxation is given to backward class person because of his/her backwardness. If a woman who marries a backward class man is considered as backward, there is every possibility that she can very easily capture the post which is meant for the backward class. The competition between a person born and brought up in backward class and a higher caste lady who married a backward class man certainly makes it as a competition between two unequals, because before her marriage she had a good environment and social background to develop her intellectual capacity and that will help herself defeat the other person. Backwardness as intended in the Constitution is not only the present but it includes the past social exploitation i.e., the historical wrongs, which resulted in the present backwardness. The judicial interpretation in this case, is remarkable in its correction of earlier wrongs and setting at right the legal position in this arena.

## II. ADOPTION

The object of adoption under Sastric Hindu Law is two fold. The first is religious i.e., to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the names of the adopter and his ancestors. The second is the secular i.e., to secure an heir and perpetuate the adoptee's name.<sup>55a</sup> The question of caste, however, did not assume any

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55a. Mulla's Hindu Law, N.M. Tripathi Pvt. Ltd., Bombay, (16th edn. - 1994), p. 490.

importance because the adoption was permitted only between the members of the same caste or gotra. But the Hindu Adoptions and Maintenance Act, 1956 has done away with such Sastric rigour.<sup>55b</sup>

(i) *Khazan Singh's case : Delhi High Court's view*

In *Khazan Singh v. Union of India*,<sup>56</sup> the petitioner by birth belonged to a Jat caste and he was adopted by a Scheduled Caste (Julaha) man in 1969. He obtained a certificate in 1970 showing that he belonged to Scheduled Caste. He was selected for a post of Sub-Inspector of Police based on that certificate. Later the authorities cancelled the certificate issued to him on the reason that the petitioner could not be treated as a Scheduled Caste since he was not one by birth and that therefore the certificate issued earlier was erroneous.

The reformulated question by the High Court of Delhi was : Does a person *ipso facto* become a member of the adopted caste as on birth or does he become a member of it only if he is approved and absorbed into it ?<sup>57</sup>

The Court approached the question from the angle of the legal effect of an adoption based on Section 12 of the Hindu Adoption and Maintenance Act, 1956.<sup>58</sup>

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55b. S.2 (1) of the Act provides that the adoption under the Act shall be only between Hindus by religion.

56. A.I.R. 1980 Delhi 60.

57. *Id.* at p.64.

58. Section 12 of the Hindu Adoptions and Maintenance Act, 1956 reads : " Effects of adoption — An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such

(f.n. contd. on next page)

The Court, speaking through Justice S. Rangarajan, construed the provision in the following words :

"The language of the section is quite clear, explicit and emphatic. The adoptee child, it says, (a) is *deemed* to be the child of the adoptive father *for all purposes*, and (b) *all the ties* of the child in the natural family shall be deemed to be severed and replaced by those of the adoptive family. The emphatic repetition of the word 'all' in relation to the 'purposes' and 'ties' is significant. The word 'ties' is very wide and comprehensive word and would include all types of bonds, social, religious, cultural or any other that bound the adoptee to his natural family. All his relationships are, according to the mandate of the section, replaced by the corresponding ties in relation to the adoptive family. It is very difficult to see why the tie of caste which indeed was and perhaps still is a very strong tie that binds a Hindu should be said to be outside the purview of this provision".<sup>59</sup>

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date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. Provided that :- a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth; b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth; c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption".

59. *Id.* at p.66. Emphasis in original. The Court pointed out that under the old Hindu Law an adoption of a son was for all purposes equivalent to the birth of a son. The question of caste however did not assume any importance because adoption was permitted only between the members of the same caste. The object of the Hindu Code was to abolish all caste distinctions. *Ibid.*

The Court thus held that the adoptee was to be treated from the date of his adoption as if he were born in the adoptive family for all practical purposes. Therefore, on adoption as in the case of birth, the adoptee acquires the caste of the adoptive parents without anything more to be done by him or by others i.e., the consensus or acceptance by the community are not applicable here.<sup>60</sup> The court also approached the question on the impact of adoption on the future generations - the children and grand children that might be born to the adoptee. The Court rightly hinted that when the congenital handicaps were removed by the patronage of the affluent caste the privilege should be denied to the offsprings.

The basis of the decision throws light on the Court's perception of the relevance of an egalitarian social order in a caste-ridden hierarchical society like India.<sup>61</sup> But the Court ignores the possible abuse of the inter-caste marriage, adoption, conversion and the like which are being abused as a cloak to rob the benefit of reservation. The Court even did not find any doubt with regard to the adoption in

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60. The Court reasoned thus : "Here the adoptee becomes a member of the caste by reason of his status as an adopted son and not as an outsider seeking admittance depending upon the sweet will and pleasure of the other members of the community... Just as it is not open to a caste to refuse to recognise a new-born in the family of one of its members as belonging to the caste, it is not open to the caste to sit in judgement over the statutory status enjoyed by the adoptee." *Id.* at p.67.

61. The Court said : "... it is a well known fact that the inter-mingling of castes and removal of the wide disparities between the forward classes and the backward classes of society is an objective of top priority in India today". *Id.* at p.67.

The Court further said : "If genuine adoptions both ways, become frequent, they may eventually lead to the development of that social equality at which the Constitution aims". *Ibid.*

the present case, where it was done on the eve of applying a post. Moreover the Court did not even enquire into the genuineness of the adoption as, the Court said, it was not an issue before the Court and it was the duty of the authorities to enquire.<sup>62</sup> This shows the hands-off approach of the Court.

(ii) *Sailaja's Case : A.P. High Court's Trend Setting Decision*

Even before the *Khazan Singh*<sup>63</sup> decision of the Delhi High Court, the cleavage of opinion in the matter of adoption was quite explicit. The Mysore (now Karnataka) High Court's approach<sup>64</sup> was an instance to the opposite view of *Khazan Singh*. Later the Andhra Pradesh High Court got an opportunity to evaluate the whole situation in *A.S. Sailaja v. Principal, Kurnool Medical College*.<sup>65</sup> In this case the petitioner was born and brought up in a Brahmin family. She claimed the backward class reservation for admission to Medical College on the basis that she was adopted by a backward class (shepard) person.<sup>66</sup>

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62. *Id.* at p.62.

63. *Supra* n. 56.

64. *K. Shanthakumar v. State of Mysore* (1971) 1 Mys. L.J. 21; *Nataraj v. Selection Committee* (1972) 1 Mys. L.J. 226 and *B. Srinivassa v. Chairman, Selection Committee*, A.I.R. 1981 Kant. 86.

65. A.I.R. 1986 A.P.209.

66. The Petitioner initially appeared for the common entrance examination for 1984-85 but failed. It was only after the second appearance in the entrance examination in which she got high marks, she put the claim of an adoptee. But she was not given admission and hence this writ petition before the A.P. High Court. *Id.* at pp. 211-212.

The Court, while examining the constitutional purpose of reservation<sup>67</sup> and the role of courts in their constructive role,<sup>68</sup> went far ahead of *Khazan Singh*<sup>69</sup> and held that the purpose of adoption under Section 12 of the Hindu Adoption and Maintenance Act, 1956 was personal to the adoptee and was distinct and apart from the Constitutional Scheme under Articles 14, 15(4) and 16(4). The Court speaking through Justice K. Ramaswamy held :

"The purpose of S. 12 is that he or she becomes completely a member of the adoptive family "for all purposes" be it for religious or secular purpose, but "for the purpose of the Constitution", under Articles 14, 15 (4) and 16 (4), the adopted child must satisfy not only that he or she belongs to the particular homogeneous group or class or tribe but also must become a member of the homogeneous group or class or tribe, also had suffered or subjected to all the disadvantages or handicaps which the

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67. The Court said: "When the adoption is set up as a means or source to take advantage of Article 15 (4), the paramount purpose of the Constitution being to advance the educational and economic interest of the Backward Class of citizens or the Dalits, to assimilate them in the main stream of the society..., the motive for such an adoption is absolutely a relevant factor and the court would pierce through the document and find the purpose for such an adoption." *Id.* at p. 220.

68. The Court said: "... we would always keep in mind the constitutional march of making India a secular casteless and classless state and enough leeway would be allowed for free mobility and interaction of all sections of society into an integrated class. But we should also keep in mind the constitutional goals set out. By adopting purposive construction we would reconcile the right of an individual as against the society and the society's right." *Id.* at p. 223.

69. *Supra* n.56.



members of the homogeneous group, class or tribe, are subjected to or have undergone or is undergoing".<sup>70</sup>

The Court further held that in that context, recognition of such a person by the caste or community was a relevant factor. The Court rightly pointed out that in *Khazan Singh* the Delhi High Court did not consider the impact of adoption on the constitutional provisions of reservation.<sup>71</sup>

The Court illustrated a situation where a child belonging to a Brahmin is given and taken in adoption to a shepherd family at a young age and the child is brought up in the adoptive family, the child is getting opportunity to assimilate himself/herself as a member of such group imbibing all the traits of the group or undergoing sufferings or subjected to all disadvantages or handicaps ignominy which the members of the homogeneous group are subjected to. In those circumstances, such a child might be considered to be a member of the adopted group though had the birth in Brahmin caste.<sup>72</sup> But in the present case the situation is diametrically opposite and she cannot claim the benefit of reservation since she did not assimilate herself to be a member of the homogeneous Backward class group nor she suffered any handicaps or ignominy.<sup>73</sup>

The Andhra Pradesh High Court in this case rightly came to the conclusion that backwardness can be acquired in the above stated circumstances. But if a person

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70. *Id.* at p.224.

71. *Ibid.*

72. *Id.* at p.223.

73. *Id.* at p.225.

having very advantageous start in life and suffered no disabilities or unfavourable situations of backward class group would not be entitled to claim the benefit of reservation.

(iii) *The Supreme Court's Decision*

Though the issue before the Supreme Court in *Valsamma Paul*<sup>74</sup> was the effect of marriage on backwardness, the Court treated the whole issues of marriage, conversion, adoption and their impact on backwardness and settled the law.<sup>75</sup> The Court adopted the very same approach of the Andhra Pradesh High Court in *Sailaja's* case and held that *Khazan Singh's* case was not correctly decided.<sup>76</sup>

### III. CONVERSION

India is a secular State and it treats all religions equally without any discrimination or bias towards a particular religion. Religious freedom has been guaranteed under Articles 25 to 28<sup>77</sup> of the Constitution and thereby each person has the freedom to practice, profess and propagate religion subject to public order, morality

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74. *Supra* n.49.

75. *Supra*, nn.50-55.

76. Justice K. Ramaswamy of the Supreme Court, in *Valsamma Paul's* case, was the judge in *Sailaja's* case of the Andhra Pradesh High Court.

77. Constitution of India, Article 25 guarantees the freedom of conscience and the right freely to profess, practice and propagate religion. Article 26 guarantees the right to establish and maintain religious institutions and to manage religious affairs. Article 27 prohibits the levying of taxes for promotion of any particular religion. Article 28 prohibits compulsory attendance at religious instruction or religious worship in educational institutions.

and health.<sup>78</sup> Secularism has become a part of the basic structure of the Constitution.<sup>79</sup> In the exercise of religious freedom one can change his or her ideology and philosophy of a religion and easily go away from one religion and enter into another religion. When one exercises his religious freedom to convert from one religion to another, his social status i.e., his caste apart from his religious identity, becomes an issue for entitling the constitutional benefits of reservation which are also guaranteed under the Constitution.

The modern Indian society, especially the Hindu caste system, evolved from the Varna system and thereby castes had been classified on the basis of occupation. After the invasion of the Mughals and British rule in India, Islam and Christianity also began to spread in India. Here the question is this : If a person who is born in Hindu religion converts to another religion,<sup>80</sup> especially Christianity, what is his social status for the purpose of allowing him to get the State's protective discrimination advantages i.e., reservation in employment and educational admissions and other welfare measures.

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78. *Id.*, Article 25.

79. *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.

80. Muslims were considered as backward class people even before independence and it had been accepted by the Constituent Assembly members. For details, see *supra* Ch. II. But after independence, there was mass conversion from Hindus to Christianity especially from Hindu Dalits to get away from the social exploitation of caste Hindus. But even after conversion the stigma is prevailing. See *supra* Ch. IV.

(i) *Earlier View of the Supreme Court : Punjab Rao's Case*

The definition of 'Hindu' under explanation II to Article 25 (2) of the Constitution of India includes persons professing the Sikh, Buddhist and Jaina religion.<sup>81</sup> Prior to the Janatha Government notification in 1990 to include Neo-Buddhist<sup>82</sup> (Scheduled Caste converts to Buddhism) to get reservation, they were not treated as Scheduled Castes. In *Punjab Rao v. D.P. Meshram*<sup>83</sup>, the effect of conversion to Buddhism had come before the Supreme Court. The respondent, a Buddhist convert won in the election from the constituency reserved for Scheduled Caste and his election was challenged by the petitioner on the ground that after the conversion, the respondent ceased to be a Hindu. The Court accepted the contention of the petitioner and held :

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81. Similar definition is given in Hindu Marriage Act 1955 S.2.

82. The Constitution (Scheduled Castes) Order 1950 imposed a religious qualification for qualifying as the recipients of the benefits of the order. Paragraph 3 of the order states: "No person who profess a religion different from Hinduism shall be deemed to be a member of the Scheduled Castes". In 1956 the Sikhs were included within the purview of the order. In 1990 Buddhists were also included. See the Constitution (Scheduled Castes Orders) Amendment Act, 1956 and the Constitution (Scheduled Caste Orders) Amendment Act, 1990. For text of the latter, see 1990 *Current Indian Statutes*, Part II A, p. 16.

83. A.I.R. 1965 S.C. 1179.

"...if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether conversion to another religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion. Where, therefore, a person says, on the contrary that he has ceased to be a Hindu he cannot derive any benefit from that Order".<sup>84</sup>

In the public declaration, it is a mere voluntary declaratory information to the public that he ceased to be a Hindu. But the social identity has to be ascertained whether such a declaration created a special elevated status from his early part of his life when he was a Hindu. If there is no elevation of status in the society, mere individual declaration will not positively improve a person's social status. Hence, instead of probing whether there is any public declaration or not the court should have examined the impact of the declaration as to whether there was any progressive change of the person's position in the social life.

(ii) *Towards A New path : Arumugham's and Mohan Rao's Cases*

The impact of conversion and reconversion has been analysed by the Supreme Court in *C.M. Arumugham v. S. Rajagopal*.<sup>85</sup> The question in this case was : If a

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84. *Id.* at p.1184.

85. (1976) 1 S.C.C. 863.

Scheduled Caste person converts from Hinduism to Christianity and later reconverts to Hinduism, can he become a Hindu ? The respondent by birth belonged to Hindu Scheduled Caste and converted to Christianity and again he reconverted to Hinduism. He contested in a reserved constituency and won in the election and his election was challenged by the appellant and it was contended that he ceased to be a Hindu by conversion and he cannot become a Hindu by reconversion.<sup>86</sup> A three judge Bench of the Supreme Court rejected the contention of the appellant and held that the respondent belonged to a Scheduled Caste Hindu.

The Court examined the significance of caste and its ties with religion in the historical context of Indian society and pointed out that the general rule that the convert ceased to have any caste had no relevance in certain situations where there were instances of one caste professing not only Hindu religion but also other religion. This might happen where caste was based on occupational characteristic and not on religious identity or the cohesion of the caste as a social group was so strong that conversion into another religion did not operate to snap the bond between the convert and the social group.<sup>87</sup>

The Court speaking through Justice P.N. Bhagwati, proceeded to add :

"This is indeed not an infrequent phenomenon in South India where, in some of the castes, even after conversion to Christianity, a person is regarded as continuing to belong to the caste".<sup>88</sup>

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86. In an earlier case before the Supreme Court, *S. Rajagopal v. C.M. Arumugham*, A.I.R. 1969 S.C. 101.

87. *Supra*, n. 85 at p.872.

88. *Ibid*

After analysing the case law on this point, the Court further pointed out that the consistent view taken in this country since 1886 was that on reconversion to Hinduism a person could once again become a member of the caste in which he was born and to which he belongs before conversion to another religion, if the members of the caste accept him as a member. The Court observed that there was no reason, either on principle or on authority, which should compel it to disregard this view which has prevailed for almost a century and lay down a different rule on the subject. The Court evaluated the evidence<sup>89</sup> adduced by the respondent that he was accepted by the members of his community and held that on reconversion to Hinduism he could once again revert to his Adi Dravida caste, for he was accepted by the other members of the Caste.<sup>90</sup> The Court rightly assessed the impact of conversion and reconversion on the eligibility of constitutional benefits of reservation in the following words :

"Once such a person ceases to be a Hindu and becomes a Christian, the social and economic disabilities arising because of Hindu religion cease and hence it is no longer necessary to give him protection and for this reason he is deemed not to belong to a Scheduled Caste. But when he is

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89. The Court said: "The first respondent ... in the present case, led considerable oral as well as documentary evidence tending to show that ... the first respondent had been accepted as a member of the Adi Dravida caste. The High Court referred to twelve circumstances from the evidence and held on the basis of these twelve circumstances, that the Adi Dravida caste had accepted the first respondent as its member and he accordingly belonged to the Adi Dravida caste at the material time." *Id.* at p.878.

90. *Id.* p.877.

reconverted to Hinduism, the social and economic disabilities once again revive and become attached to him because these are disabilities inflicted by Hinduism."<sup>91</sup>

The issue of conversion - reconversion was again brought to a five judge Constitution Bench of the Supreme Court in *Principal, Guntur Medical College, Guntur, v. Y. Mohan Rao*.<sup>92</sup> The question in this case which added another dimension to the issue was : whether a person whose parents belonged to a Scheduled Caste before their conversion to Christianity can, on conversion or reconversion to Hinduism, be regarded as a member of the Scheduled Caste so as to be eligible for the benefit of reservation of seats for Scheduled Castes in the matter of an admission to a medical college.

In this case the parents of the respondent originally professed Hindu religion and belonged to Scheduled Caste (Madiga) in the State of Andhra Pradesh. They were both converted to Christianity before the respondent's birth. The respondent applied for a seat in medical college under Scheduled Caste quota, but his claim was rejected and against that denial he approached the High Court and the High Court ordered in favour of his claim and against that the appellant preferred this appeal to

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91. *Ibid.* The Court thus illustrated: A Mahar or Koli or a Mala would not be recognised as anything but a Mahar or a Koli or a Mala after conversion to Hinduism and he would suffer from the same social and economic disabilities from which he suffered before he was converted to another religion.

92. [1976] 3 S.C.R. 1046. The Bench consisted of A.N. Ray, C.J., P.N. Bhagwati, A.C. Gupta, S. Murtaza Fazal Ali and Jaswanth Singh, JJ. The judgement was handed down by Justice P.N. Bhagwati.



the Supreme Court. The Court formulated the issue thus : could the respondent become a member of Madiga Caste on conversion to Hinduism ?<sup>93</sup> It is significant to note that in this case the respondent was not a Hindu Scheduled Caste by birth but born from parents who were Christian converts of Scheduled Caste. Therefore, the question can be put in another fashion. Is it necessary that a person claiming Scheduled Caste status must be a Hindu by birth ?

The Court examined the Constitution (Scheduled Castes) Order 1950<sup>94</sup> and pointed out that by reason of paragraph (3) of the Order, a person belonging to Madiga caste would not be deemed to be a member of Scheduled Caste unless he professes Hindu or Sikh religion at the relevant time.<sup>95</sup> The Court speaking through Justice P.N. Bhagwati held :

"It is not necessary that he should have been born a Hindu or a Sikh. The only thing required is that, he should at the material time be professing Hindu or Sikh religion".<sup>96</sup>

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93. *Id.* at p.1050.

94. Relevant portion of the Order reads as follows: "2. Subject to the provisions of this Order, the castes, races or tribes or parts of or groups with in caste or tribes specified in Part I to XIII of the Schedule to this order shall, in relation to State to which these parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them in those parts of that schedule. 3. Notwithstanding anything contained in paragraph 2, no person who profess a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste".

95. *Ibid.*

96. *Supra* n. 92 at p. 1049.

Therefore, the requirement that a candidate in order to be eligible for a reserved seat should be a member of Scheduled Caste (Hindu) by birth went beyond the provision of paragraph (3) of the Constitution (Scheduled Caste) Order 1950 and was held void. The Court analysed the precedents in this area especially the *C.M. Arumugham*<sup>97</sup> and said :

"The reasoning on which this decision (*Arumugham*) proceeded is equally applicable in a case where the parents of a person are converted from Hinduism to Christianity and he is born after their conversion and on his subsequently embracing Hinduism, the members of the caste to which the parents belonged prior to their conversion accept him as a member within that fold".<sup>98</sup>

The Court therefore rightly concluded that on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he would become such member, if the other members of the caste accept him as a member and admit him within the fold.<sup>99</sup>

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97. *Supra* n. 85.

98. *Supra* n. 92 at p. 1051.

99. *Ibid.* Regarding the role of community's recognition, the Court said : "It is for the members of the caste to decide whether or not to admit a person within the caste. Since the caste is a social combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide, admit a new member just as it may expel an existing member. The only requirement for admission of the person as a member of the caste is the acceptance of the person by the other members of the caste..." *Ibid.*

(iii) *Kerala High Court's Approaches*

(a) *Following the Supreme Court's Decision by a Division Bench*

The decisions in *Arumugham*<sup>100</sup> and *Mohan Rao*<sup>101</sup> show that the position is crystal clear that a person can become a Scheduled Caste after conversion or reconversion from Hinduism if the members of the community accept him or her. It seems that this privilege is limited only to Scheduled Castes and not to Other Backward Classes. The approval of the community is a decisive factor in this aspect. Court usually examines the evidences leading to such acceptance. A befitting example of this judicial approach is the case that came before a Division Bench of the Kerala High Court in *J. Das v. State of Kerala*.<sup>102</sup>

In this case the petitioner by birth belonged of Paraya Christian community and his grand fathers belonged to Hindu Paraya community. After his graduation, he reconverted from Christianity to Hinduism and applied a seat for MBBS in the Scheduled Caste quota. His application was rejected on the ground that he did not belong to Scheduled Caste. He moved the High Court for a declaratory order in this behalf. He argued that he followed the guidelines issued by the Government<sup>103</sup> in

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100. *Supra* n. 85.

101. *Supra* n. 92.

102. A.I.R. 1981 Ker. 164.

103. Relevant portion of the Government Order reads : "Cases of conversion and reconversion :- In the case of descendent of Scheduled Caste convert the mere facts of conversion to Hinduism and Sikhism will not be sufficient to entitle him to be regarded as a member of the Scheduled Caste to which his forefathers belonged. It will have to be

*(f.n. contd. on next page)*

*(f.n.103 contd.)*

established that such a convert has been accepted by the members of the caste claimed as one among themselves and thus become a member of that caste". *Id.* p. 166. The Government Order was made in compliance with the Supreme Court decisions.

cases of conversion and reconversion to Hinduism and thereby he was accepted by his community as a member of his caste. By relying on Arumugham<sup>104</sup> and Mohan Rao<sup>105</sup> the Court examined the evidence adduced by the petitioner as to whether he could sufficiently establish that he was accepted by the members of his caste. Answering in the negative, the Court, speaking through Justice V. Khalid, said :

"The petitioner and his father are born Christians. The evidence in the case is far from satisfactory to show that the members of his caste have accepted him as one among them. It is stated in the counter-affidavit filed by the State that the other members of the petitioner's family are still continuing as Christians."<sup>106</sup>

The Court proceeded to add :

"Merely by taking a membership in the All Kerala Hindu Sambhava Mahasabha or by becoming a share holder of the Kerala Scheduled Caste and Scheduled Tribes' Welfare Trust, the petitioner cannot claim that he has been accepted as a member of the Scheduled castes by the members of that community".<sup>107</sup>

The Court categorically stated that the petitioner had to submit far more acceptable evidence in order to be entitled to the benefit of the Government Order in that behalf.

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104. *Supra* n. 85.

105. *Supra* n. 92.

106. *Supra* n. 102 at p. 168.

107. *Ibid.*

The observations of the Supreme Court and the High Court clearly reveal that the mere act of conversion or reconversion to Hinduism is not a sufficient factor for obtaining the reservation benefits, but the person has to get the real acceptance of the member of the caste group. That requires much time to get assimilated within the group so as to become one member among themselves. In other words, the acquisition of a new social status through conversion should not be nominal and unilateral act, but should be real and bonafide bearing the stamp of acceptance by the community. Assimilation into the folk making the convert or reconvert to undergo the very same social handicaps or sufferings which other members of the group are subjected to should be a necessary concomitant of such act. That is the reason why the theory of acceptance by the same community is considered as the prime factor in conferring the benefits of reservation to the converts or reconverts to Hindu Scheduled Caste.

(b) *A Per incurium decision of the Single Bench : Chinnamma's case*

However, an odd decision rendered by a Single Bench of the Kerala High Court in 1989 on the issue of conversion to Hinduism created an anomalous situation in the existing law. It was in *Chinnamma v. Secretary to Government*.<sup>108</sup>

In this case, the petitioner by birth belonged to Pulaya Christian converted to Hinduism and got a provisional appointment in Kerala Government Service. She approached the High Court for getting regularised her appointment on the basis of

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108. 1990 (i) K.L.T. 62.

Government Order<sup>109</sup> that gave service protection to Scheduled Caste-Scheduled Tribe appointees who were in service in a particular year. The question before the Court was whether a person can become a Scheduled Caste by conversion from Christianity. The above analysed decisions of the Supreme Court in *Arumugham*<sup>110</sup> and *Mohan Rao*<sup>111</sup> and even the Kerala High Court's decision in *J. Das*<sup>112</sup> were not brought to the notice of the Court by the counsel for the petitioner. The Court, therefore, held that a Christian by conversion into Hinduism would not become a member of the Scheduled Caste. The Court speaking through Justice Sreedharan said :

"...she is a Christian by birth. Christianity does not recognise caste discrimination. There are no Scheduled Caste among the Christians. Hence the petitioner's claim that she was a Pulaya Christian is a misnomer. She a born Christian adopted Hinduism by undergoing Suddhikarma under the auspices of Araya Samaj. A Christian by conversion into Hinduism will not become a member of the Scheduled Caste Community. So the conversion into Hinduism (*Sic.* does)not confer on the petitioner the status of a member of Scheduled Caste. Hence the claim put forward by

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109. By G.O. (P)372/85/GAD dated 6.9.1985, the Government ordered retention in service of employees belonging to Scheduled Castes and Scheduled Tribes communities appointed under R. 9 (a) (i) of the General Rules and who were in service as on 2.8.1984.

110. *Supra* n. 85.

111. *Supra* n. 82.

112. *Supra* n. 102.

the petitioner as a member of the Scheduled Caste Community is unsustainable".<sup>113</sup>

The Court was unaware of the case law when it said :

"I am at a loss to understand how and under what process of law a Christian who has adopted Hinduism can describe himself as a Pulaya Hindu (Scheduled Caste). No provision of law or authoritative writing has been placed before me to substantiate the petitioner's contention that a Christian on conversion can claim to be a Pulaya Hindu and get all the benefits due to the members of a Scheduled Caste community".<sup>114</sup>

Way back, the legal status of converted and reconverted persons to Hinduism had been settled by the judicial decisions. That is, by conversion or reconversion a person can acquire the Hindu Scheduled Caste by his or her community's acceptance as one among them. However in the instant case Justice Sreedharan observed that no law was placed before him to support the argument of the petitioner. The opinion of Justice Sreedharan resulted in suppressing the legitimate claim of the petitioner. The Court failed to follow the earlier judicial decisions especially the earlier Kerala High Court's decision which was rendered by a Division Bench. This decision, thus, has become *per incurium*<sup>115</sup> and thereby a bad law.

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113. *Supra* n. 108 at p. 63.

114. *Ibid.*

115. *Per incuriam* means when a judge decides a case disregarding or unnoticing the earlier judicial decisions which are binding as law relating on that aspect, then such a decision is considered as a *per incuriam* and in the eye of the law it has no binding force and considered as a bad law. Rupert Cross, *Precedent in English Law* Clarendon Press, Oxford(1991), p.109.



(c) *Per Incurium Followed by Another Single Bench : Chandramohan's Case*

The Kerala High Court once again fell into the very same error by following *Chinnamma*.<sup>116</sup> It was in *Chandramohan v. S.I. of Police*,<sup>117</sup> the Single Bench of the High Court was confronted with a similar issue. In this case, a girl, born of Scheduled Tribe (Mala Arayan) Christian parents, was a victim of an alleged offence of outraging her modesty committed by the petitioner. Police took offence also under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989<sup>118</sup> on the basis that the girl belonged to Scheduled Tribe. The question before the Court was whether the girl born of Christian parents was Scheduled Tribe or not so as to attract the provisions of the Atrocities Act. The Court speaking through Justice P.V. Narayanan Nambiar followed the *Chinnamma* decision and that the victim in this case could not be treated as a member of Scheduled Caste or Scheduled Tribe in view of the fact that she was born to parents belonging to Christianity.<sup>119</sup> This case also became *per incurium*.

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116. *Supra* n. 108

117. 1996 (1) K.L.T. 766.

118. S. 3 (1) (xi) of the Act.

119. The Court said : "This Court had occasion to consider a question similar in nature in *Chinnamma v. Secretary to Government* (1990) (1) K.L.T. 62). In that case the petitioner, who was a member of the Scheduled Caste, was converted into Christianity and later she gave it up and came back to Hinduism. She contended that she is entitled to the benefits of Scheduled Castes as if she is a Pulaya Christian. This Court declined the same on the ground that Christianity does not recognise Scheduled Castes/Scheduled Tribes. This Court further said that there can not be Scheduled Caste Christians or Scheduled Tribe Christians". *Supra* n. 117 at pp. 768-769.

The overall assessment of the cases relating to conversion and reconversion reveal that a person can be treated as acquiring the status of Scheduled Caste if he converts or reconverts to Hinduism from other religion subject to the condition of acceptance of the community to which he rejoins. The rider of acceptance of the caste-group aims at preventing the misuse or abuse of this provision and it at the same time opens a choice of the convert to come back and join his folks, i.e., to undertake and undergo the very same sufferings or handicaps or social stigmas which others of the groups do have to face. The acceptance, thus, requires its own course of time.

#### IV. MIGRATION

India is a federal country with single citizenship and guaranteed fundamental rights to every citizen. Freedom of movement<sup>120</sup> and reside and settle<sup>121</sup> any part of the territory of India are of paramount significance. The Universal Declaration of Human Rights 1948 also guarantees the right to freedom of movement.<sup>122</sup> The right to freedom of movement had been very widely interpreted by the Supreme Court of India so as to avail the right not only in India but outside also.<sup>123</sup>

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120. Constitution of India, Article 19 (1) (d).

121. *Id.* Article 19 (1) (e).

122. Article 13 reads : "1) Everyone has the right to freedom of movement and residence within the borders of each State 2) Everyone has the right to leave any Country, including his won, and to return to his Country ...."

123. *Satwant Singh v. A.P.O., New Delhi*, A.I.R. 1967 S.C. 1836; *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

Under Article<sup>124</sup> 12 of the Constitution, the State Government includes not only Central Government but also State Governments and the State Government is empowered to enact legislation regarding the matters of employment<sup>125</sup> and education<sup>126</sup>. In India two sets of Governmental institutions are functioning i.e., Central as well as the State institutions. When a Scheduled Caste citizen seeks reservation benefit from Central Government institutions, irrespective of his or her home and migrant state, he/she is entitled to reservation. The Central Government adopted 15% and 7.5% reservation for Scheduled Castes and Scheduled Tribes respectively based on their proportion to the population in India. But based upon the peculiar circumstances prevailed in States, the States are empowered to fix percentage of reservation to Scheduled Castes and Scheduled Tribes on their proportion to the population in those States. For instance, in State of Kerala the reservation is 8% for Scheduled Castes and 2% for Scheduled Tribes.<sup>127</sup> Here the question is : if a reserved category person migrates from one state to another will he/she get the benefits in the migrant state ? Can the candidate of original and migrant states be treated equally without any discrimination in the migrant state ? Can the migrant candidate be allowed to enjoy reservation benefits in the absence of any candidate who belonged to that particular state ?

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124. Article 12 reads : "In this part, unless the context otherwise requires, "the state" includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India."

125. The Constitution of India, 7th Schedule, List III, Entry 23.

126. *Id.*, Entry 25

127. Kerala State and Subordinate Services Rules 1958, R 14(a).

The above issues are to be analysed with the idea of national integration and getting employment from any part of India. A person born in South India may get employment in North India or vice versa, in such circumstances can a person who permanently settled or settled for life in a particular region be denied the benefit where he settled by his migration ? All the above issues are analysed by the Supreme Court and High Courts and reached a conclusion that a person is not entitled to get reservation benefits.

(i) *The Circular of 1985*

The Government of India issued a Circular in 1985 which states :

"It is also clarified that a Scheduled Caste/Tribe person who has migrated from the State of origin to some other State for the purpose of seeking education, employment etc, will be deemed to be a Scheduled Caste/Tribe of the State of his origin and will be entitled to derive benefits from the State of origin and not from the State to which he has migrated".<sup>128</sup>

The above Circular of the Central Government strictly restricts a migrant person's right to get benefits from the migrant state. On this issue, the migrant's right to get reservation benefit was agitated before the Supreme Court in *Marri Chandra Shekhara Rao v. Dean, S.G.S. Medical College*.<sup>129</sup>

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128. The Circular dated February 22, 1985 issued by the Ministry of Home Affairs.

129. (1990) 3 S.C.C. 131.

(ii) *Marri Chandra's Case : A Decision of the Constitution Bench*

In this case, the petitioner and his parents belonged to an Andhra Pradesh Scheduled Tribe and the petitioner's father joined Public Sector Undertaking in Maharashtra and since his 9th age the petitioner started living in Maharashtra with his parents and in 1989 he passed the higher secondary education from Bombay and applied for MBBS seat in the Medical Colleges of Maharashtra. Candidates of Scheduled Tribes from that State who scored less marks than himself had been admitted. The petitioner was denied admission based upon the above referred circular of the Home Ministry. The petitioner challenged the denial of his admission before the Supreme Court. The Court examined the issue as to whether one who is recognised as a Scheduled Tribe in the State of his origin continues to have the benefits of reservation. In other words, what is the scope and extent of the right of the migrant citizen of Scheduled Caste or Scheduled Tribe ? Can he/she enjoy the fundamental rights like freedom of movement and reside and settle any part of the territory of India together with his right to reservation ?

The Court examined the proper meaning of the expressions "for the purposes of this Constitution" and "in relation to the State" appearing in Articles 341 and 342 of the Constitution.<sup>130</sup> The Court also referred to the then existing cleavage of

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130. Articles 341 and 342 provide for the specification by the President of India of the Scheduled Caste and Scheduled Tribes for the State or Union Territory or part of a State, which shall, for the purpose of this Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to that State or Union Territory as the case may be. Once a notification is issued by the President, only Parliament is empowered to amend the notification.

opinions of various High Courts with regard to the interpretation of the above expressions.<sup>131</sup>

The Court adopted a harmonious construction in the sense that both parts of the constitutional provision should be so read that one part does not become nugatory to the other and held :

"...when a Scheduled Caste or Tribe migrates, there is no inhibition in migrating but when he migrates, he does not and cannot carry any special rights or privileges attributed to him or granted to him in original state specified for that state or area or part thereof. If that right is not given in the migrated state it does not interfere with his constitutional right of equality or of migration or of carrying on his trade, business or profession. Neither Articles 14, 16, 19 nor Article 21 is denuded by migration but he must enjoy those rights in accordance with the law if they are otherwise followed in the place where he migrates".<sup>132</sup>

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131. The High Court of Gujarat took the view that the phrase "for the purpose of the Constitution" could not be and should not be made subservient to the phrase "in relation to the State" and therefore held that a caste or tribe in a State would entitle to all the benefits, privileges and protections under the Constitution of India. See *Kum. Manju Singh v. Dean, B.J. Medical College*, A.I.R. 1986 Guj. 175; *Ghanshyam Kisan Borikar v. L.D. Engineering College*, A.I.R. 1987 Guj. 83. A similar view was taken by Karnataka High Court in *P.M. Muni Reddy v. Karnataka P.S.C.* 1981 Lab. I.C. 1345 (Kant). Contrary view was taken by Orissa High Court in *K. Appa Rao v. Director of Posts & Telegraphs, Orissa*, A.I.R. 1969 Ori. 220 and Bombay High Court in *M.S. Malathy v. Commissioner, Nagpur*, A.I.R. 1989 Bom. 138

132. *Supra n. 129 at p. 143*. It was contended that the only way in which the fundamental rights of the petitioner under Articles 14, 19 (1), 19 (1) (e) and 19 (1) (g) could be given effect to is by construing Article 342 in a manner by which member of a Scheduled Tribe  
(f.n. contd. on next page)

*(f.n. 132 contd.)*

gets the benefit of that status for the purposes of the Constitution throughout the territory of India. *Ibid.* The Court held that the expression "in relation to that State" would become nugatory if in all states the special privileges or the right granted to SCs or STs are carried forward. *Ibid.*

The Court reasoned that in Andhra Pradesh, a Scheduled Caste or a Scheduled Tribe might require protection because a boy or a child grew in that area was inhibited or was at disadvantage, but in Maharashtra that caste or that tribe might not be so inhibited and protection was only necessary for the disadvantaged ones.<sup>133</sup> Moreover such reservation would deprive the percentage to the member of that caste or tribe in Maharashtra who would be entitled to protection.

The opinion of the Court, it seems, ultimately discourages the movement of persons from one State to another and integrating with people of different parts of India. However, based on the peculiar situations prevailing in a State for the adequacy of protection to a particular section, the court is absolutely right. But this type of interpretation will discourage citizens to get good employment opportunities in States other than his home State.

If the migration is effected due to the involuntary transfer of guardians, what will be the fate of Scheduled Castes and Scheduled Tribes ? In such situations, the Court rightly canvassed the need for a suitable legislation to protect the rights of the migrants without affecting prejudicially the rights of Scheduled Caste and Tribe persons in those States or areas.<sup>134</sup>

(iii) *Action Committee's Case : Another Constitution Bench*

The question of right to reservation of migratory Scheduled caste and Scheduled Tribe citizens was once again agitated before a Constitution Bench of the

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133. *Id.* at p. 144.

134. *Id.* at p. 147.



Supreme Court in *Action Committee On Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra v. Union of India*.<sup>135</sup>

In this public interest petition, the denial of the right to reservation of migrant persons was challenged before the court and the court reformulated the issue in the following manner : Where a person belonging to a caste or tribe in State A migrates to State B where his caste or tribe is specified, will that person be entitled to claim the privileges and benefits admissible to persons belonging to Scheduled Castes and Scheduled Tribes in State B ?

Endorsing the view of *Marri Chandra's* case,<sup>136</sup> the Court rejected the contrary but novel approach of the Bombay High Court.<sup>137</sup> The Court thus reiterated :

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135. (1994) 5 S.C.C. 244.

136. *Supra* n. 129.

137. The Bombay High Court analysed the nature of the power under clause (2) of Article 342. For instance in *Rajesh Arjunbhai v. State of Maharashtra*, A.I.R. 1990 Bom. 114, where the petitioner's parents migrated from Gujarat to Bombay and he was brought up in Bombay. His tribal caste was recognised both in Gujarat and Maharashtra. He challenged his denial of right to reservation. The Court viewed that the power to include or exclude from the enumeration of Scheduled Tribes under the Order of 1950 vested only in Parliament and this power could not be encroached upon by the State Government in the guise of administrative instructions which was an usurpation of power contrary to Article 342 (2). *Id.* at p. 119. For similar observations, see *Bhiwaji Eknath Kawle v. State of Maharashtra* W.P.No. 1572 of 1980 decided on 3.2.1982; *Rajesh Khusalbhai Patel v. State of Maharashtra*, W.P.No. 2499 of 1983, decided on 19.9.1984; *Kannaya Devjibhai Borisa v. State of Maharashtra*, A.I.R. 1990 Bomb. 394. *Supra*, n. 135 at p. 253.

"...the concept of backwardness in Articles 15 and 16 is a relative one or varying from area to area and region to region and hence it is not permissible to generalise any caste or any tribe as a Scheduled Caste or as a Scheduled Tribe for the whole of the country".<sup>138</sup>

Thus the Court viewed that a person belonging to a Scheduled Caste or a Scheduled Tribe in relation to a State would require necessary protection and benefits in that State to bring about equality but the social environment of the State to which he migrates may not be the same as in the State of his origin and therefore he cannot claim the benefits and privileges available to Scheduled Castes and Scheduled Tribes in the State to which he migrates.<sup>139</sup>

If there is no sufficient candidates from the reserved community for a particular reserved vacancy in educational institutions or employment, can the migrant persons be considered to that vacancy ?

Logically, it can be seen, instead of converting the unfilled vacancy as open, it can be given to a migrant person. But in this aspect, the Circular issued by the Central Government is silent. It says that a person is not entitled to get any benefit from the migrant State. Benefit can be in two stages, e.g., allowing a person to get an admission and in pursuance of that admission providing incentives to him as available to the candidate of the original state. The Circular of the Government totally negatives a migrant person to get benefit. Here instead of totally rejecting, the

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138. *Supra* n. 135 at p. 254.

139. *Ibid.*

State may allow a migrant person to avail of the educational admission to the reserved seats if no candidates are found in the migrant State, and he may be directed to get the monetary benefits from the original State. Though different state institutions are following the said practice, a clarificatory circular of its earlier one has to be issued by the Central Government.

(iv) *Pushpa Devi's case : Kerala High Court's decision*

A person from Tamil Nadu, whose caste has been included in the list of Scheduled Caste both in Tamil Nadu and Kerala, migrated to Kerala by marriage and sought the reservation benefits. It was in *N. Pushpa Devi v. Kerala Public Service Commission*,<sup>140</sup> her application for the post of Dairy Extension Officer was rejected by the Kerala Public Service Commission on the ground that as she was a migrant from Tamil Nadu was not eligible for reservation in Kerala. The Court examined the decisions of the Supreme Court in *Action Committee*<sup>141</sup> and *Dr. Pradeep Jain*<sup>142</sup> and said :

"...to confer the benefit on the petitioner would be a case of treating the two equals as unequal which is discriminatory. As far as one person who originally belongs to SC/ST in one State cannot derive the benefit in another State, petitioner is also not entitled to the benefit even though her community is included in the list of Scheduled Castes in the State of Kerala.

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140. 1996 (1) K.L.T. 56.

141. *Supra* n. 135.

142. *Dr. Pradeep Jain v. Union of India*, (1984) 3 S.C.C. 654.

She is entitled to the benefit of her community only in the State of Tamil Nadu, and not in the State of Kerala".<sup>143</sup>

The Kerala High Court's decision is consistent with the Supreme Court's decision. Though the caste of the petitioner has been recognised in both States, the essential issue considered by the Court was whether a migrant can get the benefit or not? The Court rightly decided that in the State's employment opportunities, the migrant need not be given reservation. Now it is crystal clear that the backwardness in one State need not amount to backwardness in another State and a particular State Government is obligated to protect its own backward class people and not the migrants of other States.

The preceding analysis of the case law with regard to the impact of marriage, adoption, conversion and migration reveals that the courts have proceeded from a vague to a more or less concrete principle starting from *Horo* to *Valsamma Paul*. The view expressed by Justice Ramaswamy lays down an acceptable principle of law. It added a new dimension by specifying that acceptance by the community is not the relevant factor in marriage, but the advantageous start in life of the individual. However, this view is not without defects. For, in many situations, especially in rural India, a woman, married to a man of backward caste would be subjected to the same disabilities and disadvantages as her in-laws, despite her advantageous start in life. In such cases denying the benefit to such individuals will not be fair and in accordance with the purpose of reservation.

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143. *Supra* n. 140 at p. 59.

## CHAPTER - IX

# ENFORCEABILITY OF EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

Many of the schemes of reservation adopted by the Central and State Governments had been subjected to judicial scrutiny ever since the commencement of the Constitution. As a result, protective discrimination attained a new jurisprudential dimension especially from the verdict of *N.M Thomas*.<sup>1</sup> Similarly, the positive and wide interpretation of the Supreme Court in *Maneka's case*<sup>2</sup> and its impact brought forth a new content and meaning to the fundamental rights as such and especially the right to life and personal liberty which now includes not only the procedural rights but also the substantive ones. Through the technique of judicial construction of the Constitution, many of the socio-economic rights provided in Part IV have been tailored into Part III of the Constitution and now the State is not only expected to see that a person's fundamental rights are not violated or infringed but also to effectively see that these rights are meaningfully enjoyed.

An analysis of the feasibility of enforcing the reservation principles like other rights guaranteed under Part III of the Constitution is undertaken in this Chapter from the premises of constitutional nature and judicial responses to Articles 15(4) and 16(4); Directive Principles of State Policy and the idea of justiciability; and the

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1. *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490.

2. *Maneka Gandhi v. Union of India* A.I.R. 1978 S.C. 597.

earlier and recent judicial trends in this aspect. The following questions are relevant in this context:

Is reservation in public employment an exclusive discretion of the State or an enforceable constitutional right? Do the directive principles impose a mandatory duty upon the State to implement the reservation for the backward classes in jobs? Can a reserved candidate seek the remedy of a writ of mandamus to compel the State to implement a scheme of reservation related to public employment or to fill the reserved vacancies? What are the judicial responses towards these questions?

### 1. *Nature of Articles 16 (4) and 15 (4) and Judicial Responses*

In general, Part III of the Constitution is characterised as the fundamental rights and when the State violates or infringes the fundamental right, the aggrieved person can move the Supreme Court or High Court to get an appropriate remedy. Equality is guaranteed in different articles and there is a substantial connection between Articles 14 and 16. In order to satisfy the first part of Article 14 i.e., the equality before law, Article 16 (1) is guaranteed and to satisfy the latter part, the equal protection of the laws, Article 16 (4)<sup>3</sup> is incorporated. Similarly, there is a substantial relation between Articles 14 and 15. The reservation for backward classes in admission to educational

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3. Constitution of India, Article 16 reads : *Equality of opportunity in matters of public employment*: 1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. ... 4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State".

institutions under Article 15(4)<sup>4</sup> was construed as a special provision of exceptional character in *Balaji's case*.<sup>5</sup> The reasoning of such an approach was justified by the Supreme Court in the following words :

"... it must not be ignored that the provision which is authorised to be made is a special provision, it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of society at large would be served by promoting the advancement of weaker elements in the society that Article 15 (4) authorises special provision to be made. But a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15 (4)".<sup>6</sup>

This observation shows that in weighing these conflicting interests, the Court gave predominance to the general rule of non-discrimination and subordinated the reservation provision for backward classes. Though *Balaji* was a case exactly related to Article 15(4) i.e., reservation in educational institutions, the Court extended its

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4. Constitution of India, Article 15 reads : *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth* — (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them... (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste and Scheduled Tribes."

5. *M.R. Balaji v. State of Mysore*, (1963) Supp. 1 S.C.R. 439.

6. *Id.* at p. 467.

findings to Article 16(4)<sup>7</sup>. The proximity between the two sub-clauses had been explained by the Court in the following words :

"Article 15 (4) like Article 16 (4) is an enabling provision. It does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to make suitable actions, if necessary".<sup>8</sup>

This mode of literal and restrictive interpretation of the provision of reservation was made without examining the proximity between the reservation principle and its importance in attaining the real equality guaranteed under the latter part of Article 14. However, the position of *Balaji* was later emphatically accepted by the majority in *Devadasan*<sup>9</sup> and Article 16(4) was re-emphasised as an exception when the Court said:

"A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under clause (4) of Article 16 would in effect efface the guarantee contained in clause (1) or at best make it illusory. No provision of the Constitution or of any enactment can be so construed as to destroy another provision contemporaneously enacted therein".<sup>10</sup>

The decision in *Balaji* and *Devadasan* brought out two propositions. Firstly, Article 16 (4) is only an exception and, secondly, it is only a discretion of the State

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7. See for detailed analysis of this aspect. *supra* Ch. IV.

8. *Supra* n. 5 at p. 468. Emphasis supplied.

9. *T. Devadasan v. Union of India*, [1964] 4 S.C.R. 680.

10. *Id.* at p. 695



to implement Article 16(4) when the State feels it necessary. If Article 16 (4) is only an exception, no doubt, the citizen cannot claim it as a matter of right. But if it is an explanation to Article 16(1), Article 16(4) will become a fundamental right and part and parcel of the principle of equality of opportunity.

The exception-explanation controversy was put to a thorough analysis by the Supreme Court in *State of Kerala v. N.M. Thomas*.<sup>11</sup> Justice Subba Rao's dissenting view in *Devadasan* was instrumental in taking such an appraisal. He, for the first time, searched for a jurisprudential foundation and its basis in protective discrimination policy. By construing the expression "nothing in this article" in clause (4) of Article 16 as a legislative device to express its intention in a most emphatic way, he observed that the power conferred thereunder was not limited in any way by the main provision but fell outside it.<sup>12</sup> He thus viewed that clause (4) of Article 16 'has not really carved out an exception, but has prescribed a power untrammelled by the other provisions of the Article'.<sup>13</sup> Asserting Article 16(4) as an explanation to Article 16(1) Justice Krishna Iyer in *Thomas* said :

"To my mind, this sub-article 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 the forward sections are ordinarily entitled to".<sup>14</sup>

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11. *Supra* n. 1.

12. *Supra* n. 9 at p. 700

13. *Ibid.*

14. *Supra* n. 1 at p. 535.

According to him, 'it might be loosely said that Article 16 (4) is an exception, but it was an illustration of constitutionally sanctified classification'. He further clarified thus:

"Public services have been a fascination for Indians even in British days, being a symbol of State power and so a special Article has been devoted to it. Article 16 (4) need not be a saving clause but put in due to the over anxiety of the draftsman to make matters clear beyond possibility of doubt".<sup>15</sup>

In a tone similar to Justice Krishna Iyer's, Justice Mathew too perceived clause (4) of Article 16 as an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upto the point of reservation. He said:

"If equality of opportunity guaranteed under Article 16 (1) means effective material equality, Article 16(4) is not an exception to Article 16 (1)".<sup>16</sup>

Justice Fazl Ali also observed that clause (4) of Article 16 could not be read in isolation but had to be read as part of Article 16 (1) and (2).<sup>17</sup>

Justice Krishna Iyer reiterated his position in *Soshit Sangh*<sup>18</sup> by holding that Articles 14 to 16 form a code by themselves and embody the distilled essence of the

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15. *Id.* at pp. 535 - 536

16. *Id.* at p. 519.

17. *Id.* at p. 552.

18. *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*, (1981) 1 S.C.C. 246.

Constitution's casteless and classless egalitarianism. According to him, Articles 15(4) and 16(4) had to be read together with Articles 15(1) and 16(1). 'The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination'.<sup>19</sup> After observing thus, Justice Krishna Iyer immediately jumped into the following conclusion:

"Article 16(4) imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16(1) or as an exception to it".<sup>20</sup>

This observation is a notable shift in emphasis. In another context he observed that clause (4) of Article 16 "is auxiliary" to "fair fulfilment" of Article 16 (1).<sup>21</sup> His reading that it is no matter even if clause (4) of Article 16 is taken as exception or amplification pushes him back to an ambivalent situation.<sup>22</sup> Does it mean that he is

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19. *Id.* at p. 270.

20. *Ibid.*

21. *Id.* at p. 263. Krishna Iyer, J. said : "Article 16 which guarantees equal opportunity for all citizens in matters of State service inherently implies equalisation as a process towards equality but also hastens to harmonise the realistic need to jack up 'depressed' classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes *Article 16 (4)* for this specific purpose ... *Article 16 (4)* is not a jarring note but auxiliary to fair fulfilment of *Article 16 (1)*". *Ibid.* Emphasis supplied.

22. Justice Krishna Iyer was quite reasonably anxious about the possibility of misusing the provision of reservation by vested interests for political ends. This is reflected in the following observation: "The success of State action under Article 16(4) consists in  
*(f.n. contd. on next page)*

*(f.n.22 contd.)*

the speed with which result oriented reservation withers away as no longer a need, not in the ever widening and everlasting operation of an exception. [Article 16 (4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its *raison d'etre*, to politicise this provision for communal support and party ends is to subvert the solemn undertaking of Article 16 (1), to casteify 'reservation' ... is to run a grave constitutional risk". *Id.* at p. 264.

trying to depart from his earlier position in *Thomas* ? No wonder, controversy emerged later in several cases that Justice Krishna Iyer made a retreat to the exception theory.<sup>23</sup>

It is significant to note that except Justice Krishna Iyer the other two judges including Justice Pathak, in his dissenting judgement, adopted the line of explanation theory. Justice Chinnappa Reddy unequivocally stated that preferential treatment was not a concession or privilege, but it was in recognition of their undoubted fundamental right to equality of opportunity.<sup>24</sup> He emphasised thus:

"Article 16 (4) is not in the nature of an exception to Article 16 (1). It is a facet of Article 16 (1) which fosters and furthers the idea of equality of opportunity with special reference to an underprivileged and deprived class of citizens to whom egalite de droit (formal or legal equality) is not egalite de fait (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between egalite de droit and egalite de fait".<sup>25</sup>

Similarly, Justice Pathak perceived clause (4) of Article 16 as one facet of equality and a part of the process of equalisation.<sup>26</sup> Thus, Justice Krishna Iyer's view

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23. E.g., *Chakradhar Paswan v. State of Bihar*, (1988) 2 S.C.C. 214.

24. *Supra* n. 18 at p. 315.

25. *Id.* at p. 310.

26. *Id.* at p. 303. Justice Pathak observed : "It is now well accepted that equality provisions of Part III of the Constitution constitute a single code, illustrating the multi-faceted character of the central concept of equality. Article 16 (4) also is one  
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is made insignificant by the other judges' views. In other words, Justice Krishna Iyer's view stands as the only one and dissenting voice among all the three judges in *Soshit*.

Justice Chinnappa Reddy, got yet another opportunity to tread on this aspect in *Vasanth Kumar*<sup>27</sup> where he equated the right to equality as a matter of human right and re-emphasised it as a part of constitutional right. His observation is worth-quoting in this context:

"... the claim of the Scheduled Castes and Scheduled Tribes and other backward classes to equality as a matter of human and constitutional right is forgotten and their rights are submerged in what is described as the 'preferential principle' or 'protective or compensatory discrimination', expressions borrowed from American jurisprudence. Unless we get rid of these superior, patronising and paternalist attitudes ... it is difficult to truly appreciate the problems involved in the claim of the Scheduled Castes, Scheduled Tribes and other backward classes for their legitimate share of the benefits arising out of their belonging to humanity and to a country whose constitution preaches justice, social, economic and political and equality of status and opportunity for all".<sup>28</sup>

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facet. It enables a backward class of citizens, by the process of reservation in Government Service, to move along with the road to ultimate equality with the more advanced classes. It is part of the process of equalisation". *Ibid*.

27. *K.C. Vasanth Kumar v. State of Karnataka*, A.I.R. 1985 S.C. 1495.

28. *Id.* at p. 1508.

Justice Chinnappa Reddy's observation that the right to reservation as a "human and constitutional right" is a significant milestone in the evolutionary path of equality of opportunity in public employment. This approach reveals that even in the absence of a special provision in the Constitution like that of Article 16(4), the State is bound to act positively on the principles of preambular objective of attaining justice, in removing the age old disabilities and the resultant inequalities of the backward class of citizens. He vehemently argued that the backward class of people needed aid, facility, launching and propulsion. Their needs were their demands and the demands were matters of right and not a philanthropy. 'They ask for parity and not charity'.<sup>29</sup> Thus the Court was very categorical in its holding by turning down the argument of 'enabling provision' and re-asserting the Article as a concomitant of equality of opportunity:

## 2. *Mandal Case Crystallised the 'Explanation - Right Theory*

The Supreme Court undertook a thorough enquiry into the exception- explanation controversy in *Mandal Case*.<sup>30</sup> After examining the case law in this regard, Justice Jeevan Reddy relied on the majority view in *Thomas* as the correct position and held that 'clause (4) of Article 16 is not an exception to clause (1) of Article 16, but it is an instance of classification implicit in and permitted by clause (1)'.<sup>31</sup>

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29. *Ibid.*

30. *Indra Sawhney v. Union of India*, 1992 S.C.C. (L. & S.) Supp. 1.

31. *Id.* at pp. 395-396.

Removing the doubt, he examined the inter relationship among clauses (1), (2) and (4) and held:

"... just as Article 16 (1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect is clause (4) an exception to clause (2), if 'class' does not mean 'caste'. Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit".<sup>32</sup>

Justice Jeevan Reddy's re-emphasis, in another context, on the need for a harmonious construction between clauses (1) and (4) of Article 16 is highly remarkable. He observed that 'clause (4) is a special provision though not an exception to clause (1) and both the provisions have to be harmonised keeping in mind the fact that both are but re-statements of the principle of equality enshrined in Article 14'.<sup>33</sup> Justice Sawant too, in his concurring judgement, viewed clause (4) of Article 16 as a specific class, carved out from various classes from whom reservation could be made,

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32. *Id.* at p. 396.

33. *Id.* at pp. 438-439.



which was in tune with the objective of Articles 14 and 16 (1).<sup>34</sup> Similarly Justice Pandian emphasised that clause (4) is neither an exception nor a proviso to clause (1) of Article 16 and it has an overriding effect on clauses (1) and (2) of Article 16".<sup>35</sup>

The above analysis of the *Mandal Case* reveals that the provision of reservation is crystallised and fortified, by the judicial approach in that case, as a fundamental right similar to that of equality of opportunity under clause (1) of Article 16 and

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34. *Id.* at p. 220. Justice Sawant observed : "Articles 14 and 16 (1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make the real equality guaranteed to them .... Thus, what was otherwise clear in clause (1) where the expression "equality of opportunity" is not used in a formal but in a positive sense, was made explicit in clause (4) so that there was no mistake in understanding either the real import of the "right to equality" enshrined in the Constitution or the intentions of the Constitution-framers in that behalf". *Ibid.*

35. *Id.* at p. 131. Even from the analysis of the dissenting opinions of Sahai, Kuldip Singh and Thommen, JJ., it can be seen that except Justice Thommen all others did not stick hard to the old theory of exception. According to Justice Sahai, clause (1) 'is enforceable but clause (4) is only an enabling provision. The former is mandatory and operates automatically, where as the latter comes into play on identification of backward classes of citizens and their inadequate representation'. *Id.* at pp. 284-285. However he held that both the clauses are directed towards achieving equality of opportunity in services under the State. One is broader in sweep and expansive in reach. Other is limited in approach and narrow in applicability. Former applies to 'all' citizens, where as latter is available to any class of backward citizens. Use of words 'all' in Article 16 (1) and 'any' in Article (4) read together indicate that they are part of the same scheme. *Id.* at p. 284 Justice Kuldip Singh endorsed the view of Justice Sahai and added that Article 16 (4) 'is another facet of Article 16 (1)'. *Id.* at p. 195. However, Justice Thommen viewed that 'clause (4) is an exception or a proviso to the general rule of equality'. *Id.* at p. 153.

as a facet of equality principle under Article 14. Thus, it is the settled position now that Article 16 (4) is an explanation of Article 16 (1) and the State's duty in this regard is not restricted or controlled by Article 16 (1). On the other hand, clause (1) is in conformity with the mandatory requirement of providing equality of opportunity to all citizens. Thus both are directed towards achieving equality of opportunity in public employment.

Once clause (4) is accepted as a facet of Article 16 (1) i.e., a fundamental right, the logical extension is that Article 16 (4) is also a fundamental right. Thus it can logically and reasonably be concluded that if the backward class candidates are not adequately represented in public employment i.e., there are sufficient number of unfilled vacancies and the State fails to fill up those vacancies, the backward class candidate can invoke, as a matter of constitutional right, the writ remedy available either under Article 32 or 226 of the Constitution.

### 3. *Directive Principles of State Policy and the Idea of Justiciability*

Apart from equality provisions, several Articles in Part IV of the Constitution i.e., Directive Principles of State Policy are intended for the State to adopt measures for removing inequalities and securing a just social order. These 'Instruments of Instructions'<sup>36</sup> were incorporated in the Constitution after a long debate. The

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36. Dr. B.R. Ambedkar used this expression. He said : "The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and to the Governors of the Colonies and to those of India by the British Government under the 1935 Act.... The only difference is that they (Directive Principles) are instructions to the Legislature and the Executive. Such a thing is to my mind to be welcomed. Wherever there is a grant of power in general terms for peace, order and good government, it is necessary that it should be accompanied by instruction regulating its  
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Constitutional history reveals that in the early stages of drafting, there was much confusion with regard to the classification of justiciable and nonjusticiable rights<sup>37</sup>. Some of the framers had the idea to bring the several socio-economic rights into the enforceable part i.e., Part III of the Constitution<sup>37a</sup>. But due to the soc

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exercise .... VII C.A.D. 41. Dr. Ambedkar's oft-quoted observation is relevant in this context: "But whoever captures power ... will have to respect these instruments of Instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles will possess will be realised better when the forces of right contrive to capture power". *Ibid*.

37. A division of fundamental rights into two categories - justiciable and nonjusticiable was recommended by the Sapru Committee as early as 1945. Durga Das Basu, *Commentary of the Constitution of India*, S.C. Sarkar & Sons P. Ltd., Calcutta, (5th edn - 1965), p. 311; K.C. Markandan, *Directive Principles in the Indian Constitution*, Allied Publishers P. Ltd., Bombay (1966), pp. 28-87; Granville Austin, *The Indian Constitution: Cornerstone of A Nation*, Clarendon Press, Oxford (1966), pp. 50-75; Paramjit S. Jaswal, *Directive Principles Jurisprudence and Socio-Economic Justice in India*, A.P.H. Pub. Corpn., New Delhi (1996), pp. 15-86; Sudesh Kumar Sharma, *Directive Principles and Fundamental Rights: Relationship and Policy Perspective*, Deep & Deep, New Delhi (1990), pp. 36-51.
- 37a. B.N. Rau, the Constitutional advisor of the Government of India, advocated for positive state action with regard to certain socio-economic rights e.g., right to work should be made enforceable for its guarantee. B. Siva Rao, *Framing of Indians Constitution : Select Documents* Vol. II (1966), p. 33; K.T. Shah vehemently argued, in the Constituent Assembly, that the directive principles should be made justiciable. His reasoning is more relevant today than ever before. He said : "I would like to invite the house to agree with me that the provisions contained in the chapter must be regarded as obligations of the State towards every citizen and vice versa. Every citizen should have the right to compel the State to enforce these obligations, by whatever means may be found practicable and effective, and conversely, the State also should have the right to see that every citizen fulfills his obligations to the State". VII C.A.D. 480.

economic conditions that prevailed at the time of framing the Constitution and for the purpose of obviating the administrative and other practical difficulties that might arise if the directives were to be enforced at the behest of citizens,<sup>38</sup> they incorporated the directives into the non-justiciable part with a solemn hope that within a short and reasonable time, the several benefits guaranteed in this part would be implemented. These directives are not mere "pious wishes" or "excellent window dressing without any stock behind".<sup>39</sup> They are the "essence of the Constitution".<sup>39a</sup> They are also fundamental in the governance of the country and not a mere option of the State but a bounden duty on its part to apply these principles in making law.<sup>40</sup>

Thus, the State is duty bound to extend its care to many a category of people such as working class, villagers, women, children, weaker sections and Scheduled Castes and Scheduled Tribes. Do they form part of responsibilities bestowed upon the State by this part of the Constitution? The present discussion of justiciability of reservation focusses on the following questions. What is, in general, the judicial

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38. K.P. Krishna Shetty, *Fundamental Rights and Socio-Economic Justice* (1969), p. 78.

39. This phraseology was used by K.T. Shah, See Sudesh Kumar Sharma, *supra* n. 37 at pp. 46-47.

39a. This expression was used by Pandit Thakur Das Bhargava, VII C.A.D. 277.

40. Constitution of India, Article 37. It reads as follows: "*Application of the principles contained in this part* — The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

approach towards the interpretation of directive principles ? Does the State have a duty to implement those directives? If so, has the beneficiary got a right to seek judicial remedy to compel the State to perform such an obligation?

During the early period of the commencement of the Constitution, the directive principles were treated as subsidiary to fundamental rights by the judiciary. For instance, in *State of Madras v. Champakam Dorairajan*<sup>41</sup>, the Supreme Court adopted a literal interpretation of the Constitution and held :

"The Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights".<sup>42</sup>

This view was subjected to severe criticism on the ground that fundamental rights and directive principles are interrelated and form part of the same Constitution, both of them are equally important and neither of them is superior or inferior to the other, rather both supplement each other and have to be construed harmoniously.<sup>43</sup> Later,

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41. A.I.R. 1951 S.C. 226.

42. *Id.* at p. 228.

43. Mahendra P. Singh, *V.N. Shuka's Constitution of India*, Eastern Book Co., Lucknow (1994), p. 298; P.K. Tripathi, "Directive Principles of State Policy : The Lawyers Approach to Them Hitherto, Parochial, Injurious and Unconstitutional", in P.K. Tripathi, *Spotlights on Constitutional Interpretation*, N.M. Tripathi Pvt. Ltd., Bombay (1972) p. 291 (1954); K.S. Hedge, "Directive Principles of State Policy in the Constitution of India, (1971), 1 S.C.J. (Jour.) 50 at p. 69, S. Sundara Rami Reddy, "Fundamentalness of Fundamental Rights and Directive Principles in the Indian Constitution", 22 J.I.L.I. 399 at p. 407; T. Devidas, "Directive Principles : Sentiment or Sense ?", 17 J.I.L.I. 478 at p. 483 (1975).

however, the Supreme Court accepted the need for harmony between the two<sup>44</sup> and it was held that they were complementary and supplementary to each other.<sup>45</sup> Thus the position in *Champakam* was drastically changed in the subsequent cases. The Supreme Court's decision in *Kesavananda Bharati v. State of Kerala*<sup>46</sup> added a new dimension to the directive principles. The question was with regard to the constitutional validity of the amended Article 31-C which gave predominance to some of the directive principles over fundamental rights. Upholding its validity, Justice Mathew elevated the directives principles to a higher plane in the Constitution in the following words :

"The Fundamental rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment, and even abrogation of these rights in circumstances not visualised by the Constitution-makers might become necessary: Their claim to supermacy or priority is liable to overborne at particular stages in the history of the nation by the moral claims embodied in Part IV".<sup>47</sup>

Justice Mathew emphasised that in building a just social order, it was sometimes imperative that the fundamental right should be subordinated to directive

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44. *Mohd. Hanif Qurashi v. State of Bihar*, A.I.R. 1958 S.C. 371, *Kerala Education Bill, Re.* 1957, A.I.R. 1958 S.C. 956.

45. *C.B. Boarding and Lodging v. State of Mysore* (1969) 3 S.C.C. 84 at p. 93.

46. (1973) 4 S.C.C. 225.

47. *Id.* at p. 881.

principles.<sup>48</sup> He reasoned that the 'economic goals have an uncontested claim for reality over ideological ones on the ground that excellence comes only after existence. It is only if men existed that there can be fundamental rights'.<sup>49</sup> Justice Beg too construed the relationship between the two that while directive principles lay down the path of the country's progress towards the aims and objectives of the Preamble, the fundamental rights are limits of the path, like the banks of a flowing river, which could be mended according to the needs.<sup>50</sup>

Thus, *Kesavananda* brought to light the hard Indian realities which necessitates myriads of State's action. To exist as a human being, basic amenities such as shelter, cloth and food are to be provided. Education and employment which are essential for the development of the personhood are also to be provided by the State. In short, an overall obligation is imposed upon the State by this judicial construction.

Another significant and innovative approach was undertaken by Justice P.N. Bhagwati in his dissenting judgement in *Minerva Mills Ltd. v. Union of India*<sup>51</sup> in which he highlighted the significance of distributive justice and its relevance embodied in the directive principles thus :

"Thus, Directive Principle's, therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which

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48. *Ibid.*

49. *Ibid.*

50. *Id.* at p. 902.

51. A.I.R. 1980 S.C. 1789.

there will be an egalitarian social order 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".<sup>52</sup>

Justice Bhagwati emphasised that the positive constitutional command to make laws for giving effect to the directive principles should have priority over the obligation not to encroach on fundamental rights.<sup>53</sup> According to him, 'the directive principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the directive principles that the fundamental rights are intended to operate, for it is only then they can become meaningful and significant, for the millions of poor and deprived people'.<sup>54</sup> He was categorical that the amendment of Article 31 C, far from damaging the basic structure of the Constitution, strengthened and reinforced it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and by promoting social and economic justice for all where everyone was able to exercise fundamental rights and the dignity of the individual and worth of the human person became a living reality for many.<sup>55</sup>

The very same idea is put forth by Justice Chinnappa Reddy in *Soshi*<sup>56</sup> that fundamental rights should be interpreted in the light of directive principles and the

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52. *Id.* at p. 1847.

53. *Id.* at p. 1852.

54. *Id.* at p. 1847.

55. *Id.* at p. 1853.

56. *Supra* n. 18.



latter should, whenever and wherever possible, be read into the former.<sup>57</sup> It is significant to note that Justice Bhagwati's view in *Minerva Mills* was upheld in *Sanjeev Coke Mfg. Co. v. M/s. Bharat Coking Coal Ltd.*<sup>58</sup> and *National Textile Workers' Union v. P.R. Ramakrishnan*.<sup>59</sup>

The preceding analysis of the approach of judiciary towards the interpretation of directive principles reveals that there was a slow and steady development from perceiving the directive principles firstly as subsidiary to fundamental rights<sup>60</sup> and then equally relevant and harmonious<sup>60a</sup> and finally superior to fundamental rights. This idea was re-echoed in *Mandal case*<sup>61</sup>.

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57. *Id.* at p. 309.

58. A.I.R. 1983 S.C. 239 at p. 246.

59. A.I.R. 1983 S.C. 75 at pp. 84-85, 105.

60. Upendra Baxi holds the view that "it is a constitutional truism" that directive principles are subordinate to fundamental rights. U. Baxi, "Directive Principles and Sociology of Indian Law - Reply to Dr. Jagat Narain", 11 J.I.L.I. 245 at p. 263 (1969). The article is written in 1969 and it is uncertain whether he has changed his views. H.M. Seervai also holds a similar view even today. Seervai, *Constitutional Law of India : A Critical Commentary*, N.M. Tripathi P. Ltd., Bombay, Vol. II (4th edn-1993), p. 1923.

60a. Justice Krishna Iyer holds this view of harmonious construction. Soshit, *Supra* n. 18 at p. 270. However, from his writings it becomes clear that he gives preference to part IV over part III of the Constitution. Shailja Chander, *Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles*, Deep & Deep Publications, New Delhi (1992) p. 77.

61. *Supra* n. 30 at p. 336. The Court said : "Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of several Articles in Part IV (Directive Principles of State Policy). "Justice — Social, Economic and Political", is the sum total of aspirations incorporated in Part IV". *Per* Jeevan Reddy, J.

This transformation of judicial thinking is necessitated due to the proper realisation of the judicial role in interpreting the constitutional document in the light of the felt needs of the time. Thus, as it is rightly observed, the directives are addressed to the State and are meant to provide the courts with a scheme of values for their judicial exegesis.<sup>62</sup> Therefore it becomes the duty of the court to look into the values in balancing the contending claims.<sup>63</sup> The fundamental rights embody certain values inherent in the nation's life and they are themselves not all of the same force. Therefore, it is inevitable that certain values are more absolute than others and must be preferred.<sup>64</sup> The judicial role in this regard of accepting the need of pre-eminence to directive principles is succinctly summarised by a jurist thus :

"For judges engaged in law making it is thus important to recognise that it is the dignity of the human person in the overall philosophy of the Constitution which constitutes the core of constitutional law. This explains why the directive principles, read with the preamble, together with fundamental rights concerned with the liberty of the person of the individual, are all important and so are superior to the remaining fundamental rights".<sup>65</sup>

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62. Sudesh Kumar Sharma, *supra* n. 37 at p. 84.

63. G.S. Sharma, "Concept of Leadership Implicit in the Directive Principles of State Policy in the Indian Constitution", 7 J.I.L.I. 173 at p. 185 (1965).

64. Sudesh Kumar Sharma, *supra* n. 37 at p. 85.

65. Jagat Narain, "Judicial Law Making and the Place of the Directive Principles in Indian Constitution", 27 J.I.L.I. 198 at p. 222 (1985); Sudesh Kumar Sharma's analysis is significant in this context. He writes : "However the truth is that the directive principles have not received the satisfactory judicial note. The Supreme Court has been consistently hesitant in giving priority to the directive principles over

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#### 4. *Constitutional Scheme and Judicial Practice*

Article 46 of the Constitution obligates the State to promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes and to protect them from social injustice and all forms of exploitation. This Article, together with the State's duty to secure a just social order and elimination of inequalities under Article 38,<sup>66</sup> embodies the concept of distributive justice.<sup>67</sup> Similarly, the positive content<sup>68</sup> of Article 335 also mandates the State to consider the "claims" of Scheduled

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fundamental rights in a situation of conflict between the parts. Such an approach is inherently inconsistent with the spirit and ethos of the Constitution which was never visualised by the founding fathers". *Supra* n. 37 at p. 104. The view of giving priority value of directive principles over fundamental rights becomes predominant nowadays. e.g., M.V. Pylee, *India's Constitution*, (1979), p. 181; V.S. Deshpande, "Rights and Duties under the Constitution", 15 J.I.L.I. 94 at p. 100 (1973); P.B. Gajendragadkar, *The Indian Parliament and the Fundamental Rights : Tagore Law Lectures*, Eastern Law House, Calcutta (1972), p. 67.

66. Constitution of India, Article 38 reads : "*State to secure a social order for the promotion of welfare of the people.* — 1. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a 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 status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."
67. Durga Das Basu, *Shorter Constitution of India*, Printice Hall of India Pvt. Ltd., New Delhi, (12th edn. 1996), p. 306.
68. Constitution of India, Article 335 reads : "*Claims of Schedule Castes and Scheduled Tribes to services and posts* : — The claims of the members of the Scheduled Castes  
(f.n. contd. on next page)

*(f.n.68 contd.)*

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

Castes and Scheduled Tribes in making appointments to service and posts. The Court reads<sup>69</sup> the articles together with Articles 15(4) and 16(4) and shows that the directive principles serve as a code of interpretation<sup>70</sup> for judges in meeting out justice to a considerable section of subordinated people in our society.

The practice of reading directive principles into any of the fundamental rights, in the absence of a clear cut and enumerated rights in Part III of the Constitution, has been the greatest judicial achievement in Indian Constitutional law. This has been the impact of *Maneka*<sup>71</sup> decision in the post-emergency period which witnessed the re-generation of human values and the judicial re-appraisal of its constitutional roles and goals.<sup>72</sup> The courts, since then, do stretch its arms of protection to prisoners, indigents, environment, health and so on. The right to education is the latest addition to this string of development.<sup>73</sup> It is pertinent to note that the courts have

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69. E.g., Justice Krishna Iyer's observation in *Soshit*, *supra* n. 18 at p. 270.

70. E.g., Justice Chinnappa Reddy's observation in *Soshit*, *supra*, n. 18 at p. 309. The observation of Chief Justice J.S. Verma, while examining the Constitutional obligation of judiciary is highly relevant in this context when he says : "The Directive Principles are the mandate to the State as to what is expected of it in the governance of the State for the purpose of achieving the constitutional goals indicated in the preamble. Only a few words of the preamble are alone sufficient to keep us on the right track to understand the role of the courts." J.S. Verma, C.J., "The Constitutional Obligation of the Judiciary", (1997) 7 S.C.C. (Jour.) 1 at p. 5.

71. *Supra* n. 2.

72. D. Rajeev, "Impact of Maneka Decision : Growing Dimensions of Indian Constitutional Law, [1983] C.U.L.R. 393 at p. 408.

73. Unnikrishnan, J.P. v. State of A.P., A.I.R. 1993 S.C. 2178 at p. 2231.

already abdicated their traditional technicalities of *locus standi* and now any public spirited person can approach the court for seeking a remedy.

The Indian judiciary exercises enormous and vast powers unlike any other counterpart in the world. The all-pervasive character of judicial activism brings it even to the extent of performing the functions of other sister organs of the State such as the legislature and executive and thereby tilting the very balance of separation of powers.<sup>74</sup> This is often justified as the only way out in a sheer exhaustion of all other means to awaken the executive and the legislature from their sclerotic coma.<sup>75</sup> All the more, it is viewed as the accountability of courts to the people.<sup>76</sup> In this state of affairs how can the judiciary be unheeded to the rightful claim of one class of citizens and hold the view that their's are not fundamental right, but at the same time, the rights of other citizens as fundamental rights ?

The language of Articles 15(4) and 16(4), though couched in exceptional nature, there is an inherent paradox in perceiving them as exceptions to the main provisions. This is rightly brought by M.P. Singh in the following words :

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74. D. Rajeev, "Separation of Powers and Judicial Activism : Tradition Versus Modernity", [1997] C.U.L.R. 329 at p. 345.

75. *Ibid.*

76. Dr. Justice A.S. Anand, "Justice N.D. Krishna Rao Memorial Lecture on Protection of Human Rights : Judicial Obligation or Judicial Activism", (1997) 7 S.C.C. (Jour.) 11 at p. 24. However, Justice B.P. Jeevan Reddy argues that accountability is not easy to define and the difficulty has led many people to fling epithet at the judiciary and the criticism is ill-informed and, at the best, superficial. "Judiciary and its Accountability", *The Hindu*, June 23, 1998, p. 12.

"From the very beginning the State has been performing its duties under Article 15 (4) and 16(4) through executive orders without legislation. The Courts have been consistently holding that such course is perfectly constitutional. At the same time the courts have also been holding that no fundamental right, or for that matter any right, can be taken away without authority of law. These two propositions laid down by the courts cannot stand together.... They can stand together only if these two clauses are not treated as exceptions to any fundamental right but are treated as an aspect of the fundamental rights".<sup>77</sup>

Arguing vehemently that Articles 15 (4) and 16 (4) are fundamental rights and not exceptions, M.P. Singh examines the jurisprudential basis of his thesis from the angle of Hohfeldian analysis of rights and concludes that Articles 15 (4) and 16 (4) impose positive duty on the State and to that extent they create corresponding rights in the backward classes.<sup>78</sup> He seeks support from Dworkin's concept of "right to treatment as an equal", International Covenant on Economic, Social and Cultural Rights and the constitutional scheme of protection including the directive principles.<sup>79</sup> His observation with regard to the intention of the framers of the Constitution is noteworthy that though they had made distinction between justiciable and nonjusticiable rights, they did not abandon their faith in the positive rights and retained

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77. Mahendra P. Singh, "Are Articles 15(4) and 16(4) Fundamental Rights ?", (1994) 3 S.C.C. (Jour.) 33 at pp. 36-37.

78. *Id.* at p. 39.

79. *Id.* at p. 34-39.

some of them among the fundamental rights.<sup>80</sup> Moreover, he rightly argues that 'the well recognised legal maxim, *ubi jus ibi remedium* — wherever there is a right, there should also be an action for its enforcement — gives emphasis to the view that Article 15(4) and 16(4) are fundamental rights.'<sup>81</sup>

##### 5. *Issues of Non-Implementation : Decided Cases*

The Supreme Court was consistently hesitant in recognising the right to reservation as a part of fundamental right during the pre-*Thomas* era. A notable instance of this approach was *C.A. Rajendran v. Union of India*,<sup>82</sup> in which a Scheduled Caste

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80. E.g., Constitution of India, Article 17 (abolition of untouchability); Article 23 (1) (Prohibition of traffic in human beings and forced labour) and Article 24 (prohibition of employment of children in factories, mines or any other hazardous jobs).

81. *Id.* at p. 40. However, Parmanand Singh holds an opposite view of M.P. Singh. In his rejoinder to M.P. Singh's article, Parmanand Singh raises the following apprehension : "The consequences of recognising reservation as a fundamental right — are also relevant. Once something which has so far been recognised as a matter of policy is acknowledged as a guaranteed fundamental right, each individual claim to secure the 'enforcement' of such right will be subject only to judicial determination. It may lose popular and political control. The right to affirmative action will thus open a floodgate for undeterminate, uncertain and vacuous claims." Paramanand Singh, "Fundamental Right to Reservation : A Rejoinder," (1995) 3 S.C.C. (Jour.) 6 at p. 7. B. Erabbi is also having a similar view when he says. "Answer to the question as to whether there is a fundamental right to affirmative action cannot, however, be given in the affirmative. If such a right and corresponding obligation were read into articles 14 and 16 (1), it would reduce articles 16 (4), 15 (4) and 46 into superfluity". "B. Erabbi, Protective Discrimination : Constitutional Prescriptions and Judicial Perception", 11-12 *Delhi Law Review* 66 at p. 81 (1981-82).

82. A.I.R. 1968 S.C. 507.



employee argued that the order of Central Government confining reservation in promotion to lower grade was violative of the guarantee of Article 16(4). While rejecting this contention, the Court held that Article 16(4) contained merely a power to be exercised at the discretion of the State and that the Article did not confer any right on the petitioner and there was no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes either at the initial stage of recruitment or at the state of promotion.<sup>83</sup>

This erroneous<sup>84</sup> position was changed later in post-*Thomas* era where the Court specifically ordered the implementation of some beneficial measures to Scheduled Castes and Scheduled Tribe employees. For instance in *Comptroller and Auditor General of India v. K.S. Jagannathan*,<sup>85</sup> the respondents were employees in the Department of Indian Audit and Accounts. They sought for relaxation in the qualify-

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83. *Id.* at p. 513.

84. The Court did not consider the positive mandate of Article 335, but it overemphasised on the negative aspect of that Article. *Id.* at p. 514. Criticising this approach Marc Galanter says : "The Courts seem to infer that since there is no duty to confer any particular sort or amount of preferential treatment, there is no duty to confer any at all. In effect, they hold that a discretion sufficiently broad to allow a zero response to any individual claim is taken to imply a discretion to make a zero response to every claim. But this is somewhat paradoxical in view of the clear and explicit constitutional duty to make some special provision (Article 46) to advance the interest of the weaker sections". Marc Galanter, *Competing Equalities : Law and the Backward Classes in India*, Oxford University Press, Delhi (1984), p. 397.

85. (1986) 2 S.C.C. 679. The Court consisted by R.S. Pathak, A.P. Sen and D.P. Madon, JJ. The judgement was handed down by Madon, J.

ing standard of marks in their departmental test for getting promotion, in accordance with an Office Memorandum<sup>86</sup> which was not extended to them. The Madras High Court accepted their contention and directed the appellants to give suitable relaxation in that regard. It was contended before the Supreme Court that the High Court could not issue a writ of mandamus to direct a public authority to exercise its discretion in a particular manner. While rejecting this contention the Court examined the scope of the power of High Court under Article 226 and held that the High Court had the power to issue directions or orders where the public authority had failed to exercise or had wrongly exercised the discretion or had exercised the discretion malafide or on irrelevant consideration or by ignoring relevant considerations. The Court also examined the nature of the discretion conferred by the Office Memorandum, viz., whether it was a discretionary power simplicitor or a discretionary power coupled with duty ? The Court was emphatic that the discretion was to be exercised to discharge the constitutional duties imposed by Articles 335 and 346.<sup>87</sup>

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86. No. 36021/10/76. Esst. (SCT) dated January 21, 1977, issued by the Department of Personnel & Administrative Reforms to all Ministers etc. and it contained provisions for relaxation of standards in qualifying examinations for promotion to the higher grade on the basis of seniority subject to fitness to Scheduled Caste-Scheduled Tribe candidates.

87. *Supra* n. 85 at p. 693. The Court said : "The treatment meted out to the members of the Scheduled Castes throughout the ages was an affront to Human Rights. It was in a spirit of atonement for the wrongs done to them and to make restitution for the injury and injustice inflicted upon them that the framers of the Constitution enacted Article 16(4) placing them in a separate class in matters relating to employment or appointment to any office under the State, formulated the Directive Principles embodied in Article 46, and proclaimed the *great constitutional mandate* set out in Article 335." *Id.* at p. 700. Emphasis supplied.

This observation of the Court makes it clear that when the executive fails to implement a beneficial order, the Court could construe it as a violation of a mandatory duty and issue a writ of mandamus. Similarly another issue was brought before the Supreme Court in *P. & T. SC-ST Employees' Welfare Association v. Union of India*.<sup>88</sup> In this case, the reservation of vacancies at the stage of promotion to Scheduled Castes-Scheduled Tribes employees in Post and Telegraph Department was withdrawn by the Government. This was challenged by the petitioners before the Supreme Court and sought for directing the Government to issue orders conferring such concession which was available in other departments. The three-Judge Bench speaking through Justice Venkataramiah said :

"We feel that the claim made by the petitioners is fully justified in view of the fact that similar advantage is being enjoyed by persons belonging to the Scheduled Castes and Scheduled Tribes in other departments and only they have been deprived of it. Such deprivation violates the equality clause of the Constitution".<sup>89</sup>

The Court further said :

"While it may be true that no writ can be issued ordinarily compelling the Government to make reservation under Article 16 (4) which is only an enabling clause, the circumstances in which the members belonging to

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88. (1988) 4 S.C.C. 147 The Court consisted of E.S. Venkataramiah, S. Natarajan and N.D. Ojha, JJ.

89. *Id.* at p. 151.

Scheduled Castes and Scheduled Tribes in Post and Telegraph Department are deprived of indirectly the advantage of such reservation which they were enjoying earlier while others who are similarly situated in the other departments are allowed to enjoy it make the action of government discriminatory and invite intervention by this Court".<sup>90</sup>

The Court issued a direction to the Government of India to confer some additional advantage on the employees belonging to the Scheduled Castes and Scheduled Tribes in the Post and Telegraph Department commensurate with similar advantages which were enjoyed by the employees belonging to the Scheduled Castes, Scheduled Tribes in the other departments of the Government of India.<sup>91</sup> The decisions in *Jagannathan* and *P.T. S.C.S.T. Employees* reveal that the inaction or the discriminatory attitude on the part of the Government could be challenged before the court of law and appropriate remedy sought for.

The preceding assessment of the constitutional provisions and the trends of judicial approach reveal that the judiciary is adopting a pragmatic approach and it cannot take a hands-off approach on the plea that reservation is the domain of the executive discretion. The following conclusions emerge in this context.

Article 16(4) is not an exception to Article 16(1) but it is an integral part of fundamental right. Its enforceability gets support from directive principles too. Directive principles have acquired an enforceable status by the recent judicial treatment. They are substantially related to equality principles and preambular

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90. *Id.* at pp. 151-152.

91. *Id.* at p. 152.

justice. The State has got a mandatory duty to implement the directive principles and the citizens have got a corresponding right to get it enforced. The judiciary too has got a duty to interpret the fundamental rights in the light of the directive principles, since directive principles are codes of judicial interpretation. The instances of issuing a writ of mandamus to the Government show that it has got a mandatory duty to comply with. Therefore, a backward class citizen can approach the court of law for getting implemented the right to reservation. The trends of judicial activism reveals that it opens the scope for interested person or groups on behalf of the backward group of people to get judicial redressal of their grievances.

## CHAPTER - X

# CONCLUSIONS AND SUGGESTIONS

The basis of favoured treatment or protective discrimination to backward classes is firmly rooted in jurisprudential foundations. The idea of equality of opportunity stems from the concept of justice. Its multifacets include social justice, equality, distributive justice and fair equality of opportunity. These concepts were nicely accommodated by the framers in the Indian Constitution with a view to eliminating the inequalities and achieving a casteless, classless and egalitarian society. The study reveals that the Indian judiciary could successfully locate and apply the above principles. It was Justice Subba Rao's nascent attempt in *Devadasan* which marked the starting point of such a jurisprudential enquiry. Later *Thomas* developed the thoughts by a reading new meaning and content to equality provisions of the Constitution which included the elimination of inequalities as the positive content of Articles 14 and 16(1) and elevated reservation provision to the same status of equality principles under the Constitution. *Soshit*, *Vasanth Kumar* and *Mandal* supplemented further to the jurisprudential contents. In this process, the courts were guided by the theories of John Rawls, David Miller, Ronald Dworkin, Max Weber and Roscoe Pound. Thus there was a slow and steady process of transformation of the reservation provision. From an anti-meritarian, unenforceable and enabling provision, it reached a stage of equally relevant and explanatory part of fundamental right to equality. *Mandal* viewed it as a part of sharing of State power. Though this can be seen by re-reading and re-joining thoughts of judges in this regard, the judicial approach lacks coherence and concerted efforts in evolving a jurisprudential basis for protective discrimination. The deliberations of the framers of the Constitution reveals that

there was much confusion and indeterminacy with regard to the concept of backwardness. It was, therefore, criticised that the provision of reservation would become a paradise of lawyers. This apprehension is found to be proved. However, the Constituent Assembly reposed faith in the judicial wisdom in finding out timely solutions to the recurring and vested questions of competing equalities. The study shows that the judiciary has been keeping intact the framers' expectation of having a reasonable quantum of reservation, preventing the undeserved sections from enjoying the benefit, avoiding its abuse and evolving a new criteria and rejecting the old ones.

The Indian social milieu shows the justification for protective discrimination of a section of people who happened to be de-humanised and marginalised due to the caste-ridden social system with its gradation and degradation. The caste factor and its occupational nexus, ritual and religious practices are significantly interwoven with educational and intellectual achievements and thereby the emulation of social status. However there are changes in the social mobility. The indelible stigma of lower castes disappears in certain cases but the disabilities still continue. The judiciary intervenes into those areas putting forth new criteria for the determination of backwardness. Creamy layer is the most significant one of this judicial contribution. The judiciary is meticulously overseeing the need for limiting the benefits to the most deserved and the most needy.

From the classic decision of *Balaji* onwards, the determination of backwardness was highly controversial. The relevance of factors such as caste and poverty in the determination were mainly in issue. Whether caste can be the sole determinant or poverty can be the sole test irrespective of caste or whether both are

relevant ? The class-caste controversy existed for a quite long time. The judicial approaches towards these issues were highly confusing and vacillating. *Balaji* viewed that caste might not be irrelevant to Hindus, but its relevance should not be exaggerated and poverty was the primary index or root cause of the backwardness and considerations of caste aggravated the backwardness. However in *Chitralkha* it was viewed that caste could be eschewed altogether if backwardness could be ascertained on the basis of other criteria.

Though *Triloki Nath* re-asserted *Balaji*, *Rajendran* and *Periyakaruppan* adopted a different approach by holding that caste based list of backward classes in Tamil Nadu was valid because those included in the list were found to be socially and educationally backward. *Balram* also endorsed this view by giving due relevance to the role of caste in Indian society. However, later cases like *Janaki Prasad* and *Pradip Tandon* rejected this line of approach and went back to *Balaji-Chitralkha*. Though *Vasanth Kumar* confounded this controversy, the observations of Justices Chinnappa Reddy and Venkatramiah were found to be a turning point of ascertainment of backwardness. They emphasised the significance of caste-ridden hierarchical society of India and the nexus of social status and economic power. Justice Chinnappa Reddy was more specific in laying down that caste was the primary index of social backwardness and poverty the culprit cause. This observation is diametrically opposite to *Balaji* and instrumental in later developments towards the appraisal of caste and poverty in their right perspective.

*Mandal Case* is a significant trend setter in the area of determination of backwardness. The Court in this case re-emphasised the significance of the role of caste in the Indian context especially its homogenous and endogamous character with



occupational nexus. The decision settled the class-caste controversy by holding that caste could be a sole criterion in certain circumstances. At the same time caste might not be relevant at all in certain occupational groups or classes like agricultural labourers, rickshaw-pullers/drivers, streethawkers etc.

The identification of backward class on the basis of caste was much criticised, from the very beginning, as it would lead to the perpetuation of casteism, instead of eliminating it. The Supreme Court in *Mandal case* exposed the fallacy of this argument by citing the American practice of affirmative action and pointed out that "if race be the basis of discrimination, race equally forms the basis of redressal." The Court thus emphasised that protective discrimination was given to the disadvantaged group because they belonged to such discriminated castes and a different basis would perpetuate the status quo and therefore the caste system itself, instead of eliminating it. The Court hoped that by giving the discriminated caste-groups the benefits of reservation, the discrimination would in course of time be eliminated along with casteism. This realistic appraisal of the situation is a remarkable pointer towards the right direction.

While distinguishing between the import of Articles (16)4 and 15(4), the Court categorically stated that the backwardness contemplated by Article 16(4) was "mainly" social backwardness as it should not be both social and educational. This observation also repelled yet another 'assumption' that the backwardness contemplated by both Articles is one and the same. The Court reasoned that "social backwardness leads to educational backwardness and both of them together lead to poverty — which in turn breeds and perpetuates the social and educational backward-

ness". This means that social backwardness comprises in it the educational backwardness, the very same requirement in Article 15(4). Though this statement seems paradoxical, the Court was conversant with this inherent defect in compartmentalizing the two Articles of reservation and therefore it used the expression, "mainly social backwardness". The Court's rejection of the test of similarity of backwardness of Scheduled Castes and Scheduled Tribes with backward classes for reservation is a notable approach towards correcting the *Balaji* dictum. The test of exclusive economic criterion was also rejected by the Court by observing that it might be a basis along with other criteria of social backwardness. This is yet another realistic perspective of the Indian situation.

Much light was shed on the distinction between backwardness of forward class and backward class by the Court. The Court's reasoning that the backwardness of the lower castes or occupational backwardness being the consequence of both their social and educational backwardness and hence mere economic aid would not enable them to compete with others is well founded. It is significant to note that though the Court accepted the classification between backward and more backward and the preference in favour of the poorer sections it was left open to the Government to make such a classification. The Court could have issued directions in this regard rather than invoking the political will.

Though the constitutional scheme does not provide the extent or limit of reservation in employment it is specific about providing adequate representation in services for backward classes. The *Balaji's* less than 50 percent rule in relation to

Article 15 (4) was adopted by the Supreme Court to Article 16 (4) in *Devadasan* and a reservation upto 64.4 % based on carry forward scheme was held unconstitutional. Later *Thomas* went for more than 50% rule, on the reason that such a quantum of reservation was nowhere near 50% while considering the total number of posts. However *Soshit* returned to 50 per cent limit by upholding the validating the carry forward rule subject to that limit.

In *Mandal case* the Supreme Court re-emphasised the need for 50 per cent limit to reservation in jobs. The Court however, observed that in certain extraordinary circumstances the 50 per cent rule could be relaxed. But this should be done with utmost caution and a special case should be made out. The Court specified that the situation of the inhabitants in farflung and remote areas who happened to be out of the mainstream of national life necessitated such a relaxation in the strict rule. This is a well-balanced approach. The Court significantly turned down the contention that the representation should be proportionate to the percentage of the population of the backward classes. However Justice Sawant accepted the idea of proportionate representation as a general rule, but he realised immediately the constitutional limits by observing that the provision of reservation cast a discretion on the Government to keep the reservation at a reasonable level. Justice Sawant's approach that the representation should be "effective and qualitative" including the higher rungs of administration and not quantitative in the administration as a whole, seems to be more plausible than the approach of Justice Jeevan Reddy in this aspect.

The question of quantum of reservation received a puzzling dimension in the post-*Mandal* period. The legislation of Tamil Nadu and Karnataka are suitable

instances of attempts to evade the *Mandal* verdict of 50 per cent limit. The Tamil Nadu legislation was put in the Ninth Schedule of the Constitution with a view to getting an insulation from the judicial attack. However, the Ninth Schedule can be examined on the basis of *Kesavananda's* insistence that it should pass the test of basic structure theory. So far the Supreme Court has not stated that 50 per cent quantum is a part of basic structure theory. One can reasonably hope that in future there is every chance of such an approach.

Applicability of reservation to solitary posts became an issue of highly controversial nature in post-*Mandal* period. The issue originated from the decision of a two-Judge Bench of the Supreme Court in *Chakradhar* that reservation should not be applicable to solitary posts on the reason that it would amount to 100 per cent reservation. Several High Courts followed the decision but some High Courts distinguished *Chakradhar* and followed an earlier decision of a Constitution Bench of the Court in *Arati Ray*. The question received a significant turn when a Bench of three Judges of the Court in *Madhav* did not follow *Chakradhar* and followed *Arati Ray*. This approach was followed by the Supreme Court in certain cases. However there was a reversal to *Chakradhar* by another Constitution Bench in a review petition in *Post Graduate Institute of Medical Education and Research case*, holding that even at the stage of first appointment or promotion there should not be reservation in single posts.

The study reveals that the recent review petition of the Constitution Bench did not assess the decision of *Chakradhar* and its import. In *Chakradhar* the interpretation of Government instruction for grouping of isolated posts was made in

such a way that the isolated posts could not be grouped at all. This erroneous reading of the instruction is manifestly against the spirit of the Government instructions. This fallacy was followed by courts later without noticing the factual situation of the case of *Chakradhar*. If reservation is not applicable to single posts, especially those of rare and specialised posts, the ramifications would be far-reaching. The policy of reservation to the rare and isolated posts was carried out by the Government by grouping of similar posts in the cadre with a rotation based roster system. Therefore there would be an equal chance of backward class members and forward class members in that posts. The whole system has become upset by the latest decision of the Court in the review petition. Thus equality of opportunity for backward classes becomes a mirage in rare, specialised and high posts of solitary character. This decision would trigger further controversies and litigations. One can reasonably hope that the judiciary should re-enter into the picture and correct its approach.

The concept of creamy layer i.e., the benefit of reservation should not be given to the advanced persons among the backward classes, has its germination in the very early period of judicial confrontation with protective discrimination. It has come to stay in *Mandal case*. The Supreme Court, in this case, while examining the question as to what are the criteria required in determining creamy layer, observed that social backwardness being the connecting link of backward class and if some of the members were far too advanced socially, the connecting thread between them and the remaining class would snap and they would be misfits in the class and only after excluding those sections, the class would become a compact one. According to the Court such exclusion would benefit the truly backward.

In drawing the line of exclusion, the Court said that the emphasis should not merely be on economic factor, unless the economic advancement was so high that it necessarily meant social advancement. In other words, income or the extent of property held by a person can be taken as a measure. Justice Sawant was more specific that the elimination should be based on the person's capacity to compete with forward classes and the adequacy of representation should be qualitative and quantitative. Till that stage reservation should be continued. Though the Central Government framed and implemented the criterion of elimination of creamy layer, State Governments like Bihar and Uttar Pradesh made legislation with multiple criteria for the exclusion of creamy layer which were invalidated by the Supreme Court.

Kerala's position is in a peculiar tangle. The Government tried to evade the direction of the Supreme Court and enacted a legislation by saying that backward class was not adequately represented in services and there was no creamy layer. Meanwhile the Supreme Court itself had appointed a Commission to find out the creamy layer in the services of the State. The Commission's findings show that in certain services of the Government the representation of backward classes is beyond their prescribed percentage. The matter is now pending before the Supreme Court. The Kerala legislation is intended to give continuance and validity to the existing reservation as provided in the Kerala State and Subordinate Service Rules. The study reveals that the legislation will not stand against the verdict of *Mandal case*.

Marriage, adoption, conversion or migration promote social mobility and fraternity which are the essential attributes towards unity, integrity and secularism of a nation. In exercise of these rights, there is bound to arise a conflict between

these rights and constitutional goal of providing equality of opportunity to backward class of citizens. Much confusion and controversy existed as to the question whether a person can acquire backwardness through marriage, adoption, conversion or migration ? Or what is the impact of the exercise of these rights on backwardness ?

There were conflicting decisions of High Courts in the case of marriage. Delhi High Courts decision in *Urmila* was the beginning of the controversy. It held that a lady from higher caste who was married to a Scheduled Caste was not entitled to the benefits conferred upon the Scheduled Caste since she had not suffered any social and educational backwardness during the early period of her life. However in *Kunjamma Alex*, the Kerala High Court viewed otherwise while holding that a non-Latin Catholic lady after marriage to a Latin-Catholic man would become a member of Latin Catholic and was eligible to avail of the reservation benefits of her husband's community. But later the High Court went back to the earlier view. Similar was the approach of Andhra Pradesh High Court in *Neelima*. The matter was finally settled by the Supreme Court in *Valsamma Paul* that though a non-Latin Catholic lady after her marriage to a Latin Catholic man had become a member of her husband's community, she could not claim the benefit, since she had an advantageous start in life and had not undergone the disabilities, disadvantages or sufferings so as to entitle the facility of reservation. In the case of adoption also the judicial approach is the same. However, in the matter of conversion or reconversion, the Court stipulates that the convertee should have been accepted as one among them by the members of the same community to which he rejoins. The Court further stated that there must be substantial evidence to show that the person has been accepted by the community. Thus the Court fixes strict measures to become the

beneficiaries of reservation. The study reveals that there are two decisions of the Kerala High Court which are *per in curium*, i.e., the decision in those two cases were taken without noticing the earlier Supreme Court decisions and law in this regard.

The judicial approach is similar in the case of migration too. That is, reservation benefit is restricted to a person's original State and not allowed in the migrant State on the reason that the circumstances, percentage of reservation, the obligations of governmental protection are different from State to State. The reasoning in all the above issues relating to the impact of marriage, adoption, conversion and migration on backwardness is well-founded. The basic idea of such reasoning is that reservation benefits should not be misused or abused.

However, it cannot be overlooked that the principle creates difficult in some cases, for instance, involuntary migration or migration due to other compelling circumstances. In such cases, as observed by Justice Kukharji in *Marri Chandra*, legislative intervention is needed. In marriage too there are similar problems. For, in many such cases individuals of higher caste, especially women in rural India, married to backward caste would be usually subject to the same disabilities and disadvantages as their in-laws suffered. Here also, the principle needs change either through a review or by a proper legislation.

The constitutional provisions of reservation i.e., Articles 15(4) and 16(4) are of special and extraordinary nature. They are juxtaposed with the formal equality



i.e., guarantee of non-discrimination in Article 15(1) and the mandate of equal opportunity in Article 16(4). Similarly the constitutional duty to promote the interests of weaker sections is placed in the unenforceable directive principles. This constitutional framework leads to conflict between these rights. Earlier, these provisions were construed as exceptions to the main clauses. They were held as enabling provisions and there was no right on the beneficiaries or a corresponding constitutional duty imposed on the Government to take measures in this respect. This *Balaji* line of approach was discarded in *N.M. Thomas* and later cases. *Thomas* stood for viewing the reservation provision as an explanation or illustration or a facet of the main provision of equality. *Mandal case* fortified this concept when it categorically stated that "just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (4) of Article 16 is also an elaboration of a facet of clause (1)." The Court re-emphasised on the need for a harmonious construction between clauses (1) and (4) of Article 16 and both clauses "are but re-statements of the principle of equality enshrined in Article 14". This remarkable observation crystallises the view that both clauses (main as well as explanation) are one and the same aspect for achieving equality of opportunity.

The idea of justiciability of directive principles got a new dimension in *Kesavananda*, which upheld the constitutional validity of giving predominance to certain directive principles over fundamental rights. The earlier view of *Champakam* treating directive principles as subsidiary to fundamental rights lost its ground. Now

the directive principles are treated as equally relevant and harmonious or even superior to fundamental rights. It shows the trend of getting prime significance of directive principles in the constitutional scheme. The judiciary has tailored many of the rights from directive principles to fundamental right. This has added new dimensions to the enforceability of many of the individual as well as socioeconomic rights. This development would pave the way for evolving the right to reservation as an enforceable fundamental right.

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