

# **Right to Reservation as an Emerging Fundamental Right: A Study under the Indian Constitution**

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## **I. Introduction:**

Reservations are the devices for removal of the historical distortions that have crept into our social system. These denote the body of rules recognized and enforced by the state in the administration of social justice. Reservation is the means to promote the goal of social justice. By social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunity, race, caste, religion, sex and title.<sup>2</sup> In the words of the Supreme Court of India, it is the harmonization of the rival claims of the interests of the different groups and sections in the social structure, by means of which alone it is possible to build up a welfare society.<sup>3</sup> Reservation is meant to remedy the handicap of prior discrimination impeding the access of classes of people to public administration. It is for the state to determine whether the evil effect of inequities stemming from prior discrimination against classes of people have resulted in their being reduced to positions of backwardness and consequent under representation in public administration. Reservation is a remedy or a cure for the ill effect of historical discrimination.<sup>4</sup>

Reservation is one of the measures adopted by the Constitution to remedy the continuing evil effect of prior inequalities stemming from discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness. Reservation is meant to be addressed to the present social, educational and economic backwardness caused by purposeful societal discrimination. To attack the continuing ill effect and perpetuation of such injustice, the Constitution permits and empowers the state to adopt corrective devices even when they have discriminatory and exclusive effects.<sup>5</sup> The object of this small paper is to study the need and purpose of reservation and to examine whether a right

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<sup>2</sup> Harpal Kaur Khehra : Job Reservation Versus Efficiency of Administration, C I L Q 1990. p. 28.

<sup>3</sup> Held in *Crown Aluminium Works v. Workmen*, A I R 1956 S C 30.

<sup>4</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477.

<sup>5</sup> Ibid.

to reservation in favour of backward classes, provided under the Constitution of India, is a fundamental right.

## **II. The Need of Reservation:**

Indian society has always been full of inequalities. It was a caste ridden stratified hierarchical society, and a particular segment of the society had been denied the bare human rights. Their educations, wages, living condition, social status were dictated by the whims of upper strata of society, reducing them to destitution. It is very difficult to gauge the extent and depth of social and economic exploitation that resulted in discrimination, misery, poverty and other disabilities for an appreciable large section of our population. The economic backwardness brought social backwardness which consequently made them down trodden and thus depriving them even of the dignity of life. In a society compartmentalized on caste basis, upper castes controlled the levers of power enabling them to run their whips, prejudicial to the interests of lower segment of the society. Lower castes had to serve the upper caste without having any say and grievance redressal mechanism<sup>6</sup>.

It was natural that the higher castes were able to exploit the lower ones. Members of lower castes always suffered from discrimination in all areas of life. One of the worst effects of caste system was that access to knowledge and learning was denied to the lower castes. Since the majority of Indian population was Hindu, the impact of this caste discrimination was severe and wide. In a society as ours where there exist forward and backward, higher and lower social groups the first step to achieve social integration is to bring the lower or backward social group to the level of the forward or higher social groups. The trinity of the goal of the Constitution viz., socialism, secularism and democracy cannot be realized unless all sections of the society participate in the state power equally, irrespective of their caste, community, race, religion and sex and all discrimination in the sharing of the state power made in those grounds are eliminated by positive measures/actions.

The founding fathers of the constitution were men of vision and wisdom well versed in law, polities and social philosophy. They were wholly committed to the good of the people and as such were best suited for evolving a framework of a welfare state of socialistic patterns of society. They felt that the caste system as it operated in India of late forties of the twentieth century had subjected a majority of the population, civil and even

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<sup>6</sup> K. K. Arora, “*Backwardness in India- A Judicial Dilema*” in D. N. Saraf (Ed). Social Policy Law and Protection of Weaker Section of Society (1986), Eastern Book Company, Kashmir Gate, Delhi, p. 120.

legal disabilities. The system needed to be abolished legally and constitutionally. The constitution made elaborated provision to remove the disabilities arising from one's caste so as to enable a citizen to participate freely in the social, economic and political activities and attain fullest development of his personality. Equality, justice, liberty and fraternity are the chief objectives enshrined in the preamble to the constitution of India. Our founding father wished to build an edifice of democracy wherein those noble objectives might be materialized in regard to the entire Indian society which includes communities which had neither to remain disadvantaged and under- developed due to historical discrimination perpetrated in the name of caste, creed, race or the like. *They therefore, designedly embodied certain provisions in the Constitution which conferred special favours and protection to the backward classes of citizens with a view to uplift them to the levels of equality with the rest of the society. The Indian Constitution embodied manifold concession, preferences exemption and above all reservation as the means of achieving social justice.* The backward of all sections viz. Scheduled Castes and Scheduled Tribes are provided reservation in central and state legislatures bodies as a manifestation of political justice whereas they are provided along with other backward classes' reservation and other special favour in numerous areas including in employment and admission in educational institutions as measures of social justice. Our Constitution has the unique distinction of outlining an extensive scheme for the advancement of the backward classes of citizens.

### **III. The Constitutional Provisions:**

The Indian Constitution proclaims as Sovereign, Socialist, Secular, Democratic Republic and promises to its citizens, Justice, Liberty, Equality and Fraternity. The state created by the Constitution is pledged to political Socio-economic Equality of all citizens irrespective of sex, caste and creed, committed to social reforms, social change and removal of discriminations between one citizens and another. Every citizen irrespective of religion, caste, creed and sex, is therefore, entitled to education and employment according to his capacity. Justice is the key stone of our constitution and the principle of equality is the very foundation of justice. In pursuance of these assurances, Article 14, 15 and 16 have been enacted which embody certain fundamental rights guaranteed by the Constitution. Article 14 guarantees equality before law and equal protection of law to all persons. Clause (1) of Article 15 prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth. Clause (1) of Article 16 guaranteed equality of opportunity for all citizens in matter relating to employment or appointment to any office under the state. Clause (2) of the said Article further lays down that no citizens shall on grounds only of religion, race,

caste, sex descent, place of birth, religion or any of them be ineligible for, or discriminated against in respect of any employment or office under the state.

Although clause (1) of Article 16 guaranteed equality of opportunity to all citizens alike, it would be meaningless to those for whom offices of position and dignity have been out of bounds for centuries and they are so crippled by the circumstances in which they are placed that such office are beyond their reach if they are left to themselves. In India, we have been faced with inequalities, which are mainly due to social injustice perpetuated for centuries by the upper castes of those belonging to the lower castes by denying them a proper social status and opportunity for their betterment. At the same time our founding fathers were not oblivious of the socio economic backwardness of many segment of our society and were convinced that mere guarantee against discrimination was not sufficient. The social backward classes needed to be brought at par with others by giving them special push through positives states action. Since independence there has been a special concern not only to promote the interest of all the groups in the country, but also to provide for protective status to certain groups or people in the society specially Scheduled Castes, Scheduled Tribes and the Backward Classes. So it was specially provided under Article 16(4) of the constitution that nothing shall prevent the state from making any provision for the reservation of appointment of post 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.

Unlike Article 16(4) which specially provided for reservation of jobs, there was no provision in the constitution which permitted reservation of seats in educational institutions. In pursuance to the directive embodied in Article 46 to promote with special care the educational and economic interest of the weaker sections of the people various state governments started making reservation of seats on the technical and medical institutions. Such a reservation was held as invalid and violation of Article 15(1) and 29(2). In *State of Madras v. Smt. Champakam Dorairajan*<sup>7</sup> while examining the underlying social policy the court found that except for reservation in service, the framers did not contemplate giving any special treatment to the backward classes. The basis of the conclusion was found in the express provision in Article 16(4) for the reservation of seats in public service for backward classes and the absence of such a provision in Article 29(2) and Article 15. The court recognized the obligation of the states under Article 46 to promote the welfare and interest of the weaker section of the people but considered the underlying object of Article 16 and 29 (2) so sacrosanct that

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<sup>7</sup> A I R 1951 S C 226, wherein the court struck down the government order which allocated seats in educational institutions to the various communities in proportion to the population they bore to the total numbers of seats.

the promotion of welfare of such classes was not to be by way of undermining it. To overcome such difficulty the constitution (First Amendment) Act, 1951 was passed which added a new clause to Article 15. The clause reads as under.

“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 wording “any special provision” in Article 15(4) gives the state great leeway in prescribing the method of operation of preferential treatment for the advancement of weaker sections of society. Special measure such as housing scholarship, land distribution, health benefits are being taken under this power. The reservation of seats in educational institutions under Article 15(4) and of jobs under Article 16(4) has received a uniform interpretation by the court. This is reflected through various judgments of the courts.

#### **IV. Right to Reservation as a Fundamental Right:**

Reservation under Article 15 (4) and 16 (4) no doubt fall within part-III of the constitution comprising the fundamental rights. Every provision of part- III however does not confer a fundamental right. Some of the provisions of part III are just definitional: others are on the effect of the fundamental right on the existing and future laws. Still other provides for the enforcement and implementation of the fundamental rights while some others provides exceptions to the fundamental rights. Because of this variety of provisions, doubt persists whether Article 15(4) and 16(4) confer fundamental rights<sup>8</sup>.

There is so much of suffering, discrimination and systematic exclusion of member of disadvantaged groups from valued reserves, opportunities and careers that a theory of right may help them to fight against existing inequalities. Despite its usefulness this theory seems illogical, unsound as well as unbalanced. Some may even consider it undesirable. With too much of participation of the reservation issue and political abuse of this device one has to move with great circumspection in acknowledging a right to reservation. One cannot overlook that Articles 15(4) and 16(4) have been placed under several limitations especially in

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<sup>8</sup> Mahendra Pratap Singh, “Are Articles 15(4) and 16(4) Fundamental Rights? (1994) 3 S C C (J) p. 33.

respect of a firm evidence of clear and legitimate identification of the backward groups<sup>9</sup>.

In *M.R. Balaji v State of Mysore*<sup>10</sup>, the Court held that Article 15(4) authorises special provision to be made but if a provision which is in the nature of an exception completely excludes the rest of the society that clearly is outside to the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the constitution intended to provide that where the advancement of the backward classes or the Scheduled Castes and Scheduled Tribes was concerned the fundamental right of the citizens constituting the rest of the society were to be completely and absolutely ignored. Considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provisions contemplated by Article 15 (4) can be special provision which excludes the rest of the society altogether. Further the court held that like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the constitution. In this connection it is necessary to emphasis that 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 take suitable action if necessary<sup>11</sup>.

In *C.A. Rajendran v. Union of India*<sup>12</sup>, the petitioner based his argument on the minority opinion of Subba Rao J, in *T. Devasasan v. Union of India*<sup>13</sup> and contended that the provision contained in Article 16 (4) of the constitution was in itself a fundamental right of Scheduled Castes and Scheduled Tribes and it was not open to the Government to withdraw the benefit conferred on SCs/STs by the Govt. Orders. Rejecting this contention the court held that the only matter which classes (4) of Article 16 cover is a provision for the reservation of appointment in favour of a backward class of citizens. It is well settled that clause (4) of Article 16 is an exception classes and is not an independent provision and it has to be strictly construed. It is also apparent that the language of Article 16(4) has to be interpreted in the context and background of Article 335 of the Constitution. In other words, in making a provision for reservation of appointment or posts the Government has to take into consideration not only the claims of the members of the backward classes but also the maintenance of efficiency of administrator which is a matter of paramountt importance. The court cited the majority opinion of Gajendra Gadkar. J., in *General Manager, Southern Railway v.*

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<sup>9</sup> Ibid

<sup>10</sup> AIR 1963 S C 649 at 31.

<sup>11</sup> AIR 1963 S C 469.

<sup>12</sup> AIR 1968 S C 507.

<sup>13</sup> AIR 1964 S C 179.

*Rangrchari*<sup>14</sup>, where he said “it is true that in providing for the reservation of appointments or posts under Article 16 (4) the state has to take into considerate the claims of the member of the backward classes consistently with the member of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. It is also true that the reservation which can be made under clause 16(4) is interceded merely to give adequate representation to backward communities. It cannot be used to creating monopolies or for unduly or illegitimately disturbing the legitimate interest of other employees”<sup>15</sup>.

The court ultimately held that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make reservation for Scheduled Castes and Scheduled Tribes either at the initial stage of recruitment or at the stage of promotion. In other word Article 16(4) is an enabling provision and confers a discretionary power on the state to make a reservation of appointments in favour of backward class of citizens which in its opinion is not adequately represented in the services of the state<sup>16</sup>.

In *P & T Scheduled Castes / Tribes Employees Welfare Association v. Union of India*<sup>17</sup>, the court refused to issue a writ against Government for providing reservation in posts or appointment in P and T. Department. Here the petitioner prayed that a direction should be issued to the government to issue specific orders conferring on thin such an extra advantage. The court held that the claim made by the petitioner is true but 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. Therefore the court issued a direction to the Government of India to issue order on the behalf.

In *State of Kerala v. N.M. Thomas*<sup>18</sup>, the court held that the power to make reservation, which is conferred on the state under Article 16 (4) can be exercised by the state in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointment or posts under Article 16(4) the state has to take into consideration the claims of the backward classes

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<sup>14</sup> A I R 1962 S C 36.

<sup>15</sup> Ibid

<sup>16</sup> C.A. Rajendra case

<sup>17</sup> (1998) 4 S C C 147

<sup>18</sup> A I R 1976 S C 490 para 29.

consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make reservation at the cost of efficiency of administration

The consequences of recognizing reservation as a fundamental right are also relevant. Once something which has so far been recognized 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.

The right to affirmative action will thus open a flood gate for indeterminate uncertain and vacuous claims. It seems even the courts are not likely to responsive to such claims as a matter of enforceable right. It may be mentioned here that beginning from Balaji<sup>19</sup> until the nine judge bench decision of the supreme court in Mandal<sup>20</sup> Article 16(4) and 15(4) have been treated as enabling provisions.

In *Mohan Kumar Singhania v. Union of India*<sup>21</sup>, the court held that the constitution, no doubt, has laid a special responsibility on the government to protect the claims of SCs/STs in the matter of public appointments under various constitutional provisions is an enabling provision conferring a discretionary power on the state for making any provision or reservation of appointments of posts in favor of any backward class of citizens, which in the opinion of the state is not adequately represented in the service under the state. Clause (4) of Article 16 has to be interpreted in the background of Article 335. Article 335 conjoins that the claim of the members of the SCs/STs shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of appointments to services or posts in connections with the affairs of the union or of a state. The court further held that reservation is not a constitutional compulsion but it is discretionary one. In *Mandal case*<sup>22</sup>, the court has clearly ruled that reservations in promotions are constitutionally impermissible. The court has also advised the government not to make any reservation in higher position and in specialized areas. For instance, no reservation should be provided in technical posts in research and development institutions, in specialties and super specialties in medicine engineering and other such areas. Similarly University Professorship and higher echelon positions in defense-space, science and nuclear research have to go by merit alone. Reservations in these kinds of jobs are seen as inconsistent with the values of efficiency that are

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<sup>19</sup> *M.R. Balaji v. State of Mysore*, A I R 1963 S C 649.

<sup>20</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477.

<sup>21</sup> AIR 1992 S C 1.

<sup>22</sup> *Indra Sawhney v. Uunion of India*, A I R 1993 S C 477.

needed in such professions and services<sup>23</sup>. None of these judges even indirectly indicates that those clauses can themselves be construed as aspects or the fundamental rights to equality and thus be enforceable in a court of law.

The word “Nothing in this Article shall prevent the state from making any provision” in Article 16 (4) and nothing in Article 15 or Article 29 (2) shall prevent the state from making any special provision, in Article 15 (4) clearly establishes that those clauses constitute authorizing provisions for implementing the directives contained in Article 46<sup>24</sup>. It is true that in *Thomas* case the Supreme Court ruled that Article 16 (4) was not an exception to Article 16 (1) but an emphatic statement that equality of opportunity could be carried to the extent of making reservation but Thomas nowhere acknowledged a fundamental right to affirmative action<sup>25</sup>.

In *Union of India v Madhav*<sup>26</sup> a three Judge Bench held that “Government evolved reservation in post or office under the state as one of the modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an office or post in a service under the state is some of the means to render socio-economic justice<sup>27</sup>. The same consideration was held in *Ashok Kumar Gupta v State of Uttar Pradesh*<sup>28</sup>, where it was observed that the policy of reservation is part of socio-economic justice enshrined in the preamble of the constitution, the fundamental right under Article 14, 15(4), 16(1), 16(4), 16(4A) 46 and 335 and other related Articles to give effects to the above constitutional objectives. It was also held in this case that right to proportion is a statutory right. It is not fundamental right. The policy of reservation creates an obligation on the state to treat everyone with equal respect and concern and in this sense this policy serves the principle of equal treatment but this policy dose not create any corresponded individual right in favour of the members of the beneficiary groups<sup>29</sup>.

There is no indication in the Constitution that the state need reserve any minimum number of posts in government service or seats in educational institutions; nor divert any minimum part of its resources to benefits. Preferences are not mandatory but only permitted<sup>30</sup>. Article 15(4) and 16(4)

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<sup>23</sup> Ibid

<sup>24</sup> Parmanand Singh, *Fundamental Right to Reservation- A Rejoinder*, (1995)3 S C C P.6-12.

<sup>25</sup> Ibid.

<sup>26</sup> (1997) 2 S C C 332..

<sup>27</sup> Ibid

<sup>28</sup> (1997) 7 S C C 201.

<sup>29</sup> (1997) 7 S C C 201.

<sup>30</sup> Marc Galanter, “Protective Discrimination” for Backward Classes in India, *Law and Society in India*, Oxford University Press, Delhi, 1994 p. 44.

do not confer on backward groups any fundamental rights to such arrangements. But rather are an exception to the rights that other would otherwise enjoy complaining of such arrangements as violation of the fundamental rights granted in Article 15, 16 and 29. It is clear that Government man constitutionally omit to make any such preferences<sup>31</sup>.

#### V. Exclusion of Creamy Layer:

Some members of the designated backward classes are highly advanced socially as well as economically and educationally and they constitutes the forward section of that particular backward classes – as forward as any other forward class member – and that they are lapping up all the benefit of reservation meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward.<sup>32</sup> The *Mandal Commission* has pointed out 3743 castes as backward which are considered as other backward classes for giving the benefit of reservation. But the real agony is whether all the 3743 backward castes fulfill all the conditions of a backward class? Justice Kuldip Singh in his minority opinion has said Mandal has not done any survey to find out whether 3743 castes which according to him are backward classes under Article 16(4). He further said that hardly any investigation was done by the Mandal Commission to find out the backward classes for the purpose of Article 16(4). A collection of so called backward castes by a clerical act based on drawing room investigation cannot be backward class under Article 16(4).

In *K. C Vasant Kumar v. State of Karnataka*<sup>33</sup>, Chinnappa, J., observed “one must, however, enter a caveat to the criticism that the benefits of reservations are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and post 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 post snatched away, in the same way, by the top creamy amongst them as the same principle of merit on which the non reserved seats are taken away by the top layers of society. How can it be had if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved post by the top creamy layer of society itself is not bad?”

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<sup>31</sup> Ibid

<sup>32</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477 at 558

<sup>33</sup> A I R 1985 S C 1495.

In *Indra Sawhney v. Union of India*,<sup>34</sup> it was held that it is not the question of permissibility or desirability of means test but one of proper and more appropriate identification of a class - a backward class. The very concept of class denotes a number of persons having certain common traits which distinguishes them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially which in the context, necessarily means economically and may also mean educationally, the connecting thread between them and the remaining class snaps? They would be misfit in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, nearly lies in drawing the line – how and where to draw the line? For, while drawing the line it should be ensured that it does not result in taking away with one hand what is given by the others. The basic of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement.

The court further observed that the industrialization and the urbanization which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social reform movement of the last several decades, the spread of education and the advantages of special provisions including reservation secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birth mark. It can further hardly be argued that once backward class, always a backward class. That would defeat the very purpose of the special provision made in the Constitution for the advancement of the backward classes and for enabling them to come to the level of and to compete with the forward classes, as equal citizens. On the other hand, to continue to confer upon such advanced section from the backward classes the special benefits, would amount to treating equals – unequally violating the equality provision of the Constitution. The object of special Constitutional provision is not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Hence taking out the forward from among the backward classes is not only permissible but obligatory under the Constitution.

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<sup>34</sup> AIR 1993 S C 477.

However, it is necessary to add that just as the backwardness of backward groups cannot be measured in items of the forwardness of the forward groups, so also the forwardness of the forward among the backward classes cannot be measured in terms of the backwardness of the backward section 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. So long as the individuals belonging to the backward classes do not develop sufficient capacities of their own to compete with others, they can hardly be classified as forward. The moment, they develop the requisite capacities; they would cease to be backward. It will be a contradictory term to call them backward and others more or more backwards. There will always be degree of backwardness as there will always be degree of forwardness, whatever the structure of society. It is not degree of backwardness or forwardness which justifies classification of the society into forward and backward classes. It is the capacity or the 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.<sup>35</sup>

The court further held that while the income of 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. At the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of designated backward classes becomes a member of I.A.S or I.P.S or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children get full opportunity to realize their potential. They are in no way handicapped in the race of life. By giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.<sup>36</sup>

Keeping in mind all these considerations, the court directed the government of India to specify the basis of exclusion - whether on the basis of income, extent of holding or otherwise of 'creamy layer'. One such specification person falling within the net of exclusionary rule shall cease to be the members of the other backward classes for the purpose of Article 16(4).<sup>37</sup>

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<sup>35</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477

<sup>36</sup> Ibid.

<sup>37</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477 at 486.

The creamy layer concept was introduced in *Indra Sawhney case*.<sup>38</sup> The court observed that the protective discrimination in the shape of job reservations has to be programmed in such a manner that the most deserving section of the backward class is benefited. Means test ensures such a result. The process of identifying backward class cannot be perfected to the extent that every member of the said class is equally backward. There are bound to be disparities in the class itself. Some of the members of the class may have individually crossed the barriers of backwardness but while identifying the class they may have come within the collectivity, it is often seen that comparatively rich person in the backward class though they may not have acquired any higher level of education are able to move in the society without being discriminated socially. The members of the backward class are differentiated into superior and inferior. The discrimination which was practiced on them by the superior class is in turn practiced by the affluent members of the backward class on the poorer members of the said class. The benefits of special privileges like job reservation are mostly chewed up by the richer or more affluent section of the backward class and the poorer and the really backward section among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniformed. The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the state – services. It is therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservation is necessary to benefit the needy section of the class. In *Janaki Prasad Parimoo v. State of Jammu and Kashmir*<sup>39</sup>, it was held that in identifying backward classes therefore, one has to guard oneself against including therein section which is socially and educationally advanced because the whole object of reservation would otherwise be frustrated. In this connection it must also be remembered that state resource 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.

#### **V. I. Determination of Creamy Layer Class:**

In pursuance of the *Mandal case*, the Union of India in 1993 issued an Office Memorandum which stated that children of officers belonging to I A S, I F S, I P S and All India First Class Service and are those whose annual income exceeded Rs. 1 lakh per annum among the OBCs – be identified as falling under “creamy layer” for being excluded from the benefit of

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<sup>38</sup> Ibid.

<sup>39</sup> AIR 1973 S C 930

reservation meant for OBCs. State of Kerela could not evolve a suitable mechanism for identifying creamy layer. It was seeking extension of time periodically. Then the Apex Court issued suo motu contempt notice to the state and its chief secretary. During the pendency of the contempt proceedings, a state legislature committee went into issue of creamy layer. It reported that the some OBCs were not adequately represented in the service of the state. Later the state enacted the impugned 1995 Act declaring that there was no socially advanced person among the OBCs in the state. Apex court directed the construction of K. J Joseph Committee to identify the creamy layer among the OBCs. The Committee identified the creamy layer and frame some guidelines to exclude them. The annual income of a person belonging to OBC was raised to Rs. 1.5 lakh for this purpose. The Bench said that till the state appointed a commission to identify the “creamy layer” all the appointment in the service of the state government including the PSUs and cooperatives would be on the basic of guidelines of the Joseph Committee Report.<sup>40</sup> Justice Jagannadharao said “whether creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely that will be a breach not only of Article 14 but of the basic structure of the constitutions”<sup>41</sup>

In accordance with the direction given by the Supreme Court the Union Government had appointed an expert committee known as the Justice Ram Nandan Committee to identify the creamy layer among the socially and educationally backward classes (SEBC). The Expert Committee submitted its report on March 16, 1993 which was accepted by the Government of India. The report identified the creamy layer among the SEBC for excluding it from the list of Mandal Beneficiaries. The Committee report states that only when the creamy layer is substantially and stably formed after crossing the limits of social backwardness, then and then alone can it be made the basic for disentitlement. At present six lakh rupees is the upper income level for exclusion of creamy layer.

## **VI. Conclusion:**

It is submitted that the notion of equality as a matter of policy has to be kept distinct from the notion of equality as a matter of right. In the constitution the protective clauses are juxtaposed with the main clauses guaranteeing nondiscrimination and equality of opportunity. The constitution seems to view it as a matter of policy. A policy stipulated a collective goal which a community seeks to pursue. A right is an individual claim which seeks to protect an individual's interest. Rights are primarily protective.

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<sup>40</sup> M Sridhar Acharya. *Quota System in the Higher Levels of Employment and Educational and Exclusion of Creamy Layer*, 27 (3 & 4) 2000 I B R p. 133.

<sup>41</sup> Ibid at 144.

They guarantee citizens certain basic freedoms and protect them against infusions, discrimination and arbitrary action by the state. The duties correlative with these personal rights and largely prohibitions on the Constitutional rights, here in citizens generally and no one is excluded from the benefits they confer. Indeed these constitutional rights can justly be suppressed for achieving certain social or collective goals. In a sense, Article 16 (4) and 15 (4) could be treated as authorizing norms in Kelsenian sense justifying encroachment of the individual's right to the disadvantaged groups<sup>42</sup>. Professor Dworkin<sup>43</sup> holds that rights are individual claims which operate as trumps over collective goals. If a right is truly a right, it must have some weight to trump policy considerations but compensatory discrimination is thought of as serving a policy of increasing caste-harmony by eliminating visible and institutionalized prejudices and increasing economic equality by removing some of the obstacles that keep the members of backward classes in an economically and socially disadvantaged position. Dworkin argues that a right is a matter of principle and there every citizen has a right not to be discriminated against on racial ground and has a right to be treated with equal concern and respect. It is submitted that the underlying argument in Dworkin's theory had adequately been embodied in the non-discrimination clause of Article 15 and 16<sup>44</sup>.

The policy of reservation creates an obligation on the state to treat everyone with equal respect and concern and in this sense this policy serves the principles of equal treatment. The policy of reservation does not create any corresponding individual right in favor of the members of the beneficiary group<sup>45</sup>.

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<sup>42</sup> Parmanand Singh, *Fundamental Right to Reservation. A Re-joinder*, (1995) 3 S C C pp. 6-12.

<sup>43</sup> *Ibid.*

<sup>44</sup> *C. E. S. C. Ltd v. Subhash Chandra Bose*, AIR 1992 SC 573

<sup>45</sup> *Air India Statutory Corporation v. United Lab Union*, AIR 1997 SC 645