

**RESERVATION: IDENTIFICATION AND  
DETERMINATION OF BACKWARD  
CLASSES IN INDIA**

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**A THESIS SUBMITTED TO THE UNIVERSITY OF NORTH  
BENGAL FOR THE AWARD OF DEGREE OF DOCTOR OF  
PHILOSOPHY IN LAW**

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**APRIL, 2013**

## **DECLARATION**

I, hereby, declare that the thesis entitled “RESERVATION: IDENTIFICATION AND DETERMINATION OF BACKWARD CLASSES IN INDIA”, has been prepared by me under the guidance of Professor (Dr.) B. P. Dwivedi, Department of Law, University of North Bengal, Raja Rammohunpur, Darjeeling. No part of this thesis has formed the basis for the award of any degree or fellowship previously.

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## **ABSTRACT**

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 discriminated and denied the bare human rights. 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. The social and economic exploitations resulted in discrimination, misery, poverty and other disabilities. The economic backwardness brought social backwardness which consequently made them down trodden and thus depriving them even of the dignity of life

This caste system divided the Indian society into forward and the backward classes. 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

To ensure protection of backward classes of citizens it was necessary that members of backward classes be appointed in the state services so the power was given to the state to provide for reservation of such appointments. Accordingly the provision was made for the reservation of jobs in terms of Article 16(4).

## ***Abstract***

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The word “Backward” as used in the Constitution of India is nowhere defined. Article 15(4) uses the word socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes. Whereas Article 16(4) uses the word ‘backward’. So far the work of this research is concerned, it is confined only with Article 16(4) of the Constitution and thus the backward word as used in this Article is the subject matter of this research work.

So far SCs and STs are concerned the Constitution defines them and their ascertainment does not pose major problems. The geographical and cultural factors make the identification of the SCs / STs fairly simple but the question as to who are deemed to be the Other Backward Classes and what criteria should be adopted in determining their backwardness for the purpose of reservation in jobs and educational institutions give rise to serious difficulties. The question of backwardness has also become a subject matter of considerable litigation. No doubt the judiciary has over the years made numerous attempts to evolve a secular, scientific and rational formula for adjudging backwardness yet the judicial attempt in this direction have not resulted in concretizing any well-defined principle that could find an application in every case. The identification of backward classes had been left to the states. States and Union Territories adopted different criteria of backwardness, several of which have been subjected to judicial review. The judicial verdicts have thrown up several guidelines for the identification of backward classes. The demand for determining as to who the OBCs are, was made several times in parliament. The clamor ultimately led to the appointment of the several backward class commissions.

The present reservation policy is made on the basis of the recommendation made by the Second Backward Classes Commission Report. The lacuna of this report is that the commission has studied the condition of the backward class people prevailing in pre independence and took note of the Caste Census 1931. After independence, the government has made several attempts for the upliftment of these classes and that reduced the disparities between backward and the forward classes.

The questions relating to reservation are so many and so vast that it is not possible to incorporate and to answer all the questions relating to reservation. So I

## *Abstract*

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have selected certain questions and tried to find out answers of those questions in my thesis. An attempt has been made in this work to discuss the aforesaid issues analytically and to suggest appropriate solution. For the sake of better presentation of entire research work / thesis has been divided into seven chapters including the introduction and the conclusion.

The method to be applied for this study is primarily doctrinaire research, the historical analytical methodology of research has been applied and a systematic analysis is made. Only the Supreme Court cases have been taken for the study on different issues concerning the subject matter.

Reservation is one of the many facets of equality and undoubtedly a means to bring unequals and down-trodden to the levels of equals and to provide them social justice. It is undeniable fact that by reservation at least some families in the backward classes gained sufficient means to develop their capacities to compete with others in every field. Such change was not only because of reservation but it was a combined effect of lots of factors. With the increase of industrialization and urbanization which necessarily followed in its wakes, the advances on political, social and economic front made particularly after the commencement of the constitution, the social reform movements of the last several decades, the spread of education have played their roles.

The existing policy of reservation needs fundamental and drastic changes. Neither it could bring about the desired social reconstruction, nor did it help to ameliorate the socio-economic conditions of the weaker sections. Instead creating distrust and tension between various segments of society, a time bound programme to uplift all the weaker sections is needed.

So it is recommended that the reservation in favour of Other Backward Classes should continue for further period. It is believed that, if the reservation policy is implemented whole-heartedly and properly, the concept of reservation would be a subject of History and it would be found only in the Museums. The day will come and it is hoped that day will come soon.

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## **CERTIFICATE**

This is to certify that Mr. Om Prakash Sharma has pursued his research work on the topic entitled “RESERVATION: IDENTIFICATION AND DETERMINATION OF BACKWARD CLASSES IN INDIA” under my supervision and he has fulfilled all the requirements under the U G C Ph. D Regulation, 2009. Now his thesis is ready for submission. It is an original piece of work and it has not been submitted anywhere for the award of any degree. It may hence be submitted for evaluation before examiners for the award of the degree of Doctor of Philosophy (Law) of the University of North Bengal.

Professor (Dr.) B. P. Dwivedi

## **PREFACE**

*The concept of Reservation is one of the most controversial among the policies undertaken by the government to bring the backward classes to the level of forward class. The fact that the Constitution provides reservation for the advancement of the backward sections of the society, no further justification is required to defend such policy. Reservations, on the other hand provoke resentment and dismay of various kinds, as they impinge heavily on the careers of specific individuals who are compelled to pay the price for collective good. In the face of the recent anti-reservation agitation and unabated violent disturbances over the new reservation policy the wider discourse that takes place today centers round the meaning of backward classes and the criterion for determining these groups.*

*Article 15(4) uses the word socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes and Article 16(4) uses the word 'backward'. So far the work of this research is concerned, it is confined only with Article 16(4) of the Constitution and thus the backward word as used in this Article is the subject matter of this research work. A humble attempt has been made in this research work to find out the appropriate criterion for determining the backward classes which serve the maximum interests with minimum friction and waste.*

*The present work is the outcome of the different intellectual thoughts of different people who have contributed in their capacities to bring this thesis in present form. So I acknowledge their contributions.*

## ***Preface***

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*It is indeed a great pleasure to express my deep and profound gratefulness to my supervisor Prof. (Dr). B. P. Dwivedi for bestowing much of his valuable time and thought in going minutely through every word of the work and making appropriate corrections, alterations if any and valuable suggestions. I am proud and delighted of having got guidance from dynamic scholar like him, a man of noble ideas, with whom I always feel with great respect.*

*I must record my thanks with gratitude to Prof. (Dr.) Gangotri Chakraborty, Head, Department of Law, University of North Bengal, Darjeeling, for her kind guidance and academic patronage as well as boosting my confidence and continuous motivation throughout my academic life.*

*I am thankful to my reverend teacher Dr. Rathin Bandyopadhyay, Former Head, Department of Law, N.B.U. for guiding me during my Ph. D course work and helping me to organize my research work.*

*I am equally thankful to my brother turned colleague Dr. Sujit Kumar Biswas for his encouragement to complete the work.*

*There is no word to express my gratitude to my parents Late Chandrakanta Devi (mother) and Late Nagendra Sharma (father). My mother had always encouraged me and she tried her level best for my better studies. She will always be remembered for her contribution in my academic career in Law. Mr. Sarju Sharma and Mrs. Parvati Sharma, and Late Bhagwan Lal Sharma are the people whom I have found the reflection of my parents. I am proud to be a part of their families.*

*I am also grateful to my brother, Mr. Ram Nath Sharma, my sister- in -law, Mrs. Manorama Sharma for their contribution in my academic life. I am equally grateful to my sisters namely Mrs. Sunaina Sharma and Mrs. Shiromani Sharma. On the other hand Mr. Sanjay*

## ***Preface***

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*Sharma, Mr. Ajay Sharma, Mr. Bijay Sharma, Mr. Raja Sharma, Mr. Dipak Sharma, Mrs. Rakhi Sharma are attached with me in such a way that today my existence are depended on them.*

*Mrs. Lila Sharma (my wife) is the witness of my every success and failures of last 14 years. My success is a reflection of her selfless, consistent and untiring efforts. The way during my bad days she held and inspired me, it really helped me to reach out my target. My two little angels, i.e. Anushrita and Kaavya are the greatest source of inspiration of my life.*

*My friends Mr. Biswanath Jha, Mr. Nilay Gupta, Mr. Debjit Saha and Dr. Pawan Kumar Mishra have always given me their valuable advices since my student life. My life is enriched with their companionship.*

*I am highly indebted to Dr. Kaushik Ghosh for extending his helping hand and heartiest co-operation. His contribution to this work is remarkable and unforgettable.*

*I am very much thankful to my colleagues of the Department of Law, University of North Bengal namely, Ms. Sangeeta Mandal, Dr. Diganta Biswas, Dr. Rajendra Dhar Dubey, Ms. Sanyukta Moitra, Dr. Kaushik Ghosh, Mr. Sanjay Dutta, Mr. Suraj Kumar Saw and Ms. Taniya Basumajumdar for their kind and heartiest cooperation.*

*There is no word to express my gratitude towards all the non-teaching staffs of the Department of Law, University of North Bengal. The way Mr. Amal Kumar Dhar and Mrs. Sati Dey of the Library, Department of Law helped me during my student and researcher life, is just unforgettable.*

**(OM PRAKASH SHARMA)**

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# ABBREVIATIONS

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A I R .....	ALL INDIA REPORTER
C. L.....	CREAMY LAYER
C I L Q .....	CENTRAL INDIA LAW QUARTERLY
I B R.....	INDIAN BAR REVIEW
J I L I.....	JOURNAL OF INDIAN LAW INSTITUTE
N B C C.....	NATIONAL BACKWARD CLASSES COMMISSION
N B C C A .....	NATIONAL BACKWARD CLASSES COMMISSION ACT, 1993.
O B C S .....	OTHER BACKWARD CLASSES
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U. O. I.....	UNION OF INDIA

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## **CHAPTER – 1**

### **INTRODUCTION**

History holds testimony to the fact that over the centuries many sections of our caste – ridden society have been the victim of oppression and exploitation at the hands of the dominant groups in society. 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>1</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

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<sup>1</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.

## ***Introduction***

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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, politics 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 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 concision, 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 legislatives bodies as a manifestation of political justice whereas they are provided along with other backward classes'

## ***Introduction***

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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.

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

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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 violated of Article 15(1) and 29(2) in *State of Madras v. Smt. Champakam Dorairajan*<sup>2</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

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<sup>2</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.

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object of Article 16 and 29 (2) so sacrosanct that 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.

Reservation in favour of Backward Classes (BC) was introduced long before independence. The policy<sup>3</sup> of reservation in job was firmly established during the closing decades of the British rule but such policy was designed more to redress communal inequalities in the representation in public services rather than as a social engineering device to redress the rooted socio-economic inequalities of the disadvantaged sections of the society because of the past societal discrimination. In the South India, a scheme of communal reservation emerged as a result of a revolt by Non-Brahmins against Brahmin domination in services. In the British Province of Madras and in the Princely state of Mysore there was a preponderance of Brahmin in public services and the Mysore Government, following the Madras scheme made reservation in favour of backward classes as far as 1874. In 1895, appointment in

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<sup>3</sup> Parmanand Singh, Equality, Reservation and Discrimination in India; A constitutional Study of Scheduled Castes and Scheduled Tribes and Other Backward Classes, Deep & deep Publication, Rajou Garden, New Delhi. 1985.

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Police Department was made reserving posts in proportions in favour of the Brahmins, Musalmans and other Hindu castes. Despite the scheme of communal reservation from 1874, the representation of other communities in the Government Departments was far from being satisfactory and the Brahmin domination continued. In January 1895 the Mysore Government issued further circular reserving posts in favour of the backward classes. Even in 1918 the Mysore Government noted the preponderance of Brahmins in the State services and desired that other under representative communities should be adequately represented in services. That year, the Government appointed a committee headed by Miller. The Miller Committee proceeded on the assumption that the expression backward classes meant castes and communities including Muslims who were not adequately represented in the services. The committee defied the term 'Backward Classes' to include all the communities except Brahmins. Thus the Mysore and Madras Governments followed a policy of job reservation as a result of the revolt by Non-Brahmins against Brahmin domination in public services. Similarly in Mysore until 1959 the Brahmins could compete for only three out of every ten posts. The Government of Travancore and Cochin, Andhra and Kerala also pursued a policy of caste-quota for reservation in government jobs<sup>4</sup>.

There did not appear to be any reservation for the backward classes in North Indian states mainly due to the lack of any organized movement on the part of the backward groups to press for such a demand as the Non-Brahmin movement had gone in the Southern Province<sup>5</sup>.

The Indian Constitutional policy of compensatory discrimination was very much as a result of Ambedkar's dramatization of the deprivation and disadvantages suffered by the Untouchables and his endless efforts to ameliorate their socio-economic conditions. The foundation for this policy was laid after Gandhi's historic

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<sup>4</sup> Ibid

<sup>5</sup> Ibid

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fast at Poona in the face of Ambedkar's demand for the establishment of a separate electorate for untouchables<sup>6</sup>.

The British Government followed a policy of communal reservation in public services for communities like Muslims, Christians, Anglo-Indians, Parsis, Depress Classes, Aborigines and other groups. The claims of these communities in public services were recognized and preserved in the initial stages of constitution making but were ultimately eliminated from the final draft under which only the claims of backward classes were incorporated in the constitution for compensatory treatment in the field of public services<sup>7</sup>.

The concept of reservation is one of the crucial factors in the Constitution of India to secure socio – economic justice to the down-trodden people and to bring them to the mainstream of the national life. The political, social and economic inequalities, which existed in our country prior to our Constitution, came into being made many revolutionary and social thinkers to agitate for securing socio-economic and political justice. Consequently, when the constitution of India was being drafted the constitution makers inserted the concept of equality so that no individuals shall be treated unequal.

Reservation is one of the measures adopted by the constitution to remedy the continuing evil effects of prior inequalities stemming from discrimination 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 purposefully societal discrimination. To attack the continuing ill effects and perpetuation of such injustice the constitution permits and empowers the state to adopt corrective devices even when they have discriminatory and exclusively effects. Any such measure in so far as one group is preferred to the exclusion of another must necessarily be narrowly tailored to

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<sup>6</sup> Ibid

<sup>7</sup> Ibid

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the achievement of the fundamental constitutional goal. 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 effects of inequalities stemming from prior discrimination against the classes of people have resulted in their being reduced to position of backwardness and consequent under representation in public administration. Reservation is remedy or a cure for the ill effect of historical discrimination. Although the programmes of affirmative action are essentially aimed at granting equality of opportunity, adequacy of representation and the like, they at times give rise to controversies due to the discrimination inherent there in and certainly the over enthusiasm of the policy makers many a time also ignites controversies regarding various aspects of protective discrimination. Time and again the Supreme Court of India as the final interpreter of the constitution has been called upon to determine the numerous contentious issues; yet with changing times growing demands for inclusion in the list of beneficiaries, expansion in scope of such scheme, or any decision of a court restricting / expanding the amplitude of such special favours, all are enough the start fresh spate of debates in this matter.

The principal problem in affirmative action is that of determining the target group of the benefits package. Those who are designated as the beneficiaries become entitled to certain advantages and position and in that sense get an edge over others not similarly designated. The Constitutional mandate for affirmative action designates these target groups as backward classes. Some of these identified as Scheduled Castes and Scheduled Tribes and other it leaves in nominate. The rationale for this distinction is largely historical to ensure the protection of backward classes of citizen so the power was given to the state to provide for reservation for such designated groups. States have determined as to which caste, community or groups is backward or inadequately represented in services in the state. This was clear in the mind of Dr. B.R Ambedkar and he raised his voice for representation in state services way back in 1930. He realized that unless the backward classes have share in the power, their interest cannot be protected. While addressing the all India depressed classes

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Congress at Poona in August 1930 he asserted that “the best guarantee for the protection of your own interest consists in having the power of control in your own hands, so that you may yourselves be in position not only to punish when mischief to your interest is done but to keep a watch over your interests from day to day and prevent possible mischief from arising. The safest remedy for the protection of your interest seem to me to lie in securing control over the future exclusively in self governing India in your own hand and that you can have only a means of adequate representation in the legislature of the country. It is by this means alone that we can keep a day to day watch upon the doings of executive and thereby ensure our safety and our progress”. These ideas of Dr. Ambedkar might have been the motivating force behind the reservation for backward classes.

At another place, Dr. Ambedkar emphasized that power to administer laws was not less important than the power to make laws and the spirit of the legislators may easily be violated if not nullified by the machinations of the administrator. This is not the only reason why the depressed classes should show special concern for securing power of control over administration. Often times under pressure of work or under difficulties of circumstances law has to learn a good deal of discretionary powers in the hands of the head of the administrative department. The welfare of the people must greatly depend on how impartially this discretionary power is exercised, in a country like India where the public service is almost exclusively manned by people of one community; there is a great danger of this vast discretionary power being abused for the aggrandizement of a class. The Constitution permits protective discrimination in the form of reservation in the three specific areas:

- (1) Reservation of seats in the Legislature,
- (2) Reservation in the services of states and
- (3) Reservation of seats in the Educational Institutions.

In order to create a politically homogeneous society, the framers of the Constitution rejected the system of communal representation and separate electorate

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and instead opted for universal adult franchise and joint electorate. Strongly enough the founding fathers weakened the concept of political homogeneity by providing for reservation of seats in the legislature for the Scheduled Castes and tribes.

Articles 330 and 332 of the Indian Constitution provide for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the house of the people (Lok Sabha) and the legislative assemblies of the state. These special provisions for the reservation of seats in the legislature were provided purely as a transitory measure. Initially the reservation was for a period of ten years. However, this arrangement was extended up for further years by various Constitutional Amendments as it was felt that the Scheduled Castes and the Scheduled Tribes needed reservation for a longer period. The policy of legislative reservation, no doubt a bold imperative of equality and social justice, adopted at the time of framing of the Constitution, and its continuation by periodical extension demand a critical social enquiry.

To ensure protection of backward classes of citizens it was necessary that members of backward classes be appointed in the state services so the power was given to the state to provide for reservation of such appointments. Accordingly the provision was made for the reservation of jobs in terms of Article 16(4).

Unlike Article 16(4) which specifically provided for reservation of jobs, there was no provision in the Constitution which permitted reservation of seats in educational institutions. It was only in 1951; clause 4 in the Article 15 was inserted by a Constitutional Amendment in pursuance of the decision of the Supreme Court in the case of *Champakam Dorairajan*<sup>8</sup>.

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<sup>8</sup> A I R 1951 S C 226

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### **1. I. STATEMENT OF THE PROBLEM**

The Constitution of India permits reservation for three categories of groups (a) Scheduled Castes (b) Scheduled Tribes and (c) Other Backward Classes. The Constitution itself does not define these groups nor does it provide any standard by which they may be determined. In the case of Scheduled Castes and Scheduled Tribes the President is empowered to specify, after consulting with the governor of a state, those castes, race or tribes or parts groups within castes race and tribes which shall for purpose of this constitution be deemed to be Scheduled Caste in relation to that state. He may similarly specify tribes and tribal communities or part of groups within tribe's communities as Scheduled Tribes.

The word "Backward" as used in the Constitution of India is nowhere defined. Article 15(4) uses the word socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes. Article 16(4) uses the word 'backward'. The word backward under Article 16(4) includes the Scheduled Castes, Scheduled Tribes and the Other Backward Classes. So far the work of this research is concerned, it is confined only with Article 16(4) of the Constitution and thus the backward word as used in this Article is the subject matter of this research work.

The ascertainment of the Scheduled Castes and Scheduled Tribes does not pose major problems. The geographical and cultural factors make the identification of the SCs / STs fairly simple but the question as to who are deemed to be the Other Backward Classes and what criteria should be adopted in determining their backwardness for the purpose of reservation in jobs and educational institutions give rise to serious difficulties. The question of backwardness has also become a subject matter of considerable litigation. No doubt the judiciary has over the years made numerous attempts to evolve a secular, scientific and rational formula for adjudging backwardness yet the judicial attempt in this direction have not resulted in concretizing any well-defined principle that could find an application in every case.

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The identification of backward classes had been left to the states. States and Union Territories adopted different criteria of backwardness, several of which have been subjected to judicial review. The judicial verdicts have thrown up several guidelines for the identification of backward classes. The demand for determining as to who the OBCs are, was made several times in parliament. The clamor ultimately led to the appointment of the several backward class commissions.

The interpretations and application of these Constitutional provisions regarding the identification and determination of backward classes under Article 16(4) constitutes the main focus of this research work. It is also pertinent to analyze some important facets of reservation in favour of other backward class which has been a hot bed of controversies since last two decades and consequently been the cause of much adjudication in recent time.

## **1. II. RESEARCH QUESTIONS AND HYPOTHESIS**

The questions relating to reservation are so many and so vast that it is not possible to incorporate and to answer all the questions relating to reservation. The reservation in favour of SCs and STs in Independent India was provided by the India Constitution. But the reservation in favour of Other Backward Classes was so controversial and sensitive that no Central Government, after the coming into the existence of the Constitution could implement the policy. Although two important Commissions were set up by the Central Government, the First one was Kaka Saheb Kalelkar Commission (in 1953 when Jawahar Lal Nehru was the Prime Minister) and Second Commission was Mandal Commission (in 1979 when Morarji Desai was the Prime Minister). It was only in the year of 1991, the policy was implemented by the then Central Government, under the Prime Minister ship of V.P. Singh. Considering the vastness of the concept 'reservation', each aspect of reservation demands a

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separate research. So it is not possible to cover each and every aspect of reservation. For this present research work I have selected the following research questions:

1. Whether the present policy of reservation could bring the people of backward classes to the level of forward class and the objectives of reservation to promote and protect educational and economic interest of the weaker section of society is achieved?

No doubt reservation is one of the measures to uplift the downtrodden people who have been historically neglected by the so called forward classes and were deprived the access to administration and higher education. Could this bring any positive change in the economic and educational conditions of the weaker section? That invites intensive study.

2. Are caste-based reservations not perpetuating the evil of caste system and not accentuating caste consciousness besides impeding the goal of secularism?

The founding father felt that the caste system as it operated in India of late forties of the Twentieth century had subjected a majority of the population to several social, economic, political, civil and even legal disabilities. The system needed to be abolished legally and constitutionally. Then why should there be reservation based on caste? That has to be examined in the context of Indian society.

3. If 74 percent of Indian population is treated as backward then any reservation to backward may cause reverse discrimination to forward as they are forming minority of population.

By providing reservation to 74 percent of population whether we are doing injustice to the rest 26 percent of population? That require a relook to the policy of reservation and that is to be researched.

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4. How long reservation should continue and how long backward class will remain backward?

There is no dispute regarding the rationality of the concept of reservation for backward classes but this policy was conceived as a temporary measure to bring them to the level of forward class. But now this phenomenon has become a permanent feature of Indian Politics. Even after the elapse of seven decades of independence the backward citizens could not be brought to the forward level. Should a Government of a state or the Central Government on evaluation after five or ten years direct a group or collectivity to be excluded from the test of backward classes if it finds it adequately represented? All these are matters to be investigated and a clear conclusion is to be made.

5. In a secular state, should there be any provision like reservation which is based on caste, community and religion etc.? Whether Muslim should be included in the fold of backward class and makes them entitled for the benefit of reservation?

6. Can we all our honesty declare that the sole aim of all reservation as they stand today, is the upliftment of the weaker and disadvantaged sections of our society, especially when they blindly ignore the whole segment of economically disadvantaged cutting across all castes? One wonders whether it is a case of deliberate myopia or simply that of offering the sacrifice of national interest and integrity on the demanding altar of political ambition.

7. What is the impact of reservation on society? Whether our society as a whole is benefited by the policy of reservation?

If we say that reservation is necessary as the socio-economic status of segment of society has to uplift, at the same time we have to assess the impact of reservation on society. Whether Governments are really interested in eradicating the evil of caste discrimination or the backward people are being misused by the politicians?

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8. The criteria for providing reservation which is based on the recommendation of Mandal Commission are to be re-examined. Whether those criteria still prevail in our contemporary society, should reservation be based only on those criteria? Those are the matters to be investigated and to find out a suitable solution to the problem.

9. Nobody would oppose giving of benefit of reservation to the deprived and poor but the criteria as laid down by the government for providing reservation which is based on the Census of 1931, is still hold good and no change occurred in their condition since 1931 till now, we need a fresh look into the matter ? A close look is required to watch the real beneficiaries of reservation. Whether the creamy layer among the backward classes should be excluded from the preview of reservation and whether there should be reservation in case of promotion? Whether the single post should be reserved?

10. Why there is no caste wise census beyond 1931?

11. Whether reservation can be made on economic basis?

12. Does reservation not create the reverse discrimination against the so called forward classes?

There are so many questions related with the subject which require sincere research. An attempt has been made in this work to discuss the aforesaid issues analytically on the basis of prevailing scenario and to suggest appropriate solution.

For the sake of better presentation of entire research work / thesis has been divided into seven chapters including the introduction and the conclusion. Only the Supreme Court cases have been taken for the study on different issues concerning the subject matter. The First Chapter i.e., ***Introduction*** introduces the subject. It gives an overall idea about the entire work in brief. It contains the problems for which the

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answers are being sought in subsequent chapters. The Second Chapter, i.e., ***Historical perspective*** deals with the origin development and impact of caste attitudes which has not been vanished even after more than fifty years of efforts by the government legislature, the judiciary and the voluntary agencies. Harijans are still despised and exploited. The framers of the constitution kept caste system in mind and specifically provided for a guarantee against discrimination on ground only of caste, place of birth, race, sex, religion etc. The untouchability has been abolished and its practice by any one has been made punishable. The caste system in India is as old as our civilization and culture. It is a system on which the traditional order of the Hindu Society is based and it is believed to have immemorial antiquity. Caste in India is a social institution, deriving and intimately interwoven with the Hindu religion. Membership of a caste is compulsory and not a matter of choice. A person is born into it. It is practically impossible for individual to change his caste. The complex nature of the caste structure is evident from the fact that even after a century and a half of painstaking and meticulous research in the history and function of the social system, we do not possess any conclusive explanation of the circumstances that might have contributed to the formation and development of this unique system in India.

It is obvious that such a system of social stratification divides the society into thousands of small, hereditary and endogamous groups, each cluster of groups having its own distinctive set of customs and practices, which together form a hierarchy. In Rig Veda, the term Sudra is mentioned for the first time only in the Purusha-sukta. Dasyu and Dasa are known to the Rig Veda, both as aborigines, independent of Aryan control and as conquered slaves. The term Sudra was evidently applied to the inhabitants of the villages as well as to the wild hills tribes which lived by hunting and fishing and acknowledged the over lordship of their Aryan neighbors. In course of time it included even Dasyu-Varna who remained beyond the pale of the Aryan state and who were virtually excluded from the religious and ritual cult of the Aryans. The development of the caste system in a rigid form with sticktly hereditary and mutually exclusive caste groups did not take place till the time when the Vedic Aryans had

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settled down in the middle country and were already Brahmanised enough to look upon the vratyas because they did not follow the strict caste system. The Rig Veda used the term Varna to mean colour or light and this varna is associated with groups of people having a skin of a dark or fair colour. Brahmanas and Kshatriyas are mentioned in the Rig Veda, but the word Varna has not occurred in the Rig Veda except in the Purusha Sukta but even in that hymn the word varna is not employed with reference to them. It may be conceded that at the time when the Purusha Sukta was composed the community was divided into four groups viz. Brahmana, Kshatriyas, Vaisya and Sudra.

Many of the Samhitas and writers of Digest quoted several Vedic passages on the point of disabilities of Sudras. According to those passages sudras were not allowed to read Veda. Not only was the sudra not to study the veda but veda study was not to be carried on his presence. The sudras were not to concentrate sacred fires and to perform the solemn Vedic sacrifices.

In the 18<sup>th</sup> century, the Hindu society was divided into four parts, viz., the Brahmins, Kshatriyas, Vaisyas and Sudras. The Brahmin was the priest, the sole exponent of religion as well as the teacher and guide. Both the ignorant and the educated were superstitious and the Brahmins exploited the innate human fear of the unknown. The hereditary occupation of the Kshatriyas was to wield temporal power. The kings, ministers and soldiers generally belonged to this class. The Vaisyas were the community of businessmen. They had two broad divisions. One branch took to trade and the other to agriculture. The Sudras comprise the mass of the people. They included the aborigines admitted to the Hindu community. Their salvation was supposed to lie in the direct and indirect service rendered by them to the three upper classes. Below these four castes were the Antyajas with their eight guilds of craftsmen. They had to live at a distance from the higher castes and still rendered their services to them.

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Despite the social reform movement of 19<sup>th</sup> and 20<sup>th</sup> centuries, rapid expansion of trade and industries, influence of western thoughts and the Constitutional abolition of all castes distinctions, the caste system still exists and shows no sign of dying. Chapter- 3 of the work shows the ***Conceptual and Constitutional Foundation***. In this chapter the concept of socialism and welfare state have been analysed elaborately, specially the post independent Constitutional provisions. When India became independent and it framed its own constitution, India decided to establish a socialistic pattern of society based on parliamentary democracy. To late Prime Minister Jawaharlal Nehru “the establishment of a socialist order means a controlled production and distribution of wealth for the public good”. “The socialist way of life” observes Jayprakash Narayan” is a way of sharing together the good things that common endeavor may make available”. Mahatma Gandhi upheld that idea of sarvodaya which sought to achieve the material as well as moral well beings of all section of the community and more especially of the poorest and the lowest strata of society. The constitution of India directs that 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 institution of national life”. It has been stated that all citizen have “the right to an adequate means of livelihood” and that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good”. The Directive Principles also enjoys the state to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Preamble of the Indian constitution says, we, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizen: justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all; fraternity assuring the dignity of the individual and the unity and integrity of the nation. By the constitution 42<sup>nd</sup> Amendment, Act, 1976,

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the words, socialist secular and integrity were inserted in the preamble. It indicates the source from which the constitution derives its authority and also states its objects which the constitution seeks to establish and promote. It is a key to open the mind of makers.

The principal aims of a socialist state as envisaged in the preamble are to eliminate inequality in income and status and standards of life. The basic from work of socialist is to provide a decent standard of life to the working people and especially to provide security from cradle to grave. The constitution of India is not a mere pedantic legal text, but it embodies contain human values, cherished principles and spiritual norms and recognized and uphold the dignity of man. It accepts the individual as the focal point of all development and regards his material moral and spiritual development as the chief concern of its various provisions. The core constitutional objective of social and economic democracy in other, just social order cannot be cannot be established without removing the in equalities in income and making endeavor to eliminate inequalities in status through the rule of law and legislative actions. A just social order can be achieved only when in equalities are obliterated and everyone is provided what is legally due.

From the statements of objects and reasons of the 42<sup>nd</sup> Amendment Act, 1976, it appears that the words socialism was inserted to spell out expressly the high ideals of socialism. What is meant by socialism is explained in the same context but there is no reference to collectivism or nationalism but mere social justice these words are the objective of social economic revolution which would end poverty and ignorance and disease and inequality of opportunity. This amongst other on economies side envisaged economic equality and equitable distribution of income. This is a blend of Marxian and Gandhism learning heavily toward Gandhian socialism.

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

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by the state in the administration of social justice. Reservation is the means to promote the goal of social justice. To put it simply social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunity, race, caste, religion, sex and title. 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.

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. The concept of reservation is one of the crucial factors in the constitution of India to secure socio-economic justice to the downtrodden people and to bring them to the main stream of the national life. The political, social and economic inequalities, which existed in our country prior to our constitution, came into being made much revolutionary and socio-economic and political justice. Consequently, when the constitution of India was being drafted, the constitution-makers inserted the concept of equality so that no individual shall be treated unequally. They thought that the meaning of equality based upon individual achievement was to hypocritical in our caste ridden society where group identification had been historically used for the purpose of discrimination and separateness. Therefore, the makers of the constitution adopted a policy of preferential treatment in favour of certain weaker section of the society to offset the effects of inherited inequalities and remedy historic injustice.

Article 14 which guarantees equality before law would by itself, without any other provision in the constitution, be rough to validates such equalizing measures. The founder of the constitution, however, though it advisable to incorporate another provision, viz, Article 16 specifically providing for equality of opportunity is matter

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of public employment. Further they emphasized in clause (4) therefore that for equalize the employment opportunities in the service under the state the state may adopt positive measure for reservation of appointment or post in favor of any backward class of citizen which in the opinion the state, is not adequate represented in such service by hind sight, the foresight shown in making the provision specifically instead of leaving it only to the equality provision is more than vindicated the absence of such provision may well have led to total denial of equal opportunity in the most vital sphere of the state admit. And democracy cannot be realized unless all section of the society participate in the state power equally irrespective if their caste, community, race, religion and sex and all discrimination in the sharing of the state power made on those grounds are eliminated by positive measures.

The purpose of the reservation is to help of the weaker section the society whose weakness is quantitative and not as they suffer from qualitative infirmities due to lack of educational facilities, economic opportunities, social status, places or habitation and nature of occupation followed.

The reservation are aimed at securing proper representation in administration to all section of the society, intelligence and administration capacity being not the monopoly of any one class, caste or communities this would help to promote healthy administration of the country avoiding sectarian approaches and securing the requesting talent from all available sources. The objects of the reservation policy in stated to be to promote and protect educational and economic interest of the weaker section of society such reservation is said to be permitted under Article 15(4) and Article 46 for admission to educational institutes while under Article 16(4) read with Article 335 as well as Article 46 provide for the reservation of claim of the Scheduled Castes and Scheduled Tribes service ad post. The main objective of providing reservation for the Scheduled Castes and Scheduled Tribes and the backwards class in civil posts and service of the government is not just to give jobs to some person belonging to those communities and therefore increase their representation in the

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service but to uplift these people socially and educationally and to provide proper place for them in the society. Chapter 4 of the work i. e., ***Identification and Determination of Backward Classes*** deals with a vital issues of reservation rather it is the main topic for discussion in this research work. The Constitution permits preferences in the form of reservation under protective discrimination provision for three categories of people:

- (a) Scheduled Caste (b) Scheduled Tribes and (c) Other Backward Classes. The constitution permits protective discrimination in the three specific areas: reservation of seats in the legislature, reservation of jobs, and reservation of seats in the educational institution.

Although clauses (1) of Article 16 guarantees equality of opportunity to all citizens alive it would be meaningless to those for whom office of position and dignity have been out bounds for centuries and they are so crippled by the circumstances in which they are placed that such offices are beyond their reach if they are left to themselves. In India we have been faced with inequalities which are mainly due to usocial injustices perpetuated for centuries by the upper castes on those belonging to the lower castes by denying them a proper social status and opportunities for their betterment. Because of its pernicious castes system which may truly desorbed as its original sin the Indian society has for ages remained stratified. Hindus constitutes 80% of the country's population and overwhelming majority amongst them " belong to the castes which suffered social disabilities in some degree or the other. Every Hindu born in particular castes which he cannot change. Hitherto he had to follow the occupation assigned to his castes and he could not even think of changing it. The nobility to upper castes is forbidden one of the worst effects of castes was that access to knowledge and learning was denied to the lower castes for centuries. It was not till the advent of the British Rule in this country that the doors of education were opened to theme as well as to women who were considered as much disentitled to education as the sudras. Naturally all the parts in the administrative machinery were married by the higher castes which had the monopoly of learning.

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The concentration of the executive power in the hands of the select social group had its natural consequences. The most invidious and self-perpetuating consequence was the stranglehold of a few high castes over the administration of the country from the lower to the higher rungs to the deliberate exclusion of others. Consequently all aspects of life were controlled directly and regulated mostly to suit the sectional interests of a small section of the society which numerically did not exceed 10 per cent of the total population of the country. The state of the health of the nation was incurred through their eyes and the improvement in its health was effected according to their prescription. To ensure protection of backward classes of citizens it was necessary that members of backward classes be appointed in state's services and so the power was given to the state to provide for reservation of such appointments.

Unlike Article 16(4) which specifically 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 (16) to promote with special care the educational and economic interests of the weaker sections of the people, various state governments started making reservations of seats in the technical and medical institutions. Such a reservation was held as invalid and violation of Article 15(1) and 29(2). In the State of Madras v. Smt. Champakam Dorairajan<sup>9</sup>, the Supreme Court held that Article 29(2) was not controlled by Article 46 and that the Constitution did not intend to protect the interest of the backward classes in the matter of admission to educational institutions, while examining the underlying social policy, the court found that except for reservation in services, the framers did not contemplate giving any special treatment to the backward classes in the matter of admissions to educational institutions. 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

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<sup>9</sup> AIR 1951 SC

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advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”<sup>10</sup>.

For determining the backwardness of the people different criteria have been laid down for different benefits under the constitution. So far SCs and STs are concerned, their determination does not pose much difficulty, because the constitution itself defines these groups but so far OBCs are concerned, neither the constitution defines them nor laid down any criteria for their determination. In this chapter I tried to find out a proper solution to this problem.

Chapter 5 of the work entitled *Limits of Reservation* deals with the extent of reservation, exclusion of creamy layer and period of reservation etc. The Constitutional mandates that the state need reserve any minimum number of post in government service or seats in educational institutions; or diverts any minimum part of its resources to benefit of backward people are not mandatory but only permitted. In absence of any specific limits on the extent of reservation under the constitution, various Governments have been resorting to implement reservation in educational institutions and governmental jobs to the maximum possible extents. The claimants of reservation under the constitution the three categories, the scheduled caste, the Scheduled Tribes and the backward classes, constitute 74.5% of the total population of India; Their percentage being 15%, 7.5% and 52% respectively. At present the Scheduled Castes are given 15 percent seats in the total number of vacancies on account of their 15 percent population. The Scheduled Tribes are given 7.5% seat and the other backward classes (OBC) are given 27% reservation. Apart from this, the central Government has made a reservation of seats to the tune of 27% for socially and educationally backward classes in central educational institutions.

Chapter 6 entitled *The Impact of Reservation* contained the overall impact of reservation on our society. In some areas efficiency of administration is badly

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<sup>10</sup> Article 15 (4), Constitution of India.

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suffered because of the reservation. Therefore, in those areas the reservation cannot be appreciated and it could be dangerous to recommend reservation of seats in government services. Apart from this, there are some posts which require only merit, for those posts of super-specialties also reservation can bring adverse impact on society. This chapter also deals with some related matters like use and misuse of reservation policy, reservation in private sector and reservation and social changes. Chapter 7 leads to ***Conclusion and Suggestions***.

### **1. III. RESEARCH METHODOLOGY**

Since the adoption of the Indian Constitution, a number of studies have been conducted relating to the scope of the right of reservation. A good number of judicial pronouncements have been delivered by the Supreme Court and High Courts over the issue of reservation. In this study, the historical analytical methodology of research will be applied and a systematic analysis will be made. The method to be applied for this study is primarily doctrinaire research. A doctrinal research involves analysis of case laws, arranging, ordering and systematizing legal propositions and study of legal institutions. Our is the welfare society and the aim of law in such a society is to adjust the conflicting interest of various components of the society by applying the principle of reasonable classification. The task of a doctrinal research is not purely mechanical one. While inferring a principle on the basis of available knowledge in the area of research, he may apply logic, ethics and requirements of the day and out of several alternatives he may choose the best one which best serves the interest of the society. In modern context, the doctrinal researcher has to find out and propose those principles, rules and regulations which can serve the purposes what Roscoe Pound has termed as 'social engineering'. In doctrinal research the research is carried on the basis of facts and data stored in the library, archives and other data base.

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In analytical research the researcher uses facts or information already available and analyze to make a critical evaluation of the existing state of affairs e. g whether the existing state of law is conducive for the development of law or it needs to be amended to make it more flexible or rigid for necessary development; whether the law is necessary for development should be remedial, or penal or enabling in character etc. Due to the uniqueness of the statutes, the analytical method applied in legal research relies on specific interpretation methods namely the mischief, literal and golden rules.

In the area of law Historical research is of much significance. It utilizes historical sources like documents and other records to study events of the past or ideas prevalent in the past, the social values and philosophy of the past, the cultural element of the past of the people in general as well as individual components of the society to ascertain what changes have taken place? Whether they are good or bad? Whether they can be continued or need modification to be more effective? Whether the present is good or the past was good etc?

For this purpose survey has been made of the various statutes, books, Articles, journals and reports available in the library of Department of Law, North Bengal University, Central Library, N.B.U and other important Law Libraries in India including the Indian Law Institute, New Delhi. Besides the judicial decisions of the Supreme Court the opinions of individual judges and academicians shall also be taken into account for the purpose of the study. Besides the judgment of the Indian Supreme Court, the important decisions of the American courts shall also be investigated in my present work. Only the decisions of the Apex court are to be taken and as such it will be collected from All India Reporters and Supreme Court Cases for this purpose. Materials and data available in different websites will also be taken in to account. The present study mainly concentrates in relation to the Indian position. However a brief reference to the provision prevailing in other countries shall be taken into account. Some foreign cases which have attracted the attention of the Indian judiciary will also

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be referred to. The historical analytical approach shall be applied to study the relevant materials to evolve a conspectus conclusion.

### **1. IV. SIGNIFICANCE OF THE STUDY**

The continuation of reservation under Articles 15(4) and 16(4) for over the decades produced increasingly resentment among them who were discriminated against by such reservation. Our vision of building a casteless society that recognizes merit and knowledge has become an illusion. This issue involves the future of the youth of the nation. Therefore, the present research is of great public interest and importance.

The present reservation policy is made on the basis of the criteria which were laid down and recommended by the Second Backward Classes Commission. In the present work a humble attempt was made to examine the relevancy of reservation in present day India and the rationality of its basis for determination of backwardness under the Constitution of India.

The aims and objectives of this study are as follows:

1. To study the scope of the right of reservation in India.
2. To examine the criteria as laid down in the present policy for the benefit of reservation and also to examine its relevancy in present time.
3. To study the nature and rationale of the present reservation policy and find out its lacunae's and to place useful suggestion.
4. To examine the role of the judiciary in promoting and protecting the right of reservation.
5. To assess the impact of reservation on society and to suggest future strategy for better protection and promotion of the interest of the weaker section of the society (SCs, STs and OBCs).

## **CHAPTER – 2**

### **HISTORICAL RETROSPECT**

#### **2. I. CASTE SYSTEM AND INDIAN SOCIETY**

The caste system in India is as old as our civilization and culture. It is the system on which the traditional order of the Hindu Society is based and it is believed to have immemorial antiquity. The complex nature of the caste structure is evident from the fact that even after a century and a half of painstaking and meticulous research in the history and function of the social system, we do not possess any conclusive explanation of the circumstances that might have contributed to the formation and development of this unique system in India.<sup>11</sup> The sense of discrimination became an effective instrument which proved dangerous retarding expected progress in our society. This indeed led to the emergence of a few rodents' reformers whose sincere efforts were directed to bring about equality by granting socio-economic, religious and political concessions to the economically weaker sections. The main significant idea is to bring them at par with the upper castes and communities.<sup>12</sup> It is perhaps true that the most frequently mentioned peculiarity of the traditional Hindu Society is the institution of caste or as it more frequently called the caste system. The social institutions that resemble caste in one respect or the other is not difficult to find elsewhere, but it is only in India that it is known as caste. The caste system has survived in a far perfect form in India than elsewhere, but it seems that the India caste system is not an isolated phenomenon as it is often thought to be, but a species of a very wide spread genus comparable forms still exist in Polynesia

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<sup>11</sup>. Ramesh Chandra, *Identity and Genesis of Caste System in India*, Kalpaz Publications, C-30 Satyawati Nagar, New Delhi 2005.

<sup>12</sup> Ibid.

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and Melanesia, and that clear and in modern Egypt.<sup>13</sup> Hutton finds analogues institutions which resemble caste in one or other of its aspect in various part of the world like Ceylon, Fiji, Egypt, Somali, Rwanda and Urundi in Modern Africa and Burma.<sup>14</sup>

Ghurye<sup>15</sup> traces elements of caste outside India like Egypt, Western Asia, China, Japan, America, Rome and tribal Europe. It is true that social and racial differences in some form or the other do prevail in other parts of the world but the kind of system found in India is characterized more by its specific unique features like the complexity, elaboration and rigidity than by such features which it shares with caste structure elsewhere. The caste system that has developed in India is the natural result of the interaction of a number of geographical, social religious and economic factors not elsewhere found in conjunction. It is the peculiarity of India that it recognized the social differences inherent with a religious and spiritual background.<sup>16</sup>

The caste system is one that is composed of small and ranked groups of persons, called *jatis*, each of which is a hereditary, endogamous group having a traditional association with an occupation and each is usually associated with more or less distinct ritual status in a hierarchical system used on the concepts of purity and pollution. Relative rank affects almost all social relations. Most interaction among people of different groups involves consideration of superiority and inferiority, and superiority means greater privileges, precedence, and a large share of the good things in life. Thus caste is not only a cultural system concerned with ideas and values but also a structural system consumed with privileges and deprivation, domination and subjugation, surplus and exploitation. The caste groups are interdependent, each need the services or goods provided by others, called the layman system. But they are held together by religious sanction and the coercive power wielded by the superior castes.

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<sup>13</sup> Hocart, A.M., *Caste – A Comparative Study*, Methuen & Co. London, 1950, p.p. VI-VII.

<sup>14</sup> Hutton, J.H. *Caste in India*, Oxford University Press, 1946. Chapter – IX.

<sup>15</sup> Ghurye, G.S. *caste and Race in India*, popular prakashan, Bombay Fifth Edition, 1990, Chapter – VI.

<sup>16</sup> Ramesh Chandra, *Identity and Genesis of Caste System in India*. Kalpaz Publication (2005) , New Delhi.

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As a system of social relations caste has a central point in Hindu society for several centuries.<sup>17</sup>

Caste in India is a social institution, deriving sanction and intimately interwoven with the Hindu religion. Membership of a caste is compulsory and not a matter of choice. A person is born into it. It is practically impossible for individuals to change their caste. Each caste boasts of a peculiar tradition of culture and tries to preserve it's tenaciously. The customs by which other castes sometimes in marked their contract to those of any other caste. The caste system provides the individual member of caste with rules which must be observed by him in the matter of food, marriage divorce, birth, initiation and death.<sup>18</sup> Wilson<sup>19</sup> sums up in his own inimitable way as follows: Caste gives its directions for recognition acceptance, consecration and sacramental dedication and vice-versa, of a human being on his appearance in this world. It has for infancy, pupilage and manhood, its ordained method of sucking, sipping, drinking eating and voiding, of washing ring sing, risign and reclining; of moving, visiting and traveling, of speaking, reading listing, and reciting and of meditating, singing working, playing and fighting. It has its laws for social and religious rights, privileges, and occupations; for instructing training and educating; for obligation, duty and practices; for divine recognition, duty and ceremony, for errors, sins, and transgressions; for intercommunion avoidance, and excommunications; for defilement, ablution, and purification; for fines, chastisements, imprisonments, mutilations, banishments, and capital executions. It unfolds the ways of committing what it calls sin, accumulating merit, and losing merit. It treats of inheritance, conveyance, possession, and dispossession; of bargains, gain, loss and ruin. It deals with death, burial, burning; and with commemoration, assistance and injury after death. It interferes, in short with all the relations and events of life and with what precedes and follows life.<sup>20</sup>

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<sup>17</sup> D.C. Bhattacharyya. *Caste and Class in India*, Vijaya Publishing House (2004), 106, Vivekanand Road, Kolkata.

<sup>18</sup> Ramesh Chandra. *Identity and generic of caste system in India*, Kalpaz Publication, New Delhi.

<sup>19</sup> Wilson, *Indian castes*, quoted in Census, 1951, West Bengal.

<sup>20</sup> Wilson, quoted in Prof. Ramesh Chandra. Supra note 6.

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It is obvious that such a system of social stratification divides the society into thousands of small, hereditary and endogamous groups, each cluster of groups having its own distinctive set of customs and practices, which together form a hierarchy. Each such group of caste or jati is associated with one or more traditional occupations and related to the other by means of an elaborate division of labour. Each caste pursues, within limits, its own style of life, having distinctive customs in the matter of dress, diet, rituals, etc. and is characterized by a degree of social and cultural identity within the country every region has its distinctive culture as well as its distinctive patterns of casts and sub-castes. Moreover a particular caste is a complex group, a successive inclusion of groups of diverse orders or levels, in which different functions are attached to different levels. Finally, for more than a group in the ordinary sense the caste is a state of mind, a state of mind which is expressed by the emergence, in various situations, of groups of various orders generally called castes. The caste systems is above all a system of ideas and values, a formal, comprehensible, rational system, a system in the intellectual sense of the term.<sup>21</sup>

## **2. II. ORIGIN AND DEVELOPMENT OF CASTE SYSTEM**

The origin of the caste system is highly controversial. The exact origin of caste system cannot be traced. The system is said to have originated in India. The records of the Indo-Aryan culture contain the first mention and a continuous history of the factors that make up caste. The people who are known as Indo-Aryans belong linguistically to the larger family of peoples designated either as Indo-Europeans or as Indo-Germans. They comprised the Anglo-Saxons the Celts, the Romans, the Spanish, the Portuguese and the Iranians among others. One of the branches of these peoples which reached India about 2,500 B.C. is called Indo-Aryans Caste in India has had a history going back to the varnas of the Vedic times. (C. 1500 – 800 B.C.)

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<sup>21</sup> Bataille, Andre, *Castes; Old and New*, Asia Publishing House, New Delhi, 1969. p. 90.

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**CASTE** - The term caste, originally used by the Portuguese refers to endogamous groups which in Sanskrit, are called Jatis.<sup>22</sup> According to Vidya Bhushan<sup>23</sup>, the word 'caste' owes its origin to the Spanish word 'casta' which means breed, race, strain or a complex of hereditary qualities. The Portuguese applied this term to the classes of people in India known by the name of Jati. The English word caste is an adjustment of the original term. The number of works dealing with the origin and characteristics of the caste system in India is legion. The origin of caste has been rise to great speculation and several authors lay undue emphasis on the elements or attach for too much importance to one point in tracing the origin of the caste system and its ramifications, such as race, tribe, occupation, as very rightly commented by D.N. Mazumdar, there are today as many theories regarding the origin of the system s there are writers on the subject.<sup>24</sup>

The earliest speculation regarding the origin of caste system can be traced to the Mythological story of creation of the Four Varnas embodied in the Purusasukta (Hymn of man) of the Rig Veda. The hymn appears in the Rig Veda as well as in the Atharva Veda; in the Rig Veda it is RV. X. go.90-12 and in the Atharva Veda Av. XIX.6.6. Both stand in the name of one Rishi Narayan. It is reproduced with slight changes in the later Vedic literature and in the traditions of the epic<sup>25</sup>, Puranas and Dhanasastras<sup>26</sup>. It states that the Brahmans emanated from the muth of the primitive man, the Khatriya from his arms, the Vaisya from his thighs and the Sudra from his feet. In point of time, the Purusasukta version may be ascribed to the end of the period of the Atharva Veda, in which it occurs in the latest portion. It seems to provide a theoretical justification for the disintegration of tribal society into classes. The

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<sup>22</sup> D.C. Bhattacharyya, *Caste and Class in India*, Vijaya Publishing House (2004), 106, Vivekanand Road, Kolkata.

<sup>23</sup> Vidya Bhushan, *An Introduction to Sociology*, Kitab Mahal Allahabad – 1, 2001, P. 368.

<sup>24</sup> Mazumdar, D.N. *Races and Cultures of India*, Asia Publishing House Delhi, 1958.

<sup>25</sup> Pancavimsa, P.113. Brahmanya, Vol.-1,6-18; Vajasaneni Samhita, XXI, II; Taittiriya Aranayaka, III, 12.5 & 6, quoted by R.S. Shama in *Sudras in Ancient India*, Motilal Banarasdass 1958, P-28.

<sup>26</sup> Vasistha Dharmasutra IV, 2; Baudhayana Dharmasutra, I. 110.19. 5 – 6; APasthamapa Dhanasutra, 1.1,1-7, Manusmriti. 1. 31. Vajna Valkga Smriti, 111. 126 quoted by R.S. Saha abid.

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Brahmanas were assigned teaching and studying (Veda or knowledge), sacrificing for their own benefit and for others, giving and accepting of alms. The Khatriyas were to be ruler and warriors protecting the people, offering sacrifices, studying (the Veda); and abstaining from sensual pleasures. The Vaisya were to tend cattle, cultivate land, offer sacrifices, study the Veda, to trade and to lend money, the Shudras were to serve meekly the other three castes. According to Manu's injunctions, the Brahmanas' ideological activity of teaching the Vedas is graded higher than the Khatriyas political and military activity of the political management of the society. In turn, Khatriya's activity of managing the state is higher than all the other economic activities of cattle wearing, money-lending, trade, and cultivation. The Shudras, at the lowest level, provide their toil in the service of the other three Varnas, the three superior Varnas, in subsequent elaborations of the Varna Dharma ideal, came to be known as 'twice-born'<sup>27</sup>.

In the later Vedic Period, as more and more different tribal peoples were absorbed within the spreading boundaries of the Aryan Society there emerged the untouchables, also called the 'fifths' (Panchamas) or outcastes.

European writers on the subjects of caste origins know about the racial difference between castes, high and low, and consciously or unconsciously, linked their findings to race weale wrote that the whole history of India, from the earliest times, had been one long story of colour prejudice and that more cruelty had probably been displayed there than in the rest of the world, believed that the Aryan races, who were white simply devised the irron system of castes to prevent the undue mixing of a dominant race with black inferior race. Sir Herbert Risley argued in his work the people of India (1908) that the caste system is the outcome of the encounter between two district racial groups : one, the Aryan people, light skinned and broad nosed, and the other, the dark skinned and narrow-nosed 'non-Aryans'. The latter are usually referred to as Dasas in the Vedic literature. Risley explains that the Aryans, the

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<sup>27</sup> D.C. Bhattacharyya, caste and classes in India, Sociology 2005, Vijoya Publishing House – 106 Vivekananda Road, Kolkata – 700006.

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dominant group, adopted the practice of hyperamy. Hypergamous marriages between the fair Aryans and the dark non-Aryans led to the formation of a series of intermediate groups whose social rank varied directly with their amount of Aryan blood.

The racial significance of the caste system was recognized by Sir Herbert Risley<sup>28</sup>, who traced the origin of caste from Indo-Aryan immigration into India. The prehistoric migration of the Indo-Aryans from Persia, where a four-fold division of society was known, laid down the structure of social grouping, and the clash and fusion of cultures between the invading people, on the one hand, and the indigenes, on the other, who belonged to separate racial stock inferior to the immigrants, brought about the super-structure which was the caste system. The motives principle of Indian caste is to be sought in the antipathy of the higher race for the lower, of the fair skinned Aryan for the black Dravidians. The invading Aryan displayed a marked antipathy to marriage with persons of alien black race and devised an elaborate system of taboo for the prevention of such unions. But intermarriage could not altogether be prevented. The continual contact between the Aryan and Dravidian elements created a series of endogamous groups, which may be roughly classified as Ethnic, provincial or Linguistic Territorial or Local, Functional or Occupational, Secretarian, and social. In the first of these classes the race basis is palpable and acknowledged whereas in the remaining other classes a fiction has been generated that they must be of a fundamentally different race. Risely<sup>29</sup>, therefore, concluded that “Caste was an institution evolved by the Aryans in the attempt to preserve the purity of their own stock, and afterwards expanded and adapted, by the influence of a series of fictions, to fit an endless variety of social, religious, and industrial conditions.

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<sup>28</sup> Quoted in Ramesh Chandra. *Identity and Genesis of Caste system in India*, Kalpaz Publication, Delhi – 110052. 2005.

<sup>29</sup> Risely, *the Tribes and Castes in Bengal*, quoted in Ibid note.

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Among the Indian writers Hayavadana Rao<sup>30</sup>, S.C. Roy<sup>31</sup>, N.K. Dutt, G.S. Ghurye and D.N. Mazumdar<sup>32</sup>, have linked caste with the racial factor. The initial form of the India caste structure has been credited to the Indo-Aryans, and the Varna is regarded as a concept of racial origin, diluted in course of time through race mixture and hybridization which have resulted from intermarriage on the principles of hypergamy and of Anuloma (meaning with the hair, i.e., natural) and pratiloma (meaning against the hair, i.e., unnatural) unions, as they are found even in present times. Dr. Ghurye emphasizes in particular the factor of precisely manipulation by Brahmanans attempting to maintain the purity of Aryan invaders. According to him, 'caste in India is a Brahminic child of the Indo-Aryan culture, cradled in the land of the Ganges and the Jamuna and thence transferred to other parts of India. He also thinks that endogamy the outstanding feature of the system, was first developed by the Brahmins in the plains of northern India and thence conveyed as a cultural trait to the other areas.

The colour question in the formation of Caste has also been considered. There was little colour distinction between the Aryans and the non-Aryans in Europe. But the extreme divergences of colour between the Aryans and the Non-Aryans in India made the invading Aryans conscious of colour or complexion. That the colour question was at the net of the Varna which means colour as well as class and from the great emphasis with which the Vedic Indians distinguished themselves from the non-Aryans in respect of colour. The three higher Varnas were originally distinguished from the other by the various shades of colour that were found in earlier days, resulting from the intermixture between the immigrants of Indo-Aryan racial stock and the indigenes, either of Dravidian or pre-dravidian or roundhead racial affiliation various factors contributed to such race mixture scarcity of women among the invading group, the settled life with a house and all that it connoted among the

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<sup>30</sup> Hayavadana Rao, *Indian Caste System*, Bangalore, 1931, Quoted in Ramesh Chandra Book.

<sup>31</sup> Supra Note 28.

<sup>32</sup> Majumdar, D.N. and Madan T.N. *An introduction to social Anthropology*, Asia Publishing House, 1956.

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indigenous population which naturally attracted the nomadic elements of the immigrant population/ highly developed Dravidian culture with its matriarchal system; temple worship of the mother goddess, rites, rituals and temple architecture, priesthood and learning, all have contributed to a racial miscegenation<sup>33</sup>. That class which retained almost purity of colour by avoiding intermixture normally gained precedence in the social scale. The status also depended on the extent of isolation maintained by the social groups. The Brahmins were white; the Kshatriyas red, the Vaisayai because of large absorption of black blood were yellowish like the mulattoes of America and the Sudras black as described in the Mahabharata<sup>34</sup>.

The three higher Varnas have tried to maintain their claims to superior Status by keeping to themselves the important professions and avocations and jealously restricting the liberties of others with respect to their means of livelihood. Moreover, in course of time, the Brahman ritualism became so complicated and the Brahmanic literature became so developed at a time when writing was not known to them and everything had to be preserved by memory alone that a special class of men were required for the purpose who could carry on the profession from father to son and who could improve their skill and memorials power by the adoption of strictly hereditary principle. The same system developed in Persia, where the Atharva or Priests in particular formed something like a caste. They had their secrets which they were prohibited from divulging; they were spiritual guides of their nation, and none but the son of a priest could become a priest, a rule which Persia still maintain. When two such parallel institutions were noticed in the two neighboring countries in a high state of development, it is not difficult to assign the beginning of caste system in the shape of Varna division to the Indo-Iranian period of history as the four-fold division of society is found both the Avestan Persia and the Rig Vedic India. In ancient Persia there were the Atharvas (Priests), Rathaesthas (Warriors), Vastriya Fshuyants (Cultivators) and Huitis (Artisans), the only important difference lay with

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<sup>33</sup> Mazumdar, D.N., and Madan, T.N., *An Introduction to social Anthropology*, Asia publishing House, 1956.

<sup>34</sup> Dutt. N.K. *Origin and growth of caste in India*. Vol. I. Firma K.L. Mukhopadhyaya, Calcutta, 1968.

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regard to fourth class, which was the antaeon class in Persia, and the simile or Sudra class in India. But the difference is more apparent than real if we consider that the pursuit of handicrafts was mostly assigned to the slaves or Sudras in India.

Occupational basis of the origin of caste has also been propounded. Common occupation or division of labour is the chief, if not the sole, cause of the foundation of the caste system. This theory was advocated by Nesfield who regarded occupation as the exclusive basis of caste distinction. In his opinion caste originated in India long after the Aryan invaders had been absorbed in the mass of the native people and all racial distinction between the two sets of people, Aryan and aboriginal, had disappeared. Different occupations grouped together men from different tribes into guild castes, which then borrowed the principle of endogamy and prohibition of commensality from the customs of the old tribes and thereby solidified themselves into isolated units. The ranking of any caste as high or low depended upon whether the industry represented by the caste belonged to an advanced or backward stage of culture and thus the natural history of human industries afforded the chief clue to the gradation as well as the formation of the Indian castes. Thus castes following the most primitive occupations like hunting, fishing, basket making, etc, were regarded as the lowest, the metal workers, agriculturists, and traders were higher in rank, while the highest castes was of those who were priests and teachers. He went on to add that “function, and function only was the foundation upon which the whole caste system of India was built up”.

A theory of the origin of caste which combines both functional and racial origins has been put forward by Slater in his *Dravidian Elements in Indian culture*. He emphasizes the fact that caste is actually stronger in Southern than in Northern India, and suggests that caste arose in India before the Arya Invasians as a result of occupations becoming hereditary and marriages being managed by parents within the society of the Common craft because sexual maturity developed early and trade secrets were thus preserved. As a result of magic and religious ceremonies also,

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exclusive occupational groups were built up, marriage outside which became prejudicial and contrary to practice. The Aryan invasion had the effect of strengthening a tendency to associate difference of caste with a difference of colour and of strengthening also a tendency for castes to be placed in a scale of social precedence. He also maintains the existence in the Pre-Aryan society of India of an order of Priest magicians.

Denzil Ibbetson explains caste as arising from a combination of tribal origins, functional guilds and a liturgical religion and lays great stress on the tribe. The turning point in the career of a tribe comes when it abandons its wild and nomadic life and adopts a particular occupation as its principal method of economic subsistence. This is the guild stage in caste history, and is common at some period or other of economic progress to all peoples in the world. The formation of guilds of occupational groups naturally led to the recognitions of skills and importance of the various guilds. In an industrial society, the technicians have assumed a dominant and even dictatorial status. In medieval times, the guilds vie with one another for predominance in accordance with their economic status exercising various degrees of pressure on the social life of the country. The exaltation of the priestly guild was soon followed by the priests insisting on the hereditary nature of their occupational status, and this led to the formation of endogamous units, as more and more of the guilds wanted to conserve the social status and privileges they enjoyed and to secure these permanently for the member of the guild. The Brahmins set the ball rolling and the various other guilds followed suit and a hierarchical organization established itself. Chappel and Coon<sup>35</sup> trace the origin of castes to the absorption of aboriginal types, and they also explain formation of new castes with reference to the emergences of new occupations.

The political theory regarding the origin of caste system says that caste system is a clever device invented by the Brahmins in order to place themselves on the highest ladder of social hierarchy. Dr. Ghurye states caste is a Brahminic child of

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<sup>35</sup> Quoted in Majumdar, D.N., and Madan, T.N. An Introduction to social Anthropology, Asia Publishing House, 1956.

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Indo-Aryan culture cradled in the land of the Ganges and thence transferred to other parts of India.<sup>36</sup> The Brahmanic literature of the post Vedic period mentions certain mixed classes and also a group of outcaste classes. Among the four Varnas, the old distinction of Arya and Sudra now appears as Dvija and Sudra. The first three classes are called Dvija (Twice born) because they have to go through the initiation ceremony which is symbolic of rebirth. The Sudra was called “ekhajati” (once Birth). The word ‘jati’ is hence forward employed to mean the numerous sub-divisions of a “Varna”. However, this demarcation is not rigidly maintained. The word “Jati” is sometimes used for Varna. In the Brahmin period the position of the Brahmins increased manifold. The three lower classes are ordered to live according to the teaching of the Brahmin, who shall declare their duties, while the king also is exhorted to regulate his conduct accordingly<sup>37</sup>. The Pre-eminence of the Brahmin had secured him many social privileges sanctioned by the law givers. The Statement that God created the Sudra to be the Slave of all is repeated and he is given the name of “Padaja” (Born from the feet).

As the priestly influence grew in India complicated rules of ritual and conduct were built up and incorporated into the religious books. The Brahmins closed their ranks and tried to maintain their superiority over the other classes. It is true that in the beginning there were no rigid restrictions but slowly and gradually the idea of separation stiffened. It was first the ritual and ceremonial purity which as time went on took an exaggerated aspect. Distinction began to be made between things pure and impure. Restrictions were imposed on food and drink. When the Brahmins closed their ranks, it was but natural that other classes also should follow suit.

Quite a different origin for caste is argued by Hocart<sup>38</sup>, who apparently regards the whole system as originating in ritual. According to him, the basis of the caste

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<sup>36</sup> Ibid.

<sup>37</sup> Ogburn and Nimkoff, quoted in *An introduction to sociaology* 2001. Kitab Mahal 22. A, Sarojini Naidu Marge, Allahabad 211 001.

<sup>38</sup> Hocart, A.M. *Caste – A comparative study*, Methuen & Co., London, 1950.

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system is two –fold – descent and sacrifice. Of the two, sacrifice is the essential one; descent is merely a qualification which at times may be dispensed with for even a boy of non-sacrificial lineage can be admitted to royal, priestly or farmer rank by going through the initiation ceremony appropriate to that rank as a result of which he is reborn as a member of the particular rank. Every son of a Brahmin is born of his father but he is also born of the sacrifice, and so is every Kshatriya and Farmer. Hence, such expressions as “the twice born, first born of ritual”. Castes are merely families to whom various offices of the ritual are assigned by heredity. Since rank depends upon certain qualifications, a family can lose its ranks by wusing its qualifications, i.e., observance of rules which go with certain offices. Since the offices are ritual, the rules are ritual. He regards the caste system as a system for distributing through out the community the various duties connected with the royal ritual and the kings service, which are largely the same, and for ensuring that these duties are performed only by those properly qualified to perform them qualified, that is to say, both by hereditary and knowledge of the rites.

Hutton<sup>39</sup> says emphasis on the importance of the primitive conceptions of taboo, mana, magic and soul staff in contributing to the formation of the caste system. He thinks that the primitive attitude to taboo, belief in mana and the resulting taboo on food of, or other contracts with, strangers, which may be infected with the dangerous soul matter of strangers, the occupational division of society as is found among the Naga tribes in Assam, and superstitious regard for everything strange and unfamiliar might have shaped the structure of Indian society. In other words, the fundamental elements of the caste system have been functioning in the primitive society from very early times and the Rig Vedic invaders had only to superimpose their definitely graded social classes on a society already divided into groups isolated by taboos. Roy<sup>40</sup> also stresses the importance of the primitive ideas of taboo, mana and soul staff

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<sup>39</sup> Hutton, G.S., *Caste and Race in India*, Popular Prakashan, Bombay, Fifth Edition, 1990

<sup>40</sup> Roy S.C, caste, *Race and Religion in India, In man in India*, Vol. XVII, No. 4.

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in the formation of the caste system Max Weber's<sup>41</sup> view becomes significant in this context. Caste, according to him, signifies the enhancement and transformation of social distance into a religious or more strictly a magical principle. It is not difficult to trace endogamy, occupational division and untouchability from the dread of uncanny mana the untouchables that developed in this country has been found to be mutual<sup>42</sup>. It is practiced not only by the Brahmins but by all other castes. Thus, when a Brahmin has been in a Kur-cchan's house, the moment he leaves it, the place where he was seated is besmeared with cow dung to remove the pollution.<sup>43</sup> or when a Brahmin enters the Para cherry of the Holiyas, men and women from the settlement come to the outskirts of the village to greet him with cow dung solution broomstick and a garland of torn shoes; these, the Holiyas Say, disarm the Brahmin of his evil mana and the Holiyas Rane little to fear from consequent social interference with the Brahmin. In many areas of south India, the sight of a Brahmin was considered ill omen. Several communities ever observe pollution from the visit of a Brahmin to their village, and parkane Nambakoodatu (Trust Not the Brahmin) has become a saying widespread among the Villagers of Tamilnadu.<sup>44</sup> The concept of mana or bongo does explain the social distance and personality fixation. It has given rise to innumerable taboos and avoidances. It regulates individual behaviors and group responses and its importance to tribal life and conduct must be conceded. The fear of pollution has also been stressed by Ketkar<sup>45</sup>, who points out that the chief Principles on which the entire caste system depends is that of purity and pollution.

Pillai<sup>46</sup> argues that caste is neither based on political grounds as advanced by the Europeans, nor it is based on divine dispensation as is believed by the orthodox Hindus. The political basis of caste in the presumed invasions of India by the Aryans,

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<sup>41</sup> Majumdar, D.N., and Madan, T.N., Introduction to social Anthropology, Asia Publishing House, 1956.

<sup>42</sup> Ramesh Chandra, *Identity and Genesis of Caste System in India*. Kalpaz Publication (2005), New Delhi.

<sup>43</sup> Ibid.

<sup>44</sup> Hardgrane, Robert L. Jr., *The Dravidian Movement*, Popular Prakashan, Bombay, 1965.

<sup>45</sup> Ketkar, S.V., *History of caste in India*, Rawat Publications, Jaipur, 1979.

<sup>46</sup> Pillai, G.K., *Origin and Development of Caste*. Kitabmaha, Allahabad, 1959.

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and case quant enslavement of the original inhabitants. As there is no historical or traditional or archaeological evidence to establish an Aryan invasion, the development of caste on a political basis should be discredited as it is much more based on mistaken interpretation of certain terms used in a single hymn in the Vedas. Hence, Pillai thinks that in the absence of any other evidence, it can safely be stated that Jati or caste originated with the totem and maintained by prohibitions on inter ining and inter marriage.

According to Evolutionary theory<sup>47</sup>, the caste system did not come into existence all of a sudden on at a particular date. It is the result of a long process of social evolution. A number of factors played their part in the development of the present caste system. Among these factors we may enumerate the following ones:

- (i) Hereditary occupations;
- (ii) The desires of the Brahmins to keep themselves pure;
- (iii) The laek of rigid unitary control of the state;
- (iv) The unwillingness of rulers to enforce a uniform standard of law and custom and their readiness to reogness the ranging customs of different groups as valid;
- (v) Belief in re-incarnation and the doctrine of karma;
- (vi) Ideas of exclusive family, ancestor worship, and the sacramental meals;
- (vii) Clash of antagonistic cultures particularly of the patriarchal and the matriarchal systems;
- (viii) Clash of races, colour prejudices and conquest;
- (ix) Deliberate economic and administrative policies followed by the various conquerors particularly by the British;
- (x) Geographical isolation of the Indian peninsula;
- (xi) Static nature of Hindu Society;
- (xii) Foreign invasions;
- (xiii) Rural social structure.

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<sup>47</sup> Vidya Bhushan, Social Stratification, An Introduce to sociology, 2001.

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C. Dwarkanath Gupta, in his book<sup>48</sup>, writes about the continental Drift theory about the origin of caste system in India. The theory says that the northern part of Australia was linked with the southern part of India, as the eastern part of Africa was linked with the western part of India. As the equator passes through the centre, the climate is very hot on account of direct sun rays. The inhabitants of this part of the world are different from those of the other parts. Short structure, brown colour, black hair, weighty lips, round heads etc., are the important features of the people of the region. Owing to the climate conditions, people's working efficiency is low. Due to this the people of this region could not make progress compared to the progress achieved by people in other parts of the world. Taking advantage of this backwardness the Dravidians were the first to attack the aborigines of India. They were a nomadic people and wanted to live a settled life. After defeating the natives of India, they settled some of the defeated natives joined the Dravidians and some fled away into forests and mountain regions. Later on the Dravidians attained a higher stage of civilization as compared with other races.

After the Dravidians, another major attack against India was made by the Aryans. It is believed that the Aryans originally inhabited central Asia from where they spread to east and west. The Dravidians were defeated by the Aryans. The defeated aboriginals were made slaves in the Aryan social order, given low status in society and assigned the duties of serving other people. Those who did not accept slavery were driven into forests and they remained aboriginals with their social, economic, and cultural distinctions. Some turned to a nomadic way of life and began to roam from place to place.<sup>49</sup> In this way ancient Indian Society was divided into four classes: the Aryans, the Anararyans, the aboriginals and the nomadic aboriginals criminal tribes. It was during the early Vedic period there were only two main classes; Aryans and Anaryans. Though there was no sharp distinction between their

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<sup>48</sup> C. Dwarkanath Gupta, *Socio-cultural History of an Indian Caste*. Mittal Publications, New Delhi-110059 (India). 1999.

<sup>49</sup> Supra Note 40.

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relationships, their cultures differed widely. The feeling of superiority was there in the minds of the Aryans since they were the conquerors with a distinct philosophy and religion of their own<sup>50</sup>.

In the Rig Veda age there were only two classes: The Aryans and the Anaryans. The Anaryans were the enemies of the Aryans. The Aryans defeated the Anaryans who were considered dasas, and at later period the 'dasas' were assigned the status of 'Sudras' in the Varna Vyavastha hierarchy. The advent of Ajaras was about 3000 B.C. The Victory of Aryans over Anaryans gave rise to the caste system. The historians are of the opinion that the three Varnas of the Aryans society were already established and the defeated Anaryans were given the status of Sudras<sup>51</sup>. It appears that the Vedic society was not too rigid. There was not much difference among four Varnas. But in the post Vedic period the Varna Vyavastha was well established and made rigid on the basis of four Varnas – Brahmins, Kshatriyas, Vysya, and Sudras. Immediately after the end of Vedic era, comes the age of Brahmanas, Upanishads and Sutras. The Varna Vyavastha became a social institution.<sup>52</sup>

Though the caste system as it exists is peculiarly an Indian product, it must be admitted that the elements of the system existed or still exists in other countries also. One may refer to the colour problem in the united states of America as essentially a caste problem though the commensal taboo does not operate there with any rigour or to comparable forms as existed in medieval Ceylon, Ancient Iran, Ancient Rome and Greece, Ancient Egypt or as exists, in Polynesia, Melanesia a even in modern Egypt. One may also refer to the occupational hereditary groups in the Western Roman Empire as created by the Theodesian Code. Such groups could not have been created overnight unless elements of social segregation where there<sup>53</sup>. In many societies there

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<sup>50</sup> C. Dwarkanath Gupta, *Socio-Cultural History of an Indian Caste*, Mital Publications New Delhi – 110059 (India). 1999.

<sup>51</sup> *Supra* Note 40.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

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is a tendency of divisional occupation on racial lines so much so that particular occupation becomes associated with a particular tribe Ketker<sup>54</sup> finds numerous cases of this kind in America.

The different theories, mentioned above, only go to show that only one or two factors cannot be indicated as probably contributing to the emergence and development of the caste system in India. On the other hand, it can be stated that caste in India is unique and peculiar because it is a composite institution, having a complex origin in the combination of geographical, historical, ethnic, social, economic, religious and political factors which have been operative only in India<sup>55</sup>. The attempt to solve the problem of origin, requires a keen eye to discriminate between things certain, probable and plausible, a profound sense of the realities of life, and the faculty of appreciating stronger and psychological situations and even with all these qualities, it is very difficult to attain certitude in the problem's solution. There must be always wide gaps and interspaces where one can only measure possibilities, draw certain inferences, note half-seen indications, and where, after all, one can but choose the least unlikely clue among many, Sir Alfred Lyall's warning was never more needed than when one sets out to explain the origin of caste in India; the most careful inquirer will probably never attain certitude in the solution of this problem, and all that sums possible is to choose, the least unlikely clue by reference to probabilities<sup>56</sup>.

### **A. ANCIENT AGE**

- **VEDIC PERIOD**

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<sup>54</sup> Ketkar, S.V, *History of caste in India*, Raucat Publications, Jaipur, 1979.

<sup>55</sup> Ramesh Chandra, *Identity and Genesis of Caste System in India*, Kalpaz Publication, New Delhi, 2005.

<sup>56</sup> Supra Note 45.

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**RIG VEDA** - The extent to which caste had been developed in the age of the Rig Veda Samhita has formed a subject of keen controversy among scholars. The uncertainty regarding the exact interpretation of the basic words and phrases in the Rigveda, and the relative chronology of the various restraint passages scattered throughout that Veda, make it difficult to arrive at any conclusion that is likely to meet with general acceptance<sup>57</sup>. We shall, therefore, state first of all in detail the most widely accepted version in a sense, almost the recognized version of the development of caste in the Rig Veda, contenting ourselves with only a brief statement of divergent views. Much confusion will be avoided, if we keep in view the fact, generally agreed to, that the development of caste has been a progressive one, and that we should not expect in the Rig Veda Samhita the picture of the caste system which is presented even in the Yayurveda Samhitas<sup>58</sup>.

There are various speculations in later Brahmanial literature regarding the origin of castes. The most common is that which represents the Brahmans, Kshatriyas, Vaisyas, and Sudras to have been created respectively from the head, breast or arms, the thighs, and the feet of the creator. An echo of this is found in a hymn of the Rig Veda (X-90), the famous Purusha-Sukta, which describes the mythical legend of the Sacrifice of a primeval giant called Purusha, the ideal 'Man' or world-spirit. The relevant passage has been translated thus<sup>59</sup>: "When (the gods) divided Purusha, into how many parts did they cut him up? What was his mouth? What arms (had he)? What (two objects) are said to have been his thighs and feet? The Brahmanas was his mouth; the Rajanya was made his arms; the being (called) the Vaisya, he was his thighs; the Sudras sprang from his feet".

This passage refers to the first three castes not as sprung from but as identical with, the mouth, arms and the thighs of the creator. But in spite of this difference

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<sup>57</sup> R.C. Majumdar (ed), *The history and culture of the Indian People*. Volume – I, The Vedic Age Bharati Vidya Bhavan, Kulpati Munshi Marg Mumbai. 400007. 1996, p. 388.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

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many regard this hymn of the Rig Veda as the earliest exposition of the later Brahmanical view, and regard the essential features of the caste system as existing even in the earliest Aryan Society in India<sup>60</sup>.

This theory has been challenged by many scholars whose views may be briefly stated as follows<sup>61</sup> :

The evidence of the Purusha-Sukta, an admittedly late hymn, is not valid for the bulk of the Rig Veda, which was produced by the as yet un-Brahmanized tribes of Vedic Indians living in the Indus region and the Punjab. The Caste system was developed only later, when a section of these Vedic tribes migrated farther east. The terms Varna (lit. Aryan colour) is used in the Rig Veda of all the three highest castes of later times, being contrasted only with Dasa (the dasyn-Varna or “aboriginal colour). The terms “Rajanya”, “Vaisya” and “Sudra” occur only in the purusha Sukta, the term “Brahmana”, also being rare in the Rig Veda. The term “Kshatriya” of which “Rajanya” is an earlier variant occurs but seldom in the Rig Veda. The term “Brahman” denotes a priest by profession only in some passages, while in others it denotes any person who was distinguished by genius or virtue, or one who, for some reason was deemed especially receptive of the divine inspiration<sup>62</sup>.

It has been shown that the word ‘Varna (Colour) has been applied to Aryans and dasas in the Rig Veda, that these two were opposite camps, that Brahmanas and Kshatriyas are mentioned in the Rig Veda but the word Varna has not been expressly connected with them. The words Vaisya and Sudra do not occur in the Rig Veda except in the Purusasukta. The transition from the casteless, through classified, society of the bulk of the Rig Veda to the elaborate caste system of the Yajur Veda is to be traced to the complication of life resulting from the further migration of the Vedic Aryans from the Punjab to the east. The necessity of carrying on a ceaseless

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<sup>60</sup> R.C. Majumdar (ed). *The History and Culture of the Indian People*. Volume – I, The Vedic Age Bharati Vidya Bhavan, Kulpati Munshi Marg Mumbai. 400007. 1996. p. 388.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

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fight with, and the conquest of, the above aborigines called for an organization of the conquering people by the merger or fusion of petty tribes into centralized kingdoms. Thus emerged the powerful monarch, while the lesser tribal princes, deprived of their royal rank, sank to the position of nobles. The monarchy, moreover, needed now a standing armed force, prepared to meet all eventualities such as resisting the sudden incursions of native or other Aryan tribes and quelling revolts on the part of the subdued aborigines. This standing army was naturally recruited from the rank of the nobility of tribal princes and the chief armed retainers of the king. This is the genesis of the warrior class. At the same time, the 'people' of the Aryan masses, secure in the protection afforded by the warrior class, ceased to take interest in military matters and settled down to a peaceful life devoted to agriculture pastoral pursuit, trade, and industry. They constituted the third class the *vis*, later called 'Vaisyas'<sup>63</sup>. Side by side also grew a distinct community of priests. In the earlier period, not only the householder but even the petty prince could offer sacrifice to the gods for himself and his people, the ritual being very simple. When the size of the kingdom grew and military and administrative affairs kept the hands not only of the king but also of the warrior class full, while, at the same time, the ritual tended to become more complicated and elaborate, the need was keenly felt of a hieratic order, composed of the more intellectual elements among the non-fighters who could dedicate themselves, undisturbed by the distractions of war or peace to the faithful and exact performance of the highly developed ritual and to the preservation (by word of mouth) of the traditional formulae and sacred hymnology of the Aryans, a heritage in part at least from almost prehistoric times<sup>64</sup>.

As regards the fourth class, the Sudra is mentioned for the first and only time in the 'Purusha-sukta'. Dasyu and dasa are known to the Rig Veda, both as aborigines, independent of Aryan control and as conquered slaves. The latter may reasonably be supposed to represent the Sudras of the later texts. But not all the

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<sup>63</sup> R.C. Majumdar (ED), *The history and Culture of the Indian People*. Volume – I, The Vedic Age Bharati Vidya Bhavan, Kulpati Munshi Marg Mumbai. 400007. 1996. p. 388.

<sup>64</sup> Ibid.

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defeated aborigines could be absorbed as slaves in the royal household as in the houses of individual owners. There must have been whole villages of the aborigines, though under Aryan control. The term 'Sudra' was evidently applied to the inhabitants of these villages as well as to the wild hill tribes which lived by hunting and fishing and acknowledged the over lordship of their Aryan neighbors. In course of time it included even Dasyu-Varna (or dark skinned) people who remained beyond the pale of the Aryan state and who were virtually excluded from the religious and ritual cult of the Aryans. The development of the caste system in a rigid form with strictly hereditary and mutually exclusive caste groups, did not take place till the time when the Vedic Aryans had settled down in the middle country and were already Brahmanized enough to look upon the inhabitants of the North West the home of the Rig Veda as uncivilized vratyas because they did not follow the strict caste system<sup>65</sup>.

The view summed up above may be regarded as the one now generally accepted by scholars. According to this recognized version, in the earliest society represented by the bulk of the Rig Veda that were probably different classes and professions, but none, not even the priestly and the warrior classes, were hereditary/ the warriors were drawn from the people at large, and any person with the requisite qualifications could officiate as a priest<sup>66</sup>. This view is not however, accepted by some whose agreements may be briefly stated thus<sup>67</sup>.

(1) The main, if not the earliest part of the Rig Veda was in all probability, composed not in the Punjab but in the east, in the country later known as the Madhyadesa or Brahmavarta. So the argument based on the non-brahmanical character of the Vratyas of the Indus and the Punjab becomes pointless. (2) The term Brahmans, "Son of a Brahman or Priest," Suggests that the priesthood was namely hereditary. There is no definite instance of a person other than a priest exercising priestly functions, nor was

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<sup>65</sup> R.C. Majumdar (ED), *The History and Culture of the Indian People*. Volume – I, The Vedic Age Bharati Vidya Bhavan., Kulpati Munshi Marg Mumbai. 4000071996. p. 388

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

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this feasible as the priesthood, even in the RigVeda, distinguishes within its fold a vast number of sub-groups of specialists and experts. (3) The power of the Purohita over the king in the Rig Veda, derivable from the fact that the correct performance of the sacrifice demanded the services of a hereditary priest, is nearly as great as in the Post RigVeda age. (4) The RigVeda knows of a ruling class the Kshatriya who, as a class of nobles, are appropriately named in the perusha Sukta as “Rajanya” or man of kingly family” As kingship was normally hereditary, the Kshatriyas were also in all probability as hereditary body. The Sudras were admittedly a separate group; so all the elements of the caste system were in existence in the age of the RigVeda. (5) There are glimpses in the Rig Veda, of a threefold (VIII. 35. 16-18) or fourfold (1.113.6) division of the people, corresponding to the well known three upper or all the four divisions of the caste system. (6) The existence of similar classes among the Iranians, namely priests, warrior, agriculturist, and artisans, makes it very probable that by the time of the RigVeda the four classes had developed into hereditary caste groups owing to the contact of the Arya-Varna, Aryans with the dark-skinned aborigines and the necessity this imposed on Aryan society of reorganizing its whole structure.

Although there is great force in some of these objections, it must be conceded that they are not strong enough to upset the recognized version. The existence of the four classes in Avestan literature certainly argues for the existence of some what similar classes in Rig Vedic society, but much stronger positive evidence is necessary to establish that these classes were hereditary Further, the term Brahmana, son of a priest, occurs very rarely, and the word Brahmaputra, in the same sense, is found only once. This, when contrasted with the numerous references to Brahman, seems to indicate that there was no idea of hereditary priesthood in the earlier Vedic period.

On the whole, it is difficult not to agree with the views, propounded long ago by Muir, that the Brahmanas (far less the Kshatriyas or Vaisyas) did not constitute an exclusive caste or race, and that the prerogatives of composing hymns and officiating

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at the services of the gods were not regarded, in the age of the Rig-Veda, as entirely confined to men of priestly families. The same this was equally, or perhaps more, true of the minor professions, as the hymn refers to the father, mother and the son following three different vocations in life, viz. those of a poet, a grinder of corn, and a physician. The heredity of occupation was, therefore, not yet a recognized principle, far less an established fact. The utmost that can be said is that there were recognized professions like priesthood, or distinctions of nobility and these had in many cases a tendency to become ditary here, but as in other countries of societies, theirs ranks might have been recruited from all sections of the community of the other essential features of the caste system.

## **ATHARVA VEDA**

The term Varna is used definitely in the sense of caste without reference to colour, in this age. The system of caste, whose beginnings may be traced in the broad fourfold classification of society in the Rig-Veda age, developed during this period in various directions. Many causes contributed to the rise of sub castes and other caste divisions. Guilds of workers tended to crystallize into castes, as occupations became more or less hereditary, as example we may cite the chariot makers the smiths, the leather workers, and the carpenters. The peculiar family constitution or the gotra tradition, whereby exogamy as well as endogamy regulated marriage connections, and whereby a man should normally marry a woman of equal birth, i.e., within his caste, but not of the same genes or within the gotra, was another factor in the development of complications and distinctions in the caste system. The original race feeling or the contrast which the Arya Varna felt between themselves and the Dasyu Varna (Abarigines) and which was sought to be mitigated by the incorporation of the conquered population into the framework of Aryan society by admitting them into the fourth class or caste, left its mark in the shape of the rule of hypergamy, whereby an Aryan could marry a Sudra wife but the Sudra never an Aryan wife. – The same rule was also gradually applied in marriages between the three Aryan classes, and while a

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Brahmana would normally marry a Kshatriya or a Vaisya girl, and the Kshatriya a Vaisya girl the male of a lower class could not ordinarily marry a girl of a higher class. This peculiar feeling as a mixed marriage is fundamental to all caste divisions and may be looked upon as the third factor in caste elaboration during this age<sup>68</sup>.

It was the third caste group that of the Vaisyas which by virtue of its occupations came into the closest touch with the fourth caste group, that of the Sudras. The latter was continually receiving accretions from the conquered aboriginal's population and could not therefore keep up its cultural purity to the Aryan level. There arose, the necessity of cleanly distinguishing the Aryan Vaisyas from the Sudra who was a doubtful Aryan<sup>69</sup>.

Along with their functions and duties, the privileges and status of the four castes were being differentiated minutely in the religious and social spheres. The Satapatha Brahmana prescribes varying sizes of femoral mounds for the four castes. The deities to whom victims of the different castes are offered in the purushamedha are different. Different degrees of politeness are noticed in the modes of address prescribed for the four castes.

The Sudra class was naturally the hardest hit in these invidious distinctions, but the texts are not consistent in the position they assign to it. The Sudra cannot milk the cow for the Agnihotra milk according to the Kathaka Samhita, but the Satapatha Brahmana gives the sudra a place in the some sacrifice and the Taittiriya Brahmana prescribes formula for establishing the sacrificial fire for the rathakara also who was counted a Sudra. The Aitareya Brahmana however lays down the most reactionary doctrine. It prescribes the Sudra as Yatha-Kama-Vadhya (fir to be beaten with impunity), who could be expelled at will and who is always the servant of another. It is also declared that the Sudra has no rights of property as against the rajanya,

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<sup>68</sup> R.C. Majumdar (Ed). *The History and Culture of the Indian People*. Vol. I. The Vedic Age Bharati Vidya Bhavan, Kalpati Marge Mumbai – 7. 1996.

<sup>69</sup> Ibid.

## *Historical Retrospect*

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especially the king. How far these extreme view were actually followed in practice it is difficult to say

The Vaisya class was engaged in agriculture, pastoral pen suits, industry, and trade, and paid tribute to the king and the nobles, in return for the protection given to them. A late passage in the Aitareya Brahmana gives rather a low estimate of him with reference to the Kshatriya, when it says that 'he is to be lived on by another and to be oppressed at will'. Although things might not have been really so bad as this there is no doubt that the position of the Vaisya was steadily deteriorating in this age. The Kshatriya class was composed of the king's relations, his nobility, his retainers and other chiefs of petty states. They fought for the protection of the country and maintained peace. They received revenue in kind from the people or masses during war. For their normal or peace time subsistence some of them were probably granted villages, because the Gramani seems to have been more often a nominee of the king rather than a popularly elected officer, and probably the post was hereditary in such cases. Others had their lands cultivated by tenants. In war, they were helped by the people, who fought alongside them<sup>70</sup>.

While it is generally recognized that the Brahmana and the Kshatriya have. Undoubted precedence over the Vaisya and Sudra, there is not the same unanimity in respect of the relative position of the first two. The more common view is that the Brahmana is superior to the king as recorded in the Vajasaneyi Samhita and the Satapatha, Aitareya and Panchavimsa Brahmanas. The Brahmana is dependent on the king and takes a lower seat by his side, but is superior to the king. A Kshatriya can never get along without a Brahmana while a Brahmana can: nay, the power of the Kshatriya is derived from the Brahmana. On the other hand, the Kathaka Samhita says that the Kshatriya is superior to the Brahmana, while the Aitareya rates the Brahmana rather low, describing him as a receiver of gift a drinker and as liable to be removed at will. Though this is not the common view at this age it explains some facts very

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<sup>70</sup> Supra Note 58.

## *Historical Retrospect*

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satisfactorily; the fact, for example that many kings were seers of hymns and sacrifices, and some of them were even instructors of Brahmanas in the Brahmanical lore<sup>71</sup>.

Brahmanas are contrasted with the members of the three other castes as the privileged eaters of the oblation. According to some scholars the Brahmanas were divided into two, classes the purohitas of the kings, who guided their employers by their counsel and the ordinary village priests, who led quiet lives<sup>72</sup>. In the view of the present writer<sup>73</sup> there were not separate classes as such. Any one of the ordinary priests could come into contact with the king when they were engaged in some great festival and could be selected for the post of purohita, if found pre-eminent and distinguished for his learning. The post remained hereditary, only if the son was as well qualified as the father. Imprecations against royal oppressors of Brahmanas in the Atharvaveda and the statements therein that kings that persecute the Brahmanas do not prosper, suggest on the one hand that the persecution of Brahmanas was not unknown, and on the other, the gradual consolidation of the prest of the priest hood. Even though a passage in the Aitareya exalts the Rajanya above the Brahmana whom the former can control, the references to the vaish only as the subjects of the king, suggest that the Brahmana class received preferential treatment and enjoyed certain privileges and exemptions denied to the other caste groups. The greed and lunning of the Brahmanas and many prerogatives claimed by them are reflected in the Atharvaveda and other texts, but they may not be a true picture of the class as a whole. There can be hardly any doubt that many of them deserved the highest position in society by their character and intellect.

The most glaring evil of the caste system, namely the doctrine of the impurity communicated by the touch or contact of lower castes (known as “Untouchability” to day) had not yet reached its ugly head. Restrictions on inter dining are known, but not

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<sup>71</sup> Ibid

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

## ***Historical Retrospect***

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on the basis of caste. Great importance is attached to purity of descent in the Samhitas and Brahmanas, but there are instances of Brahmanas of impure descent such as Kavasha. Vatsa, and Satyakama Jabala. On the whole it is quite clear that caste had not yet become a rigid system. And none of the three factors which definitely characterize it today, viz., prohibition of inter-dining and intermarriage, and determination by hereditary descent, was yet established on a secure basis.

- **DHARMASTRAS**

The Rigveda used the term ‘Varna’ to mean colour or light and this Varna is associated with groups of people having a skin of a dark or fair colour. It has been shown that the word ‘varna’ has been applied to Aryas and dasas in the RigVeda. Brahmanas and Kshatriyas are mentioned in the RigVeda, but the word Varna has not been expressly connected with them. The words Vaisya and Sudra do not occur in the Rigveda except in the Purusasukta but even in that hymn the word vana is not employed with reference to them<sup>74</sup>. It may be conceded that at the time when the purusasukta was composed the community was divided into four groups, viz, Brahamana, Kshtriya, Vaisya and Sudras. The Taittiriya Brahmana, with reference to the Mahabrata, says that the Brahamana is the divine Varna and Sudra is the asura Varna. If we can interpret Rigveda verse with the help of the Taittiriya Brahmana then in Rig Veda, the words “asuryam Varnam” mean “Sudra tribe”. There is no doubt that the word asura when applied to gods like Varuna has another meaning also in the Rig-Veda<sup>75</sup>.

As we have seen earlier that in Rigveda the word Vaisya and Sudra did not occur except in the Purusasukte, though both of them occur in the Atharva Veda. The position of three varnas inter see (called collective by arya) – it is clear that the samhitas other than the Rigveda and Brahmana works show that the three classes of

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<sup>74</sup> P.V. Kane, *History of Dharmasastra*, Vol. II, Part – I – Bhandarkar Oriental Research Institute, Poone – 411004. 1997.

<sup>75</sup> Supra Note 65.

## ***Historical Retrospect***

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brahmanas, kshatriyas and vaisyas had become differentiated and their privileges duties and liabilities had become more or less fixed in those time. In Rig-Veda we read that king alone who places brahma first dwell happy in his house, far him the earth always remains prosperous and to him all the people bow down of their own accord. Brahmanas are gods that are directly seen. There are two kinds of gods: for indeed the gods are gods and Brahmans who have studied and teach the sacred lore are the human gods'. In the Atharvaveda, there is an assertion of the pre-eminence of brahmanas and the consequences of harming them or their cows. Therefore the brahmanas is the foremost. Therefore the brahmana shows his might by his mouth, since he was created from the mouth. In the Aitriya Brahmana Varuna, when he was told that a Brahmana boy would be offered in place of the son of the king Haris Chandra is made to say 'a brahmana is indeed preferable to a Ksatriya. On the other hand Satapatha Brahmana says 'a brahmana is not adequate to manage a kingdom' In the Taittiriya Brahman, it is said that playing on the vina is to be done by a Brahmana and a rajana. The satapatha Brahman lays emphasis on the four peculiar attributes of Brahmana, viz., brahmanya (Purity of parentage as a brahmana), Pratirup a Carya (befitting deportment or conduct), Yasas (glory) and lokapakti (the teaching or perfecting of people). When the people are being perfected or taught by him, people endow him with four privileges. Area (Honour), Dana (Gifts), Ajyeyata (Freedom from being harassed) and avadhata (Freedom from being beaten). The Satapatha expressly mentions that brahmana, rajanya, vaisya, and sudra are the four varnas. Teaching had become so much associated with the Brahmanas that when the brahmana Gargya approached King Ajatasatru for the knowledge of Brahma, the latter replied 'this is Contrary to the natural order that a brahmana should approach a Ksatriya with the idea 'he (Ksatriya) will propound to one brahma'<sup>76</sup>.

The position of Ksatriya and their relation to the brahmanas falls. In some cases rajana means only 'a noble' or 'chief' as in Rigveda rajan means 'King.' The government often seems to have been tribal, such tribes as Yadus, Turvasa, Druhyus,

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<sup>76</sup> P.V. Kane, *History of Dharmasastra*, Vol. II, Part – I –. Bhandarkar Oriental Research Institute, Poone – 411004. India. 1997.p. 36-43.

## ***Historical Retrospect***

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Anus and Purus being frequently mentioned. The king was regarded as keeping the people within bounds. When a king was crowned it was thought that a Kshtriya was produced a lord of all beings, the defender of brahmanas and of dharma. The cooperation between brahmana and Ksatriya results in glory and success is frequently emphasized. Therefore, a Brahman must certainly be approached by a Ksatriya who is about to perform some act, for indeed that act of a Ksatriya which is sped on by brahmana succeeds. The Purohita of a Ksatriya came to occupy a very high position. The Satapatha lays emphasis on the importance of the purohita and cautions a Brahman against being the purohita of any king he meets with and adds that a brahmana may remain without a king, but a king should not be without a brahmana<sup>77</sup>.

The Taittiriya Samhita, says that the Vaisya indeed sacrifices, being desirous of cattle' and that the gods having been defeated were reduced to the condition of being the vaisyas or Vis of asuras. The Vaisyas among men, cows among beasts, therefore they are to be enjoyed (to be eaten, to be subsisted upon) by others; they were produced from the receptacle of food : The Taittiriya Brahmana says the vis go away from the brahmanas and Ksatriyas hence the vaisya though being eaten by others is not exhausted since he was created from the projanans and was produced with the Jagati metre, his season is the rains, therefore he is to be eaten by the brahmana and the rajanya, since he was created as lower than those two classes. The Satapatha Brahmanas says : He thus assigns to the Maruts a share therein after Indra, whereby he makes the people subservient and obedient to the nobility. According to the Aittriya Brahmana the Vaisya is one who is the food of others, who pays taxes to others. These passages show that vaisya were entitled to sacrifice, reared cattle were for more numerous than the other two classes, they had to bear the brunt of taxation, they lived apart from Brahmanas and Ksatriya and were obedient to them<sup>78</sup>.

Apart from the three varnas mentioned above there were other professions and crafts with specific name (which in later times became castes) even in the time of the

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

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Samhitas is quite clear. It speaks of Vapla (Barber), Tasta (a Carpenter or maker of Chariots), Bhasak (Medicine man) and Karmara or Karmare (Iron Smith). The Atharva Veda mentions rathakara Karmana and suta. In the Taittiriya Samhita mentions is made of Ksar (royal chamberlain or doorkeeper), Samgrahitr (treasures), taksan (Carpenter) and Ratha Kara (Maker of Chariots), Kulala (Potter), Karmara, Punjista (flower), etc. The most of the avocations and crafts referred to above have corresponding castes and sub castes for hundreds of years. It is therefore, possible to say that in the times of the Samhitas and Brahmanas there were groups founded on occupations that had become castes or were in process of developing into castes<sup>79</sup>.

The Vajasaneyi Samhita speaks of Paul Kasa in connection with hibhatsa (necessitating filth) and of chandala in connection with Vayu (wind). The Paulkasa and candela occur in Taittiriya Brahmana. In the Chandogya Upanisada the chandela is ranked with the dog and the boar<sup>80</sup>.

- **DISABILITIES OF SUDRAS**

Many of the Smritikaras and writers of digests quoted several Vedic passages on the point of disabilities of Sudra. According to those passages followings were their disabilities:

(1) Sudras were not allowed to read Veda. Not only was the Sudra not to study the Veda, but veda study was not to be carried on in his presence. This attitude need not cause wonder. The sacred Vedic literature was largely created and preserved entirely by the brahmanas (the Ksatriyas contributing if at all a very small share in that task). If the brahmanas deigned to keep their sacred treasures for the twice born classes in these circumstances, it is understandable and for those ages ever excusable. In the 20<sup>th</sup> century there are vast majorities who are not allowed by small by small minorities of imperialistic and capitalistic tendencies to control the just and equitable distribution of

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<sup>79</sup> Supra Note 67.

<sup>80</sup> P.V. Kane, History of Dharmasastra, Vol. II, Part – I. Bhandarkar Oriental Research Institute, Poone – 411004. India. 1997. p. 36-43.

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the material goods produced mostly by the labour and co-operation of those majorities and doctrines are being openly professed that certain races along should be imparted higher and scientific knowledge while other so-called inferior races should be only hewers of wood and drawers of water<sup>81</sup>.

(2) The Sudras were not to consecrate sacred fires and to perform the solemn Vedic sacrifices. Among the reasons given are that in several Vedic passages only the three higher classes are referred to in the case of the consecration of fires, about the samans to be sung, about the food to be taken when observing Vrata<sup>82</sup>.

(3) As to Samskaras, there is some apparent conflict among and the authorities<sup>83</sup>. Manuj says ‘The Sudra in curs no sin (by eating forbidden Articles like onions and garlic), he is not fit for Samskaras, he has no adhikara for dharma nor is he forbidden from performing dharma and in Vishnu Dharmasatra, we see”. One should not give advice to a Sudra, nor give him leavings of food nor of sacrificial oblations; one should not impart religious instruction to him nor ask him to perform Vratas.

(4) Liability to higher punishment for certain offences. If a Sudra committed adultery with a woman of the three higher castes, the prescribed punishment was to cutting off of his penis and forfeiture of all his property and if he was guilty of this offence when entrusted with the duty of protecting her, he was to suffer death in addition.

(5) In the matter of the period for impurity on death or birth the Sudra was held to be impure for a month, while a brahmana had to observe ten days period only. A Sudra could not be a judge or propound what dharma was. Manu lays down that when the king does not himself look into the litigation of people owing to pressure of other business, he should appoint a learned brahmana as a judge<sup>84</sup>.

(6) A brahmana was not allowed to receive gifts from a Sudra except under great restrictions. A brahmana could take food at the house of members of the three classes who performed the duties prescribed for them by the sastras but he could not take

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<sup>81</sup> Ibid.

<sup>82</sup> Supra Note 71.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

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food from a Sudra except when the Sudra was his own cowherd, or tilled his field or was a hereditary friend of the family, or his own barbar or his dasa<sup>85</sup>.

(7) The Sudra gradually came to be so much looked down upon that he could not touch a brahmana though at one time he could be a cook in a brahman a household and a brahmana could eat food from his house. In the Anusasaraparna it is daid, a brahmana should be served by a Sudra from a distance like blazing fire; while he may be waited upon by a Ksatriya or Vaisya after touching him. A brahmana on touching a Sudra or nisada becomes pure by acamana; on touching person lower then these, he becomes pure by bathing, pranayama and the strength of tapas.

(8) As the Sudra could not be initiated into Vedic study, the only asrama out of the four that he was entitled to was that of the householder. The life of a Sudra was esteemed rather low.

- **MAHABHARATA**

In Rigveda<sup>86</sup>, identical with Atharva Veda, there is evidence of internal struggle among the Aryans themselves. That probably put them into separate groups, each in term called Varna, namely, brahmana, Ksatriya, and Vaishya. The membership of each was determined purely by birth, and each was recognized, according to the theory, by a separate colour of the skin – the brahmana by the white, the Kshatriya by the red the Vaishya by the yellow and the Shudra by the black. No sooner was recounted, in the voice of the sage Bhrigu, what must have been the prevalent colour theory of the origin of the Varna social structure than the Mahabharata dismissed it straight away, in the voice of the sage Bharadvaj.

Bharadvaj -

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<sup>85</sup> Ibid.

<sup>86</sup> Chaturvedi Badrinath, *The Mahabharata, An Inquiry in the Human Condition*. Orient Longman private limited 1/24. A saf Ali road, New Delhi.2006 pp. 372-385.

## ***Historical Retrospect***

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“But every human body bleeds, defecates, sweats, and has phlegm and life, alike. How can the human beings then be divided into varna of different colours<sup>87</sup>”?

The Mahabharata<sup>88</sup> is throughout concerned not with the colour of one’s skin but with the colour of one’s thoughts, feelings, and acts. It is concerned with the human colours of desires, anger, fear, greed, sorrow and hunger. While the so-called dharmashastras of the Shastric were busy separating people in a fashion thoroughly artificial, an attribute of adharma, the Mahabharata was showing what brings people together in their inmate human unity, dharma. The single most important contribution of the Mahabharata in regard to Varna has been to insist that Varna is a special function and not a person. Hence to each of the four Varna a corresponding discipline was attached, an expectation from each, which was functional in the first place<sup>89</sup>. The respective disciplines, naturally interrelated, were to be, together, the foundation of social progress and social wealth, loka-yatra and loka-samagraha. In that sense, it was a collective discipline of dharma. What is functional has to be at the same time also ethical. Hence the common ethical discipline or samanya dharma, common to all special functions; and the specific discipline, or Vishesha-dharma, specific to each calling. In the event of a conflict between the two, that is, between the ethical and the functional, which one should be decisive? This question, too, was taken up by the Mahabharata. Excepting the abnormal times, during which the functional duties of the four varnas could be transposed, there is a strong and persistent element in the Mahabharata which emphasized the relativity of Varna itself. It was repeatedly held that the positions of brahmana and Shudra for example, were relative to their conduct. Those were not to be regarded as positions fixed unalterable by virtue of birth.

- **GITA**

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<sup>87</sup> P. V. Kane, *History of Dharmasastra*, vol. II, part - I, Bhandarkar Oriental Research Institute, Poone – 411004. India.1997. pp. 36-43.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

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It is stated in Gita that the system of four varnas was created on the basis of quality (or on the basis of sattva, rajas and tamas) and actions and it specifies the qualities and actions required in the four varnas as an ideal, viz., serenity of mind, self control, austerity, purity, forbearance, straight forwardness, wisdom (spiritual knowledge,) knowledge (of all kinds), faith (in god) – these are the natural actions (duties) for brahmana, bravery, fury, energy, steadiness, capability, not running away in battle charity and rulership these are duties of a Ksrtriya; agriculture, keeping herds of cows (and cattle), trade and commerce-these are the natural duties of the Vaisya; work of the nature of service in the natural duty of the Sudra. If birth had been regarded as the sole or principal basis, the words in the ‘Gita’ should have been ‘Jati-Karmavibhagasah’ (or janmakarma) and not ‘Gunakarma’. It would be noticed that out of the nine Karmani specified as natural to brahmanas most are moral and spiritual and no emphasis is laid on the elements of birth.

- **MANUSMIRITIS**

Manusmiriti, dated between 200 B.C. and 100 A.D., contains some laws that codified the caste system. Varna is mentioned as caste equivalent in Manusmiriti. Manusmiriti and some other shastras mention four Varnas. The Brahmanas (teacher, Scholars and Priest), the Kshatriyas (King and warriors), the Vaisyas (traders, land owners and some artisans group) and Sudras (agriculturists, service providers, and some artisans groups). Another group of untouchables excluded from the main society was called parjanya or Antyaja. A Varna can be viewed as a group of castes or a social division that consists of various sub-castes called jatis.

In Manu-Samhita, the highest superman in every respect is claimed for a Brahamana, though emphasis is also laid on the superior knowledge and qualifications on which that status rests. He must be well versed in his group of vows and must cultivate universal love. He filled the highest offices of state and society by his character – those of teacher, priest, judge, prime minister. He was punishable in law, but not by

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capital punishment. A Brahmana lost his status if he violated the restrictions prescribed as to food and gifts, occupation or profession, and sought for livelihood on the strength of his mere birth or caste without its virtues or ideals. This rule applied to other castes also<sup>90</sup>.

As regards the Sudra, 'service was his portion in life.' He was not eligible for sacraments, nor for hearing sacred texts except their substance. But he was not denied the rites of marriage, cooking of daily food in the grisha fires, and funeral ceremonies. Manu even mentions Sudra teachers and pupils, showing that the Sudra was not denied the right to learning. On the whole the lot of a Sudra was an unenviable one. Sudra had few privileges and many obligations. The discriminating locus against him and his social disabilities, uttered with brutal frankness, were an inheritance of the past. But Manu treats him exactly like a slave<sup>91</sup> and prescribes barbarous punishments as already noted above.

To what extent these regulations represent the actual state of things it is difficult to say. But the Jataka stories also describe how the chandalas were treated as despised outcastes doomed to live outside the city or village, and their very sight was regarded as impure. We find in this age the beginning of those ideas of untouchability which have cost a slur as Indian civilization. But as yet the sudras were not included in this category<sup>92</sup>. The most significant development in the caste system is the large increase in the number of mixed castes. We get the most elaborate account of it in Manu. This review of Manusmriti will make it clear that while the old theory of caste, adumbrated in the Vedic, especially the Sutra, texts, was developed and elaborated in this age, no new principle was enunciated. Further, though the caste system was gradually becoming more and more rigid, and the lot of the Sudra was becoming

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<sup>90</sup> S. Ramakrishnan, *The History and Culture of the Indian People*. Vol. II, The age of imperial unity, Bharatiya Vidya Bhavan, Kapatil Munshi Mong – Mumbai. 2001.

<sup>91</sup> Ibid.

<sup>92</sup> S. Ramakrishnan, *The History and Culture of the Indian People*, Volume – II, The age of Imperial unity. Bharat Vidya Bhavan. Kapatil mang, Mumbai. 2001. P. 542-544.

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harden and harden, it had not yet reached the stereotyped form in which we find it today<sup>93</sup>.

The Buddhist and Jain texts also always openly declare the Kshatriyas to be less superior to the Brahmanas, and name the Kshatriyas first in enumerating the four castes. Thus, although the general framework of the caste system is admitted, the supremacy of the Brahmanas is challenged in these texts. The Buddhist texts and other evidence also leave no doubt that the so-called mixed castes really resulted from organizations, like guilds of people following different arts and crafts. The general theory of inter-marriage leading to the different mixed castes is puerile in the extreme. Texts show how the different non-Aryan tribes like Khasas and Dravidas, and even foreigners like Sakas, Yavanas, Chinas, etc., were gradually incorporated into Hindu society and formed an integral part of it. The Buddhist texts also show that caste was not rigidly tied to craft in these days. They tell of a Kshatriya working successively as potter, basket-maker, reed worker, garland-maker, and cook, also of a Setthi (Vaisya) working as a tailor and a potter, without loss of prestige in both cases. The Dasa-Brahmana Jataka states how Brahmanas in those days pursued ten occupations against rules<sup>94</sup>.

Besides the four established castes of Hindu society the Buddhist Pali text-books speak of the peoples ranking socially below them as 'hina-jati' 'low tribes', marked out by their pursuits of low crafts, hina-sippa and instance the workers in rushes, fowling and cart-makers, who were aboriginal peoples; as also mat-makers, barbers, potters, weavers and leather workers<sup>95</sup>.

- **MEGASTHENES ACCOUNTS (DURING THE REIGN OF CHANDRAGUPTA MAURYA)**

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid at 547 - 550

<sup>95</sup> S. Ramakrishnan, *The History and Culture of the Indian people*, Volume – II, The age of Imperial unity. Bharat Vidya Bhavan, Kapatimang, Mumbai. 2001. P.542-544.

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A graphical account of the caste system is given by Megasthenes, the Greek ambassador at the court of Chandra Gupta Maurya. He enumerates seven classes or castes into which the whole population of India is divided, viz. (1) Philosopher, (2) Husbandmen, (3) Herdsmen, (4) Artisans, (5) Military, (6) Overseers or spies and (7) Councilors and Assessors. He adds that no one is allowed to marry out of his own caste, or to exchange one profession or trade for another to follow more than one business. This is undoubtedly a characteristic of the rigid caste system as enunciated in the Brahmanical texts, but it is difficult to believe that the seven categories mentioned by Megasthenes confused the castes with the professions or occupations with which he was more familiar than others. It is significant that he makes no mention of the fourfold divisions of caste, and his obvious contraction between castes and occupations probably indicates that the broad division of society was based on this latter factor rather than on the theoretical classification in the Brahmanical texts of the period<sup>96</sup>.

## **B. CLASSICAL AGE**

The rules relating to the duties and mutual relations of the four varnas in the preceding period were generally observed during the Gupta Age. We may quote by way of evidence the high authority of Hiuen Tsang, himself an intelligent foreigner belonging to a different faith, which not only refers to the four hereditary castes of Indian society together with their respective occupation, but adds that the members of a caste group marry within the caste. To this we may add that Varahamihira in his *Brihat-Samhita* assigns the different quarters of a city to the Brahmanas, Kshatriyas, Vaisya and Sudra, as does Kautilya in his *Arthashastra*. There were in the Gupta Age as in earlier times undoubted departures from the strict Smriti law. This is proved by a number of authentic instances of Brahmanas and Kshatriyas adopting the occupations of the classes below them, and of Vaisyas and Sudras following those of the classes above them. An inscription of the fifth century A.D. refers to two Kshatriya

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<sup>96</sup> Ibid at. 549

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merchants living in a city in the upper Ganga basin while another inscription of the same century mentions a body of weavers from Gujarat as having gradually adopted various other occupations in their new home in Malwa. In the seventh century Hiuen Tsang and his companions, escaping from a band of robbers, met a Brahmana who was ploughing the land, with his own hands<sup>97</sup>.

In the next place, we have in the Gupta period authentic examples of inter-marriages between Varnas, not only in the anuloma but also in the pratiloma order. In the Contemporary Sanskrit dramas and prose romances we find Brahmanas and Kshatriyas even marrying the daughters and female slaves of courtesans<sup>98</sup>.

### **• POSITION OF LOWER CASTES**

As in the preceding age, there were also numerous mixed castes. We know something about the conditions of the Chandalas and similar classes who occupied the lowest rank in the order of the mixed castes. According to the Smriti law the Chandalas were to perform the meanest work, such as carrying unclaimed corpses and executing criminals. They were not to walk about dining knight in villages and towns, and even during day-time they were to move about with distinguishing marks fixed by the king. In fact they were to live outside the village. Strict rules were laid down for preventing pollution of other classes by their contact. The evidence of contemporary Chinese travelers shows that these rules were followed in the Gupta Age. In Madhyadesa, at the beginning of the fifth century, as Fa-Hien tells us, the Chandalas were required to live outside the boundaries of towns and market places on approaching which they had to strike a piece of wood as a coarning to others to avoid their touch. For them was reserved the occupation of hunters and dealers in fish. In the first part of the seventh century, according to Hiuen Tsang, butchers, executioners scavengers, etc. lived in dwellings market by a distinctive sign and lying outside the

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<sup>97</sup> U.N. Ghoshal, *The History and Culture of the Indian people* volume – III, The Classical Age. Bharatiya Vidya Bhavan., Mumbai. 1997. pp 560-563.

<sup>98</sup> Ibid.

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city the references in the literature of the Gupta period confirm the above accounts. We learn from them how the Chandalas, who were confirmed meat eaters, were habitually engaged as public executioners and were regarded as untouchables<sup>99</sup>. Removed still further from the chandala and others caste lying within the pale of Indo-Aryan society were the aboriginal tribes (Pulindas-Sabaras, Kiratas, and so forth) who lived in the hills and forests of the Vindhya and other mountain ranges. In the Dasakumara-charita, the Harsha-Charita, the Kadambari and other works of the late Gupta period we get vivid glimpses of the dress and manners as well as the religious and social customs of these tribes. We learn that the Sabaras of the Vindhya forests in the Seventh Century were used to such reprehensible and outlandish practices as the offering of human flesh to their deities, living by hunting, partaking of meat and wine, and kidnapping women for marriage<sup>100</sup>.

### **C. MEDIEVAL PERIOD (1000 – 1707 A.D.)**

During this period Hindu society was based on caste system. In fact the Hindu society had been divided into Varnas on the basis of division of labour since the ancient times. This continued during the medieval period. The Hindu society was divided into four Varnas Brahmins, Kshatriya, Vaisya and Sudras. Though initially the caste system was evolved to achieve harmonious working of the society as a single social unit, but in course of time the caste became more ramified and rigid and came to acquire a religious tinge<sup>101</sup>. The old position of Brahmanas and Khatriyas was materially affected by the Muslim conquest of India. The Brahmanas lost their royal Patronage. They got not job in administration. They were no longer prosperous. They lost the opportunity of earning a lot of money by officiating as priests in sacrifices. The result was the new Smriti's laid down that they could pursue agriculture through lived labour. In times of special distress, they could themselves

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<sup>99</sup> Ibid.

<sup>100</sup> U.N. Ghoshal., *The History and culture of the Indian People.*, VOL.-III, the classical Age., Bharatiya Vidya Bhavan., 1997. Mumbai.

<sup>101</sup> S.C. Roychowdhury, *History of Medieval India. From 1000 – 1707 A.D.* Surject Publications, 7/8 – K. Kolhapur Road amla, Nagar, Delhi, 2003. p. 248.

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cultivate the fields. Both agriculture and trade were the occupations of the people of all castes. In view of the change, the rank and file among the Brahmanas could not devote the same time and attention to Vedic studies and spiritual and intellectual pursuits as they used to do in the past. The new commentaries on the Smritis allowed them to give less time to their original occupation and contest themselves with the study of just a part of the Vedas in which they were interested and in some cases with that of the Puranas alone. This was an admission of the decline of the Vedic studies during the sultanate period and the importance of the Brahmanas. There was also a change in the attitude of the Brahmanas towards the Sudras. The latter were allowed to listen to recitations of the Puranas. It was made permissible to eat the food of certain Sudra castes under some special circumstances. The Sudras were allowed to engage themselves in some of the prohibited Articles of sale, including meat<sup>102</sup>.

The Kshatriyas lost not only political power but also the opportunity of earning their livelihood as soldiers. Except in Rajasthan, Central India and the Himalayan region in the North, west, many of the Kshatriyas rank into the status of local landlords serving as intermediaries in the revenue system organized by the Muslim rulers. Guru Nanak has referred to the demoralization of the Kshatriyas in these words. "The Kshatriyas have forsaken their religious and adopted the language of the Malechchas." This refers to the acceptance of service by the Kshatriyas under the Muslim rulers and their imitation of Muslim manners and customs. The changed position of the Kshatriyas had a direct impact on Hindu society as a whole.

The picture of the condition of the Vaisyas and Sudras and the untouchables given by Al-Biruni seems to be exaggerated. The Sudras were divided into two categories. Those of the lower category were looked down upon as inferiors, as the untouchables. The number of mixed castes had gone up to 64 and those were divided into two groups. Those belonging to the Anuloma Group (born of higher caste males and lower caste females) were considered twice-born and were entitled to the sacred

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<sup>102</sup> Supra note 94 at 249

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thread and other sacraments. Those belonging to the pratiloma group (born of lower caste fathers and high caste mothers) were considered as belonging to low castes. The lower orders of society were discriminated against and even despised. The detailed rules were prescribed to avoid contact with the despised castes. Purification by bathing with clothes on was prescribed for touching a Chandala. Different penances were to be undertaken by a Brahman for conversing, or sleeping on the same bed, or going in company with a Chandala, for looking at or touching a Chandala, for drawing water from a tank owned by Chandala, for drinking water from a well from which water had been drawn in a Chandala vessels, for eating the food of a Chandala or living for some time in the same house with a Chandala, for the entrance of a Chandala in the house of a Brahmana etc. The caste rules and the rules governing the relations between the various castes as laid down in the shastras were not strictly followed. Some Brahmanas followed the occupation of the Kshatriyas and some Sudras, “in the teeth of the canonical rule forbidding the lower varnas to take up the functions of the higher ones assumed the Kshatriyas occupation of ruling and fighting”. In the seventh century A.D., Sindh was ruled by a Sudra dynasty. There were some Sudra rulers in other part of the country. Although Al-Birumi does not mention the Kshatriyas caste, yet it had come into existence as an important caste in the later half of the 9<sup>th</sup> century A.D. The individuals of this caste had risen “to the highest public offices in different tracts” in the eleventh and following centuries<sup>103</sup>.

With the arrival of the Muslims, the caste system grew further rigid as the Hindus were not willing to mix with them and kept themselves aloof with a motive to save their religion and social system. This institution of caste system was quite unknown to the Muslims who believed in equality and brotherhood of men and did not distinguish between man and man<sup>104</sup>. The inflexibility of Islam did not permit any compromise with other religions. The Muslims believed that their religion had the

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<sup>103</sup> S.C. Roychowdhury, *History of Mediaval India. From 1000 – 1707 A.D.* Surject Publications, 7/8 – K. Kolhapur Road amla, Nagar, Delhi, 2003. p. 248.

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monopoly of the whole world and no other religion could compete with them. The Muslims were not prepared to accept the religion and social structure of the Hindus and the Hindus were not prepared to accept Islam and lose their identity as other people conquered by the Muslims had done. The Hindus treated the Muslims as social out castes or Melechchas and avoided mixing with them<sup>105</sup>. With the passage of time this hostility towards the Muslims died out and some of the Hindus, especially of the low castes were attracted towards Islam on account of its belief in equality of all men and brotherhood of man. On the other hand the Muslims also grew less hostile towards Hindus and developed a feeling of affinity with new land. Consequently the Muslims who did not believe in caste system also felt its impact and like the Hindus they came to be divided into four classes – Sayed, Sheikh, Mughal and Pathan.

### **D. THE BRITISH PERIOD**

- **18<sup>TH</sup> CENTURY A.D.**

In the 18<sup>th</sup> century, the Hindu society was divided into four parts, viz., the Brahmins, Kshatriya, Vaisyas and Sudras. The Brahmin was the priest, the sole exponent of religious as well as the teacher and guide. Both the ignorant and the educated were superstitious and the Brahmins exploited the innate human fear of the unknown. The hereditary occupation of the Kshatriyas was to wield temporal power. The kings, ministers and soldiers generally belonged to this class. Nagari Dass, the Hindi poet observed that Kshatriyas were greedy and selfish. They never did any good to anybody and were not compassionate. If they saw a beautiful woman in the house of a poor man, their strength of arm lay only in their effort to grab her for themselves. The Vaisya were the community of businessmen. They had two broad divisions. One branch took to trade and the other to agriculture. It was the farmer who was typical of

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<sup>105</sup>. S.C. Roychowdhury, *History of Mediaval India. From 1000 – 1707 A.D.* Surject Publications, 7/8 – K. Kolhapur Road amla, Nagar, Delhi, 2003. p. 248.

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their class. They were the usurers and the sole aim of their life was to live on the interests of the money that they gave as loans. A Bania was notorious for his love of money. He was looked down upon by the society for that reason. The Sudras comprised the mass of the people. They, included the aborigines admitted to the Hindu community. Their salvation was supposed to lie in the direct and indirect service rendered by them to the three upper classes. Below these four castes were the Antyajjas with their eight guilds of craftsmen. They had to live at a distance from the higher castes and still rendered their services to them. The lowest of the low were the Hadis, Doms and Chandalas. The Brahmanas, Kshatriyas and Vaisyas were all divided and subdivided into a large number of castes and sub-castes each caste formed an endogamous group and it was only in this endogamous group that inter-dining was permissible<sup>106</sup>.

- **19<sup>th</sup> CENTURY A. D.**

The caste system and the system of untouchability linked with it, were among the primary targets of the social reformers. In the nineteenth century stress was laid on the abolition – at least relaxation - of the caste system by the Brahmo Samaj, the Arya Samaj, Swami Vivekananda and many other reformers. It was Gandhi who made the abolition of untouchability important items in the constructive programme of the Indian National Congress. He replaced the hated word ‘untouchable’, by the term ‘Harijan.’ The Constitution of India has made untouchability illegal and provided special privileges for the ‘Scheduled Castes ‘including ‘Harijans’”<sup>107</sup>.

The social reform movements which began in the nineteenth century to transform the ‘social life by purging of accumulated ills and anomalies’ has tended in

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<sup>106</sup> V.D. Mahajan, *Modren Indian History, from 1707. To the Present Day*. S. Chand & Company Ltd. Ray Nagar, New Delhi, 2005. pp. 77 & 78.

<sup>107</sup> Anil Chandra Banerjee, *The New History of Modern India. 1707-1947*. K. P. Bagchi & Company. 1983. p. 536.

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the twentieth century. In addition to contact with the west, the social revolution was brought about by the introduction of rapid means of communication, like the railways, telegraph, postal system etc. This broke down the caste barriers to a great extent. People now began to ponder over the antiquated traditions which they were following. They felt that the time had come to modernize their social institutions<sup>108</sup>. The gradual disintegration of the caste system has been due to a large extent to factors other than the crusade of the social reformers. The British rulers introduced new economic forces which undermined the caste system in different ways. Industrialization and construction of railways created new opportunities for work outside the traditional scheme of occupational castes and made close contact between workers of different castes inevitable. The right to own property in land, including the right to sell land, as also the decay of the panchayat system, led to the disintegration of the traditional pattern of the rural society. The caste system was affected by certain legal changes.

The educational system was affected by certain legal changes. The educational system provided new opportunities for the 'depressed classes' and contributed to the removal of social inequality. In the urban areas there developed a new social pattern in which caste played a role of diminishing importance. The struggle for freedom drew together men of different castes in strenuous common efforts. The depressed classes organized themselves in associations for the recovery of social rights of which they had been deprived of for centuries. Their greatest leader was Dr. B.R. Ambedkar<sup>109</sup>. It is true that the caste system was in many respects a cruel and immoral system but was so deeply rooted in Hindu society that it could not be shaken even by medieval religious reforms. Guru Nanak condemned the caste system as "folly" but in spite of that it continued. Even the Sikh Gurus who were Khatri did not marry non-Khatri girls. Chaitanya stood for removing all distinctions based on caste and religion but he himself observed practices and after his death Bengal rationalism developed on

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<sup>108</sup> H.V. Sreenivasa Murthy, *History of India – Part II*, Eastern Book Company, Lucknow, 2003, p. 20.

<sup>109</sup> Anil Chandra Banerjee., *The New History of Modern India, 1707*, K.P. Bagchi & Co. Calcutta, 1983, pp. 536 – 537.

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traditional Hindu lines<sup>110</sup>. Another aspect of the development of 20<sup>th</sup> century line building of roads all over India, and the introduction of railways, postage, telegraph, cheap paper and printing – especially in the regional language – enabled castes to organize as they had never done before. A post card carried news of a caste meeting, and the railway enabled members scattered in far-flung villages to come together when necessary, while the availability of cheap newsprint facilitated the founding of caste journals, whose aim was to promote the interests of their respective castes. It is usual to point out that railway and factories relax rules of pollution regarding eating and drinking and other forms of contact. But that is only one side of the story. The availability of cheap paper enabled caste disputes to be recorded, and this gave permanent form to rules and precedents which were till then dependent upon the fallible; and therefore challengeable, memory of elders. I think that several castes in Gujarat have had their ‘Constitutions’ Printed<sup>111</sup>.

The civil and penal codes introduced by the Britishers over the sub-continent of India took away much of the power previously exercised by caste panchayats. The British also introduced a new principle of justice, viz., that all men are equal before the law and that the nature of a wrong is not affected by the caste of the person who is committing it, or by the caste of the person against whom it is committed. It is pertinent to mention here that even the use of law courts by some peasants did not put an end to caste panchayats. The peasants made use of both the systems of justice. The traditional panchayat, caste as well as village are still factoring in many parts of the country. The British rule set in motion economic forces which upset the traditional hierarchy, but this did not necessarily mean that caste was weakened thereby. In fact, it is arguable whether such a disturbance did not actually increase caste consciousness all rounds. A low caste which made money as a result of new opportunities presenting themselves to it made attempt to raise its status vis-à-vis the other castes, and this

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<sup>110</sup> V.D. Mahajan., *History of Medieval India (Muslim rule in India)*. S. Chand & Co. Ltd. , Ram Nagar, New Delhi. 2004. p. 358.

<sup>111</sup> M. N. “Srinivas. *Caste in Modern India*” in Manoranjan Mohanty (Ed). *Class, Caste, Gender*, Sage Publications, India Pvt. Ltd. B- 42, Panchsheel Enclave., New Delhi – 110017. 2006 . p. 155.

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resulted in opposition from the latter. The newly-rich castes only pressed for a higher status for themselves – they did not urge that the caste system should be abolished. It is true that the economic forces released under British rule resulted in greater mobility within the caste system, but that is quite different from making progress towards an egalitarian society<sup>112</sup>.

- **20<sup>th</sup> CENTURY A.D. - TILL 1947**

The introduction of the principle of equality before law by the British dealt severe blow to the social and legal inequalities due to the caste system. The expropriation of the caste committees of all penal power by the British government deprived caste of a powerful physical weapon to stampede its recalcitrant members into submission. Caste Disabilities Removal Act of 1850, the special Marriage Amendment Act, 1923 contributed to a great extent in undermining the edifice of Castes<sup>113</sup>.

The growth of nationalist movement undermined to some extent, the caste consciousness of the Hindus. The mass movements such as the non-cooperation movement of 1921-22, and the civil disobedience movement of 1930-33 made the people of different castes rub their shoulders against the alien ruler. It automatically strengthened the community sense and weakened the caste consciousness. It strengthened the national consciousness. As a part of the national movement, Gandhi started movement against untouchability and the caste system. The fast undertaken by Gandhi in 1932 to prevent the introduction of separate electorate for untouchables is a great landmark in the history of the protest and resentment against the caste system<sup>114</sup>. In 1856, the widow re-marriage Act was passed which contained clauses practically violating the customs of the lower castes. In 1876 the High Court of Bombay ruled

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<sup>112</sup> Ibid.

<sup>113</sup> J.L. Kachroo., *Society in India*. Cosmos Bookhine (P) Ltd. New Delhi 1990. P. 88.

<sup>114</sup> Ibid.

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that “Courts of law do not recognize the authority of a caste to declare a marriage void or to give permission to a woman to remarry”. The caste disabilities removal Act, 1850 facilitates conversion to another religion or admission into another caste without affecting the property right of the person. In 1925 in Madras, all public wells and schools were thrown open to all the classes including the depressed.

## **E. CASTE SYSTEM IN POST INDEPENDENT INDIA.**

After the political independence of the country, the important factors, besides industrialization and urbanization, which have affected the caste system, are the merger of various states, enactment of several laws, spread of education, spatial mobility, and the growth of market economy. Before the independence, some states were the strongholds of the caste system; but after the liquidation of the native states and framing of the new Constitution for the whole country which generates justice, liberty and equality to all which has abolished the untouchability, the caste system no longer function on rigid lines<sup>115</sup>.

It has been assumed by social scientists working in or on India that the process of modernization set in motion by the colonial regime and pursued by the indigenous bourgeoisie in the post-Independence era will gradually dissolve the caste system and the collectivist ethos, and replace it with a class system and an individual ethos<sup>116</sup>. This assumption had its roots in the theories of socio-economic change. Anthropological and sociological studies on the caste system in India<sup>117</sup> undertaken in the course of the last five decades have, however revealed this assumption to be untenable, and have even exposed the naïve socio-centric judgments emerging from it. Rather, these studies seem to emphasize that modernization does not *ipso facto* tear apart the basic fabric of the caste system. At the same time, it cannot be contended

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<sup>115</sup> Ram Ahuja. *Indian Social System*, Rawat Publications, Jawahar Nagar, Jaipur 1993. at 270.

<sup>116</sup> M N Srinivas *Caste Its Twentieth Century Avatar* (Ed), Penguin India (P) Ltd, Nehru Place, New Delhi, 1996. p.70.

<sup>117</sup> Ibid.

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that the caste system has not changed at all. It can hardly be gainsaid that even from the time when written accounts of its practice are available, and certainly from the time of the colonial documentation of the phenomenon, caste has undergone considerable change. In any case, it is nowhere practiced as rigidly as it was prescribed in the ancient Hindu law texts. What is important to note, however, is that the caste system has been the most flexible of the primordial institutional arrangements anywhere in the world, and it has shown an extraordinary capacity to adopt itself to a variety of changing, and often apparently contradictory, socio-economic conditions<sup>118</sup>.

### **2. III. SANSKRITIZATION**

Sanskritization is the process by which a “law” Hindu caste or tribal or other group, changes its customs, ritual, ideology and way of life in the direction of a high and frequently, “twice-born” caste. Generally such changes are followed by a claim to a higher position in the caste hierarchy than that traditionally conceded to the claimant cast by the local caste without affecting the property rights of the person. In 1925 in Madras, all public wells and schools were thrown open to all the classes including the depressed community.<sup>119</sup> The claim is usually made over a period of time, in each, a generation or two, before the “arival” is conceded. Occasionally a caste claims a position which its neighbours are not willing to concede. This type of disagreement between claimed and conceded status may be not only in the realm of opinion but also in the more important realm of institutionalized practice. Sanskritization is generally accompanied by, and often results in upward mobility for the caste in question; but mobility may also occur without Sanskritization and vice versa. However, the mobility associated with Sanskritization result only in positional changes in the system and dose not lead to any structural changes. That is a caste moves up above its

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<sup>118</sup> Ibid

<sup>119</sup> Vidya Bhushan and D.R. Sachdev. An Introduction to Sociology., Kitab Mahal, 22 – A Sarojins Naidu Marg, Allahabad., 211001. 2001. p. 386.

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neighbors, and another comes down, but all this takes place in an essentially stable hierarchical order. The system its self does not change.<sup>120</sup>

Sanskritization is not confined to Hindu castes but also occurs among tribal and semi tribal groups such as the Bhils of western India, the Gonds and Oraons of central India, and the Pahadis of the Himalayas. This usually results in the tribe under growing Sanskritization claiming to be a caste, and therefore, Hindu. Some castes in the omnibus category of Shudra may have a highly Sanskritized style of life whereas others one only minimally Sanskritized, but whether Sanskritized or not, the dominant peasant castes provide local models for imitation, and Kshatriya and other models are often mediated through them<sup>121</sup>. New factors affecting dominance have emerged in the last century. Western education, jobs in the administration and urban sources of income are all significant in contributing to the prestige and power of particular caste group in the village. The introduction of adult franchise and Panchayati Raj (local self government at village, Tehsil and district level) since independence has resulted in giving a new sense of self respect and power to low caste, particularly Harijans who enjoy reservation of seats in all elected bodies from the village to Union Parliament. The long term implications of these changes are probably even more important, especially in those villages where there are enough Harijans to sway the local balance of power one way or the other. In the traditional system it was possible for a small number of people belonging to a high caste to wield authority over the entire village when owned a large quantity of arable land and also had a high ritual position. Now, however, in many parts of rural India power has passed into the hands of numerically large landowning peasant castes, It is likely to remain therefore some time, except in villages where Harijans are numerically strong and are also taking advantage of the new educational and other opportunities available to them. Endemic factionalism in the dominant caste is also another threat to its continued enjoyment of power. No

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<sup>120</sup> Ibid.

<sup>121</sup> J. L. Kachroo., *Society in India*. Cosmos Bookhine (P) Ltd. New Delhi 1990. p. 88.

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longer is dominance a purely local matter in rural India. A caste group which has only a family or two in a particular village but which enjoys decisive dominance in the under region which still count locally because of the network of ties binding it to its dominant relatives. What is equally important is that others in the village will be aware of the existence of this network, Country wise, a caste which enjoys dominance is only one village will find that it has to reckon with the caste enjoys regional dominance,<sup>122</sup> his hereditary occupation occasionally, a man is heard making slighting remarks about the hereditary occupation of other castes. The other tendency inherent in the caste system is the imitation of the ways of higher castes. The vast improvement in communication during the last sixty years has contributed to the decline in prestige of purely local style of living. Rural leaders or at least their son now tend to borrow items from prestigious, urban ways of living, and the long term effects of this processes are a decrease in cultural diversity and increase uniformity, landownership is a crucial factor in establishing dominance. Land-owners generally come from the higher caste while 35% of Harijans are landless laborers, and the bulk of those who own land “have such small holdings that their condition is hardly better than that of agriculture laborers.” Landownership confers not only power but prestige, so much so that individuals who have made good in any walk of life tend to interest in land. If landownership is not always and in dispensable passport to high rank, it certainly facilitates upward mobility. The existence of congruence between landownership high ranks in the caste hierarchy has been widely observed, but it is important to remember that it is only of a general kind, and admits of exception in every area. The power and prestige which owning caste command, affects their relation with all castes, including those ritually higher but important as secular criteria are, ritual has on in dependent existence and power of its own.

The mediation of the various models of sanskritization through the local dominant caste stresses the importance of the letter in the processes of the cultural transmission. Thus if the locally dominant caste is Brahmin or lingayat at will tend to

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<sup>122</sup> M. N Srinivas, *Social Change in Modern India*, Oriental Longman, Himayatnager, Hyderabad. 1992.

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transmit a Brahminical model of Sanskritization, where if it is Rajput or Bania it will transmit Kshatriya or Vaishya models. Of course each locally dominant caste has its own conception of Brahmin, Kshatriya or Vaishya models. Two distinct tendencies are implicit in the caste system. The first is an acceptance of the existence of multiple culture, including moral and religious norms in many local society, such acceptance is accompanied by a feeling believes, and practices are relevant to once group while others one not. A peasant takes a great deal of pride in his agriculture and takes about its importance and difficulty and the skill and patiencs required. An artisan or a member of a servicing has a similar attitude towards his hereditary occupation occasionally; a man is heard making slighting remarks about the hereditary occupation of other castes. The other tendency inherent in the caste system is the imitation of the ways of higher castes<sup>123</sup>.

The influence of the dominant caste seems to extend to all areas of social life, including so fundamental a matter as the principle of descent and affiliation. Dominant castes set the model for the majority of people living in rural areas including, occasionally, Brahmins where they way of life has undergone a degree of Sanskritization as it has for instance, among the Patidars, Lingayats and some Vellalas – the culture of the area over which their dominance extends experiences a change. Brahmins –like Kshatriyas, have exercised dominance in rural as well as urban in India. In strength of numbers they have rarely been able to complete with the peasant caste, but they have enjoyed ritual preeminence, and that in a society in which religious beliefs were particularly strong. In pre-British and princely India a popular mode of expiating sins and acquiring religious merit was to give gifts of land, house, gold and other goods to Brahmin. The gifts were given as such occasions as the birth of a prince, his marriage coronation, and death. In their roles as officials, scholars, temple priests, family priests and some parts of the country village record-keepers

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<sup>123</sup> M. N Srinivas, *Social Change in Modern India* , Oriental Longman, Himayatnager, Hydrabad, 1992.

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also, they come to own land. Ownership of land further increased the great prestige. Brahmins already commanded as numbers of the highest caste<sup>124</sup>.

The changes in the mode of life of the Brahmins are important, as the Brahminical model followed by the other caste is that of the post-Vedri Brahmins. The Kashatriya and Vaishya model are indeed important but not as influential as the Brahminical as a few Kshatriys and almost all Vaishyas follow the certain important religious ideas only with the increasing impact of the western model in the last several decades has the Brahminical model begun to lose ground among same section of the Hindu. The Bhakti cults are significant in yet another way. They employed regional languages to a vast and unlettered populace the contents of Sanskritic Hinduism. One of the function of the Sanskritization was to bridge the gap between secular and ritual rank. When a caste or sections of a caste achieved secular power it usually also tried to acquire the traditional symbols of high status, namely the customs, ritual, ideas, beliefs, lifestyle of the locally highest caste. It also meant obtaining the services of a Brahmin priest at Sanskritic calendrical festivals, visiting famous pilgrimage centers and finally attempting to obtain a better knowledge of the sacred literature. Ambitious castes were aware of the legitimizing role of the Brahmin priest living in a village dominated by peasant had to be treated differently from poor people of other caste. The mobility characteristic of caste in the traditional period resulted only in position changes for particular caste or sections of caste, and did not lead to a structural moved up or down, the structure remained the same. It was only in the literature of the mediaeval Bhakti movement that the idea of inequality was challenged<sup>125</sup>.

The Varna- Ashrama dharama was the social structure based on this understanding that social mobility is a social necessity. This pluralistic arrangement was accepted to facilitate the social mobility of the individual or of a group on the Varna basis, which meant choosing once vocation according to once qualifications it was open also to the people outside structured system who had to be brought within

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<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

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the social order. There was thus a twofold social mobility, the internal and external from lower to the higher Varna and from non-Varna to Varna order. It was obviously accepted to be a continuous process<sup>126</sup>.

The arranged sublime hierarchy of Varna was well conditioned. It was initiated with the promise of equal status for all. While all may be equal; the less equal had the opportunities to try for more equality. While the Brahmins within the hierarchy were recognized as the Dharma knowing, those who studied and tech the sacred lore are the human gods, were yet challenged from time to time. There were declarations to the effect that the Kshatriyas had no superior and that the priest was only a follower of the king. “Jainism and Buddhism may be religious revolts against the Brahmanical ritualism yet these were also the social revolts. Both of these movements were leadered by men from Kshtriya Varna. They had the support of the Vaishyas the traders.”

## **2. IV. VARNA AND JATI**

A great deal of confusion has arisen out of the indiscriminate use if the word caste to denote both Varna and *Jati*. Varna is not the same thing as *Jati*. Varna represents the four fold division of the society while *Jati* represents the smaller groups exiting in society which the authors of the *Dharmasastras* seek to derive from one or other of the four varnas<sup>127</sup>. Manu distinctly says that there are only four varnas, Brahmana, Kshatriyas, Vaishyas and Sudras while he speaks of about fifty Jatis, such as Ambastha chardala, Dravida, Yavana etc but even Manu not to speak of later writers has confused *Jati* with Varna. The confusion is due to the fact that Brahamana came to be called both a Varna and *Jati*, through there are many Jatis which one comprehended under the name Sudra, and a group cannot be found to day which is

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<sup>126</sup> J. L. Kachroo, *Society In India*, Cosmos Bookhine (P) LTD., New Delhi,,2002.

<sup>127</sup> . H .V Shreenivasa Murthy and V. S Elizabeth. *History of India, Part – 1*, Eastern book Company, Lucknow, 2003. p. 97.

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known simply by the name of Sudra<sup>128</sup>. According to Manu many castes or Jatis were produced by a series of crosses first between members of the four Varnas and then between the descendants of these initial unions. Secondly, many castes were formed by degradation from the original Varnas and account of non observance of sacred rites. There are called Vratas The Vrata Brahmans were known as Bhrijjakantaka, Avantya, Vatadhana etc<sup>129</sup>.

This theory which appears highly fanciful assumes, in the first place that the whole population of the world is descended from the original Varnas-even foreign and Yavana one said to have been Kshatriyas at one time, but now degraded to lower status because of the known observation of the prescribed sacrament. They belong to the same stock as the Indian Kshatriyas and are ethnically more closely related to them the latter to the Indian Brahmanas and Vaisyas. Secondly, castes which were compact tribes like the Andhras, caste which had developed out of trade guilds like the Ambastla, caste which had represented the destination between different classes of labour, between fishing, hunting, weaning, agriculture and handicrafts, are all supposed to have been produced by inter-breeding. Thirdly, the great divergence of opinion among the law-givers regarding the names of caste produced by mixed union shows the part played by fancy and imagination in the derivation and the tabulation of mixed castes. For instances, Yaksa regards the bigheads as an original castes, the fifth Varna Vishnupurana and Harivamsa them as having produced from the body of Varna; Manu traces it to union between Brahmana and Sudra<sup>130</sup>.

Caste refers to endogamous groups, which in Sanskrit are called Jatis<sup>131</sup>. These small groups developed in the later Vedic age based on occupations which later took the form of caste. Jatis grew in number through the incorporation of the tribes in the

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<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> H. V. Sreenivasa Murthy and V.S. Elizabeth, History of India, part-I, Eastern Book Company, Lucnow, 2003.

<sup>131</sup> D. C Bhattacharya, Sociology, Vijaya Publishing House, 106, Vivekananda Road, Kolkata. 700006, 2005.

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Aryan society, enough further division of labour and to some extent through the ideology of varna-dharma. The varnas are four and the Jatis are numerous. In modern India one there are about 2500 Jatis which are more or less subsumed into the Varna categories<sup>132</sup>. Jatis not Varna constitute the basic unit of the traditional caste system<sup>133</sup>. The four Varnas are ranked in a particular order whereas the Jati ranking is both more ambiguous and more flexible, as M.N Srinivas<sup>134</sup> has observed. Jatis have not grown as a result of divisions and sub-divisions within a set of four original Varnas. Rather, as Mrs. I. Karve has argued, Varna and Jatis have coexisted as two different and related systems for at least 1,000 years “Historically”. Mandelbaum<sup>135</sup> writes “the Varnas of the early texts were like open classes than like fixed social strata”. The Varna model says Yogendra Singh<sup>136</sup> “is in reality a cultural framework of caste as a pure category. It lays down normative principles without having much to do with actual processes of structural and functional variations in the reality of the caste system”.<sup>137</sup>

Theoretically, caste system is rooted in the Varna division of society into four caste categories and a fifth category of untouchables, though excluded from the caste model, yet constitute its lowest stratum in the social and ritual hierarchy. In real life caste or Jatis are divided into hundreds of hierarchically ranked endogamous groups<sup>138</sup>. The Jati system is an empirical order, verifiable by direct observation of caste ranking and other familiar distinctions. The Jati system is not uniform. It varies from region to region. What even, the nature of ranking, the consideration of pure and impure remains the sole common basis of the Jati system. Dumont according to Lannoy, regards two systems as homologous and to have interacted with each other<sup>139</sup>.

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<sup>132</sup> There are hundreds of jatis among the Brahmanas so is the case with the other castes.

<sup>133</sup> Ibid

<sup>134</sup> Mentioned in D.C Bhattacharya, *Sociology*, Vijaya Publishing House, 106, Vivekananda Road, Kolkata. 700006. 2005.

<sup>135</sup> Ibid

<sup>136</sup> Ibid

<sup>137</sup> Supra note 120

<sup>138</sup> Ibid

<sup>139</sup> Ibid

## **2. V. CASTE AND CLASS**

On the distinction between caste and class; Maclver observes, “whereas in eastern civilization, the chief determinant of a class and status was birth, in the western civilization of today wealth in a class determinant of equal or perhaps greater importance, and wealth is a less rigid determinant than birth; it is more concrete, and thus its claims are more easily challenged; itself a matter of degree, is less apt to create distinctions of kind, alienable, acquirable and transferable, it draws no such permanent lines of cleavage as does birth<sup>140</sup>”. Ogburn and Nimkoff observed “In some society, it is not uncommon for individual to move up or down the social ladder. When this is the case the society is said to have ‘open’ classes. Else where there is little shifting, individuals remaining through a life-time in the class into which they were born”. Such classes are close, and extremely differentiated, constitute a caste system, when a class is somewhat strictly hereditary, we may call it a caste<sup>141</sup>. Caste may be defined as a rank order of superior and subordinate orders and inferior subordinate orders which practice endogamy, prevent vertical mobility, and unequally distribute the desirable and undesirable social symbols. Class may be defined as a rank order of superior and inferior orders which allows both exogamy and endogamy, permits movement either up or down the system, or allows an individual to remain in the status to which he was born; it also unequally distributes the lower and higher evaluated symbols<sup>142</sup>.

Class is more open than caste. A class system is an open system of rating levels. If a hierarchy becomes closed against vertical mobility, it ceases to be a class system and becomes a caste system. Since class is open and elastic social mobility becomes easier. A man can by his enterprise and initiatives change his class and there

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<sup>140</sup> Vidya Bhushan and D.R Saehedeva, Introduction to Sociology, Kitab Mahal, 22-A, Sarojini Naidu Marg, Allahabad- 211001. 2001

<sup>141</sup> Ibid

<sup>142</sup> Supra note 126

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by rise in social status. If a man is born in a labour class, it is not necessary for him to live in the class for life die in it. He can strinc for money and success in life and with wealth he can changes his social status implied in the class destination. In case of caste system, it is impossible to change ones caste status. Once a man is born in a caste he remains in for his life time and mokes his children suffer the same fate. A caste is thus a closed class. The individual status is determined by the caste status of his parent, so that what an individual does has little bearing upon his status. On the other land the membership of a class does not depend upon hereditary basis, it rather depends on the worldly achievements of an individual. Thus class system is an open and flexible system while caste system is a closed and rigid system<sup>143</sup>.

The caste system is believed to have been divinely ordained. “Maclver Writes”, the rigid demarcation of caste could scarcely be maintained were it not for strong religious persuasion. The hold of religious belief with its supernatural explanation of caste itself is essential to the continuance of the system. The Hindu caste structure may have again out of the subjection or enslavement incidental to conquest and perhaps also out of the subordination of one endogamous community to another. But the power, prestige and pride of race thus engendered could rise to a caste system, with it social separation of groups that are not in fact set apart by any clear social signs, only as the resulting situation<sup>144</sup> was rationalized and made eternal by religious myths.”

It is everybody’s religious duty to fulfill his caste duties in accordance with his “Dharma”. In the Bhagwatagita the Creator is said to have apportioned the duties and formations of the four castes. An individual must do the duty proper to his caste. Failine to act according to ones caste duty meant birth in a lower caste and finally spiritual annihilation. Men of the lower castes are reborn in higher castes if they have

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<sup>143</sup> Vidya Bhushan and D.R Sachedeva, An Introduction to Sociology, Kitab Mahal, 22-A,Sarojini Naidu marg, Allahabad- 211001. 2001, P. 374

<sup>144</sup> Supra note 129

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fulfilled their duties. On the contrary, there is nothing sacred or of divine origin in the class stratification of society classes are secular in origin. They are not founded on religious dogmas. The choice of mates in caste system is generally endogamous. Members have to marry within their own caste. A member marrying outside his caste is treated as outcaste. No such restrictions exist in class system. A wealthy man may marry poor girl without being outcasted. An educated girl may marry an uneducated partner without being thrown out from the class of teachers<sup>145</sup>.

## **2. VI. TRANSFORMATION OF CASTE INTO CLASS**

There is continuous debate among sociologists as well as among the political left in India whether caste is being transformed into class. Caste and class are different forms of social stratification. Caste in this view, are status groups characterized by rigidity, immutability, organic solidarity functional inter dependence, homo-hierarchies and pollution / purity. Class is viewed as open system characterized by individualism, competition, individual mobility and equality while the four Varnas are comparable to the estates of the pre-revolutionary France, castes or Jatis are status groups, but classes are economic groups based on a rationalized order organized along the principle of equality. The caste system is based on ideals of hierarchy supported by religious, legal and customary sanctions. Hutton has argued that class cannot be equated with caste. Caste is not a principle by which politico economic groups are recruited nor does it organize relations between political groups, but it is an organizing principle within such groups. Secondly, classes are based on external possession, but caste thrives on ingrained biases, exclusive identity and a sense of superiority. Third, caste differs radically from the western concept of class is that its sanctions and structure have traditionally been backed by religion, law and customs, although in modern India legal sanctions no longer apply. Religious law was used to justify the exercise of power and ascendancy of one group over another by conquest.

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<sup>145</sup>Supra note 131.

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Further, castes or Jatis are endogamous groups the attribute of their identity, but endogamy is not an attribute of a castes. Individual is born into a caste and Maries into a caste. Fifthly, in a class system there is individual mobility, freedom of movement between classes. According to all cannons of Hinduism, a person cannot move out of his caste individually by hand work or acquisition of power through wealth. Traditionally the entire caste could however, over a period of years make up the scale through a process known as sanskritization or Kshtriyazation. Finally the units ranked in the class system are individual; while those ranked in the caste system are groups<sup>146</sup>.

Contrasting caste with class it has been argued that under the impact of socio-economic changes and democratic political process since independence a transformation of the Indian social stratification is taking place-from caste to class, closed to open from an original to segmentary system. Over the last hundred years new criteria of social differentiation based on income, occupation, education etc, have cut across castes are becoming more and more differentiated on these new criteria, new status groups on their criteria are completing with caste for peoples loyalties. New forms of association and new alliances have developed which are losing the traditional structure. Today, classes have become a distinct social reality, but like caste, class is also a complex phenomenon. It overlaps with caste, occupation, ownership of the means of production, factions and pressure groups. In villages caste hierarchy results unequal ownership of land and capital and economic hierarchy is closely related to social hierarchy. The dominant castes, not necessarily the upper castes, control power prestige and influence and consolidate caste hierarchy to further the process of exploitation. In real relationships among villagers, those of caste and class are not a duality. They are usually overlapping, in the variegating fabric of social life in the country side. Class relationships among villagers are mediated largely by affiliations that are defined neither from the class positions nor the class consciousness of their members. Caste and class distinct but composite part of the

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<sup>146</sup> Supra note 131

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identities of the villagers- both well to do and poor, high and low. Apart from some untouchable castes or Jatis who are the poorest, castes and sub-castes or Jatis generally included families of different classes and exclude families of the some class. Still castes have established associations to represent their member political and economic interest. Thus, castes formation as classes because they formation as interest groups. But caste associations and caste-reeducation institutions, magazines and caste lobbies in the legislatures and government ministry have strengthened caste consciousness, not class consciousness.

Caste as a frame of analysis implies a cultural continuity between the lower and the higher strata of society; but it obfuscates the lower and the higher strata of society; but it obfuscate the radical differences which have emerged between the two, and even these differences may exist due to the labouring class character of the lower caste community. To accept class as a frame of reference amounts to neglect of culture solidarity<sup>147</sup>.

Sivakumar and Sivakumar<sup>148</sup> note that caste cannot be confined to a super structural role, and at the same time caste bears economic significant to a great extent. Caste and class together bear economic significant to a great extend. Caste and class together define the structure and interest. Cognitive world is not characterized by class consciousness alone. Consciousness is a highly complex phenomenon. It emanates from distribution of income and Jati hierarchy and from the intermixture of the two castes and class nexus is understood in terms of relations of various castes to land, expropriation of its surplus, and military and bureaucratic sharing wealth and power. A similar analysis of the interlinking of caste and class stresses on the substitution of the concept of class by the concept of class/Varna which is basically from of class differentiation, hence a structural phenomenon, and not unique to Indian

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<sup>147</sup> K .L Sharma, *Social Stratification in India. Issues and Themes*. Sage Publications India Pvt. Ltd. M-32 Greater Kailash Market – 1, New Delhi, 1997. P. 184.

<sup>148</sup> Quated in *ibid*

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society<sup>149</sup>. Besides class-caste nexus, caste remained as an institution independent of class<sup>150</sup>.

Thus both caste and class are real and empiric. Both are interactional and hierarchical, and incorporate each other. Both represent, to a large extent, the same structural reality. Caste is playing an important role in election, in access to jobs, admission to educational institutions, in getting license and promotions. Similarly caste is being systematically utilized by political parties and politicians for their ends. One cannot therefore categorically state that caste is being transformed into class. It is the cleavage existing between castes which constitute the main hindrance in organizing the poor against the controllers of wealth and poor. A poor Brahman and a poor dalit are hardly found to unite against a landlord for better wages<sup>151</sup>.

In short, there is no empirical evidence to suggest that economic betterment and education and modernization will destroy the caste structure even if they accelerate mobility within the caste. Caste will play an important role in determining both on going processes and the kind of future changes which will take place in the country<sup>152</sup>.

## **2. VII. IS CASTE SYSTEM WITHERING AWAY**

The extent and nature of changes in the institution of caste are certainly different between the urban and rural areas. The decline of caste as a system is more perceptible in cities than in rural areas, whereas the growth of castes as articulated interest groups is more noticeable in urban areas. This should not be construed to mean that there is no semblance of a caste system in cities, and that the mobilization

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<sup>149</sup> Roy Ajit, *Caste and Class; an Interlined View*, Economic and Political Weekly, Vol. X11, N.O.S. 7. ad 8 1979. P. 297-812

<sup>150</sup> Supra not 133

<sup>151</sup> Supra note 131.

<sup>152</sup> Ibid.

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of people on caste lines is absent in villages. Rather it only means that the systematic dimension of caste is expectedly less significant in cities than in villages, whereas the locus of caste consciousness is to be found in the cities and towns rather than in the villages. Under the impact of socio - economic changes and political democracy caste system is changing in its cultural aspects (hierarchy, pollution and purity, and doctrines of Karma and Dharma,) and structural aspects (e.g. established pattern of inter caste relationships such as endogamy, restriction on inter-dinning and other forms of social relationship and unequal distribution of power). In the traditional society ritual purity, rather than the economic criteria, determined the rank of each group. In the modern context the ritual dimension has been considerably eroded and the signification of the secular dimension, with power and wealth are associated, has certainly increased. Today symbols of status are modern occupation, education, income, wealth and political power. The cultural and social distances among Jatis are being reduced as there has been a shift away from traditional symbols to modern political and technological symbols of status. Under privileged and socially backward groups at every level of society have now entered the political arena as they had never increasingly related to political participation in the district, state and national politics. Shifts in the traditional power structure have occurred in the local, district and state levels.

Despite these changes and the constitutional abolition of all caste distinction, the caste system exists and shows no sign of dying. There are several reasons. First, the dominance of power of one caste over another is a crucial factor in the continuance of the system. In the country side the dominant caste, not necessarily higher castes, by virtue of their control of land (the primary production asset) and capital enjoy real power and influence. Social disparities between them and the “other half” of the rural population the lower castes remain, powerless and without influence. The latter are dependent on the former for secured employment and financial borrowing in times of distress. There are millions of village households who live in debt bondage. Opportunities for them to change occupation are small in most villages.

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The patron-client relationship enables the dominant caste to mobilize the lower caste in their factional feuds in the villages or in their competitive struggle for political power. In many areas the lower caste votes for the dominant caste nominee either through mixture of fear traditional subservience or ignorance. If the lower caste appears to want to exercise its own choice of candidate, the dominant caste does not hesitate to use violent coercion. The fact is that the creation of new political opportunities and new bases of power have enabled the dominant caste or caste community to develop at the regional level, in particular, “patronage-client networks” based on traditional loyalties. In most states several castes are constantly fighting for power and people are mobilized by using the caste idiom. Increased politicization of castes has given a new base of life to castes. There are castes and various sub-caste groups in virtually every state political party organization (except the communist parties), legislative assembly and government ministry. Inter-jati conflict is a major component of politics in most states. Large agglomeration of caste groups like Jatis, Vadavas, Ahirs, Rajputs and Okkaligas play a vital role in politics and through politics, in the allocation of resources and distribution of benefits to followers. Increased politicization of caste has largely led to the displacement from state legislative assemblies reformers who represented modern values by representatives of jatis and their values. In general, the modus operandi of jatis has been neither to face change nor to oppose change beyond self-interest but rather to accommodate it, profit from it or more the best of it endure<sup>153</sup>.

The second factor contributing to increased caste consciousness and caste-based identity of the people is the reservation policy which emphasizes not the individuality of an Indian citizen but his caste identity. Caste quotas are adjusted and are readjusted through intense political bargaining in a language which implicitly assumes that castes and not just individuals have claims. In the traditional Indian society the rights and obligation of an individual were to some extent cloying by caste. The system of quotas has strengthened the belief that every caste or group of

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<sup>153</sup> Supra note 131.

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castes should have a share to the nation cause. Caste which is about collective identity is thus strengthened. Thirdly, though modern occupations have expanded only minority of people have employment in areas where equality of opportunities is expected to work. The various castes, particularly Scheduled Castes, are very thinly represented in the higher administrative and managerial occupations. Any radical change in this respect depends on two things; one, greater use of the facilities of education provided to them; and two, radical changes of traditional attitudes regarding purity and pollution among the upper castes who dominate higher occupations<sup>154</sup>.

Moreover, caste associations represent their member's political and economic concerns and to that extent they enhance caste-consciousness. The formation, fragmentation and reformation of associations of jatis, jati segments and jati alliances all over India tend to perpetuate caste distinctions. Fourth, the political system is dominated by a kaleidoscopic condition of the elites belonging to all section and the same pattern prevails in all political parties. In each of these groups whether, for example, Brahman, Jat, Rajput, Yadav, Muslim or scheduled caste, there is critical elite which is passing as spokesman of its respective constituency. In some instances they mean to do something for their constituency; but things often cannot be done. The reason is that power relations, despite the minor change, have substantially reinforced traditional power alignments, partially against the poor and under privileged. Fifth, caste is more than a system, as put it; it is a state of mind "the psychology of the vast majority if Hindus is still fundamentally a caste psychology" Indeed hierarchy and caste forms part of the unconscious psychological element of Hindu. Very few Hindus are found to carry out their social and political duties and relationship is a spirit of secularism and egalitarianism. Those who strive for social mobility do not challenged the hieratical frame but believe that they are only trying to restore their proper place within it. Those who oppose them believe that the climbers are trying to alter ordained order of society. The caste system is characterized by the dominance of the religious order the secular. To reverse this order a fundamental

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<sup>154</sup> Ibid

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changes of the value system which legitimates the caste system is required. Sixth, endogamy, the formidable pillar which has sustained the caste structure, has remained almost unshaken. Inter-caste marriages are few. Even when intermarriages do take place across castes, the barrier of untouchability is rarely crossed. Indeed, it continues to restrict intermarriage even after conversion to Christianity. The jati continues to be the principal unit of endogamy, an essential attribute of identity, a common locus for interaction.

To conclude, socio-economic changes and political democracy have profoundly affected the caste system. The caste system is changing but it persists and shows no sign of dying. The socio-political scenario of India seems to be dominated by struggle between caste for wealth and power. This struggle tends to shift the balance of caste-based bourgeois-landlord power up or down the ladder of the caste hierarchy. The hierarchy itself is left intact. The parasitic caste ideology will still rule. Individual compete with each other and claim dues as Individual in a growing number of fields, yet loyalty to caste and family both of which are intertwined have a continuing, and in some fields an increasing hold over people. The members of all caste and classes are and will be engaged in the rat-race to become an ideological rather than a political or economic manger, and a manager of others labours. Unless “Manu’s curse” is broken by a social revolution, Indian society would not be able to cast out the “casteish canker”<sup>155</sup>.

Notwithstanding the above variations in the nature and significance of change in the institution of caste are question which still remains to be answered is about the future of this institution. The general thrust of the answers based on careful scrutiny of evidence seems to be categorical, and it is admirable on adoptive structure as caste is in any serious danger of ever disappearing completely. Its religious basis may wane its systematic rigor may weaken; but its social basis will persist and its group

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<sup>155</sup>Ibid.

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connotation will gain strength. As far as its interface with Hinduism is concerned, though Hinduism may lose meaning as a justificatory ideology for the hierarchy and inequalities of the system, its cultural crux will persist and crystallize. Hinduism will benefit more from the survival of caste than caste from Hinduism.

## **2. VIII. CASTE AND INDIAN POLITICS**

Till the end of the second quarter of the twentieth century lower castes were found to sanskritizing themselves; the aim of the caste movements was to emulate Brahman or Kshatriya caste status, secure the privileges of entering the temple, etc. the traditional caste system has however been profoundly altered after political independence. The forces of industrialization and urbanizations, land reforms and development measures in villages, the introduction of adult suffrage through democratization of political structure from village level (panchayats) to the state and nation all have deeply affected the caste system in several respect-socially, economically and politically<sup>156</sup>.

Land reforms and political democracy have changed and is changing the configuration of the power of castes. In peninsula India power has rapidly passed to the lower caste. The traditional dominant castes have been either expropriated from it or hold it under constant challenge from the lower castes who have been more organized. In northern India they still has a dominant role in the power structure at the village and at the religious levels. But this dominance has been subject to a new means of challenge through the power of the vote. Hence in situation where the lower caste are successful in using their numerical power to establish their claims they have altered the traditional power structure; as it has occurred in the south where the lower and the schedule castes constitution 92.9% of the total Hindu households. In the North during the early post-independence years the large jatis of well- to do formers have

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<sup>156</sup> Ibid.

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come to political prominence more recently, other jatis amalgamated as other backward classes have successes fully challenged their prominence<sup>157</sup>. Changes in the political structure of the village have also occurred where lower castes including untouchables enrich themselves through trade and then use their wealth to buy land and so acquire prestige and power. Where some low-ranking groups are obstructed in their mobility attempt, they can appeal outside the village to higher political authorities and organize for voting purposes. Mandelbaum<sup>158</sup> writes “voters in India can be misled and manipulated as those in other countries, yet the votes of a numerous jati cannot be ignored by those who want to manage public affairs, whether in a village or in a large constituency.” The adoption of the democratic political order has led to increasing participation in the political process by section of society, which has hitherto been excluded from position of power. This has enabled them to make increasing use of political action to bargain for a better position in society. The experience being counted during elections by eminent political leaders has now given them a new awareness of their strength in the political area. A person's role as a citizen and voter has become attached to his role as jati member. The new political modus operandi of democracy is taking its toll as the principle of purity/politician. High jati politicians who would win the votes of their lowest jati constituents must woo them order tea. Untouchable jati ministers, and there are many of them expect invitations to dinner from high caste favor seekers<sup>159</sup>. With the right to vote, the dominant peasant castes become so powerful that all political parties had to come to terms with them. They were well represented in state legislatures and cabinets, and the introduction of Panchayati Raj conferred power on them at the village, Tahasil and district levels. Political power enhances the status of the individual and his group. The political power can be translated in to economic terms-not only for oneself but for one's relations; clients and caste folk-and can determine the future of young man

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<sup>157</sup> Ibid

<sup>158</sup> Ibid

<sup>159</sup> Ibid.

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and women by obtaining for them right career and well paid and prestigious jobs. This is where caste quotas are of crucial significance<sup>160</sup>.

Politics is a competitive enterprise, its purpose is the acquisition of power for the realization of certain goals, and its process is one of identifying and manipulating existing and emerging allegiances in order to mobilize and consolidate positions<sup>161</sup>. The important thing is organization and articulate of support and where politics each mass-based the points is articulate support through the organization in which the masses are to be found. It followed that where the caste structure provides one of the principal origination at clusters along which the bulk of the population each found to live; politics must strive organize through such a structure. The alleged casteism in politics is thus no more and no less than politicization of caste. It is something in which both the forms of caste and the forms of politics are brought nearer each other, in the process changing both. By drawing the caste system into its web of organization, politics finds material for its articulation and moulds it into its own design. In making politics their sphere of activity, caste and kin groups on the other hand get a chance to assert their identity and to strive for positions. Politicians mobilize caste groupings and identities in order to organize their power. They find in it an extremely well articulated and flexible basis for organization, something that may have been structured in terms of a status hierarchy, but something that is also available for political manipulations-and one that has a basis in consciousness<sup>162</sup>.

By itself Sanskritizations urge produces some very basic psychological strains in the groups that is trying to acquire a new identity in its search for status, as the process its status becomes subjectively ambivalent and thus insecure, as with Jews, Negroes and other minority groups, it is a negative assertion, a moral of submitting yet opposing the emulated group. So long as they do not succeed in raising the status

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<sup>160</sup> M.N. Srinivas, *Social Change in Modern India*

<sup>161</sup> Rajni Kothari, *Caste in Indian Politics*, Orient Lang man limited, S-6-272. Himayat Nagar Hyderabad 500029, 2001 P. 5

<sup>162</sup> Ibid.

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of the group and this is always a long period their informed status necessarily creates an insecure and unsettled position in society-leading either to compensatory devices for social recognition or real withdrawal into something else. As it is the status urge in Hindu society is an interest frustrating and painful process. It is tribute to the subtle dynamics of Hindu society that in spite of this psychological caste, the adjustments of Sanskritisation go on all time; and one of the many reasons is that the structural distance that is sought to be jumped can often be related to the achievement of other indices of power and position is the modernist segment of society, thus facilitating the transition to a consensus on the new status of the striving group. Important in this respect is the crucial role that the distribution of secular power has always played in status ranking in Hindu society; and the consequent capacity of the system to keep adjusting to its changing hierarchical balance. Liberal education, government patronage and a slowly expanding franchise have been the three influences that have perpetrated the caste system and invoked it by stages. The involvement came as a result of a mutual give and take. Economic opportunity, administrative patronage and positions of power offered by the new institutions and the new leadership drew the articulate sections of society into the modernize network<sup>163</sup>. Democratic politics of necessity led to such an involvement of the traditional structure and its leadership. Two results followed. The caste system mode available to the leadership structural and ideological basis for political mobilization, providing it with both a segmental organization and a identification system on which support could be crystallized. Second the leadership area forced to make concessions to local opinion, take its cue from the consensus that existed or regards claims to power, articulated political competition on traditional lines and, in turn, organize caste for economic and political purposes. With this came into being a new species of political organization, art cultured around particularistic divisions, yet giving to these a secular and associational orientation. Politics and society began moving nearer and a new infrastructure started coming into being. Three stages of changes in caste system the struggle for powers and for benefits was at first limited to the entrenched castes in the

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<sup>163</sup> Ibid

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social hierarchy. Leadership and occur to government patronage came from a limited group of individuals who were the first to respond to new education opportunities and were also traditionally endowed with pedagogic and sophistic skills that mattered most in the day of limited polities. This group consists of individuals from certain higher caste was not yet based on any militant caste consciousness, and was united more by a common social and intellectual endowment and idiom than through any organizational or political mobilization. However, this took place mainly on the basis of one higher caste or sub caste, it soon give rise to a feeling of deprivation and antagonism in other high caste, especially among those that had earlier enjoyed social or economic power, and resulted in the emergence of another political group, still drawn largely from the higher castes. The domination of an ascendant caste, are that was not satisfied to simply function in the context of inter-dependence and complementarily in the social sphere that characterized the social and economic system for so long. The caste system this got polarized in its first encounter with the new secularism and gore rise to a bilateral structure of caste polities, very often between two castes. Such caste also generally separated in social power and ritual status from all others or when the different higher castes were entreated at different power points, in a legitimized coalitional pattern.

This bilateralism was followed by a second stage in which power striving and demands for benefits exceeded the availability of resources, competing groups had to develop more numerous bases of support, and there started a process of competition within the entrenched and more articulated sections of society. This may be termed as the stage of caste fragmentation or of factionalism. Inter caste competition between the entrenched caste and the ascendant caste was now supplemented by intra-caste competition and the process of politicization again the process first started within the entreated caste which got factionalized and there followed a new structuring of political organization. Leadership cleavages were created, political attitudes began to condition symbols of solidarity and consensus, and there came into being multi-caste and multifunctional alignments. Mobilization of further support for each of the

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contending factions gave rise to a process of co-operation from other, caste that were till now kept out of the power system. The power structure of the caste system now become more complex and entered into a more sophisticated network of relationships, involving such other bases of support as economic patronage patron-client loyalties, bond groups, and new organizational forms such as caste associations and caste federations.<sup>164</sup> In the early stages of intellectual awakening and urban-style political organization, the need was for people able to deal with western and westernized administrators, well versed in fine points of debate and ideological disputation, processing legal acumen, and capable of founding and sustained small association of public-minded persons that would agitate for specific causes. Such men were mainly provided by Brahmins and traditional administrative classes who not only took to the new education but had also been endowed by a long tradition of scholastic knowledge and formal brilliance. With the movement into more diversified and mass oriented polities, however, not only was there need for a wider base of support articulation but also new types of managerial and organization at skills were needed, with this happening, the Brahmins ad administrative castes began to be out- numbered by men from commercial and peasant-proprietor occupations that had always called for a high level of interpersonal skills, a programmatic and bargaining approach to problems and an ability to marshal a new type of solidarity among their own castes, often times based on a reinterpretation of their traditional status and a populist and ideology.

The process of factional within the entrenched caste, a similar structuring of other ascendant caste, the system of co-operations and caste coalitions-all of these through they brought about a fragmentation of the caste system were in reality still very much caste-oriented and sought their bases in caste identities, in the process, of causes , also generating politicized values and impulses for personal power, we enter a third stage of development when the weakening of older identities and the

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<sup>164</sup> Rajni Kothari, *Caste in Indian Politics*, Orient Lang man limited, S-6-272. Himayat Nagar Hyderabad 500029, 2001 P. 5

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introduction of politicized values coincide with other changes taking place in society through the impact of education, technology, changes status symbols, and urbanization. New and more expanded networks of relationship come into being; new criteria of self-fulfillment are created the craving for material benefits becomes all pervasive and family and migration system undergo drastic changes. With these, the structure of particularistic loyalties gets overlaid by a more sophisticated system of social and political participations, with cross-cutting allegiances, a greater awareness of individual self-interest, and forms of involvement and modern education and the modern system of social communication. An essential feature of modernization is the development of new and sharp differentiations, political, economic, educational and communications functions, traditionally performed by same social structure are now differentiated and get established in large of their own purposes, structure, and dynamics. Political, of courses is still a big enough, influence but it is better understood as an active partner in the modernization process, more as providing schemes of integration and division to the developing social system than as either destroying or replacing caste as a secular social entity. What does take place is a widening base of intuitional organization in which, on the one hand, caste identities themselves take to new forms of articulation thus changing the very ethics of the social system and diminishing the importance of its ritualistic and ascriptive bases; and on the other hand, more diverse forms of organization and interest identification enter the political system and give rise to a highly mobile and cross-cutting loyalty structure in politics caste on the one side ceases to be an exclusive political support base and on the other side lands itself to increasing political articulation, both of which contribute to its participation in a broader net-work of relationship and a shift of its emphasis from a static system of stratification to a dynamic base of competition and integration. In its traditional form, the caste system integrated society through ordering primary identities along a legitimized hierarchy of status positions and occupational, roles, including the political roles of arbitration and adjudication. By participating in the modern political system, it is at first exposed to divisive influences and later to a new form of instigation resulting from a new scheme of universalistic particularizes

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relationship. This is however no simple replacement of one system by another. In the transitions, caste provides to politics on the one hand an on going structure of division and accommodations and on the other hand a cohesive element while absorbs tensions and frustration through its intimate, particularistic, channel. Such an interact ional scheme of changes, which it does not suppress strata difference and individual interests and gives rise to relativity abrupt shifts in power relations, also provides a system of containment of conflicts and angularities that facilitates the process of transition to a modern society.<sup>165</sup>

Secular involvement in the modern period has not only fostered new attitudes and offered new rewards. It has also exposed caste and communal ties as by themselves patently inadequate and often prejudicial for the building of stable support. The politicization of caste makes for outward-looking, upward moving orientation and as this resulted in the phenomenon of multiple memberships and overlapping identities, the result in highly secular for the polity as well as the society at large. The process of secularization of caste gets crystallized in three distinct but related forms. First, there emerges what can be called dominant elite, which is draws from different groups but shares a common outlook and a secular orientation, which is structured into a different network of relationship that stretches across social boundaries but yet continues to induct leaders from each important segment, which is homogeneous in terms of the values and rules of the game but as at the same time divided into so many special groups and various elite and sub-elite position such an elite structure articulates special interest and meaningful represents the more organized segments of society, while at the sometime allowing the mass of society to have its own pace of change and make its own adjustments with the modern world.<sup>166</sup>

Second, castes take on an openly secular form for new organizational purposes. There are several such forms as (a) associations of caste member ranging

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<sup>165</sup> Ibid at p. 8

<sup>166</sup> Ibid.

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from simple hostels and recreational bodies to reform clubs and pressure groups, (b) caste institution or conferences that are more broad-based and cover districts or even states, and (c) caste 'federations' composed of not one but several castes which may some times be socially homogeneous but which may at other times simply have some specific interest or political objective in common. It is this specifically of purpose that distinguishes these new organizational forms-caste associations and caste federations from the more inclusive and inscriptive bodies traditionally known as caste. Generally speaking they are oriented to the securing of economic benefits, jobs or special concessions, or for the more clearly political purpose of uniting to fight the hegemony of the upper castes or the ruling castes or for bargaining with a political party or the government, but in all cases federation once formed on the basis of caste identities, it goes on to acquire non-caste functions, become more flexible in origination as time passes, even begin to accept members and leaders from caste other than those with which it started, stretches out to new regions and also makes common cause with other voluntary organization interest groups and political parties. In course of time the federation becomes a distinct political group, wielding considerable bargaining strength and numerical power, but still able to appeal to caste sentiments and consciousness, by adopting a common label (such as non-Brahmin or Kshatriya) claiming high status in the past and fostering a sense of derivation in the present, and out of all this forging a strong and cohesive political group. It has gone for beyond the earlier caste associations in articulating group interest along political channel. The dominant elite talked of include leaders drawn from such organization or is in close touch with them. Third, alongside these new organizations, there has developed a vertical structure of factions along which the elite groups and their various support bases have got politically organized and through which channel of communication have been established between social and political forms. The result system of faction is such that is divides not only political groups but also social groups, both the traditional caste forms and really formed caste associations sad other interact group organizations. It facilitates the process of cross-cutting identification and provides an expanding network of political support for a leadership that is engaged in a

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competitive structure of media of power relationships. Factions thus provide common media of participation for both the traditional and the modernist sector and make for their mutual accommodation and ultimate fusion.<sup>167</sup>

By the above discussion, it is clear that caste system prevailed in all periods either in its rigid form or in flexible form but it showed its presence in all times. The lower castes people were discriminated and exploited by the so-called upper caste in every period. So in conclusion of this chapter we can say that the caste discrimination is one of the reasons of backwardness of certain class of people.

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<sup>167</sup> Ibid.

## **CHAPTER- 3**

### **CONCEPTUAL AND CONSTITUTIONAL FOUNDATION**

#### **3. I. AIMS AND OBJECTIVES OF THE CONSTITUTION**

Socialism has an older ancestral origin than democracy in the sense that the debate about equality and inequality is as old as civilization itself. Ever since Plato lamented that every city is a city of two – one of the rich and the other of the poor, and Aristotle's caution that inequality every where is the cause of revolution- the question of creating a just, equal stable and efficient society has been the core of political speculation<sup>168</sup>. To trace the origin of socialist ideas to classical antiquity, like Gray did, creates an ambiguity for it overlooks its modern concerns, viz. that it arose first out of commercialization and then become a reaction to the industrial revolution which decisively shaped human societies and lives. For the first time in human history there was a tremendous sense of optimism that it was possible to create a prosperous, abundant, free, equal and rational society for all with the aid of technology and science.

The concept of socialism has been interpreted by various thinkers and groups in diverse ways. The advocates of socialism are, indeed, numerous and the literature on the subject is so vast and varied that it is hard to say what exactly socialism means<sup>169</sup>. Dr. Angelo Rappaport<sup>170</sup> listed 39 definitions of socialism in his dictionary of socialism and he was still not clear in his own mind as to what it meant. These are

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<sup>168</sup>Subrata Mukherjee and Sushila Ramaswamy. *A History of Socialist Thought From the Precursors to the Present*. Sage Publications, New Delhi, (2000)

<sup>169</sup> Shriram Narayan, *Socialism in Indian Planning*. Asia Publishing House. Bombay.

<sup>170</sup> Angelo Rappaport. *Dictionary of Socialism* (1924), quoted in Ibid note 168.

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four basic tendencies in socialist ideology egalitarianism, Moralism, nationalism, and libertarianism. It would be a mistake to treat socialism, Marxism and Communism as though they were identical. In doing so one would overlook their theoretical diversity and the debates within<sup>171</sup>. Like all major ideologies, socialism too has become an umbrella ideology. ‘Socialism is in fact the theoretical genus of which Marxism is a species and anarchism another; communism is best viewed as political practice, rather than as an ideology. However, common to all strands of socialism is a commitment to equality, human solidarity, and non-exploitative relationship and socialized humanity<sup>172</sup>. The central idea to socialism like equitable distribution of wealth, reward and honor as a prerequisite to a just society, and concern for the poor, oppressed and the deprived – have always been a part of intellectual thinking<sup>173</sup>. Beyond this general agreement, socialist differed not all of their favored common ownership of property and the means of production some wanted to achieve socialism through violent revolution, while others stressed a peaceful and gradual change. Some clacked that they had discovered the laws of historical development and projected socialism as the inscrutable destiny, while others remained content in just projecting what they can side red to be a perfect society. For some socialism was a universal human ideal while others saw it as the goal and aspiration the working class. Some socialist wanted to abolish the state altogether while others perceived it as instinct freedom and cultural elevation. While for some socialism was international, others combined it within their own national boundaries. After 1840 it was increasingly used across Europe to mean common owner socialism, Asian socialism and Gandhian socialism. It is because of such a variety that socialism was described as a hat which had lost its original shape after being worn by many heads.

A number of developments interlaced with one another to produce a new version of socialism in the post – Second World War era that led to actualization of the welfare state. First the relative decline of the manual working class meant that the

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

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parties became more heterogeneous in term of class composition. This meant that, in order to succeed electorally, they needed to mobilize people from wider social and economic backgrounds. Second, in the 1950s, Western European Countries experienced unprecedented growth rate guaranteeing full employment, economic posterity and social security to all, including the working class, confirming Macmillan's oft-quoted state meant that are never had it so good. Mass miseries were mitigated and poverty became a minority concern and in many parts of world, invisible. Third, there were structural changes in the economy. Like ownership was separated from control of capital leading to the extinction of the overbearing owner boss and the emergency of a new species of salaried managers. The managerial revolution that transformed capitalism bringing to the called post industrial society <sup>174</sup>

Basically the concept of socialism was in some ways a reaction against the philosophy of individualism advocated by John Stuart Mill who thought that "the state will do well to leave people alone so long as the people in question leave other people alone"<sup>175</sup>. Bentham maintained that each man could be trusted to look after his own interests and that the satisfaction of the wants of all individuals is identical with the well-being of the community as a whole. The socialist thinkers, thought differing from one another in several important respects, strongly reacted against this individualistic approach to social problems and suggested various methods for bringing about an egalitarian order. Saint Simon was a firm believer in the virtues of large scale organization and planning; He hoped that the fullest use of science and technology could establish a socialist organization for the welfare of community. In contrast to this attitude of Saint Simon, Charles Fourier strongly believed that an agrarian oriented social structure alone could create conditions for the realization of a good life.<sup>176</sup>

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<sup>174</sup>Subrata Mukherjee and Sushila Ramaswamy; *A History of Socialist Thought From the Precursors to the Present*. Sage Publications New Delhi. (2000),

<sup>175</sup> Sriman Narayan. *Socialism in Indian Planning*, Asia Publishing House Bombay, (1964).

<sup>176</sup> Ibid.

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Although the concept of socialism has meant different ideas to different persons, groups and nations, there has been more or less, a common understanding that a socialist society should promote the following ship of men,” with the conviction that every human being has an equal right to happiness and whatever else gives value to life<sup>177</sup>. India has also decided to establish a socialistic pattern of society based on parliamentary democracy. To late Prime Minister Jawaharlal Nehru “the establishment of a socialist order means a controlled production and distribution of wealth for the public good”. “The socialist way of life” observes Jayprakash Narayan” is a way of sharing together the good things that common endeavor may make available”. Mahatma Gandhi upheld that idea of Sarvodaya which sought to achieve the material as well as moral well beings of all section of the community and more especially of the poorest and the lowest strata of society<sup>178</sup>. The Constitution of India directs that 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 institution of national life”. It has been stated that all citizen have “the right to an adequate means of livelihood” and that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good”. The Directive Principles also enjoins the state to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.<sup>179</sup>

The Preamble of the Indian Constitution says, we, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizen: justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all; fraternity assuring the dignity of the individual and the unity and integrity of the nation; By the constitution 42<sup>nd</sup> Amendment, Act, 1976,

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<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Part IV of the Constitution that deals with the Directive Principles of State Policies.

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the words, socialist secular and integrity were inserted in the preamble. It indicates the source from which the constitution derives its authority and also states its objects which the constitution seeks to establish and promote. It is a key to open the mind of makers.

The principal aims of a socialist state as envisaged in the preamble are to eliminate inequality in income and status and standards of life. The basic framework of socialist is to provide a decent standard of life to the working people and especially to provide security from cradle to grave<sup>180</sup>. The Constitution of India is not a mere pedantic legal text, but it embodies certain human values, cherished principles and spiritual norms and recognizes and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material moral and spiritual development as the chief concern of its various provisions. The core constitutional objective of social and economic democracy in other words, just social order cannot be established without removing the inequalities in income and making endeavor to eliminate inequalities in status through the rule of law and legislative actions. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due<sup>181</sup>.

From the statements of objects and reasons of the 42<sup>nd</sup> Amendment Act, 1976, it appears that the words socialism was inserted to spell out expressly the high ideals of socialism. What is meant by socialism is explained in the same context but there is no reference to collectivism or nationalism but mere social justice.<sup>182</sup> These words are the objective of social economic revolution which would end poverty and ignorance and disease and inequality of opportunity.....<sup>183</sup>

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<sup>180</sup> H.K Saharay. *The Constitution of India, An Analytical Approach*), Eastern Law House. Private Ltd., 54 Ganesh Chandra Avenue, Kalkota. 2002. p.5

<sup>181</sup> Ibid.

<sup>182</sup> Durga Das Basu, *Commentary on the Constitution of India*, 8<sup>th</sup> Edition, Vol - I, Wadhwa & Company, Nagpur, 2007. p. 394.

<sup>183</sup> Ibid.

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In 1983, the Constitution Bench in *Nakara's case*<sup>184</sup> explained that meaning of socialist in the preamble, with reference to the foregoing statements of objects and reasons appended to the constitution (42<sup>nd</sup> Amendment) Act, 1976, in these words. “The principal aim of a socialist state is to eliminate inequality in income and status and standard of life. The basic framework of socialism people and especially provide security from cradle to grave. This amongst other on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxian and Gandhism leaning heavily toward Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewith that or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily therefore, a socialist state provides for the education from primary to Ph. D, but the pursuit must be by those who have the necessary intelligent quotients and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for want of where without while the ill-equipped son or daughter of a well-to-do father will enter the portal of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without lit or hindrance of caste, colors, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise, but even there the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a mahatma, a work or a pariah. The old age overtakes each one, death being the fulfillment of life providing freedom from bondage. Here socialism aims at providing an economic security to those who have rendered up to society what they were capable of doing when they were fully equipped with their mental and

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<sup>184</sup> *Nakara v. Union of India*, A I R 1983 S C 139.

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physical powers. It was such a socialist state which the preamble directs the centers of power legislative, executives and judiciary to strive to set up.<sup>185</sup>

One of the main objectives of the constitution is to building of a welfare state and an egalitarian social order in our country. As stated before the fundamental rights and the directive principles have been described as the conscience of our constitution. The constitution makers had, among others, one dominant objective in view and that was to ameliorate and improve the lot of the common man to bring about a socio-economic transformation based on principles of social justice.<sup>186</sup> While the constitution makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have the dignity of the individual.

Part III of the constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of the individual.<sup>187</sup> The difference between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the courts to lean more and more in favour of nationalization and state ownership of an industry after the addition of the word socialist in the preamble of the constitution.<sup>188</sup> The principal aim of a socialist state is to eliminate inequality in income and status and standards of life. The word “socialist used in the preamble must be read from the goals that Arts. 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to reduce inequalities in income and status and to provide equality of opportunity and facilities.<sup>189</sup> The socialistic concept of the society is laid down in part III and IV of the

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<sup>185</sup> Ibid.

<sup>186</sup> Kesavanand Bharati v. State of Kerela, A I R 1973 S C 14

<sup>187</sup> Ibid.

<sup>188</sup> Excel Wear v. Union of India. A I R 1997 S C 25

<sup>189</sup> Samatha v. State of A .P., (1997) 8 S C C 191

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constitution. The aim of democratic socialism is to end poverty, ignorance, disease and inequality of opportunity.<sup>190</sup>

In the case of *G.B. Pant University of Agriculture Technology v. State of U.P.*<sup>191</sup>, the Supreme Court held that the economic justice is not mere legal jargon but in the new millennium, it is an obligation for all to confer this economic justice on a Sarker. If society is to rename, social justice in the order and economic justice is the rule of the day. A narrow pedantic approach to statutory document no longer survives. Justice, social and economic, ought to be made available with utmost expedition, so that socialistic Patten of the society as dreamt by founding paten can thrive and have its foundation. So that future generations donate life in dark and cry for social and economic justice. It was held that socialistic concept of society should be implemented in the true spirit of the Constitution.

In *Balbir Kaur v. Steel Authority of India*<sup>192</sup> it was held that the concept of social justice is the yardstick to the justice administrative system or legal justice. It was further held that whatever is beneficial for the society, the endeavor of the law court would be to administer justice having due regards to it. In *Tara Chand Vyas v. Chairman and Disciplinary Authority*,<sup>193</sup> it was held that economic empowerments is a fundamental right of weaker section of the people in particular the scheduled caste and Scheduled Tribes, ensured under Article 46 of the constitution as a part of social and economic justice envisaged in the preamble of the constitution as the state is enjoined to promote their welfare effectuated under Article 38. The Supreme Court in *Ajaib Singh v. Sirhind Co-Operative Marketing-cum-processing Service Society Ltd.*,<sup>194</sup> held that after inclusion of the word 'socialism' in the preamble was clearly to set up a vibrant, throbbing welfare society in the place of a feudal exploited society.

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<sup>190</sup> H.S. E. B. v. Suresh, (1999) 3 S C C 601

<sup>191</sup> A I R 2000 S C 2695

<sup>192</sup> A I R 2000 S C 1596.

<sup>193</sup> (1997) 4 S C C 565

<sup>194</sup> A I R 1999 S C 1351.

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The court must strive to give such an interpretation as will promote the march and progress towards socialistic, democratic state.

Greater concern must be shown to improve the condition of poor population of the country and every effort should be made to allow them as much benefit as may be possible after insertion of word socialism in the preamble was accepted by the Supreme Court in *Sohan Singh v. New Delhi Municipal Committee*<sup>195</sup>. It was further held that the constitution as it originally was committed to economic justice and welfare of the needy. It was further held that for that reason, other provisions of the constitution cannot be ignored. Addition of the word socialism is to alienate inequalities in income and status. The emphasis is on economic equality in a socialist welfare society and while considering whether any classification is consistent with the socialist goal, set out in the preamble, must also be taken into consideration. In *Air India Statutory Corporation v. Union Labour Union*,<sup>196</sup> Supreme Court has also laid emphasis on social justice so as to attain substantial degree of social, economic and political equality. Social justice and equality are complementary to each other. In *Post Graduate Institute of Medical Education and Research v. K. L Narashimha*,<sup>197</sup> the Supreme Court held that the object of protective discrimination as envisaged in preamble, Article 15(4), 16(4), and 16(4-A) is to integrate them into national mainstream, so as to establish an integrated social order with equal dignity of person in which justice, social, economic and political are enjoyed by them in equal measures with general member of society. Again as regards to policy of reservation, the Supreme Court in *E.V. Chinniah v. State of A.P.*,<sup>198</sup> held that the policy of reservation must be considered from the social objective angle, having regard to constitutional scheme and not as a political issue. Even if the caste system has got struck in society, if any legislation is passed to do away with the civil effect thereof, it has to be in

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<sup>195</sup> AIR 1989 SC 1988

<sup>196</sup> AIR 1997 SC 645

<sup>197</sup> (1997) 6 SCC 283.

<sup>198</sup> (2005) 1 SCC 394.

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accordance with constitutional scheme. Reservation to a backward class is not constitutional mandate but a prerogative of the state.

The Preamble to the Constitution is not a mere flourish of words, but was an ideal set up for practices and observance as a matter of law through constitutional mechanism. It contains in a nutshell its ideals and its aspiration. The preamble is not a plentitude but the mode of its realization is worked out in detail in the Constitution<sup>199</sup>. In *A.K. Gopalan V. State of Madras*,<sup>200</sup> it was held that “it is this declaration i.e. preamble that makes our constitution sublime and it is the guarantees mentioned in the chapter as fundamental right that make it one of the greatest charter of liberty and of which the people of this country may will be proud. The charter has not been forced out of unwilling hands of a sovereign like the Magna Carta, but it has been given to themselves by the people of the country through their constituent assembly. The constitution has a noble and grand vision contained in the preamble. Through in an ordinary statue, much importance is not attached to the preamble all importance has to be attached to the preamble in a constitutional statute. Preamble relates to the basic structure of frame work if the constituent assembly formulates the preamble in the light of the objectives resolution, but restricted it to defining the essential features of the new state and its basic sociopolitical objective and the draft of the preamble was considered by the assembly last after considering other parts of the draft constitution to see that it was in conformity with the constitution. On the other hand, in constituting the fundamental rights enumerated in part III of the constitution, the high purpose and spirit of the preamble, namely, that it assured to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality should be borne in mind. The emphasis of our constitution, as expressed in the preamble is to establish a welfare state.”<sup>201</sup>

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<sup>199</sup> Durga Das Basu, *Commentary on the Constitution of India* 8<sup>th</sup> Edition, (2007). vol-I Wadhwa & Company, Nagpur. p. 375

<sup>200</sup> A I R 1950 S C 27

<sup>201</sup> *Basheshar v. C.I.T.*, A I R 1959 S C 149

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In *Sajjan Singh v. State of Rajasthan*,<sup>202</sup> it was held that the preamble does not make any grant of power but it gives a direction and purpose to the constitution which is reflected in part III and IV. A comparison of the preamble with the broad features is an epitome of these features or to put it differently these features on an amplification or concretization of the concept set out in the preamble. The preamble has the stamp of deep deliberation and is marked by precision. It would suggest that framers of constitution attached special significant to preamble. The true function of the preamble is to suspend the nature and extent and application of the powers actually conferred by the constitution and not substantially to create them. In *Kesavananda Bharati v. State of Kerala*,<sup>203</sup> case the court said that “from the preamble, it is quite clear that the two primary objectives that were before the constituent Assembly (1) to constitute India into sovereign democratic republic and (2) to secure to its citizens the right mentioned therein. It was a plan to build a welfare state and an egalitarian society.

The scope of preamble in the Constitution was narrowed down in *India Nehru Gandhi v. Raj Narain*<sup>204</sup>, it was held therein “the preamble through part of Constitution is neither a source of power nor a limitation upon that of the people. The preamble sets out the ideological aspiration of the people. The essential features of this great concept set out in the preamble are delineated in the various provision of the constitution. It is these specific provisions in the body of the constitution which determines the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which was their desideratum, the context of liberty of thought and expression, which they entrenched in that document, the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the constitution alone can determine the basic structure of constitution as established. The preamble generally

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<sup>202</sup> AIR 1965 SC 845.

<sup>203</sup> AIR 1973 SC 1461.

<sup>204</sup> AIR 1975 SC 2299.

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uses words of passion and power in order to move the hearts of men and to stir them into action.

Thus equality, justice, liberty and fraternity are the chief objectives enshrined in the preamble to the constitution of India.<sup>205</sup> Our founding fathers wished to build an edifice of democracy wherein those noble objectives might be materialized in regard to the entire India society which includes communities which had hitherto remained disadvantaged and under developed due to historical discriminations perpetrated in the name of caste, creed, race or the like. They therefore designedly embodied certain provisions in the constitution which conferred special favors and protection to the backward classes of citizens with a view to uplift them to level of equality with the rest of the society. The Indian constitution embodies manifold concessions, preferences, exemption and above all reservation as the means of achieving social justice. The backward of all sections viz., scheduled caste and schedule tribes along with other backward classes are provided reservation and other special favors in numerous areas including employment and admission as measure of social justice.<sup>206</sup>

### **3. II. RIGHT TO EQUALITY**

The Constitution of India guarantees the Right to equality through Articles 14 to 18, and it is one of the magnificent corner stone of Indian democracy. The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution<sup>207</sup>. Art 14 outlaws discrimination in general way and guarantees equality before law to all persons. In view of a certain amount of indefiniteness attached to the general principle of equality enunciated in Article 14, separate provisions to cover specific discriminatory situations have been made by subsequent

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<sup>205</sup> D.K .Bhatt and P.C Joshi. *Social Justice and Reservation for OBC's. An Analysis of Justice Response*, 27 (2) 2000 I B R, p. 109.

<sup>206</sup> Ibid.

<sup>207</sup> Ashutosh Gupta v. State of Rajasthan, AIR 2002 SC 1533

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Articles. Article 14 is considered to be the most significant Constitutional provision. It has been given a highly activist magnitude in recent years by the courts and thus it generates a large number of court cases. The goal set out in the preamble to the constitution regarding status and opportunity is embodied and concretized in Articles 14 to 18. It may be noted that the right to equality has been declared by the Supreme Court as the basic feature of the Constitution. The Constitution is wedded to the concept of equality. The Preamble to the constitution emphasizes upon the principle of equality as basic to the Constitution. It means that even a Constitutional Amendment offending the right to equality will be declared invalid.<sup>208</sup>

Article 14 runs as follows: “The states shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This provision corresponds to the equal protection clauses of the 14<sup>th</sup> Amendment of the U. S. Constitution which declares: No state shall deny to any person within its jurisdiction the equal protection of the laws. Two concepts are involved in Article 14, viz., equality before law and equal protection of laws.<sup>209</sup>

The first is a negative concept which ensures that there is no special privilege in former of any one that all are equally subject to the ordinary law at the land and no persons whatsoever be his rank or condition, is above the law. This is equivalent to the second corollary of the Dicean Concept of the Rule of Law in Britain. This however, is not an absolute rule and there are a number of exceptions to it, e.g., foreign diplomats enjoy immunity from the country’s judicial process. Article 361 extends immunity to the president of India and the state governors, public officer and the judges also enjoy some protection and some special groups and interests, like trade unions have been accorded special privileges by law<sup>210</sup>.

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<sup>208</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461

<sup>209</sup> M.P. Jain, Indian Constitutional Law. Fifth Ed.

<sup>210</sup> Ibid.

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The second concept equal protection of laws is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences of circumstances. Equal protection of the laws does not postulate equal treatment of all persons without distinction. What it postulates is the application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered. That the like should be treated alike without distinction of race, religion, wealth, social status or political influence.<sup>211</sup> The Supreme Court has explained in *Sri Srinivasa Theater v. Govt. of Tamil Nadu*,<sup>212</sup> that the two expressions equality before law and equal protection of law do not mean the same thing even if there may be much is common between them. “Equality before law” is a dynamic concept having many facets. One facet is that there shall be no privileged person or class and that none shall be above law. Another facet is the obligation upon the state to bring about, through the machinery of law a more equal society for equality before law can be predicted meaningfully only in equal society.

Article 14 prescribes equality before law but the fact remains that all persons are not equal by nature, attainment or circumstances and therefore a mechanical equality before the law may result in injustice. Thus the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances or conditions. The varying needs to different classes or sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must therefore, necessarily have the power of making laws to attain particular objects and for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate.<sup>213</sup> The principle of equality of law thus means not that the same law should apply to everyone but that a law should deal alike with all in one class;

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<sup>211</sup> Ibid

<sup>212</sup> A I R 1992 S C 1004

<sup>213</sup> Chiranjeet lal v. Union of India, A I R 1951 S C 41.

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that there should be an equality of treatment under equal circumstances. It means that equals should not be treated unlike and unlike should not be treated alike. Like should be treated alike.<sup>214</sup>

Article 14 thus means that equals should be treated alike; it does not mean that unequals ought to be treated equally. Persons who are in the like circumstances should be treated equally, on the other hand, where persons or groups of persons who are not situated equally, to treat them as equals would itself be violative of Article 14 as this would self result in inequality. As all persons are not equal by nature or circumstances, the varying needs of different classes or sections of people require differential treatment. This leads to classification among different group of persons and differentiation between such classes. Accordingly, to apply the principle of equality in a practical manner, the courts have evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory.<sup>215</sup> A legislature is entitled to make reasonable classification for purpose of legislation and treat all in one class on an equal footing. The Supreme Court has under lined this principle thus: Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had a reasonable to the object sought to be achieved by the law<sup>216</sup>. Article 14 forbids class legislation, it does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of achieving specific ends classification to be reasonable should fulfill the following two tests:<sup>217</sup>

- 1) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which

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<sup>214</sup> Gauri Shankar v. Union of India, A I R 1995 S C 55.

<sup>215</sup> Ashutosh Gupta v. State of Rajasthan , (2002) 4 S C C 34

<sup>216</sup> Western U.P. Electric Power and Supply Co. Ltd. v. State of Uttar Pradesh, A I R 1970 S C 21.

<sup>217</sup> Ibid.

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distinguishes persons or things grouped together in the class from other left out of it.

- 2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.

What is however necessary is that there must be a substantial basis for making the classification and that there should be nexus between the basis of classification and the object of the statute under consideration. In other words, there must be some rational nexus between the basis of classification and the object intended to be achieved. Therefore, mere differentia or the inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attach Article 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view in making the law in question.<sup>218</sup> In *Deepak Sibal v. Punjab University*<sup>219</sup>, the Supreme Court has pointed out that a classification need not be made with mathematical precision but, if there is little or no difference between the persons or things which have been grouped together and those out of the group, then classification cannot be regarded as reasonable. The court has also pointed out that to consider reasonableness of classification it is necessary to take into account the objective for such classification.

The supreme court in a number of cases has established certain important principle concerning Article 14 and elucidated the scope of permissible classification<sup>220</sup> :-

- (a) A law may be Constitutional even though it relates to a single individual if, on account of some special circumstances or reason applicable may be treated as a class by itself.

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<sup>218</sup> *Jaila Singh v. State of Rajasthan*, A I R 1975 S C 1436

<sup>219</sup> A I R 1989 S C 903

<sup>220</sup> *Ram Krishna Dalmia v. Justice Tendulkar*, A I R 1958 S C 358.

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- (b) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The person therefore who pleads that Article 14 has been violated, must make out that not only has he been treated differently from others but he has also been treated differently from persons similarly circumstanced without any reasonable basis and such differential treatment has been unjustifiably made.<sup>221</sup>
- (c) It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.
- (d) The legislature is free to recognize the degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.
- (e) In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislations.<sup>222</sup>
- (f) While good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislations.
- (g) A classification need not be scientifically perfect or logically complete.
- (h) The validity of a rule has to be judged by assessing its overall effect and not by picking up exceptional cases. What the court has to see is whether the classification made is just taking all aspects into consideration.
- (i) The court must look beyond the ostensible classification and to the purpose of the law and apply the test of palpable arbitrariness in the context of the felt

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<sup>221</sup> Ramchand Jagdish Chand v. Union of India, A I R 1963 S C 563

<sup>222</sup> Superintendent and Remembrance of Legal Affairs v. Girish K. Navalakha, A I R 1975 S C 1030

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needs of the times and societal exigencies informed by experience to determine reasonableness of classification.

Equality has various shades. Its understanding and application have been shaped by social, economic and political conditions prevailing in the society. The reigning philosophy since 18<sup>th</sup> century has been the states responsibility to reduce disparities amongst various sections of the population and promoting a just and social order in which benefits and advantages are evenly distributed. To achieve this basic objective various theories have been advanced from time to time<sup>223</sup>. The formal equality advanced by Aristotle that equals should be treated equally and unequals, unequally was as much result of social and economic condition as the Rawls theory of justice or the Dworkins<sup>224</sup> concept of right of all to treatment was equals. Liberty and right to equality taken individually may appear to pull in different directions. But viewed as part of justice and fairness the two are the primary tenets of modern egalitarian society. The real difficulty is translating them into practical working. The American concept of equal but separate doctrine is the best illustration of distance between theory and practice of equal protection. The recognition and realization that neither all man are equal nor are the circumstances in which they are born or grow and same gave rise to classification and grouping of persons similarly situated and extending then equal or same treatments.<sup>225</sup>

In our Constitutional scheme the classification in matters of employment or appointment in the services has been done constitutionally. From entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alive for purpose of employment except those who fall under Article 16(4) any further classification or grouping for reservation would be constitutionally invalid. No. legislative exercise can transcend the constitutional barrier. For valid

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<sup>223</sup> Indra Sawhney v. Union of India, A I R 1993 S C 477 Para 681

<sup>224</sup> Quoted in Ibid.

<sup>225</sup> . Ibid

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classification legislature or executive measures must be co-related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only any further reservation being beyond constitutional purpose would be impermissible and invalid.<sup>226</sup>

Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective. Atoning for the past injustices on backward classes through Constitutional mechanism was morality raised to legal pain. Admonition to state not to deny equality before law or equal protection of laws found on sound public policy, is in reality the measure of fundamental right which every person enjoys. But, principle of the equal protection of law does not mean that every law must have universal application to all persons who are not by nature attainment or circumstances in the same position.<sup>227</sup> The varying need of different classes of persons requires special treatment. Principle of reasonable classification was developed by theorists and counts to enable state to function effectively classifying reasonably. Various sub- Articles of Article 16 especially clause (4) indicates constitutional classification and creation of two classes are dealt in Article 16 (1) and other in Article 16(4). Principles of reasonable classification for purpose of creating another class or planting one class in another would be constitutionally infirm.

The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facts, relevant to Indian society, have been referred to in the preamble and the Articles under the heading “Right to Equality” (Article 14-18). The goal of equality is Equality of status and of opportunity<sup>228</sup>. Article 14-18 must be understood not merely with reference to what they say but also in the light of the

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<sup>226</sup> Indra Swahne v. Union of India. A I R 1993 S C 477.

<sup>227</sup> Dhirendra Kumar Mondal v. The S & R of Legal Affairs to the Govt. of West Bengal & Another, A I R 1954 S C 424.

<sup>228</sup> Indra Sawhney v. Union of India. A I R 1993 S C 477

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several Articles in part IV of the constitution<sup>229</sup>. Among others the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, screening adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the scheduled caste and Scheduled Tribes and backward class and to protect them from social injustices and all forms of exploitation<sup>230</sup>. Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality either equality before law or equality in any other respect.<sup>231</sup>

Formal equality simply requires the absence of any discrimination in the words of law. This notion requires that similar cases must be treated similarly “according to one and the same rule. The formal equality notion reflects nothing more than a demand for rationality - a demand that statements made about one person be generalized into statements about all similar persons in similar circumstances. If all men were equal similar in every respect except that they were distinct individuals formal equality would have been sufficient but men are not equal in their physical characteristics native endowments, social and economic position, subjective preferences values and tests. It becomes necessary then to determine in what respects men are similar and to decide which of those are relevant to the kind of treatment they should receive. The determination of relevant similarities and dissimilarities requires an appeal to empirical realities and adoption of a value system which considers similarities and differences between different persons.<sup>232</sup>

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<sup>229</sup> Part IV of the Constitution deals with the Directive Principles of State Politics. It contains the Justice, Social, Economic and Political.

<sup>230</sup> Ibid.

<sup>231</sup> *Indra Sawhney v. Union of India*. A I R 1993 S C 477 at. 502

<sup>232</sup> Paramanand Singh. *Equality, Reservation and Discrimination in India. A constitutional Study of Scheduled Caste, Scheduled Tribes and Other Backward Classes*, Deep & Deep Publications. D-1/24, Rajouri Garden, New Delhi – 110027, 1985.

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Traditionally the equality notion did not concern itself with the elimination of group inequalities in the society caused by discriminatory social arrangements. For long it remained an individual oriented view of equality by the application of the formula that equals must be treated equally, unequal's unequally. This traditional view that state is concerned only with formal equality and is not concerned to make men equal who are really unequal has undergone radical changes in the recent years.<sup>233</sup> According to the new approach, justice demands "equality of result" which can be attained only by the mitigation of inequalities of men by positive state action. Equality as an aspect of justice requires the state to adopt a standard which takes into accounts the differing economic and social conditions of the people whenever those differences and disparities stand in the way of equal access to their basic rights. It has now been realized that the claim of equality is in fact a protest against unjust, undeserved and unjustified inequalities. The notion of equality represents into ideas numerical equality and proportional equality. According to numerical equality each individual is to receive numerically identical amount of benefits being distributed of the burdens imposed in the public sector. This notion concedes that human beings are unequal, if nevertheless concludes that all such differences are irrelevant for the purpose of distributing benefits and burdens among the members of the society. The principle of proportional equalities mean that all will receive the same consideration in the distributional decision but that the numerical amounts distributed may differ. It demands a differential and separate treatment to those who are unequal. Unequal and separate and differential treatment would necessarily require an identification system for the purpose of deciding who unequals are and why they are unequals. The principle of proportional equality would involve an appeal to some reason or criterion justifying differential treatment. A law which seeks to bridge the gap between equals and unequals would have to be viewed with approval by the courts as designed to achieve equality for all.<sup>234</sup> Article 14 guarantees the principle of equality in general terms. This is exemplified and particularized in Articles 15 and 16. It has been rightly

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<sup>233</sup> Ibid

<sup>234</sup> Paramanand Singh. *Equality, Reservation and Discrimination in India. A constitutional Study of Scheduled Caste, Scheduled Tribes and Other Backward Classes*, Deep & Deep Publications. D-1/24, Rajouri Garden, New Delhi – 110027, 1985.

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held in *State of Kerala v. N. M. Thomas*.<sup>235</sup> That Article 14 is the genus of the guarantee of equality of which Articles 15 and 16 are the species. Article 14, which has to be interpreted in the light of Articles 38 and 46, seems to enjoin the state to ensure substantive or factual equality. Accordingly, this provision confers on the state a wide latitude to provide for protective discriminatory measures with minimum of judicial interference.<sup>236</sup>

In *Kedar Nath Bazoria v. State of West Bengal*<sup>237</sup> the Supreme Court of India observed the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying person or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislation classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain.

In *Lachmandas v. State of Bombay*<sup>238</sup>, the Supreme Court observed: “Article 14 forbids class legislation; it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differential which distinguishes person or things that are grouped together from others who are left out of the group, and (ii) that differential must have a rational relation to the object sought to be achieved by the Act.

In *Kathi Ranging v. State of Saurashtra*<sup>239</sup>, justice Mukherjee of Supreme Court observed “A legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations cannot but proceed upon whom

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<sup>235</sup> (1976) 2 S C C 310

<sup>236</sup> D .N Saraf (Ed) Social Policy, Law and protection of weaker sections of society. Eastern Book Company. 56/6 Singar Nagar. Lucknow. 1986

<sup>237</sup> A I R 1953 S C 404

<sup>238</sup> A I R 1952 S C 235

<sup>239</sup> AIR 1952 S C 123

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the legislation or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious by the Constitution would not be violated to the statute operates equally on all persons whom included in the group and the classification is not arbitrary or capricious, but bears a reasonable relations to the objective which the legislation has in view.

In *Ashok Kumar Thakur v. Union of India*,<sup>240</sup> it was held that equality is a multicolored concept incapable of a single definition as is also the fundamental right under Article (9(1)(g). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14,15 and 16 may be understood as an element of the basic structure of the Constitution and may not be subject to amendment, although these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far reaching change that is objectionable, rather it is the contact of this change in so far as it implicates the question of Constitutional identity.

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<sup>240</sup> *Ashok Kumar Thakur v. Union of India*, (208) 6 S C C 1

### **3. III. PROTECTIVE DISCRIMINATION**

Discrimination shortly speaking means difference in treatment. The dictionary meaning of discriminate against is to “make an adverse distinction with regards to” distinguish unfavorably from others<sup>241</sup>

The Indian Constitution intends to establish a welfare state. Actually it is the role of law which adds to the relevance and validity of law. Therefore, the concept of the rule of law is a dynamic one which not only aims at safeguarding and advancing the civil and political rights of the citizen of the country but also at establishing social, economic, educational and cultural conditions under which their legitimate aspirations and dignity may be realized. Further wherever social inequality exists or an economics injustice is found, a democratic state enters the arena, and with the aid of law, establishes social equality and removes economic injustice<sup>242</sup>. Therefore, it is, one of the objectives of the constitution to secure to all citizens equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of nation. As the right to equality and prohibition of discrimination on ground of religion, race, caste, sex or place of birth against any citizen were not enough to make the basic human right meaningful to the weaker section of the society.<sup>243</sup> The exclusion of any men from access to the society’s goods and services means denial of his freedom and equality. The existence of equality of opportunity depends not merely on the absence of disabilities but not 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 position, possession in fact, equal chances of using to the full, his national endowments of physique, of character and intelligence. If as a result of decades of unequal treatment in education, housing,

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<sup>241</sup> Durga Das Basu, *Commentary on the Constitution of India*, Sixth Edition (1975), Vol-B (Article 14 to 19), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012, p.281.

<sup>242</sup> H.C Upadhyay, *Reservation for scheduled caste & Schedule Tribes*, Anmol Publications, 4378/4B Ansari Road, Darya Ganj – New Delhi

<sup>243</sup> P. P. Rao. *Right to Equality and The Reservation Policy*. 42 JILI (2000) p. 193.

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employment etc. the members of a group are poorly trained housed and educated it is not sufficient merely to remove the existing discriminatory barriers and to proclaim that therefore opportunities will be available to all on the basis of open competition equality of opportunity will not Then have been achieved, become although no one will be excluded merely for being belonging to a historically disadvantaged group, a casual connection will remain between those belonging to that group and being governed by unfavorable circumstances. The members of these disadvantaged groups still lack in economic, physiological and educational resources needed to participate on equal terms in the competition for the opportunities in question. In other words, one is not really giving equality of opportunity to a member of a disadvantage group and a member of wall-to-do group, if one contents oneself with applying the same criteria to the former, affected by unfavorable but curable conditions and to the latter affected by favorable conditions.<sup>244</sup>

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 right. Their education, wages, living condition, social status was dilated by the whim of upper strata of society, reducing them to destitution. The economic backwardness brought social backwardness which consequently made them downtrodden and thus depriving them even of the dignity of life. In a society compartmentalized on caste basis, upper caste controlled the level of power enabling themselves to run their whips, prejudicial to the interest of lower segment of the society. Lower caste had to serve the upper caste without having any say and grievances redressal mechanism. This inhuman and barbaric condition perpetuated for centuries.<sup>245</sup> It was natural that the higher castes were able to exploit the lower ones. Member of lower caste always suffered from discrimination in all areas of life, be it

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<sup>244</sup> Parmanand Singh., *Equality, Reservation and Discrimination in India. A Constitutional Study of Scheduled Castes Scheduled Tribe and Other Backward Classes*. Deep & Deep Publication. D-1/24, Rajouri Garden, New Delhi, 1985

<sup>245</sup> K P Singh Mahalwar. *Protective Discrimination and some Socio legal Perspective*, C1LQ 1980. pp. 244-256

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social, political or economic. One of the worst affects of casteism was that access to knowledge and leaving was denied to the lower castes.

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 power or backward social groups 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 section 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. In such circumstances there is a necessary pressure to equal up the condition by giving unequal benefit to those governed by favorable condition and thus lacking in resources, incentives and background to succeed in open merit competition for the opportunities in question.<sup>246</sup> This is perhaps the intellectual justification for giving compensatory treatment to those whose unequal environment contributes to inequality. Because of the past failure to ensure equality of opportunity to these deprived groups, society can move towards genuine equality or equality in fact by discriminating positively in their favor. The unequal characteristics of human beings are not seen as the result of innate inferiority or superiority but of the unequal environments into which they are born and must live. If the inequalities in their environment are removed, people will be able to find their real potential. Thus viewed equality is necessarily an aspect of distributive justice. While legal or formal equality in fact or substantive equalities requires a differential treatment in order to attain a result which establishes equilibrium between different situations. Equality in fact, thus necessarily implies the notion of end-equality or equality in result.<sup>247</sup> In a heterogeneous society classified into different castes, groups, classes and communities etc, if all are treated at par, it would lead to aggravation of inequalities. Member of the lower strata or disadvantaged class cannot compete with the people of privileged class on equal footing.

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<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

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The framers of the India Constitution were aware of the political, social and economic inequalities which existed in the country due to historical reasons and were anxious to remove these inequalities by positive state measures even if these measures impose unequal burdens on those individuals who had hitherto enjoyed undue advantages. They were aware of the prevailing miserable and appalling condition of the backward groups who had remained far behind and segregated from national and social life and had continued to be socially oppressed and economically exploited for centuries due to various types of disabilities. They believed that in a caste-ridden society like ours where due to historical reasons certain castes and classes were for decades socially oppressed, economically condemned to live the life of penury and educationally coerced to learn the family trade or occupation and to take the education set out for each class and caste by the society of doctrinaire insistence on formal equality would in fact aggravate and perpetuate inequality.<sup>248</sup>

A mere formal declaration of the right would not make unequal equal. To enable all to compete with each other on an equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Article 14 and 16(1) no doubt would by themselves permit such positive measures in the favor of the disadvantaged to make real the equality granted by them.<sup>249</sup>

It has become imperative, therefore, to adopt a policy of compensatory or protective discrimination as an equalizer to those who were made too weak to compete with the advanced section of the society in the race of life consonant with its resolve in the preamble to secure to all citizens 'justice, social, economic and political, equality of status and opportunity.'<sup>250</sup> Article 15(4) and 16(4) are instances of protective discrimination. Untouchability has been abolished by Article 17 of the

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<sup>248</sup> Ibid.

<sup>249</sup> *Indra Sawhney v. Union of India*, AIR 1993 S C 477.

<sup>250</sup> Ibid.

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Constitution and the citizens are protected against discrimination even on the part of private person and institutions. The Constitution secures political equality to all citizens by providing special privileges to all politically powerless groups in the legislative bodies in the legislatures of these desperate groups in the spirit of real equality of opportunity to the people who are lacking in political consciousness and political experience.

The expression protective discrimination was used by Krishna Iyer J. in *Jagdish v. Union of India*.<sup>251</sup> This expression is accurately used to describe a situation of the kind alleged by the Delhi University in *Jagdish v. Union of India*, namely, that since each university discriminated against students of other universities, the Delhi University was obliged to protect Delhi student from discrimination by other universities protective discrimination of this kind leaves the question of its validity undecided. For, if discrimination against students from other states is invalid, the fact that such discrimination is almost universally practiced would not make it valid. There is institutional preference in post graduation studies. Institutional preference indicates preference given in admission to post graduate courses to students who have graduated from the same university. The justification for such preference was stated by Pathak J., in *Jagdish v. Union of India* as follows: the student has become familiar with the teaching techniques and standards of scholarship and has adjusted his responses and reactions accordingly. The continuing of studies ensures a higher degree of competence in the assimilation of knowledge and experience. Not infrequently some of the same staff of professors and readers may lecture to the post graduate classes also. Over the under-graduate years the teacher has come to understand the particular needs a special encouragement in the removal of deficiencies.<sup>252</sup>

Krishna Iyer, J., laid down the following proposition relating to protective discrimination of Delhi students. He held that the literal terms of Article 14 did not

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<sup>251</sup> (1980) S C R 831.

<sup>252</sup> Ibid.

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permit protective discrimination involved in reservation for student of a particular university, and such discrimination fell outside Article 15(4). Such reservation cannot be justified on the vague ground” that all other universities were practicing it- a fact not fully proved before the court. Against, universally illegality practiced by universities cannot make the practice legal.<sup>253</sup>

Reverse discrimination is used correctly with reference to discrimination permitted by Art. 15(4). Article 15(4) is in two parts: Discrimination on grounds prohibited by Art. 15(1) is permitted, first, for socially and educationally backward classes, and, secondly, for schedule castes and Scheduled Tribes. Reverse discrimination is justice for the first category on the ground that it secures real equality by giving a helping hand to those who because of their backwardness would not be able to complete successfully in open competition. Members of the schedule castes and tribes occupy a special position in our Constitution. Broadly speaking, they used to be described as untouchables or harijans. They had to endure great ill-treatment from centuries and this reverse discrimination in their favour is justified not only because of their backwardness but also on the ground that such discrimination is also rightly applied to discrimination permitted by Art 16(4) <sup>254</sup>. With the increase of time some more classes of people have been included in the fold and protection of reverse discrimination. The other backward classes have been accorded the protection of reverse discrimination permitted under Article 15(4) and 16(4) of the constitution.

The provision of protective discrimination are not intended to be negative or derogatory of the equality guarantee of Article 14, 15(1) and 16(1) and 16(2) but are definitive of equality in relation to the backward groups. Article 15(4) and 16(4) therefore clarify that when making a classification showing favoured treatment to the backward classes, the state might use the forbidden criteria because any real classification will have to take into account the inequalities based on the abuse of

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<sup>253</sup> Ibid.

<sup>254</sup> H. M Seervai. Constitutional law of India . 4th edition, vol.- I, Universal Law Publishing Company Private Ltd. 2008

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caste, religion, race, criteria etc. Therefore on one hand, the constitution, forbids discrimination on grounds of race, caste, or religion, etc. so that the old iniquitous situation may not be continued, on the other hand it permit these very criteria for correcting evil consequences following from their past misuse.<sup>255</sup>

Any affirmative action must be supported by valid classification and must have a rational nexus with the object of redressing backwardness. It is much more so where such programmes totally exclude from consideration persons outside the chosen classes without regard to merits because of the set aside quotas. It does not matter whether clause (4) of Art. 16, like clause (4) of Article 15, is seen as a proviso or an exception or, in the words of Mathew, J., a legislative device to emphasis the extent to which equality of opportunities could be carried, viz., even up to the point of making reservation. The affirmative action to redress the condition of backward classes of citizens may be adopted either by a programme of preferential treatment extending certain special advantages to their or by reservation of quotas in their favor to the total exclusion of everybody outside the favored groups<sup>256</sup>. Preferences without reservation may be adopted in favor of the chosen classes of citizen by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation of age or other minimum requirement. Further more, it would be within the discretion of the state to provide financial assistance to such persons by way of grant scholarship, fee concession etc. such preferences or advantages are like temporary crutches for additional support to enable the member of the backward and other disadvantaged classes to much forward and complete with the rest of the people. These preferences are extended to them because of their inability otherwise to complete effectively in open selections on the basis of merits for appointment to posts in public services and the like or for selection to academic courses. Such preferences can be extended to all disadvantaged classes of citizens whether or not they are victim of prior discrimination.<sup>257</sup> Any such preference,

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<sup>255</sup> Ibid.

<sup>256</sup> Indra S awhney v. Union of India. AIR 1993 S C 477 at 523.

<sup>257</sup> Ibid.

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although discriminatory on its face, may be justified as a being classification for affirmative action warranted by a compelling state interest<sup>258</sup>.

In addition to such preferences, quotas may be provided exclusively reserving post in public services or seats in academic institutions for backward people entitled to such protection. Reservation is intended to redress backwardness of a higher degree. Reservation prima facie is the very antithesis of a free and open selection. It is discriminatory exclusion of the disfavoured classes of meritorious candidate.<sup>259</sup> In *M. R. Balaji v. State of Mysore*,<sup>260</sup> it was held that, it is not a case of merely providing an advantage or concession or preference in favour of the backward classes and other disadvantaged groups. It is not even a handicap to disadvantage the forward classes so as to attain a measure of qualitative or relative equality between the two groups. Reservation which exclude from consideration all those persons falling outside the specially favoured groups, irrespective of merit and qualification, is much more positive and drastic discrimination to achieve the same end of qualitative equality but unless strictly and narrowly tailored to a compelling constitutional mandate, it is unlikely to qualify as a benign discrimination. Unlike in the case of other affirmative action programmes, backwardness by itself is not sufficient to warrant reservation. What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the schedule caste and the schedule tribes. Reservation is remedial action specially addressed to the ill effect stemming from historical discrimination.<sup>261</sup>

Thus the protective discrimination is one of the important method through which constitutional goal like social and economic justice can be secured to the Scheduled Castes and Scheduled Tribes and the backward class people. Protective discrimination means preference given in admission to public employment to the

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<sup>258</sup> *Indra sawhney v. Union of India*, AIR 1993 S C. 477

<sup>259</sup> *Ibid* at 693.

<sup>260</sup> AIR 1963 S C 649.

<sup>261</sup> AIR 1963 S C 649.

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weaker sections of the society including the Scheduled Castes and Scheduled Tribes and the backward classes. Protective discrimination is aimed at balancing the benefits of a social welfare state between the haves and the have-nots. It is primarily designed to uplift the backward sections of the society without harming the interests of the advanced sections of the society<sup>262</sup>.

In consonance with the Constitutional Scheme, the preamble promise of equality of status and of opportunity has been concretized and clothed with flesh and blood by the provisions of Article 14, 15 and 16 read with Article 38, 46 and 335 of the Constitution. Article 38 obligates the state among other things to minimize the inequality in status, facilities and opportunities not only amongst individual but also amongst classes of individuals living in the country. In this context a special Constitutional obligation is imposed on the state by Article 46 to promote with special care the educational and economic interests of the weaker section of the people, and in, particular, of the Scheduled Castes and Scheduled Tribes and the backward classes. In order to enable the state to discharge the constitutional obligation imposed by those directives, the right to equality embodied in Articles 14 and 16(1) should be given a very liberal interpretation so that the right is made really meaningful to the Scheduled Castes and Scheduled Tribes and the backward classes of the India citizen<sup>263</sup>.

It may be appreciated that the Constitutional goal of equality enshrined in the preamble of the Constitution is wide enough in its import to embrace both the concept of formal and substantive equality. Its imports are also wide enough to obligate the state to bring about substantive equality by according, if necessary, favoured or preferential treatment to those who deserve and need it.<sup>264</sup> The idea of protective discrimination enjoins the state not only to make reservation in favour of the socially

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<sup>262</sup> K. K. Arora. *Backwardness in India- A Judicial Dilemma*. In D. N. Saraf (Ed), Social Policy, Law and Protection of Weaker Section of Society, Eastern Book Company, Kashmir Gate. Delhi-6, 1986, at 82.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

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and educationally backward classes but also to make reservation in favour of the socially and educationally backward classes but also to make reservation in favour of the persons not adequately represented in the state services. Thus Articles 15(4), 16(4) and 16(4-A) permit protective discrimination in favour of Scheduled Castes and Scheduled Tribes and the Backward Classes of citizens of India.

### **3. IV. EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT**

After Article 14, Article 16 lays down the elaborate provision for providing equality in the matter of employment in the state's services. We can say that Article 14 provides equality in general and Article 16 provides equality in specific. Article 16 is one of the many facets of equality. Let us discuss the provision in detail here.

#### ***Article 16:***

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

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state.

(3) Nothing in this Article shall prevent parliament from making any law prescribing, in regards to a class or classes of employment or appointment to an office under the government of, or any local or other authority within a state or union territory prior to such employment or appointment.

(4) Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or post in favor of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state.

(4-A) Nothing in this Article shall prevent the state from making nay provision for reservation in matter of promotion, with consequential seniority, to any class or

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classes of post in the services under the state in favour of Scheduled Caste and Scheduled Tribe which, in the opinions of the state, are not adequately represented in the services under the state.

(4-B) Nothing in this Article shall prevent the state from considering any unfilled vacancies of a year which are reserved for being filled up in the year in accordance with any provision for reservation made under clause (4) or clause (4-a) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year.

(5) Nothing in this Article shall effect the operation of law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 16(1) and (2) give effect to the equality before law guaranteed by Art 14 and to the prohibition of discrimination guaranteed by Article 15(1). The three provisions form part of the same Constitutional code of guarantees and supplement each other<sup>265</sup>. The word “in respect of any employment” used in Art. 16(2) must include all matters relating to employment as specified in Article 16(1).<sup>266</sup> A discrimination which involves the invocation of Art 14 is not necessarily covered by Art. 16(1).<sup>267</sup> Article 16 cannot be invoked against a discrimination made by Constitutional provisions. The archaic common law concept that employment was a matter between the master and servant has been eroded by judicial decision and legislation particularly in its application to person in public employment to whom the Constitutional protection of Art. 14, 15, 16 and 311 is available. The employees of a

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<sup>265</sup> H. K. Ssharay. *The Constitution of India, An Analytical Approach*, Third edition(2002) Eastern Law House, 54 Ganesh Chunder Avenue, Kolkata, 2002. p .135.

<sup>266</sup> *General Manager, S. Railways v. Rangchari*. A I R 1962 S C 36.

<sup>267</sup> *Prabhat Kiran v. Union of India*. A I R 1977 S C 1533.

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corporation which is an instrumentality of state are entitled to protection of fundamental right under Article 14 and 16.<sup>268</sup>

Article 16(1) is only an instance of the application of the general rule of equality laid down in Art. 14 and it should be construed as such. Hence there is no denial of the equality of opportunity unless the person who complains of discrimination is not equally situated with the person or persons who are alleged to have been favored. In other word Art. 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. The equality of opportunity guaranteed by it means “equality as between members of the same class of employees and not equality between members of the same class of employees and not equality between members of separate, independent classes<sup>269</sup>. The principle underlying Art.14 has, accordingly been applied to the interpretation of Art 16(1), namely that the equality of opportunity guaranteed by it means equality as between members of the same class of employees.<sup>270</sup>

In *State of J & K v. Khosa*<sup>271</sup>, it was held that the classification whether under Art.14 or under Art.16(a) must be founded on substantial differences which distinguish persons grouped together from those left out and (b) such differential attributes must bear a just and rational relation to the object sought to be achieved. Thus the selective test adopted by the government shall be violative of Art.16 if there is no relevant connection between the test and the efficient performance of the duties and obligation of the particular office. The classification made by the state between two groups of employees would similarly be invalid where the difference between the two groups of recruits may not be sufficient to give any preferential treatment of one against the other in the matter of promotion, or in other words, where there is no reasonable nexus between the differences and the promotion.

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<sup>268</sup>.K. C Joshi v. Union of India. A I R 1985 S C 1046.

<sup>269</sup> All India Station Master’s Association v. General Manager, A I R 1960 S C 384.

<sup>270</sup> Ibid.

<sup>271</sup> A I R 1974 S C 1.

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In *Union of India v. Kohli*,<sup>272</sup> it was held that even in a technical line, a classification of candidates recruited from the same source may be classified for promotion, according to general education qualifications, because higher mental equipment would be conducive to efficiency of the employee. Such classification may not be challenged on the ground that the state has laid down the educational qualification requirement for promotion to the lower ranks without imposing it in the case of promotion to the higher ranks because the needs at the two stages of the same service may not be identical.

Equality of opportunity in matter of employment under Art.16(1) means equality as between members of the same class of employees and not equality between members of separate, independent classes. Clause (1) is much wider in scope than clause (2) and the ground of discrimination expressly mentioned in clause (2) are not exhausted. Equal opportunity in matter of appointment or promotion under Article 16(1) does not mean that the state government as the appointing authority is debarred from picking and choosing a particular candidate from amongst several candidates for the post although a particular candidate was not the senior most.<sup>273</sup> Article 16(1) both in terms and in the allocation of the words indicates that it is confined to “employment” by the state, and has reference to employment in service rather than as contractors. Of course there may be cases in which the contract may include within itself elements of service. The expression “matter relating to employment” used in Article 16(1) is confined to initial matter prior to the act of employment, but comprehends all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, age of superannuation, promotion and even domination of employment.<sup>274</sup>

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<sup>272</sup> AIR 1973 SC 811.

<sup>273</sup> Sukhnandan Thakur v. State of Bihar . AIR 1957 SC 617.

<sup>274</sup> Government Branch Press v. D. B. Belliappa. AIR 1979 SC 429.

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The equality of appointment guaranteed by Art.16 (1) need not be an absolute equality. It does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. It is open to the appointing authority to lay down such prerequisite conditions for appointment as would be conducive to efficiency of or proper discipline amongst government servants<sup>275</sup>.

It is in evident that Article 16(1) seeks to implement the equality of opportunity 'held out by the preamble of the constitution in so far as it relates to employment under the state. It does not ensure to each citizen an employment under the state, irrespective of his suitability for the same, but ensure that each will have an opportunity to be considered subject to his suitability for appointment or promotion to an office or post under the state-regardless of his affiliation to the party in power and irrespective of considerations which are irrelevant or extraneous to public employment, such as religion, race, caste, sex, descent, place of birth or residence.<sup>276</sup>

In *Satish v. Union of India*,<sup>277</sup> it was laid down that Article 16 does not mean that government is not, like other employers, entitled to pick and choose from amongst a number of candidates offering themselves for employment under the government. It is also open to the appointing authority to lay down such prerequisite condition of service as would be conducive to proper discipline amongst government servants. This also holds good in the case of promotion or appointment of part time servants to some whole time posts. Just as government may make it a condition that only those who had a satisfactory record in the past would be considered for promotion, so it is open to government to lay down that only those part - time servants who had been amenable to proper discipline during their part time employment should

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<sup>275</sup> Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol-B (Articles 14 to 19), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012, p. 281.

<sup>276</sup> Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol-B (Articles 14 to 19), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012. P. 281.

<sup>277</sup> A I R 1953 S C 250.

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be considered eligible for appointment on a permanent basis. There is no denial of equal opportunity involved in such choice in the matter of recruitment or recruitment of persons in special terms by contract.

In *Achutan v. State of Kerala*,<sup>278</sup> it was held that the word employment does not necessarily imply the relationship of master and servant, but, used in relation to word 'under the state', the word means that there must be an element of subordination to the state or other authority, referred to in clause (3). This Article has no application in the matter of election of a municipal councilor who cannot be said to be subordinate to the local authority. But subject to this, the words employment and appointment connote two different conceptions. While 'appointment refers to appointment to an office' and therefore implies the conception of tenure, duration, emoluments, duties and obligations, fixed by law or some rule having the force of law, these elements are absent in the case of employment which means a contract for temporary purpose, e.g., the engagement of laborers or professional experts by bilateral contracts. The word employment in Art.16 (1) is not wide enough to include contracts which involve no element of service, e.g., contracts for the supply of goods to government for price.

Article 16(2) emphatically brings out in a negative form what is guaranteed affirmative by clause (1). It prohibits discrimination on certain grounds and thus assures the effective enforcement of the right of equality of appointment guaranteed by clause (1).

So far as the private sphere is concerned, the legislature has enacted the Civil Right Act, 1964, to make unlawful any discrimination in the matter of employment or discharge or conditions of employment because of the individual race or colour. Through this act does not assure employment to members of minority racial, communities, it would invalidate any sort of discrimination based solely on race. Even

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<sup>278</sup> A I R 1959 S C 490.

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if there be a legitimate ground for exclusion, e.g., unlawful conduct, the exclusion of a Negro will be struck down if such exclusionary rule or practice is confined to members of a particular race.<sup>279</sup>

Through both Art.15 and 16 are species of the genus of the principle of equality which is enunciated in Art.14, nobody has said so far nor can say that the scope of this entire Article is identical. Article 15 is a provision which prohibits discrimination not only by the state but also by private persons, with respect to the user of certain public utilities and places. The matter of employment cannot be held to have been included within the ambit of Art.15, for, then, there would not have been necessary to adopt another special provision dealing exclusively with public employment.<sup>280</sup> Clause (1) of Article 16 is wider than clause (2) and prohibits discrimination on any ground other than those mentioned in clause (3) and (4). Hence a preference given to political sufferers would be hit by clause (1). It is to be noted; however that exclusion from a state service on the ground of want of knowledge of the regional language has been held by Supreme Court to be a reasonable classification for the purpose of Art 14.<sup>281</sup>

## **RESERVATION IN THE EDUCATIONAL INSTITUTIONS**

Article 15 as originally enacted contained only three sub-clauses. Sub- clause (4) was inserted by the Constitution (1<sup>st</sup> Amendment) Act, 1951, as a result of the decision in *State of Madras v. Champakam Dorairajan*.<sup>282</sup>

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<sup>279</sup> Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol-B (Articles 14 to 19 ), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012.

<sup>280</sup> Supra note 276.

<sup>281</sup> Pandurangarao v. A. P. P. S. C, A I R 1963 S C 268.

<sup>282</sup> A I R S C 1951 226, in this case the state of madras maintained four medical colleges & only 330 seats are available for students in those four colleges. Out of those 330 seats, 17 seats are reserved for students coming from outside the state & 12 seats are reserved for discretionary allotment by the state & the balance of the seats available are apportioned between four distinct groups of districts on the state.

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Likewise the State of Madras maintains four engineering colleges & the total number of seats available for students in those colleges are only 395. Out of these, 21 seats are reserved for students coming from outside the state, 12 seats are reserved for discretionary allotments by the state & the balance of the seats available are apportioned between the same four distinct groups of districts. For many years before the commencement of the Constitution, the seats in both the medical colleges & the engineering colleges so apportioned between the four distinct groups of districts used to be filled up according to certain proportions set forth in what used to be called the communal G.O. Thus for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis; Non-Brahmins (Hindus) - 6, Backward Hindu - 2, Brahmin-2, Harijans-2, Anglo-Indian & Indian Christian-1, Muslim-1. Subject to the aforesaid regional & what have been claimed to be protective provision selection from among the applicants from a particular community from one of the groups of districts used to be made on certain principles based on academic qualification & marks obtained by the candidates. In the case of the medical colleges, not less than 20% of the total number of seats available for students of the state were filled by women candidates separately for each region, it being open to the selection committee to admit a larger number of women candidates in any region if qualified candidates were available in that region and if they were eligible for selection on merits vis-a vis the men candidates in accordance with the general principles governing such admissions as laid down in those rules. It appears that the proportion fixed in the old communal G.O has been adhered to even after the commencement of the Constitution on 26-1-1950. Indeed, G.O No.2208, dated 16-6-1950, laying down rules for the selection of candidates for admission into the medical colleges substantially reproduces the communal proportion fixed in the old communal G.O.

On 7-6-1950, Smt. Chapakam Dorairajan made an application to the H. C. of Judicature at Madras under Article 226 of the Constitution for protection of her fundamental rights under Articles 15(1) and Article 29 (2) of the Constitution and prayed for the issue of a writ of Mandamus or other suitable prerogative writ restraining the State of Madras and all officers and subordinates thereof from enforcing, observing, maintaining or following or enforcing or requiring the enforcement, observance or following by the authorities concerned of notification as the Communal G. O. in and by which admission into the Madras Medical Colleges were sought or purported to be regulated in such manner as to infringe and involve the violation of her fundamental rights. The Court held that the directive principles of the State Policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs. The Court further held that the chapter of fundamental rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Articles in the part III. The directive principle of state policy has to conform to and run as subsidiary to the chapter of Fundamental Rights. However, so long as there is no infringement of any fundamental right, to the extent conferred by the provisions in part III, there can be no objection to the state acting in accordance with the directive principle set out in part IV, but subject again to the Legislative and Executive powers and limitations conferred on the state under different provisions of the Constitution. Finally the Court found that the Communal G.O. being inconsistent with the provisions of Article 29(2) in part III of the Constitution.

To modify the effect of this decision Article 15 was amended by the constitution (1<sup>st</sup> Amendment) Act, 1951. Under this clause the state is empowered to make special provision for the advancement of any socially and educationally backward classes of citizens or for the schedule caste and schedule tribes. After the amendment it would be possible for the state to put up a Harijans colony in order to advance the interest of the backward classes. The provisions made in clause (4) of Article 15 are only an enabling provision and does not impose any obligation on the state to take any special action under it. It merely confers discretion to act if necessary by way of making special provision for backward classes.

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The object of this clause (4), added in 1951, is to bring Art. 15 and 29 in line with Art.16(4), 46 and 340, and to make it Constitutional for the state to reserve seats for backward classes of citizens, schedule caste and tribes in the public educational institutions, as well as to make other special provisions as may be necessary for their advancement, e.g., to provide housing accommodation to such classes.<sup>283</sup> The immediate object of this amendment was to override the decision in *State of Madras v. Champanam Dorairajan*,<sup>284</sup> to the effect that Article 29(2) was not controlled by Article 46 and that the Constitution did not intend to protect the interest of the backward classes in the matter of admission to educational institutions. Through the amendment would validate reservation for the backward classes and schedule caste and tribe, it would not support the distribution of seats according to communities so as to discriminate between classes who are not backward, inter se; in short, the amendment would not sanction any communal order. Nor would it enable the state to extend the reservation to such an extent as to nullify the guarantee of equality under Article 15(1) altogether.<sup>285</sup>

It is a provision which enable the state to do what would otherwise have been unconstitutional. It does not confer any right upon a member of these classes to compel the state to make such special provisions. Such special provision may be made not only by the legislative but also by the executive.<sup>286</sup> If the special provision is for the advancement of the backward classes and does not altogether render nugatory the general rule of equality in Art. 15(1), the method of making such special provision rests with the state, and the court may not interfere. Such special provision may consists of-

- (a) A reservation of seats for members of backward classes in an educational institution.
- (b) Relaxation of the qualifications required for admission into such institution

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<sup>283</sup> Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol- B (Articles 14 to 19 ), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta- 700012.

<sup>284</sup> A I R 1951 S C 226.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid..

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- (c) Providing housing accommodation to members of such classes, specially.
- (d) Concessional treatment for them in the matter of settlement of government lands.<sup>287</sup>

### **3. V. MEANINGS OF RESERVATION**

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. To put it simply social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunity, race, caste, religion, sex and title.<sup>288</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>289</sup>

The concept of job reservation relies upon government intervention into the labour relations area in order to promote the right of some particular portion of the population. The reasons for this intervention may come from diverse rationales but usually can be reduced to a political one.<sup>290</sup> To quote Principal D.N. Sandashiv,<sup>291</sup> the law of reservations encompasses the protective justice, corrective justice, distributive justice and promotive justice and social justice the expression that embodies within its content all these forms of justice.

The constitution permits the state to adopt such affirmative action as it deems necessary to uplift the backward classes of citizen to levels of equality with the rest of

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<sup>287</sup> Durga Das Basu, *Commentary on the Constitution of India*, Sixth Edition (1975), Vol-B (Articles 14 to 19), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012. 1975.

<sup>288</sup> Harpal Kaur Khehra : *Job Reservation Versus Efficiency of Administration*, C I L Q 1990. p. 28.

<sup>289</sup> Held in *Crown Aluminium Works v. Workmen*. A I R 1956 S C 30.

<sup>290</sup> Paul Lansig and Sarosh Kuruvila, *Job Reservation: A Functional Analysis*. I B R 1986 p. 170.

<sup>291</sup> *Ibid*.

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countrymen. The backward classes of citizen have been in the past denied access to government services on account of their inability to compete effectively in open selections on the basis of merits. It is therefore open to the government to reserve certain number of seat in places of leaning or public services in favour of the schedule castes and schedule tribes and other backward classes to the exclusion of all others, irrespective of merits.

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>292</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 exclusively effects.<sup>293</sup>

The concept of reservation is one of the crucial factors in the Constitution of India to secure socio-economic justice to the downtrodden people and to bring them to the main stream of the national life. The political, social and economic inequalities, which existed in our country prior to our constitution, came into being made many revolutionary and social thinkers to agitate for securing socio-economic and political justice. Consequently, when the Constitution of India was being drafted, the

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<sup>292</sup> Indra Sawhney v. Union of India. A I R 1993 S C 477.

<sup>293</sup> Ibid.

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constitution- makers inserted the concept of equality so that no individual shall be treated unequally. They thought that the meaning of equality based upon individual achievement was too hypocritical in our caste ridden society where group identification had been historically used for the purpose of discrimination and separateness. Therefore, the makers of the Constitution adopted a policy of preferential treatment in favour of certain weaker section of the society to offset the effects of inherited inequalities and remedy historic injustice.<sup>294</sup> In *Chattern Singh v. State of Rajasthan*<sup>295</sup>, the Supreme Court said that the state had evolved the principle of reservation to an office of the state or post as an affirmative action to accord socio-economic justice guaranteed in the preamble of the Constitution; the fundamental rights and the directive principles which are the trinity of the constitution to remove social, educational and economic backwardness as a Constitutional policy to accord equality of opportunity, social status or dignity of persons as enjoined in Article 14, 15, 16, 21, 38, 39, 39-A, 46 etc. Article 335 enjoins the state to take the claims of dalits and tribes into consideration for appointment to an office/post in the services of the state consistently with efficiency of administration. The object of reservation for the schedule caste and schedule tribe is to bring them into the mainstream of national life, while the objective in respect of the backward classes is to remove their social and educational handicaps<sup>296</sup>.

In *Indra Sawhney v. Union of India*,<sup>297</sup> the Supreme Court held that reservations can take various forms whether they are made for backward or other classes. They may consist of preferences, concessions, exemptions, extra facilities etc. or of an exclusive quota in appointment as in the present case. When measure other than an exclusive quota for appointments other than an exclusive quota for appointments are adopted, they form part of the reservation measures or are ancillary to or necessary for availing of the reservations. Whatever the form of reservation, the

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<sup>294</sup> C. Basavaraju, *Constitutional Reservation to SC/ ST – A Perspective*. I B R 2000, p. 155-156.

<sup>296</sup> Ibid.

<sup>297</sup> A I R 1993 S C 477 at 644

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backward classes have to look for them to Art.16 (4) and the other classes to Article 16(1).

The constitutional scheme and context of Article 16(4) make it clear that larger concept of reservations take within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exception, concession and relaxations consistent no doubt with the requirement of maintenance of efficiency of administration- the admonition of Art.335. Therefore, where the state finds it necessary for the purpose of giving full effect to the provision of reservation to provide certain exemption, concession or preferences to members of backward classes, it can extend the same under clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provision for reservation can be provided as part of concept of reservations itself. Similarly, in a given situation, the state may think that in the case of a particular backward class it is not necessary to provide reservation of appointment/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under clause (4) itself.<sup>298</sup>

### **3. VI. AIMS AND OBJECTIVES OF RESERVATION**

The aim of any civilized society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities is a walk of social life, is a denial of equal status and equal participation in the affairs of the society and therefore, of its equal membership. The dignity of the individual is dented and direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing, and give one's best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct and indirect as when the wherewithal's to avail of them,

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<sup>298</sup> Indra Sawhney v. Union of India, AIR 1993 S C 477

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are denied. Nevertheless, the consequences are as patent. Inequality ill- favours fraternity and unity remains a dream without fraternity. The goal enumerated in the preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all<sup>299</sup>.

Likewise, the social and political justice pledged by the preamble of the Constitution to be secured to all citizen, will remain a myth unless first economic justice is guaranteed to all. The liberty of thought and expression also will remain on paper in the face of economic deprivations. A remunerative occupation is a means not only of economic upliftment but also of instilling in the individual self-assurance, self-esteem and self-worthiness. It also accords him a status and dignity as an independent and useful member of the society. It enables him to participate in the affairs of the society without dependence on, or domination by, others, and on equal plane depending upon the nature, security and remuneration of the occupation. Employment is an important and by far the dominant remunerative occupation, and when it is with the government, semi-government or government- controlled organization, it had an added edge. It is coupled with power and prestige of varying degrees and nature, depending upon the establishment and the post. The employment under the state, by itself, may, many times help achieve the triple goal of social, economic and political justice<sup>300</sup>.

The employment – whether private or public thus, is a means of social leveling and when it is public is also a means of direct 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 economic justice to them as ordained by the preamble of the Constitution. It is no longer necessary to emphasis that equality contemplated by Article 14 and other cognate Article including Article 15(1), 16(1), 29(2) and 38(2) of the Constitution, is secured not only when equal are

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<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

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treated equally but also when unequal are treated unequally conversely, when unequal are treated equally, the mandate of equality before law is breached. To bring about equality between the unequal therefore, it is necessary to adopt positive measure to abolish inequality. The equalizing measure will have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalization will not be of the unequals.

Article 14 which guarantees equality before law would by itself, without any other provision in the constitution, be rough to validates such equalizing measures. The founder of the Constitution, however, thought it advisable to incorporate another provision, viz., Article 16 specifically providing for equality of opportunity in matter of public employment. Further they emphasized in clause (4) therefore that for equalize the employment opportunities in the service under the state, the state may adopt positive measures for reservation of appointment or post in favor of any backward class of citizen which in the opinion the state, is not adequately represented in such service by hind sight, the foresight shown in making the provision specifically instead of leaving it only to the equality provision as under the U.S Constitution is more than vindicated. The absence of such provision may well have led to total denial of equal opportunity in the most vital sphere of the state activity. Consequently, Article 38(2) which requires the state in particular to strive to minimize the inequalities income, and Endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also among groups of people residence in different areas or engaged in different vocation and Article 46 which enjoins upon the state to promote which special care the educational and economic interest of the weaker section of the people, and to protect them from social injustice and all forms of exploitations, and Article 335 which requires the state to leave into consideration the claims of the schedule caste and schedule tribes in making the appointment to service and post under the union or state, would have, all probably remained on paper. The family of the goals of the Constitution, viz. socialism, secularism and democracy cannot be realized unless all section of the society participate in the state power equally irrespective if their caste, community, race, religion and sex and all

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discrimination in the sharing of the state power made on those grounds are eliminated by positive measures<sup>301</sup>.

The purpose of the reservation is to help the weaker section of the society whose weakness is quantitative and not as they suffer from qualitative infirmities due to lack of educational facilities, economic opportunities, social status, places or habitation and nature of occupation followed.<sup>302</sup>

The reservation are aimed at securing proper representation in administration to all section of the society, intelligence and administration capacity being not the monopoly of any one class, caste or communities. This would help to promote healthy administration of the country avoiding sectarian approaches and securing the requisites talent from all available sources.<sup>303</sup>

The objectives of reservation may be spelt out variously. The U.S Supreme Court held in *Metro Broadcasting, Inc. v. Federal Communications*<sup>304</sup> and in *Macro Defunis etc. al. v. Charles Odegaard*,<sup>305</sup> that the reservation or affirmative action may be undertaken to remove the persisting or present and continuing effects of past discrimination to lift the limitation on access to equal opportunities to grant opportunities for full participation in the governance of the society; to recognize the discharge special obligation towards the disadvantages and discriminated social groups, to overcome substantial chronic under representation of social group, or to serve the important governmental objectives. What applies to American society, applies ex prop Rio vigor to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous.

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<sup>301</sup> Indra Sawhney v. Union of India, AIR 1993 S C 477

<sup>302</sup> Harpal Kaur Khehra. *Job Reservation Versus Efficiency of Administration*. C I L Q 1990 p.29.

<sup>303</sup> Indra Sawhney v. Union Of India, A I R 1993 S C 477.

<sup>304</sup> (1990) III Law Ed 2d 445, Quated in Indra Sawhney v. Union of India A I R 1993 S C 477.

<sup>305</sup> 40 Law Ed 2d 164. Quated in Ibid note.

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The objects of the reservation policy is stated to be to promote and protect educational and economic interest of the weaker section of society such reservation is said to be permitted under Article 15(4) and Article 46 for admission to educational institutes while under Article 16(4) read with Article 335 as well as Article 46 provide for the reservation of claim of the Scheduled Castes and Scheduled Tribes service and post.<sup>306</sup> The main objective of providing reservation for the Scheduled Castes and Scheduled Tribes and the backwards class in civil posts and service of the government is not just to give jobs to some person belonging to those communities and therefore increase their representation in the service but to uplift these people socially and educationally and to provide proper place for them in the society<sup>307</sup>.

Sri. K. G. Balakrishna, CJI., in the matter of reservation of seats in central higher educational institutes for OBC opined in *Ashok Kumar Thakur v. Union of India*,<sup>308</sup> that reservation is one of the many tools that are used to preserve and promote the essence of equality so that disadvantage groups can be brought to the forefront of civil life. It is also the duty of the state to promote positive measure to remove barriers of inequalities and enable diverse communities to enjoy the freedom and share the benefits guaranteed by the Constitution. In the context of education any measure that promotes the sharing of knowledge, information and ideas and encourages and improves learning among India's vast diverse classes deserves encouragement to cope with the modern world and its complexities and turbulent problems, education is a must and cannot remain cloistered for the benefits of a privileged few. Reservation provide that extra advantage to those person who without such support can forever only dream of university education, without ever being able to realize it. This advantage is necessary. He also quoted the words of President Lyndon Johnson, "you do not take a person who, for years has been hobbled by chains and liberate him, bring him up to the starting line and then say, 'you are free to complete with all the others.'"

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<sup>306</sup> S Musharraf Ali. *Mandal Commission Report: Need for a Fresh Look*, C I L Q 1991 p.179.

<sup>307</sup> M A A Baig. *Backward Classes : An Appraisal of the Constitutional Provisions Relating to their Classifications and Upliftment Through Job Reservatin* ; I B R 1996 p. 89.

<sup>308</sup> (2008) 6 S C C at 446.

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Dr. Rajendra Prasad<sup>309</sup>, at the concluding address of the Constitution Assembly, stated in the following words:

“To all we give the assurance that it will be our endeavor to end poverty and squalor and its companion, hunger and diseases; to abolish distinction and explanation and to ensure decent condition of living. We are in embarking on a great task. We hope that in this we shall have the unstinted service and cooperation of all our people and the sympathy and support of all the communities”.

### **3. VII. IS ARTICLE 16(4) EXCEPTION OR EXPLANATIONS TO ARTICLE 14 AND 16(1)?**

Whether 16(4) is provision or explanation to Article 16(1) will ultimately depend upon the meaning one would, give to “equality” notion under the Indian Constitution. If equality guaranteed under Article 14, 15(1) and 16(1) is conceived as formal equality requiring the uniform distribution of governmental benefits and protecting meritocracy, then Article 15(4) or 16(4) are the exceptions to the equality clauses. If on the other hand, the Articles 14, 15(1) and 16(1) are viewed as including the broader notion of proportional equality or substantive equality then Article 15(4) and 16(4) are not the exceptions but only explanations of the main provisions. If Article 15(4) and 16(4) are viewed as exception then the state will be limited to only those forms of preferences which are expressly authorized by these clauses.<sup>310</sup>

In *Balaji*,<sup>311</sup> case it was held that there is no doubt that Article 15(4) has to be read as a proviso or an exception to Article 15 (1) and 29(2). It was observed that Article 15(4) was inserted by the first amendment in the light of the decision in *Champakam case*<sup>312</sup>, with a view to remove the defect pointed out by this court

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<sup>309</sup> Ibid.

<sup>310</sup> Parmanand Singh. *Equality, Reservation and Discrimination in India. A Constitutional Study of Scheduled Caste and Scheduled Tribes and Other Backward Classes* Deep and Deep Publication, D-1/24 Rajouri Garden, New Delhi.1985,

<sup>311</sup> M. R. Balaji v. State of Mysore. A I R 1963 S C 649.

<sup>312</sup> A I R 1951 S C 226.

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namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. In *Devadasan* case,<sup>313</sup> the Supreme Court held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1). Subbarao.J., however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that is only an emphatic way of stating the principle inherent in the main provision itself. Since the decision in *Devandasan*, it was assured by the Supreme Court that Article 16(4) is an exception to Article 16(1). This view however received a severe set-back from the majority decision in *State of Kerala v. N. M. Thomas*,<sup>314</sup> the majority held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). Though the minority stuck to the view that Article 16(1) being a fact of the doctrine of equality enshrined in Article 14 permits reasonable classification just Article 14 does. Article 16(4) is an instance of such classification. The backward classes of citizens are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the state. Accordingly the court held that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1).

### **3. VIII. RESERVATION AND SOCIAL JUSTICE**

The concept of justice is of imponderable import and has been the watchword of all major social and political reforms movement since times immemorial. All social thinkers from Plato to Gandhi ji and others have been making supreme endless efforts in quest of justice in order to abolish injustice, tyranny and exploitation. All their energies whether material, mental or moral have been devoted to the sole cause of justice. States whether ancient or modern capitalistic or socialistic, democratic or authoritarian have been self proclaiming to be governed by the yard scales of justice and take pride in being styled as a just state with just law and just social order. However what is justice is an imponderable problem. Justice is generally equated with

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<sup>313</sup> A I R 1964 S C 179.

<sup>314</sup> A I R 1976 S C 490.

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truth fullness, rightness, goodness, equality, mercy, charity etc. and all these expressions being relative and vague have been eulogized universally as worthy of emulation and application in the ordering of human relation. However what constitutes justice at a particular time and place is not definite the standard of reasonableness, truth and justice has to be measured necessarily on the basis of shared values which are common to mankind. Therefore justice is that makes man to live honestly, not to injure any one to give everyone his due. As such justice is not a mere fantasy but a necessary and desirable goal of law and society.<sup>315</sup>

Justice is both an objective reality as well as abstract quality outside and within the realm of law involving values and reality, ethics and morality, equality and liberty, individual freedom and social control condition by the need of individual good and community interest.<sup>316</sup> The notion of justice varies with time and place what is just at particular given time has not been generally considered at another. What should be good or right or justice at a particular epoch is conditioned by social milieu and moral ethos of each community. Hence search for justice is eternal quest and no attempt to delineate its contour can succeed. Nevertheless this concept continues to be of abiding interest of thinkers and philosophers, jurist and judges.<sup>317</sup> At every interval of human history we find competing formulation and enunciations of theories of justice. Philosophers have been measuring in terms of distribution according to merit, capacity or need or in conformity to custom or equal opportunity for self development, utility or morality or as balancing of interest or felt- necessities of the people etc.<sup>318</sup>

The concept of social justice denotes a philosophy of life and sets a way in which all social life should behave. Further, this concept is believed to be of a revolutionary import. There has been a historical process through which this concept,

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<sup>315</sup> S. N Dhayani: Fundamentals of Jurisprudence. The India Approach (2002), Central Law Agency Allahabad – 2, p. 129

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

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which was initially a doctrine of social philosophy, had entered into state craft and captured the Constitutional field. The glorious revolution of 1688 in England with its achievement in the Bill of Rights (1689), the American War of Independence with its fruition in 1776, the French Revolution with its success in the declaration of the rights of man (1789) and the Russian Revolution of 1917 with its resurgence from the despotism of Czars, were political in their outlook and consequences yet of them each were motivated by social causes.<sup>319</sup> This social Philosophy assumed a political shape because, in the Visia of the fathers of all such revolutions, the then existing political set-up was the only barrier impeding the proper harmony of the individual with his society. Justice is generally divided into legal and social. “Legal justice concerns the punishment of wrongdoing and the compensation of injury through the creation and enforcement of a public set of rules. Social justice requires equitable or just distribution of social goods and evils or of burden and benefits.<sup>320</sup> The task of just distribution in the present day society has to be performed primarily by the state and therefore, though social justice may cover even private, or in Aristotle’s language ‘corrective’ justice, yet it is mainly concerned with distribution through the agency of the state. To operationalise the general notion of social justice from time to time thinkers have laid down several principles of distribution. Some of these principles are :- (1) to each according to this need; (2) to each according to his worth ; (3) to each according to his merit (4) to each according to his work; (5) to each according to the agreement he has made; and (6) to each according to his claims.<sup>321</sup> The principles are neither completely mutually exclusive nor exhaustive. They also find different treatment in the hands of different writers. They may however all be put under the rubric of “to each his due.” What is one’s” due” is not easy to determine and these various principles attempt to provide a measurement or slandered to arrive at that “due”. Multiplicity of these principles, however, proves that no are standard is acceptable to all.<sup>322</sup>

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<sup>319</sup> R. C. Chaturvedi. *Natural and Social Justice*. Law Book Company, Sardar Patel Marge, Allahabad (1980) p. 467.

<sup>320</sup> M. P. Singh. *Jurisprudential Foundation of Reservation*. 17 & 18 (1990-91) I B R, p. 247

<sup>321</sup> Ibid Note 158.

<sup>322</sup> Ibid.

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Justice K. Subba Rao has an analysis with a distinction He explains: social justice is a compound word wherein justice is the noun and social is the adjective.<sup>323</sup> It means that the social justice is one of the disciplines of Justice Social relates to the society. Justice is a virtue of being just and fair to all individuals, to give every one, what is due. It depends upon time, place and circumstances. It conveys that as far as possible there shall be equality<sup>324</sup>. Whatever might be the peculiarities of social justice, it cannot reasonably claim existences outside the concept of justice'. David Miller in his treatise open with: "the concept of social of justice is best understood as forming one part of the broader concept of justice in general." It is conveyed that "justice" is a body of which "social justice" is one of the species.<sup>325</sup>

Social justice is a branch of justice which deals with the responsibilities of the state to promote the welfare of backward classes and the weaker section of society by improving their social and economic condition and protecting them from all kinds of exploitation.<sup>326</sup> A just state would then be one which can supply in abundance the need of her people. In the fulfillment of their needs lies welfare of the people. In the modern phraseology, a welfare state in rightly another name for a just state. The first and greater necessity is food which is the condition of life and existence. The second is dwelling the third clothing, then education, then right to work and leisure, then freedom from exploitation, and so on and so forth. The more a state is able to make provision for the greatest number of wants, the more she is approximate to the idea of a luxurious state. The more she is so, the more she will be able to secure social justice to her people.<sup>327</sup>

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<sup>323</sup> Justice Ashok A Desai, *Justice versus Justices Taxmann's Allied Services (P) Ltd.*, New Delhi.2000. pp 10-11

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> S. M. Raina. *Radical Approach to the Question of Reservation*. C I L Q 1990 p. 501.

<sup>327</sup> R. C. Chaturvedi, *Natural and Social Justice*. Law Book Company, Sardar Patel Marge, Allahabad. 1980. p. 10.

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Social justice is the concomitant of a just state; it is concurrent with a just order of society. The prototype of a just state is one which strives to promote the welfare of the people by securing and protecting as effectively as she may, a social order in which justice social, economic and political, shall inform all the institutions of the national life. That state is able to secure to her citizens social justice which directs its policy by legislation or otherwise, towards securing to her people the right to an adequate means of livelihood that the material resources of the community are preserved from concentration and distributed only to sub serves common good; that there is equality before the law and equality of opportunity in matters relating to public life; that the health and strength of workers is not abused by sheer force of economic necessity; that children and youth are protected against exploitation; and so forth that the dignity of the individual is assured that he can realize his personality to the fullest of his being in all walks of life<sup>328</sup>.

The master mind of Aristotle was superior to most people's and his pioneer analysis still serves as crucible into which even modern craftsman continue to pour problems of the 20th century in the hope that an acceptable brew will emerge. In dealing with particular justice as distinct from universal justice, he distinguishes between distributions among equals. Corrective justice seeks to restore equals when this has been distributed e.g. by wrong doing, which assumes that the situation that has been upset was distributively just<sup>329</sup>. However the application of his distinction to the problems of distributive justice might posthumously tinger his allusion to justice with some relevance starting with disadvantages, the most abundant of these are duties and liabilities. The imposition of duties is always distasted by policy. Doing justice here involves balancing various considerations for which no rules can be laid down with regards to imposition of liabilities, equalities should be very rough guide so that special variation in their incidence require justification with regards to disabilities, when these affects large numbers of people the question of justice concern their removal so as to produced equalities of advantages rather than the

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<sup>328</sup> Ibid.

<sup>329</sup> R. W. N. Dias. Jurisprudence, Aditya Books Private Limited. New Delhi. 1994. p. 68

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imposition e.g., those attaching to women. Advantages may be divided into claims, liberty, power and immunities.<sup>330</sup> With regards to claims professor Horore<sup>331</sup> invites his readers to consider not primarily the duty to act justly but the demand for just treatment; and he continues ‘following Hohfelds usage it seems appropriate to use the word “claim” in this context to mark the point that we are here concerned not as we are in the analysis of liberty with the question “what are men permitted to do? But with the question “what are men entitled to demands”. For this purpose claim can be divided into those correlative to negative and positive duties. With regard to negative duties, e.g., the duties not to injure others, no one should be accorded less protection by the way of correlative claims than his neighbour unless he forfeits it by choice or his own conduct e.g., by consent or aggression. With regard to claims correlative to positive duties, these can be divided into claims against individuals and against the state. The allocation of the latter type of claim depends on state policy e.g., that the state shall provide basic subsistence. Professor Horore speaks of advantages which are generally desired and are in fact conducive to their well being, mean such things as life health, food, shelter, clothing, places to move in, opportunities for acquiring knowledge and skill for sharing in the process of making decision for recreation, travel etc. Men not only have a claim to these things but to an equal share in them.<sup>332</sup>

The basic proposition of Communist theory is that economic forces determine the character of law and that it is not the result of free activity of legislature, judges and jurist. The material condition of production determines the social condition which finds expression in laws, religion, justice, metaphysics etc. of the people.<sup>333</sup> Hence the conception of justice in the communist society is conditional by forces which bring about equality from each according to his ability to each according to his needs The communist theory combines two principles in explaining the idea of justice, namely to each according to his ability and to each according to his needs. Thus merits and

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<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> S. N. Dhyani, Fundamentals of Jurisprudence the Indian Approach. Central Law Agency, Allahabad. 2002. p 142.

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needs principles do not contradict each other but strive in establishing a practical equality which does not ignore merit yet satisfies the needs irrespective of capacity or work in other words individuals merit or desert gets recognized yet his need can be summed up as justice in the communist sense.<sup>334</sup>

The Soviet jurists do not employ the term justice as a concept of juristic value and instead use the phrase Socialist legality. The term Socialist legality connotes the establishment of a classless society based on the principles of real equality non-exploitation, ownership of the means of production in the hands of the state etc. The function of law and court in the Communist society is to defend and further the interests of the working class and promote the progress of the society what is described as socialist legality is anti- thesis of capitalist justice which aims at reconciling interests of the rich and poor, strong and weak on false legal equality in so far as economically and socially weak sections of society are concerned and treats the rich and poor by the same scale.<sup>335</sup>

Gandhiji's life is a saga of fighting injustice, tyranny and inequality in order to establish a new socio-economic order based on truth, equality and non-exploitation. He fought racialism in South Africa and imperial British rulers in India because both of these evils were contrary to the principles of human liberty, dignity and equality. He crusades for the liberation of depressed classes in India is the testimony of his commitment to equality and social justice. In short he was against all kind of unjust social, economic and political order.<sup>336</sup> Adhering to such philosophy of human equality and justice for all, Gandhi spiritualized politics, economic and social philosophy and advocated socialism by wise renunciation of wealth. He subscribed to the Marxian formula 'to each according to his needs' to be translated by love and not violence, by persuasion and not by coercion.<sup>337</sup>

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<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> S. N. Dhyani, Fundamentals of Jurisprudence the Indian approach. Central Law Agency, Allahabad. 2002. p 142.

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Social justice is an advanced mode of state-craft. It is through this advanced mode that a service state has emerged out of a police state. In this field, justice does not mean just decision but a just existence. It enjoys upon the state a way of life to be set for the individual rather than to set a way how justice is to be administered. It is a principle binding upon a tribunal. It is yet a philosophy to be observed by the state in the formulation of its legislative policy but is not a procedure to be followed by judicial or administrative tribunals. This is the fundamental differences between natural justice and social justice that whereas the one has totally transformed some principles of philosophy into a procedure of justice, the other is yet a philosophy superimposed on the legal system.<sup>338</sup>

Socialism seems to be a utopian programmed of social welfare. Social welfare is criteria of social prosperity or a standard of general happiness. The standard is a pattern which has either become a thing in itself or is one yet in progress of becoming. In the former case, it is a way to life, and in the latter, a pursuit of life; but both have their roots in the meaning of life, in the purpose for which life suffers and sustains. Social justice is conformity of social behavior with social purpose.

Social justice in our Socialist Republic is socio-economic revolution in the current miasmatic milieu and in contemporary India the human condition is so poi grant that governments have been constrained to profess and promise revolutionary change, from socialistic pattern through '*garibi hatao*' (removal of poverty), to total revolution. To epitomize, social justice is of revolutionary import although dismissed by many as a vague ideal or glittering phrase or a Constitutional dope.<sup>339</sup>

When we speak of social justice in the Indian context, we have to focus on its human dynamics. The content of social justice was best expressed in lay eloquence by

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<sup>338</sup> R. C. Chaturvedi. *Natural and Social Justice*. Law Book Company, Sardar Patel Marge, Allahabad. 1980. . p. 16.

<sup>339</sup> V. R. Krishna Iyer. *Some Half-Hidden Aspects of India Social Justice* Eastern Book Company, Lucknow. 1979. p. 5

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Nehru at the dawn of our freedom. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.<sup>340</sup>

Social justice, Constitutionally accented but left undefined, is a relative concept taking in its wings the people, their traditions and aspirations, their turmoil and torments, their backwardness, blood, sweat and tears.<sup>341</sup> The democracy took upon itself the task of attacking five giant evils; want diseases, ignorance, squalor and idleness. Basically, all these five giant units thrive on the fundamental evil of property. Therefore, under the concept of welfare state, the primary function of the state to attack the problem of poverty, assumes considerable significance. Democracy realizes that this problem which concerns an overwhelming large number of its citizens cannot be successfully met unless it wisely uses its mighty weapon of law and attempts to restore balance to the economic structure and to remove the causes of economic tension from the body politic of the community. All the attempts made by democratic legislature to meet the challenge to poverty constitute attempts to give to the citizen of the state economic justice.<sup>342</sup> Equality of opportunity to all citizens to develop their individual personalities and to participate in the pleasure and happiness of life is the goal of economic justice. Social justice as distinguished from economic justice has a special significance in the context of Indian society. As we are all aware, the Hindu social structure is based on caste and communities which creates wall and barriers of exclusiveness and proceed on the basis of consideration of superiority and inferiority.<sup>343</sup>

This vice of social inequality assumes a particular reprehensible form in relation to the backward classes and communities which are treated as untouchable

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<sup>340</sup> Ibid at 13.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid at 33

<sup>343</sup> Ibid at 33

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and so the problem of social justice is as urgent and important in India as in the problem of economic justice .....Using the term social justice in a comprehensive sense so as to include both economic justice and social justice. The concept of social justice thus takes within its sweep the removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities.<sup>344</sup>

Social justice is a relative concept with changing context dependent on time and circumstances, on people culture and aspirations. We concern ourselves with an ancient Asian member of the Third World with its inherited injustices, cultural kinds and enormous economic, social and demographic problems.<sup>345</sup> So our perception must be conditioned by the past, present and future and the traditions and aspirations of the broad community in working its way towards liberation, all of which have, in good measure, codified in our Constitution but even within the Constitution, which is the sanction for the correction of the old way of life and the direction for the new social order, there is spacious scope for interpretation guided by social perspective.<sup>346</sup> The Indian Constitution, says Granville Austin, is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the renascence, the core of the commitment to the social revolution lies in parts III and IV, in the Fundamental Rights and the Directive Principles of State Policy. These are the conscience of the Constitution.<sup>347</sup>

The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence and they are included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The rights and principles thus connect India's future, present and past adding greatly to the

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<sup>344</sup> Ibid at 33.

<sup>345</sup> Ibid at 35.

<sup>346</sup> Ibid at 35.

<sup>347</sup> Ibid.

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significance of their inclusion in the Constitution and giving strength to the pursuit of the social revolution in India.<sup>348</sup>

Dr. Ambedkar regarded part IV as a socialist chapter and contended that the intention of the nation was not to pay lip service to these principle but they were to be made the basis of all legislative and executive action that they might be taking hereafter in the matter of the governance of the country. He vehemently objected to making the Constitution any other then a mere political contrivance. He cited the Directive Principles as giving us the substance of a socialistic state. He said “if these directive principles are not socialistic in their direction and in their contents, I fail to understand what more socialism can be. Thus, social justice is the balancing wheel between freedom, political, economic and indeed makes for the survival of democracy.”<sup>349</sup>

By the time our Constitution makers began their deliberations the weakness of the meritarian concept of market and individualistic society leading to wide spread social injustice had already been exposed by thinkers like saint Simon, Durkheim, the Webbs, Tawney, Laski, and Green. These thinkers had also drawn an alternative plan for a new society which will assure greater equality to all and take in to account the existing disabilities of the people. Laying down the foundation of a social welfare state they emphasized that social good result from the national coordination of the activities of altruistic men, rather than from the free play of individuals self interest. These ideas had immensely impressed the leading figures is our freedom struggle as well as the Constitution makers. They thought that the solution to Indian problem lay in the implementation of these ideas.<sup>350</sup>

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<sup>348</sup> Ibid. 35

<sup>349</sup> Ibid.

<sup>350</sup> M. P. Singh. *Jurisprudential Foundation of Reservation*. 17 & 18 (1990-1991) I B R . p. 255

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This is the background in which our Constitution, describe first and for most a social document was drafted .Although like the Constitution of the USSR, or the People Republic of China, it does not embody any specific principles or maxim of social justice, yet certainly it cannot be supposed to have recognized merit as the social or even dominant basis of social arrangement and allocation of social goods. This is crystal clear from its provision. Its Preamble makes explicit in bold letters our resolves to constitute India into a socialist, democratic, republic with the view to securing , inter alia, social, economic, and political justice, equality, liberty , and above all, dignity of the individuals. Translating these general principles into concrete legal proposition, Part III of the constitution guarantees certain fundamentals rights to the individuals which are not at all negative in character but envisage positive state action. Among these rights Articles 14, 15, 16 and 17 deal with other facets of social justice. The right to equality in its various facets, including the authorization of the state to take affirmative action for the benefits of the backward classes, the scheduled caste, and the Scheduled Tribes, abolition of Untouchability, prohibition of traffic in human beings are clearly representative of egalitarian as opposed to meritarian concept.<sup>351</sup>

The same concept has been expressed with greater clarity in the directive principles of the state policy contained in part IV. The directives in no uncertain terms require the state inter alia, to promote the welfare of the people by securing and protecting a social order in which justice, social , economic and political should inform all the institution of national life, to reduce economic disparities; to make available adequate means of livelihood; to distribute the ownership and common good; to operate the economic system in such a way that it does not result in the concentration of wealth and means of production to the common detriment; to promote health and strength of workers and children of tender age against abuse, to provide for legal assistance and aid, to provide right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement and the

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<sup>351</sup> Ibid at 256

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others cases of undeserved want; to secure just and human condition of work and provision for maternity relief, to provide for living wages and condition of work ensuring descent standard of life and full enjoyment of leisure and social and cultural opportunities, to promote with special care the educational and economic interest of the weaker section of the people of their protection from social injustice and all forms of exploitation, and to raise the level of nutrition and the standard of living and public health. These principles can be enforced notwithstanding the general right to equality in Article 14 and right to the six freedom in Article 19<sup>352</sup>. Part IV specially, Articles 38, 39, 39-A, 41, 43, 43-A and 46 sums up the socio-economic facets of social justice.<sup>353</sup>

Justice K. Subba Rao remarks; “it is impossible to make all men equal”. Justice to all and not a favoured class. Justice may demand preferential treatment to the weaker section, to correct the imbalance and not to cause unnecessary harassment to the advanced section thereof. In broader sense it endeavors to remove the imbalances in the political, social and economic life of the people.<sup>354</sup> He summarized social justice, as a constitutional process and also an object of democracy where in social justice may be defined as justice to all members of the society in all facts of human activities. The doctrine of equality is the foundation of law. The concept of social justice implements doctrine of equality and it gives practical contents to the latter. The doctrine of social justice and equality are complementary to each other and maintain their potency. They should also be so harmonized that both of them should maintain their vitality. In democratic countries, rule of law has become a potent instrument of social justice.<sup>355</sup>

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<sup>352</sup> Ibid at 256.

<sup>353</sup> Ibid.

<sup>354</sup> Quoted in Ashok A Desai, Justice VEersus Justices (2000) Taxman’s Allied Service (P) LTD. New Delhi. P. 11.

<sup>355</sup> Ibid.

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As justice is the key-stone of our constitution and the principle of equality is the very foundation of justice<sup>356</sup> but our 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 right. Their education, wages, living condition, social status was distilled by the whims of upper strata of society, reducing them to destitution. The economic backwardness brought social backwardness which consequently made them downtrodden and thus depriving them even of the dignity of life. In a society of power, enabling themselves to run their whips, prejudicial to the interest of lower segment of the society. Lower caste had to serve the upper castes without having any say and grievance redressal mechanism. This inhumane and barbaric condition perpetuated for centuries.<sup>357</sup> Members of the lower strata or disadvantaged class cannot compete with the people of privileged class on equal footing and that is why framers of our constitution sought to elevate the unprivileged to the level of privileged or other by distributing the things in proportion to the disability they have earned in the past.<sup>358</sup>

In order to check furtherance of injustice and sufferings of people because of their handicaps of being born in a particular class, community or caste, our Constitution prohibits the state from discriminating on grounds of religions, race, caste, sex or place of birth.<sup>359</sup> The state had vast power to make reservation in employment and admission for such backward people or down trodden people.<sup>360</sup> Any state- socialistic or otherwise which thinks in terms of well being of its inhabitants has to take care of the last person of its soil. In a nation with limited resources like ours, the need to treat those unfortunate millions, by distributing higher dividends could not rationally be debated. This is the supporting treatment to the less equal to minimize the imbalance. Thus, the civilized society ordains. It takes shape of constitutional

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<sup>356</sup> S. M. N. Raina. *Reservation with Justice*. C I L Q 1990 p. 1.

<sup>357</sup> K. P. Singh Mahalwar. *Protective Discrimination and Some Socio- legal Perspective*. C I L Q 1989 p. 244.

<sup>358</sup> Ibid.

<sup>359</sup> Harpal Kaur Khehra. *Job Reservations Versus Efficiency of Administration*, C I L Q 1990 p. 28

<sup>360</sup> Ibid

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objectives which are, however, to be accomplished by the modus operandi evolved and within the parameters prescribed by the Constitution itself. The social justice as one of the Constitutional objectives is to be aimed at accordingly. Distribution have to reach to the less equals in a proportion as commanded by the Constitutional scheme<sup>361</sup>.

Thus reservation is the means to promote the goal of social justice. To put it simply, by social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunities, race, caste, religion, sex and title<sup>362</sup>.

Justice E. S. Venkatamaiah, in the case of *Crown Aluminum Works v. Workmen*<sup>363</sup>, held, social justice in a broad sense involves political justice and in restricted sense economic or distributive justice. Political justice is sought to be guaranteed in our country by a constitutional mechanism providing for elected legislatures, parliamentary executive and an independent judiciary. Social justice measures which are introduced to reduce the effect of centuries old social injustice include abolition of untouchables, reservation of seats in educational institutions and of posts in government employment, reservation of seats in elected bodies and certain other positive measures such as financial assistance given to socially and economically backward people in order to ameliorate their condition.

To quote Principal D.N Sandanshiv<sup>364</sup> the law of reservation encompasses the protective justice, corrective justice, distributive justice and promotive justice and social justice is the expression that embodies within its contents all these four forms of justice. The purpose of the reservation is thus to help the weaker sections of the society, whose weakness qualitative and not quantitative as they suffer from

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<sup>361</sup> Justice Ashok A.Desai. *Justice versus Justices*, Taxmann's Allied service (P) ltd. New Delhi. 2000 . p.12.

<sup>362</sup>.Ibid.

<sup>363</sup> A I R 1958 S C 30

<sup>364</sup> Quoted in Harpal Kaur Khehra. *Job Reservations Versus Efficiency of Administration*, C I L Q 1990 p. 28

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qualitative infirmities due to lack of education facilities, economic opportunities, social status, places of habitation and nature of occupation followed<sup>365</sup>.

### **3. IX. PROTECTIVE DISCRIMINATION IN THE UNITED STATES**

In the United States, the problem of blacks (Negros)- holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in U.S.A. the problem is just 200 years old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters.<sup>366</sup> In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. In quick succession followed several decisions in the U. S. A. which effectively out-looked all discrimination against blacks in all walks of life. But the ground realities remained. Socially, educationally and economically blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their marks. They were still unable to compete with their white counterparts. Similarly was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of persisting effects of past-discrimination. The Congress, the State University and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally these measures were challenged in courts with varying results. Although like the Constitution of India, the U.S. Constitution does not in terms authorize positive or protective discrimination, it was very soon realized that it was too hypothetical to talk about equality based upon individual achievement when the

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<sup>365</sup> Ibid.

<sup>366</sup> Dred Scott v. Sandford (1857)15 Law Ed 691, Quoted in A I R 1993 S C 477 at 529.

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deprivations and injustices were suffered by the Negroes as a group because of past and present societal discrimination.<sup>367</sup> The matter eventually went before the courts. In 1974 the constitutionality of racial preferences reached the U. S. Supreme Court in *De Funis v. Odegaard*.<sup>368</sup>

In *Defunis v. Charles Odegard*,<sup>369</sup> the University of Washington Law School, in December 1973, an admission policy where under certain percentage of seats in the Law School were reserved for minority racial groups. The admission policy stated that because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under representation can effect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admission policy to contribute to the solution of the problem. The procedure for admission for the minority students was different and of a lesser standard than the one adopted for all others. *Defunis*, a non-minority student was denied admission while granting it to minority applicants with lower evaluation. He commenced an action challenging the validity of the programme. According to him, the special admissions programme was violative of the equal protection clause in the Fourteenth Amendment<sup>370</sup>.

The trial court granted the requested relief including admission to the plaintiff. On appeal, the Supreme Court of Washington reversed the Trial Court's judgment. It upheld the constitutionality of the admission policy. The matter was brought by Defunis to United States Supreme Court by way of certiorari. The judgment of the Washington Supreme Court was stayed pending the decision. Four of the judges Brennan, Douglas, White and Marshall, JJ., however, did not agree with that view. Of them, only Douglas, J., recorded his reasons for upholding the special admissions'

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<sup>367</sup> Permanand Singh. *Equality, Reservation and Discrimination in India. A Constitutional Study of Scheduled Caste, Scheduled Tribes and Other Backwaed Classes.*, Deep and Deep Publications, Rajouri Garden, New Delhi (1985) p. 54.

<sup>368</sup> Infra Note 414.

<sup>369</sup> (1974) 40 Law Ed 2d 164

<sup>370</sup> Ibid

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programme. The learned Judge was of the opinion that the equal protection clause did not require that law school employ and admissions formula based solely upon testing results and under-graduate grades nor does it prohibit Law Schools from evaluating an applicant's prior achievements in the light of the barriers that he had to overcome<sup>371</sup>.

The learned Judge while agreeing that any programme employing racial classification to favour certain minority groups would be subject to strict scrutiny under the Equal Protection Clause, yet concluded that the material placed before the court did not establish that Defunis was invidiously discriminated against because of his race. Accordingly, he opined that the matter should be remanded for trial to consider whether the plaintiff has been individually discriminated against because of his race.<sup>372</sup>

The next case is in *Regents of the University of California v. Allen Bakke*.<sup>373</sup> The medical school of the University of California at Davis had been following two admissions programmes, one in respect of the 84 seats (general) and the other, a special admission programme under which only disadvantaged members of certain minority races were considered for the remaining 16 seats- the total seats available being 100 a year. For these 16 seats, none except the members of the minority races were considered and evaluated. The respondent, Bakke, a white, could not obtain admission for two consecutive years, in view of his evaluation scores, while admission was given to members of minority races who had obtained lesser scores than him. He questioned the validity of special admissions programme on the ground that it violated the equal protection clause in the Fourteenth Amendment to the constitution and also Title VI of the Civil Rights Act, 1964.

The Trial Court upheld the plea on the ground that the programme excluded members of non-minority races from the 16 reserved seats only on the basis of race

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<sup>371</sup> Ibid

<sup>372</sup> Ibid

<sup>373</sup> (1978) 57 Law Ed 2d 750

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and thus operated as a racial quota. It, however, refused to direct the plaintiff to be admitted in as much as he failed to establish that he would have been admitted but for the existence of the special admissions programme. The matter was carried in direct appeal to Supreme Court of California which not only affirmed the Trial Court's judgment in so far as it held the special admissions programme to be invalid but also granted admission to the plaintiff- respondent in to the Medical school. It was of the view that the University had failed to prove that in the absence of special admissions programme the respondent would not have been admitted.

The matter was carried to the United States Supreme Court, where three distinct view-points emerged. Brennan, White, Marshall and Blackmun, JJ., Were of the opinion that the special admission was a valid one and is not violative of the Federal or State Constitutions or of Title VI of the Civil Rights, 1964. They were of the opinion that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University's remedial use of race.

Since the judgment of the Supreme Court of California prohibited the use of race as a factor in University admissions, they reversed that judgment. Chief Justice Warren Burger, Stevens, Stewart and Rehnquist, JJ., took the other view. They affirmed the judgment of the California Supreme Court. They based their judgment mainly on Title VI of Civil Rights Act, 1964, which provided that "no person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any programme or activity receiving Federal Financial Assistance." They opined that Bakke was the victim of, what may be called, reverse discrimination and that his exclusion from consideration in respect of the 16 seats being solely based on race is impermissible. Powell, J., took the third view in his separate opinion, partly agreeing and partly disagreeing with the other view-points. He based his decision on Fourteenth Amendment alone. He did not take into consideration the 1964 Act. The learned judge held that though racial and ethnic classifications of any kind are

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inherently suspect and call for the most exacting judicial scrutiny, the goal of achieving a racially balanced student body is sufficiently compelling to justify consideration of race in admission decisions under certain circumstances. He was of the opinion that while preference can be provided in favour of minority races in the matter of admission, setting up of quotas (which have the effect of foreclosing consideration of all others in respect thereof) is not necessary for achieving the said compelling goal. He was of the opinion that impugned programme is bad since it set apart a quota for minority races. He sustained the admission granted to Bakke on the ground that the University failed to establish that even without the quota; he would not have been admitted.

To Powell, J., the argument that a guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of greater protection than accorded to others, was an amorphous concept of injury that may be ageless in its reach in to the past. There was no principle, he argued, to force an innocent individual to be asked to suffer in order to promote the welfare of the victims of societal discrimination when such an individual might not be the actual victimizer.

## **CHAPTER - 4**

### **IDENTIFICATION AND DETERMINATION OF BACKWARD CLASSES**

#### **4. I. RESERVATION FOR BACKWARD CLASSES**

It is a harsh but true fact that over the centuries many section of ours caste ridden society have been the victim of oppression and exploitation at the hands of the dominant groups in society. It is very difficult to gauge the extent and depth of social and economic exploitation that resulted in their discrimination, misery, poverty and other disabilities for an appreciably large section of ours population. Man has an intrinsic urge to revolt against injustice and the makers of the Indian Constitution were not oblivious of this reality. They had keen sense of perception and were aware of the dangers that inequality could breed. They made provision in the Indian Constitution to promote secularism, ensure equality and eradicate injustice that had been heaped upon millions through the abominable principles of protective discrimination for backward classes aimed at breaking the bandages of religious, race, caste, sex, language and descent and ensuring to the weak, the deprived and the backward the opportunity to compete with the strong and more advanced.<sup>374</sup>

The Constitution permits preferences in the form of reservation under protective discrimination provision for three categories of people:

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<sup>374</sup> K. K. Arora, *Bakwardness in India- A Judicial Dilemma*, in D .N Saraf (ed). Social Policy, Law and Protection of Weaker Section of Society, Eastern Book Company, Kashmere Gate, Delhi 6. 1986, p. 80.

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### **(a) Scheduled caste (b) Scheduled Tribes and (c) Other Backward Classes.**

The constitution permits protective discrimination in the form of reservation in the three specific areas: reservation of seats in the legislature, reservation of jobs, and reservation of seats in the educational institutions.

## **4. II. RESERVATION OF POSTS IN THE STATE'S SERVICES**

Although clause (1) of Article 16 guarantees equality of opportunity to all citizens alike, it would be meaningless to those for whom offices of positions and dignity have been out bounds for centuries and they are so crippled by the circumstances in which they are placed that such offices are beyond their reach if they are left to themselves. In India, we have been faced with inequalities, which are mainly due to social injustices perpetuated for centuries by the upper castes on those belonging to the lower castes by denying them a proper social status and opportunities for their betterment.<sup>375</sup> Because of its pernicious caste system which may truly be described as its original sin<sup>376</sup>. The Hindu constitutes 80 percent of the country's population and overwhelming majority amongst them belongs to the castes which suffered social disabilities in some degree or the other.<sup>377</sup> Every Hindu born in with particular castes which he cannot change. Hitherto, he had to follow the occupation assigned to his caste and he could not even think of changing it. The mobility to upper castes is forbidden. One of the worst effects of castes was that access to knowledge and learning was denied to the lower castes for centuries. It was not till the advent of the British Rule in this country that the doors of education were opened to theme as well as to women who were considered as much disintitiled to education as the

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<sup>375</sup> S. M .N Raina. *Reservation with Justice*, C I L Q 1990, p. 1

<sup>376</sup> Indra Sawhney v. Union India, A I R 1993 S C 477 at 634.

<sup>377</sup> T. N Shalla. *Dynamics of Reservation Policy Under Indian Constitution: A Working Paper*. In D .N Saraf, *Social Policy, Law and Protection of Weaker Section of Society*, Eastern Book Company, Kashmir Gate, Delhi. 1986, p. 120.

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shudras<sup>378</sup>. Naturally all the posts in the administrative machinery were manned by the higher castes which had the monopoly of learning. The concentration of the executive power in the hands of the select social group had its natural consequences. The most invidious and self-perpetuating consequence was the stranglehold of a few high castes over the administration of the country from the lower to the higher rungs to the deliberate exclusion of others. Consequently all aspects of life were controlled, directly and regulated mostly to suit the sectional interests of a small section of the society which numerically did not exceed 10 percent of the total population of the country. The state of the health of the nation was viewed through their eyes, and the improvement in its health was effected according to their prescription.<sup>379</sup>

To ensure protection of backward classes of citizens it was necessary that members of backward classes be appointed in state service and so the power was given to the state to provide for reservation of such appointments<sup>380</sup>. Dr. B.R. Ambedkar realized that unless the backward classes have share in the power their interest cannot be protected<sup>381</sup>. Accordingly the provision was made for the reservation of jobs in terms of Article 16 (4) which qualifies the non-discriminatory provisions guaranteeing the equality of opportunity in matters of public employment. Special privileges through reservation and percentage quotas in recruitment and promotion in services have been given in pursuance of the provision. In order to complete the stupendous task of social reconstruction of building an egalitarian society, the framers of the Constitution thought it fair that people who were socially, economically and educationally backward should be given special concession in the form of out-of-turn opportunities in recruitment as well as promotion. It was apprehended that these unfortunate people will not be able to compete on an equal footing with people who are better placed in life, socially advanced and educationally

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<sup>378</sup> M. N. Rao. *Reflection On Law & Society*, Mahatma Joti Rao Phooley Institute of Social Justice (2000), Hyderabad. p. 110

<sup>379</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477 at 634.

<sup>380</sup> P. C. Juneja. *Caste As Criterion for Reservation - An Overview*, CILQ 1992 p 214

<sup>381</sup> *Ibid.*

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better qualified. The aim was to strike a balance between the fundamental rights of the individual and social justice to the backward classes<sup>382</sup>.

The Constitution permits reservation of jobs in terms of Article 16(4) only if two conditions are satisfied, viz., (a) that the classes of citizens are backward and (b) that the classes are not adequately represented in the service under the state. Both conditions must be fulfilled<sup>383</sup>. In the *General Manager Southern Railway v. Rangachari*,<sup>384</sup> the Supreme Court held that the provision of Article 16(4) are meant for providing adequate representation in the service to the backward classes, the representation has to be in all categories and grades in the service. Adequacy does not mean mere proportionate numerical or quantitative strength. It means effective voice or share in power in running the administration.

In *Indra Sawhney v. Union of India*,<sup>385</sup> the Supreme Court held that Article 16(4) enables the state to make a provision for the reservation of appointment to the posts. The provision may be made either by an Act of legislature or by rule or regulation made under such Act or in the absence of both, by executive order. Executive order is not less a law under Article 13(3) which defines law to include among other things rules and regulations. The provision of reservation under Article 16(4) being relatable to the recruitment and condition of service under the state, they are also covered by Article 309 of the Constitution. Article 309 expressly provides that until provision in that behalf is made by or under an Act of the appropriate legislature, the rules regulating the recruitment and condition of service of persons appointed to service under the union or a state may be regulated by rules made by the President or the Governors as the case may be.

Further it was also held that the expression backward classes of citizens in Article 16(4) does not comprise all the weaker section of the people, but only those

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<sup>382</sup> Supra note 377

<sup>383</sup> Ibid.

<sup>384</sup> AIR 1962 SC 36

<sup>385</sup> AIR 1993 SC 477

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which are socially and therefore, educationally and economically backward, and which are inadequately represented in the service. The expression “weaker section of the people “ used in Article 46, however, is not confined to the aforesaid classes only but also includes other backward classes as well as, whether they are adequately represented in the service or not<sup>386</sup>. Though the expression “backward class” has not been defined under the Constitution, the judiciary has tried to define it.

In *M. R. Balaji v. State of Mysore*<sup>387</sup>, it was held that there is no doubt that Article 15(4) has to be read as a proviso or an exception to Article 15(1) and 29(2). It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in *State of Madras v. Champakam Dorairajan*<sup>388</sup> with a view to remove the defects pointed out by the Court namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16, no reservation can be made in the educational institutions for backward classes. Following *Balaji*, it was held by another Constitution bench in *Devadasan*<sup>389</sup> further this court held that clause (4) of Article 16 by the way of a proviso or an exception to clause (1), Subba Rao, J., however opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that it may, since the decision in *Devadasan*, it was assumed by this court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe setback from the majority decision in *State of Kerala v. N. M. Thomas*<sup>390</sup>. Though the majority stuck to the view that Article 16(4) is an exception, the majority held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). The majority held that Article 16(1) being of facet of the doctrine of equality enshrined in Article 14 permits reasonable classifications just as Article 14 does. The majority judges in *Indra*

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<sup>386</sup> AIR 1993 SC 477

<sup>387</sup> AIR 1963 SC 649

<sup>388</sup> AIR 1951 SC 226

<sup>389</sup> AIR 1964 SC 179

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*Sawhney case*<sup>391</sup> held that the majority decision of Thomas case was correct and held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In the view of judges of this case the view taken by the majority in Thomas is the correct one. It was further held that Article 16(1) does permit reasonable classifications for ensuring attainments of the equality of opportunities assured by it. For assuring equality, it may well be necessary in certain situation to treat unequally situated persons unequally. Not doing so would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification put into place the matter beyond controversy.<sup>392</sup>

The “backward classes of citizen are classified as separate category deserving special treatment in the nature of reservation of appointments / post in the services of the state. Accordingly we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1). It was accepted that clause (4) is an instance of classification inherent in clause (1). Now just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16(4) is also an elaboration of a facet of clauses (1).

In *Indra Sawhney v. Union of India*<sup>393</sup> it was held that the very object of Article 16 (4) is to ensure equality of opportunity in matter of public employment and to give adequate reservation to those who have been placed a very discounted position from time immemorial on account of sociological reason. To put in differently the purpose of clause (4) is to ensure the benefits flowing from the fountain of this clause on the beneficiaries namely the backward classes who in the opinion of the Constitution makers would have otherwise found difficult to enter into public service competing with advanced classes and who could not be kept in Limbo until they are benefited by the positive action schemes and who have suffered and are still suffering from historic disabilities arising from past discrimination or disadvantages or both .

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<sup>391</sup> A I R 1993 S C 477.

<sup>392</sup> Ibid.

<sup>393</sup> A I R 1993 S C 477.

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They continue to be deprived of enjoyment of equal opportunity in matters of public employment despite there being sufficient statically evidence in proof of manifest imbalances in Government jobs which evidence in sufficient to support an affirmative action plan.<sup>394</sup>

The basic policy of reservation is to offset the inequality and remove the manifest imbalance the victims of which for by generation lag far behind and demand quality by special preferences and their strategies. Needless to say that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes on equilibrium between two sections placed unequally. In *Mohan Kumar Singhania v. Union of India*,<sup>395</sup> it was held that the Constitution no doubt has laid a special responsibility on the Government to protect the claims of SC/ST in the matter of public appointments under various constitutional provisions. Article 16 (4), one of the various Constitutional provisions is an enabling provision conferring a discretionary power on the state for making any provisions or reservation of appointments or post in favour of any backward classes 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 enjoins that the claims of the members of SC/ST shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of appointments to service or post in connection with the affairs of the union or of a state. Thus reservation is not a Constitutional compulsion but it is discretionary one. The expression backward class obviously takes within its fold people belonging to SC /ST.

In *Indra Sawhney case* it was held that the expression “in the opinion of the state” would mean the formation of opinion by the state which is purely a subjective process. It cannot be challenged in a court on the ground of propriety reasonableness and sufficiency though such an opinion is required to be formed on the subjective

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<sup>394</sup> *Indra Sawhney v. Union Of India*, A I R 1993 S C 477.

<sup>395</sup> A I R 1992 S C 1

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satisfaction of the Government whether the identified backward class of citizens are adequately represented or not in the services under the state, but drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a sine quo nun. If the opinion suffers from the vice of non - application of mind or formation of collateral grounds or beyond the scope of statute irrelevant and extraneous material then that opinion is challengeable.

Again the action of the government in making provision for the reservation of appointments or posts in favor of any backward class of citizens is a matter of policy of the Government. What is best for the backward class and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservation is a matter for decision exclusively within the promises of the Government and such matters do not ordinary attract the power of judicial review or judicial interferences except on the grounds which are well settled by a catena of decision of this court.<sup>396</sup>

### **4. III. RESERVATION FOR SCHEDULED TRIBES**

Like Scheduled Castes the Scheduled Tribes are also getting protective discrimination in the form of reservation under three categories namely, reservation of seats in Lok Sabha, and State Vidhan Sabha, reservation in admission in educational institution and reservation in appointment or post in State employment. Under Articles 330<sup>397</sup>, 332<sup>398</sup> and 334<sup>399</sup> of the constitution, seats are reserved for Scheduled

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<sup>396</sup> *Ibid.*

<sup>397</sup> Article 330 says- *Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of People—(1) Seats shall be reserved in the House of the people for—(a) the Scheduled Castes; (b) The Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam.*

(2)*The number of seats reserved in any state or Union Territory for the Scheduled Castes or the Scheduled Tribes under Clause(1) shall be as nearly as may bear, as nearly as may be, the same proportion to the total number of seats allotted to that state or Union territory in the House of the People as the population of the Scheduled Castes in the state or union territory or of the Scheduled Tribes in the state or Union Territory or part of the state or Union Territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the state or Union Territory.*

(3) *Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous district of Assam shall bear to the total number of*

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Castes and Scheduled Tribes in the Lok Sabha and State Vidhan Sabha in proportion to their population<sup>400</sup>. Scheduled Tribes<sup>401</sup> constituted a society in itself<sup>402</sup>. A tribe as a society has a linguistic boundary<sup>403</sup>.

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*seats allotted to that state a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.*

<sup>398</sup> Article 332 says- *Reservation of Seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States- (1) Seats shall be reserved for the Scheduled Castes and Scheduled Tribes, except the Scheduled Tribes in the autonomous district of Assam, in the Legislative Assembly of every State.*

*(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the state of Assam.*

*(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any state under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the state or the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved bears to the total population of the state.*

*(3A) Notwithstanding anything contained in clause (3), until the taking effect, under Article 170, of the re-adjusted, on the basis of the first census after the year 2026, of the number of seats in the Legislative Assemblies of the States of Anunachal Pradesh, Meghalaya, Mizoram, Nagaland, the seats. Which shall be reserved for the Scheduled Tribes in the Legislative Assembly of any such state shall be-*

*(a) if all the seats in the Legislative Assembly of such state in existence on the date of coming into force of the Constitution (Fifty-seventh Amendment ) Act, 1987 are held by members of the Scheduled Tribes, all the seats except one.*

*(b) in any other case, such number of seats as bears to the total number of seats, a proportion not less than the number as on the said date of members belonging to the Scheduled Tribes in the existing Assembly bears to the total number of seats in existing Assembly.*

*(3B) Notwithstanding anything contained in clause(3), until the re-adjustment, under Article 170, takes effect on the basis of the first census after the year 2026, of the number of seats in the Legislative Assembly of the state of Tripura, the seats which shall be reserved for the Scheduled Tribes in the Legislative Assembly, shall be, such number of seats as bears to the total number of seats, a proportion not less than the number, as on the date of coming into force of the Constitution (Seventy second Amendment ) Act,1992, of members belonging to the Scheduled Tribes in the Legislative Assembly in existence on the said date bears to the total number of seats in the Assembly.*

*(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the state of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the state.*

*(5)The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.*

*(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the state of Assam shall be eligible for election to the Legislative Assembly of the state from any constituency of that district.*

<sup>399</sup> Article 334 of the Constitution of India –(Reservation of seats and special representation ceases after sixty years.)

<sup>400</sup> H.C. Upadhyay, *Reservation for Scheduled Castes and Scheduled Tribes*, Anmol Publication, Ansari Road, Darya Ganj, New Delhi P.195.

<sup>401</sup> About 8 percent of India's population consists of tribal people, distributed through unevenly throughout the length and breadth of the country. They belong to various racial, linguistic, economic and religious categories .they are also at different Social, Political, economic levels. These difference

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can be in terms of hill tribes and plains people, and those engaged in forest based economic pursuits and the ones who are empowered as settled agriculturalists or those who are Hinduised or converted to Christianity and those who seek to adhere to their unadulterated tribal way of life. They are, for example –the indigenous tribes of the Andaman Islands-the onga, the jarawa, and other-who until the nineteenth century remained almost completely isolated from the mainland and therefore unaffected by Hindu method of Tribal absorption. Despite such differences among various tribal groups, they are economical, educational and political backward as compared to the non tribal peoples. It is because of this diversity that social anthropologists do not provide an agreed upon definition of tribe.

(D.C. Bhattacharyya, *sociadogy*, Vijoya Publishing House, 106 Vivekananda Road, Kolkata, 2004. P. 385)

<sup>402</sup> The term tribe was taken over by the anthropologists from ordinary usage and lives all such terms it had a variety of meanings. In general, it was applied to people who were considered primitive, lived in backward areas, did know the use of writing. Sometimes, it was considered synonymous with the term race, which in scientific usage has entirely different meaning. In India, and also in certain extent in Africa, the situation is conspicuously different. In this country, groups which correspond closely to anthropologists' conception of tribe have lived in long association with communities of entirely different type. Except in a few areas, it is very difficult to come across communities which retain all their pristine tribal characters. A tribe is in ideal state, self contained units. It constituted a society in itself.( Andre Banteille; *the definition of the Tribe, Ramesh Thapar Tribe Caste and Religion in India, Maemilan India Limited, Delhi. 1983. P. 7*)

<sup>403</sup> We can define tribe as a collection of individual sharing of common culture. This definition has been accepted, either implicitly, by a wide range of anthropologists. The purest of the tribal groups, which have been resisting acculturation or absorption, posses certain features which can be considered as common features if possessed by the entire tribal group. They are as follows:

- 1) they live away from the civilized world in the most inaccessible parts of both forest and hills;
- 2) they belong to either of the three stocks- Negritos, Austroloids, or Mongoloids;
- 3) they speak the same Tribal dialect;
- 4) they prefers a primitive religion Known as 'Animism' in which the worship of ghosts and spirits is the most important elements;
- 5) they follow primitive occupations such as gleaning, hunting and gathering of forest products;
- 6) they are largely carnivorous or flesh or meat eaters;
- 7) they live either naked or semi naked, using tree barks and leaves for clothing
- 8) they have nomadic habits and love for drink and dance.<sup>403</sup>

Mandelbaum mention eight characteristics of Indian Tribes:

- 1) Kinship as an instrument of social bonds;
- 2) Lack of hierarchy among individuals and groups

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- 3) *Absence of strong, complex, formal organization;*
- 4) *Communitarian basis of land holding;*
- 5) *Segmentary Character;*
- 6) *little value on surplus accumulation;*
- 7) *lack of distinction between form and substances of religion;*
- 8) *A different physiological make up for enjoying life.*

*The tribes of India prior to Independence were considered animistic by the census authorities. Distinction was made between those who were Hinduised and those who followed their own religion. Some scholar had opined that no shape line demarcation can be drawn between Hinduism and animism. There is no uniform pattern of religion among the tribal people of India.*

*Tribal Society is homogenous, undifferentiated and unstratified as contrasted with Hindu society which is heterogeneous, differentiated and stratified. Tribes in India differ in social organization and culture pattern. Tribal who have become peasant and are engaged in allied occupation do not constitute a homogenous unstratified society. Members of a tribe may not perceive it, but each tribe is internally stratified. Tribes in India differ in social organization and cultural pattern. Tribal who have become peasants and are engaged in allied occupations do not constitute a homogeneous unstratified society. Members of a tribe may not perceive it, but each tribe is internally stratified.*

*Tribes in India are not a monolithic lot of people. They vary in terms of their historical and ecological backgrounds, Socio-economic and cultural level of advancement. Some tribes live in forest or hill slopes, where other live on the plains. Except, Tribal in the North East region, tribes are generally backward, economically as well as educationally. Generally, they are distinct from non tribes Language, Religion and magical beliefs and practices, foot habits and style of dress, pattern of habitation and dependence upon forest produce are important features of their life which make them distinct from non tribal groups. Kinship is the very principle of social organization; it governs major social, economic and political activities of their life.*

*N.K. Bose classified the tribal into three main categories considering the manner in which they earn their livelihood:*

*1. Gatherers; 2. Shifting cultivators and 3. Settled Agriculturalist, using the plough and plough cattle; Santhals, Gonds, Bhils and oraons and Mandas fall in the last category. These Tribal peasants are not substantially different from the non tribal peasants. These Tribal are also categorized as cultivators, agricultural laborers and workers. They are working in factories in south Bihar, West Bengal, Orissa and Madhya Pradesh and in plantations in Assam. From the point of view of geographical distribution, L.P. Vidyarthi has clarified tribal people into four categories: Himalayan, middle India, Western India and Southern India region. S.C. Dube provides a fivefold.*

*Classes of Tribes:*

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The constitution of India now recognizes the Scheduled Tribes as a separate category with specific claims and entitlements that schedule was initially promulgated by presidential order and can be modified only by an Act of parliament. Thus the administrative definition of who is a tribesman was set by presidential or parliamentary decision without much social analysis. The spectrum of Indian groups called tribal, by official notification or popular usage, ranges from hunters and gatherers who are clearly out of caste society, to settled village group that function as Jatis. Article 366 (25) define Scheduled Tribes<sup>404</sup>

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*1) Aborigines living in seclusion; 2) Tribal group having an association with the neighboring non-tribal and also maintaining their non-tribal distinctiveness; 3) tribal living in village along with the caste group, sects and religious groups and maintaining, their identity; 4) tribal who have been degraded to the status of untouchables; 5) tribal who enjoy high social, economic and political status. This classification is basically based on the nature of culture contact on the tribal with non-tribal.*

*Tribes in India may also be classified into three types on the bases of language.*

*They are: a) Dravidian, the tribal people of the middle and southern India (Gonds, Toda, Oran, Paliyan, Chenchu); b) Austric, the munda tribes of Chotanagarpur; c) Tibeto-Chinese, the tribal of Assam, Meghalaya, or other tribes of the north eastern regions.*

<sup>404</sup> *“Scheduled Tribes” means such tribes and tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342, to be Scheduled Tribes for the purpose of this constitution.” In exercise of the power conferred under clause (1) of Article 342, the President has made the constitution (Scheduled Tribes) order, 1950, listing the Scheduled Tribes in various states. The list was revised by the parliament subsequently. Under the constitution, the president and the parliament are explicitly given broad and exclusive power to define these scheduled groups and the courts have refused to review the appropriateness of the criteria applied in determining these group. The constitution of India nowhere defines Scheduled Caste and Scheduled Tribes nor lay down any criteria for each. However, under Article 341 and 342 the president of India from time to time has provided by Constitutional (Scheduled Castes) and (Scheduled Tribes) orders, lists of such castes and tribes. In these orders there are lists of SC/ST of different States and Union Territories. Later on Parliament, by law, included more groups in the Schedule. The interesting thing is that the southern states of India had largest number of SC/ST in the representative lists to their credits*

#### **4. IV. THE RESERVATION FOR SCHEDULED CASTES**

The Scheduled Caste has been getting three kinds of protective discrimination under the constitution of India. Article 15(4) provides reservation of seats in education institution in favour of the Scheduled Castes. Article 16 (4) provides reservation in appointment or post in Government employment in favour of Scheduled Castes. The percentage of reservation for Scheduled Castes is 15% of the total seats or posts available in any year. Apart from these two types of reservation, the Scheduled Caste has also been given reservation for representatives in Lok Sabha and Legislative Assemblies of states. This special provision for the reservation of seats in the legislative was provided purely as a transitory measure. The Scheduled Castes are backward socially and economically. Therefore, the constitution gives special protection to them. Under Article 46 of the constitution, it is the responsibility of the states to promote with special case the educational and economic interests of the weaker section of the people, and the Scheduled Castes and the Scheduled Tribes in particular and protect them from social injustice and all forms of exploitation.

#### **Who are Scheduled Castes?**

The Vedic literature, which mainly includes the Vedas, the Brahmins, the Aranyakas, and the older Upanisads, dose not provide any evidence that the Sudra Caste's existed in the early period. The Rig Veda (second century or about 1500 BC) only refers to the three castes of Brahmins, Kshastriyas and Vaisya in the Aryan community. It seems that the caste of Sudra was created by the Aryan in the closing phases of the Rig Veda. However, there are scholars who contended that the class of Sudra was known to Rig Veda. The non mention of the word Sudra dose not argues its non-existence. In the Brahmins, however, we find a repeated reference to Sudra along with Brahmins, Kshastriyas and Vaisya forming the integral part of the Indo-Aryan Society. The text of Brahmin as assign to the Sudras (Dasas) the lowest

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position and maintain them as the people outside the fold of the Brahmanical Sacrificial Religion<sup>405</sup>.

This is perhaps because they were racially and culturally different from the Aryans and opposed them as far as their religion is concerned. According to Kamble, they not only opposed the God of the Aryans but also did not perform any sacrifices and gave no gifts to the gifts to the priests. The term and epithets used by the Aryan for Dasas were Aryavrata, Anasa, and Mridhravaka. In the matter of social privileges and religious right, therefore, the Sudras were given very low status<sup>406</sup>.

These people belong to the last verna namely the Sudra and Avarnas include many caste groups which have suffered many social and economic inequality since the ages. Particularly those people who were outside the Vena system were known as Avarnas or Panchmas or Antyajas. They were externally in the sense that they were required to stay outside the village settlements<sup>407</sup>. The concept was attached to them they were treated as untouchable caste in India was officially defined as the depressed caste in 1932<sup>408</sup>. Gandhiji named them “Harijans” where Hari means God; jans means people and thus “Harijans” means people of God. This word in Marathi, Gujarati, Hindi and other languages means a child whose father identity is unknown, and hence a bastard progeny. Therefore, the name Harijan was not only disliked but was hated and opposed by untouchables. Surprisingly enough, their reaction to the word Scheduled Caste or even to the word untouchable is not that sharp<sup>409</sup>.

The expression Scheduled Castes was first coined by the Simon Commission and embodied in the government of Indian Act 1935. While the castes were listed systematically in the 1931 census of India, the term Scheduled Caste (SC) was applied

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<sup>405</sup> Ram Ahuja, Indian Social System, Rawat Publication, Jaipur, New Delhi, 2007, P. 362

<sup>406</sup> Ibid.

<sup>407</sup> . N.D. Kamble, the Scheduled Caste, Ashish Publishing House  
New Delhi, 1982, P. 30-31

<sup>408</sup> Ibid

<sup>409</sup> Ibid

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to these castes for the first time in the Government of Indian Act of 1935. Until then they were known as untouchable, depressed classes or exterior Castes. Then the Government of India published a list of Scheduled Castes under the Government of India (Scheduled Castes) order, 1936<sup>410</sup>.

What underlines untouchability is the notion of pollution defilement and contamination. Referring to the notion of purity Ghurye<sup>411</sup> has said: “Before 800 BC, we find the idea of ceremonial purity almost full-fledged and even operative in relation not only the despised and degraded group of people called “Chandal” but also the forth order of society, the Sudra”. Ambedkar<sup>412</sup> has, however, maintained that while the impure as a class came into existence at the time of Dharmasutras, the untouchable came into being much later than 400 A.D. Ambedkar has further said, “if Anthropology is a science which can be depended upon to determine the race of the people, then the result obtained by the application of Anthropometry to the various strata of Hindu society disapprove that the untouchable belong to a race different from Aryans and the Dravidians. The Brahmins and the untouchable belong to the same race.” Huttons<sup>413</sup> opinion is that the origin of the position of the exterior caste is partly racial, partly religious, and partly a matter of social custom. The economic condition of the Sudras also reveals the low position that they occupied in the hierarchy of society. The cases of Sudras possessing cattle’s and wealth were very rare. Mostly they worked as landless labourers on farms and as domestic servants. One Sutra mentions that “Sudras have to earn their subsistence only by servicing the higher Varnas.”<sup>414</sup>

In the process of the evolution of the castes and principles of graded Chaturvarna and Ceremonial purity, the vast body of people known as, the vast body of people known as Panchamas or exterior castes or Antyajas or Anti Sudras fell

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<sup>410</sup> Ibid

<sup>411</sup> Ram Ahuja, Indian Social System, Rawat Publication, Jaipur, New Delhi, 2007, P. 363

<sup>412</sup> Ibid

<sup>413</sup> Hutton, caste in India, 1961 quoted in Ibid note

<sup>414</sup> Ibid at 363

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outside the pale of the Chaturvarna systems and are known as Avarnas (not belong to varna). It seems probable and inter-varna struggles and other religious, historical predominant in the evolution of four Varnas at the fifth group of the Avarnas. Their problem arises from the peculiar just a position of the castes-Hindu village and then Scheduled Castes get to all over India, perpetuating untouchability. They were denied the right enjoyed by the Brahmins, Kshastriyas, Vaishyas and even Sudras such as the right of Upanayana, learning, bearing arms, trade and other 'clean' occupations<sup>415</sup>.

#### **4. V. DISCRIMINATION AGAINST THE SCHEDULED CASTES**

With the deal of the fundamental religion and civil rights, the segregated Antyajnas had no status as a person in the eyes of law as observed in the Hindu Shastra. Moreover, they were forced to live on the outskirts of the savarna village thus restricting their mobility. In effect, they were segregated and became the Antajnas and untouchables. The instances given in the religious scriptures help to show the direction given to the Hindu society with respect to untouchability that exists today.

The twice born Hindu sought to make the Sudras and the Ati-Sudras their perpetual slaves. Slavery here doesn't mean a legalized form of subjection only. It could be a state of society in which some men are forced to accept from others the commandments which control their conduct. It has been proved through manus law that the Brahmin may confidentially seize the goods of the Sudras, as the Sudras was denied any property.

The law relating to Sudras and the Ati-Sudras down the centuries were in favour of Dwijas who dominated ruthlessly the Ati-Sudras and the Sudras though the latter formed the bulk the population. Lord Buddha was perhaps the first great

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<sup>415</sup> N. D. Kamble. *The Scheduled Caste*, Ashish Publishing House  
New Delhi, 1982, p. 30-31

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teacher of mankind to raise a revolt against caste. The untouchables were out of the Varna (Panchamas or Avarnas) and had no share in the social, political and judicial powers. On the contrary they were slaves and were offered as presents to friends or gifts to temples and were bought, sold and mortgaged in the same manner as the land on which they dwelt or as the cattle or other property of their owners. The master had the right even to kill a slave. Until recently they were landless labourers and slaves. The British rule through the East India Company in 1792 banned the slave trade. The practice of selling the slaves for arrears of revenue was discontinued in 1819. In 1843 and each was passed by which the right of any Para claiming a slave could not be investigated in public offices or Courts. The penalties for slave's dealings were inserted in the penal codes of 1862 but all caste destinations ceremonies and prohibition were respected, despite these acts, caste tyranny and oppression remained vigorous<sup>416</sup>. The lower caste in hierarchy was required to keep a respectable physical distance from the higher caste<sup>417</sup>.

Untouchability in India is intimately organically associated with the institution of caste. Its rigid form is a logical outcome of a peculiar nation of pollution sanctified by religion and codified by the Brahmmanical discriminative laws. This only institutionalized the caste hierarchy and untouchability but gave it socio religious-legal approval. While talking with higher caste, the untouchables had to (a) keep a distance from 30 to 64 feet according to the caste hierarchy of the person to whom he was talking. (b) bend his body, (c) cover his mouth by his hand, (d) address higher caste by 'lord', 'sir', 'parents' etc. (e) address himself slave, his children as calves, his house as hut, his paddy as chaff and his rice preparation as dirty gruel. Both men and women untouchables were prohibited from: (a) wearing clothes above the waist and below the knees, (b) wearing new clothes (Even when new cloth were brought they were to be made dirty by dipping them in mud or rubbing on the dark spots), (c) wearing gold and silver ornaments and (d) using shoes notwithstanding the thorns and sharp stones of the jungle paths. Shanani caste women who were above the

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<sup>416</sup> N. D. Kamble. *The Scheduled Caste*, Ashish Publishing House New Delhi, 1982, P. 30-31

<sup>417</sup> Ibid

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untouchable caste in caste hierarchy were not allowed to cover their bosom, the covering of which led to riots in south Travancore in 1932. If this was the caste with the Shanans what might have been the plight of the untouchables<sup>418</sup>.

The untouchable was not allowed to enter the house of the higher ups. However, he was allowed to work as a labour during construction, repair or storing the grains, etc. But later the house was purified by sprinkling cow urine or cow dung. If the Scheduled Caste touched the utensils and other things, then non-inflammable things were to be put on fire and then purified by sprinkling cow urine, while things like clothes were to be purified by only sprinkling cow urine. Water had to be purified by mixing cow dung if it was touched by a Scheduled Caste. Food was seemed to the Scheduled Caste only outside the house in lives or broker vessels which were to be watched by him before and after use. A caste served only the castes above it and since the Scheduled Caste was the lowest caste they had to serve all castes and no caste served it.

The Scheduled Caste people were not allowed to walk on public roads or enter temple. In the court of justice, he had to shout from the appointed distance and take his chance of being heart. This is because he was prohibited from entering the village or town and hence virtually prohibited from employment, business and contact with the people.

After independence, the constitution of prescribed protection and safeguard for the Scheduled Castes (and the Scheduled Tribes and other backward classes) with the object of removing their social disabilities and promoting their varied interests. The important ones are: - abolition of untouchability, protection of social injustice and various forms of exploitation, throwing open religious institution of public character to all section, removal of restriction on access to shops, restaurants-wells, tanks, roads, etc. giving them the right to move freely and acquired property, giving them

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<sup>418</sup> Ibid.

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the right of admission to educational institution and receiving grants out of state funds, permitting the state to make reservation on for in service, giving them special representation in the Lok Sabha and in the Vidhan Sabha, setting up separate departments and advisory council to promote their council and safeguard their interests, prohibition of forced labour, and making special prohibition for the administration and control of the Scheduled areas<sup>419</sup>. The Constitution of India now here defined neither Scheduled Caste nor lays down any criteria for it. Under Article 341(1) of the constitution of India, the president of India after consultation with the governor may specify “the castes, races, tribes or part of groups within caste or races, tribes which shall be deemed to be Scheduled Caste for the purpose of the institution.” However, according to Article 341(2), Parliament of India by law can include or exclude the above mention groups from the list of the Scheduled Caste; such Scheduled Caste can be notified separated for each state. Accordingly the President has notified the Scheduled Caste in the orders called Constitution (Scheduled Castes) part-c status order 1951 and the Scheduled Caste and Scheduled Tribes lists (modification) order 1956<sup>420</sup>.

As has been pointed out earlier, the Scheduled Castes are backward socially and economically. Therefore, the Constitution gives special protection to them. Under Article 46 of the constitution, it is the responsibility of state to promote with special care the educational and economics interest of the weaker section of the people; and Scheduled Castes and the Scheduled Tribes in particular and protect them for social injustice and all forms of exploitation.

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<sup>419</sup> Ram Ahuja. *Indian Social System*. Rawat Publication, Jaipur, New Delhi, 2007, P. 363

<sup>420</sup> N.D. Kamble *The Scheduled Caste*, Ashish Publishing House New Delhi, 1982, P. 31-32

#### 4. VI. IDENTIFICATION AND DETERMINATION OF SCHEDULED CASTES AND SCHEDULED TRIBES

The ascertainment of the Scheduled Castes and Scheduled Tribes does not pose major problems. The geographical and Cultural factors make identification of the Scheduled Caste and Scheduled Tribe fairly simple<sup>421</sup>. In order to determine whether or not a particular caste is a scheduled tribe within the meaning Articles 341 and 342, one has look to the public notification issued by the President in that behalf. Moreover, Parliament may by law include or exclude the list of Scheduled Caste Scheduled Tribes specified in a notification any caste, or race or tribe or part thereof moreover it is not open to anyone to seek for any modification in the order by producing evidence to show that though caste a alone was mentioned in the order, caste be was also a part of caste A and as such to be deemed to be included in caste<sup>422</sup>.

In view of these provisions, it is not supervising, therefore, that the courts have refused to oversee the presidential designation of the Scheduled Castes and Scheduled Tribes. It is obvious that President has been given very broad and exclusive power to specify these classes and there is no room left for judicial scrutiny of scheduling of castes<sup>423</sup>. In *Basanatingappa v. Munichinnappa*<sup>424</sup>, the Supreme Court held that it was not open to anybody to seek any modification in Scheduled Castes order by producing any evident to show that such caste should have been included in such list. In *BhaivaLal v. Hari Krishnan Singh*<sup>425</sup>, an enquiry whether the appellant there belong to the Lohar Caste which was not recognized as Scheduled Castes and his declaration that he belonged to the Chamar Caste could not be permitted. The Court, however, assumed that “before a notification is issued under Article 341(1), an elaborate inquiry is social justice is to be done to castes, races or Tribes as it may

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<sup>421</sup> A.K. Pandey. *Some Aspects of Reservation*, 21 (4) 1994 IBR, p.81.

<sup>422</sup> Harpal Kaur Khera. *Job reservation versus efficiency of administration*. C I L Q 1990. p. 33

<sup>423</sup> Padmanan Singh. *Equality, Reservation and Discrimination in India; A constitutional Study of Scheduled Castes and Scheduled Tribes and other backward classes*. Deep & deep Publication, Rajouli Garden. New Delhi -1985. P.113

<sup>424</sup> A I R 1965 S C 1269

<sup>425</sup> A I R 196 5 S C 1557

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appear to be necessary. The Court further observed that it is doing justice it would obviously be expedient not only to specify the parts or groups of castes, races or Tribes but to make the said specification by reference to different areas of the states.

The court through declined to review the order, conceded that object of Article 341 was to provide “additional protection to the members of the Scheduled Castes having regard to the economic and educational backwardness from which they suffer. The Scheduled Tribes also are at the bottom of the society, but their case is somewhat different. They were not victims of social injustices. It was their love for their natural environment which kept them away from the main stream of the society, in forest and other backward areas where they led a very simple life in poverty but a contended life with no zeal of better living. They, therefore, lagged behind and their condition worsened as an account of their ignorance, illiteracy and simplicity they were exploited by the business man and other of the upper strata of the society<sup>426</sup>. In contrast to the Scheduled Castes, who suffer from the social disabilities like untouchability, the Scheduled Tribes or oelivasi live in exclusive territorial community. They are not a part of Hindu Society. Their basic disability is due to their physical isolation from their society and their exploitation by non-tribal. The indifference of the British rulers towards the tribal welfare had perpetuated the distinctive characteristics of the tribal. They were very easily exploited by the money-lender, contractors and zamindars<sup>427</sup>.

Our ideas of social justice and dream of establishment an egalitarian society demanded a positive effort on the part of the Government to lift them and bring them to of an average enlightened citizen of India by not only making them literate but by opening the doors of higher education to them and providing them with adequate representation in public services under the state<sup>428</sup>

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<sup>426</sup> S.M.N. Raina. *Reservation with justice*, C1LQ 1990. p. 2

<sup>427</sup> Supra note 423.

<sup>428</sup> Ibid

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The **Simon Commission** prescribed thirteen-tests for including a caste in the Scheduled list. Some of these tests were<sup>429</sup>:-

1. Whether caste in question pollutes high castes by their touch or proximity.
2. Whether caste in question is denied entry into temples
3. Whether caste in question is denied the use of public places like schools, wells, etc.
4. Whether caste in question can be served by Brahmins and purohits.
5. Whether caste in question can be served by tailors, barbers, washer men, water carriers, etc.
6. Whether caste in question is one from whose hands a caste Hindu can take the water.
7. Whether in ordinary social intercourse, a well-educated member of the caste in question will be treated as an equal by high caste man.
8. Whether caste in question is merely ‘depressed’ on accounts of his own ignorance illiteracy or poverty and but for that would be subject to no social disability.
9. Whether caste in question is, depressed on account of the occupation followed and whether but for that question, it would subject to no social disability.

Some of the important castes included in the Scheduled Castes lists are: Chuhra, Bhangi, Chamar, Dom, Pasi, Raigar, Mochi, Rajbani, Dosadh, Shanam, Thiyan, Paraiyan and Kori<sup>430</sup>.

Article 366 clause 24 reads: - In the Constitution, unless the context otherwise requires, the following expression have the meaning hereby respectively assign to them, that is to say”

“Scheduled Caste means castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purpose of this Constitution.”

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<sup>429</sup> Ram Ahuja, *Indian Social System*, Rawat Publication, Jaipur, New Delhi, 2007, P. 364.

<sup>430</sup> Ram Ahuja, *Indian Social System*, Rawat Publication, Jaipur, New Delhi, 2007, P. 364.

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The groups in the category were listed (i.e. scheduled) in 1936 for purposes of giving effect to the provision for the special electoral representation in the Government of India Act, 1935. This list reflected definition of untouchability with an admixture of economic and educational tests and consideration of local politics. The criteria were, all of the castes included in the final tests were socially the lowest Hindu caste in their particular provinces and they were listed partly, at least, on that basis. The above list contained over 40 million persons<sup>431</sup>.

In order to determine whether or not a particular caste is a Scheduled Caste or Tribe within the meaning of Article 341 and 342, one has to look to the public notification issued by the president on that behalf. Moreover the Parliament may by law include or exclude from the list of Scheduled Caste specified in the notification any caste, race or tribe or part thereof. It is not open to anyone to seek any modification in the order by producing evidence to show that the enough caste alone was not mentioned in the order, case b was also a part of caste A and such to be deemed to be include in caste A. Whenever one caste has another name it has been mentioned in the brackets after it in the order<sup>432</sup>.

### **4. VII. RESERVATION FOR OTHER BACKWAD CLASSES**

The reservation for the Scheduled Castes and Scheduled Tribes was provided in the Indian Constitution framed after Independence but the reservation for Other Backward Classes was announced by the Janata Dal Government only on August 7, 1990. This was done in accordance with implementing the Mandal Commission Report.

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<sup>431</sup> E. Dharma Rao. “*Scheduled Castes and Scheduled Tribes Admission into Educational Institution*” AIR 1991 journal 185

<sup>432</sup> Harpal Kaur Khehra, *Job Reservation versus Efficiency of Administration*, C I L Q 1990, P. 33

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Presently, the Constitution provides reservation for OBCs in two areas namely, (a) reservation in the services of the state and (b) reservation in the educational institutions. Article 15(4) uses the expression socially and educationally backward classes of citizens and Article 16(4) speaks of backward classes of citizens. In order to invoke Article 16(4) two conditions must be satisfied: 1). A class of citizen is backward socially and educationally; 2). the said class is not adequately represented in the services under the state.

This Article requires the classification of backward classes to be based upon the criterion of backwardness which may be socially, educationally, economically or politically. Backward classes used in Article 16(4) are wide enough to include in its scope SCs and STs. They are also entitled to claim its benefits. It is submitted that in the context of Article 16(4) the application of the statistics regarding underrepresentation in services may involve two stages, one at the stage of classification of citizens as backward and non-backward and the other when the state makes an assessment of the inadequacy of representation of the backward classes in services. It maybe that certain groups which have been classified as socially and educationally backward classes for purpose of Article 15(4) may be adequately represented in the services under the state. Consequently these groups will have to be eliminated from the list prepared for the purpose of Article 16(4). Therefore, the groups drawn for the purposes of Article 15(4) need not be the group for the purpose of Article 16(4).

## **4. VIII. WHO ARE THE OTHER BACKWARD CLASSES? --- A HISTORICAL EVOLUTION OF THE CONCEPT**

The broad category of backward class includes (1) Scheduled Caste (2) Scheduled Tribes and (3) Other Backward Classes. Each of these categories has its own distinctive background and, to some extent, its own problems. Of these three, the Other Backward Classes (OBCs) are the least homogeneous and the most loosely

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defined. Their problems also are in many ways different from the first two. The term backward classes broadly refers to the category of people who have been designated as backward by the Government and are entitled to get certain special benefits and privileges conferred by the government. Backwardness is considered an attribute of a group and not of an individual.

The term Backward Class has neither been defined nor there is any provision empowering the president to specify such classes. One does not find parallel Articles in the constitution for backward classes. No doubt, Scheduled Castes and Scheduled Tribes are backward classes, but there may be other classes of people who may be equally or less backward classes of citizens for whom special provisions have been made by Article 15(4) and 16(4) treated as being similar to the Scheduled Castes and Scheduled Tribes, which were defined and were known to be backward and for whom it was felt that special provision should be made for their advancement<sup>433</sup>. The position of the OBCs is not clearly mentioned in the Constitution. Their position was not defined in specific terms until recently. If we go to the Caste System which was the common feature of Indian society prior to the Constitution, the society was divided among four castes viz, *Brahmins*, *Kshatriyas*, *Vaisyas* and *Sudras*. The *Sudras* were the lowest among the caste hierarchy and were suffered social disabilities from very ancient time and were also discriminated by the three upper castes. The *Sudras* are generally designated as Other Backward Classes. The *Ati-Sudra* among the *Sudras* were designated as *Dalit* or *Scheduled Castes*. Officially defined in terms of caste and occupation, the OBCs would comprise intermediate agricultural and functional (clean) castes they are higher than the Scheduled Castes or *Dalits* in the caste hierarchy<sup>434</sup>. Compared to the upper castes, they are behind in the economic and educational sphere. There are also increased inequalities between different categories of backward classes and even within the same category. The OBCs, as compared with SCs and STs, have been successful in registering their political presence strongly in recent

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<sup>433</sup> Harpal kaur khehra, *Job Reservations Yesus Efficiency in administration*. C I L Q 1990.p.34.

<sup>434</sup> Dinesh Chandra Battacharya , *sociologes*, Vijaya puhishing house,106 Vivekananda Road, Kolkata,2004. P.382

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time. Andre Beteille<sup>435</sup> considers peasant castes the core of the OBCs. They are at a lower rung in the castes hierarchy. They have certainly been far behind the upper castes in education, profession and Government jobs and white-color occupation in general<sup>436</sup>.

Marc Galanter has aptly observed that the question of who were the Scheduled Castes was debated and roughly settled before independence within the executive and without the participations of the courts, but who are the backward classes in a post independence question which the constitutional recognition of the category made one of all India basis<sup>437</sup>. A close look at the debates of the Constituent Assembly on Article 16(4) gives the impression that the backward classes were not merely economic groups but historical social categories whose backwardness was associated with discriminatory social structure of the Indian society<sup>438</sup>.

### **4. IX. IDENTIFICATION AND DETERMINATION OF OBC'S**

The ascertainment of the Scheduled Castes and Scheduled Tribes does not pose major problems. The geographical and cultural factors make the identification of the Scheduled Castes and Scheduled Tribes fairly simple but the question as to who are deemed to be the other backward classes and what criteria should be adopted in determining them for purposes of reservations in jobs and educational institutions give rise to serious difficulties. Even after the constitution came into force there was a strong tendency to equal the backward castes with the backward classes. Some states in the guise of giving representation to backward classes adopted the principle of representation to backward castes<sup>439</sup>.

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<sup>435</sup> *Ibid*

<sup>436</sup> *Ibid*

<sup>437</sup> Parmanand Singh, *Current Reservation Crisis in India: Reflections on Mandal Report*. 17 & 18 (1990-91) I B R. p.210

<sup>438</sup> *Ibid*

<sup>439</sup> A. K. Pandey, *Some aspects of reservation*. 21(4) 1994, I B R p.81

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The Constitution permits reservations of jobs in terms of Article 16(4) only if two conditions are satisfied, viz (a) the class of citizens is backward and (b) that class is not adequately represented in the services under the state. Both conditions must be fulfilled. Article 16(4) cannot be invoked merely because a class of citizens is not adequately represented in services. If that was so, “it would really exclude the backward classes from the benefit of Article 16(4) and confer the benefit only on a class of citizens who though rich and cultured, have taken to other avocations of life<sup>440</sup>. The expression backward class in clause (4) of Article 16 has the same meaning as the expression “socially and educationally backward class” in clause (4) of Article 15<sup>441</sup>.

In *Triloki Nath Tiku v. State of Jammu and Kashmir*,<sup>442</sup> the court pointed out that, though the caste of a group of citizens might be a relevant circumstance in ascertaining their social backwardness, it could not be the sole or the dominant fact in that behalf. This court accepted the criteria adopted by the Mysore Government for ascertaining the backwardness of a class. The argument advanced on behalf of the state, namely, that the difference in the phraseology used in Article 15(4) and Article 16(4) namely, socially and educationally backward classes in the former and backward classes in the latter, leads to the incredible conclusion that backward classes of citizens in Article 16(4), are only such classes of citizens who are not adequately represented in the services of the state does not appeal to us. The sole list of backwardness under Article 16(4), the argument proceeds is the inadequacy of representation in the services under the state that is to say, however, advances a particular class of citizens, socially and educationally, may be, if that class is not adequately represented in the services under the state, it is a backward class. This

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<sup>440</sup>T.N. Shall. *Dynamics of Reservation Policy Under Indian Constitution: A Working Paper*, in D. N. Saraf (ed). *Social Policy, Law and Protection of Weaker Sections of Society*, Eastern Book Company, Kasmere Gate, Delhi-6, 1986.

<sup>441</sup> S. M .N. Raina. *Reservation with justice* ,C L L Q 1990. p.5.

<sup>442</sup> A I R 1967 S C 1283.

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contention, if accepted, would exclude the really backward classes from the benefit of the provision and confer the benefit only on a case of citizens who, though rich and cullied, have taken to other avocation of life. It is therefore, necessary to satisfy two conditions to attract class (4) of Article 16, namely, (1) *class of citizens is backward, i.e., Socially and educationally, in the sense explained in Balaji case and (ii) the said class is not adequately represented in the services under the state.* In *T. Devadasan v. Union of India*,<sup>443</sup> it was held that reservation under clause 4 of Article 16 must be in favour of any backward class of citizens: “Backward class” is not defined, whether a particular class is backward or not is a question of fact in each case and it must satisfy certain objective lists, but it is admitted in this case that the scheduled caste and the Scheduled Tribes are backward classes. The second condition is that, in the opinion of the state they are not adequately represented in the services under it. Once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the state. The result of the analysis of the Article is that to in clause (4), (i) there shall be a backward class of citizens, and (ii) the said class, in the opinion of the state is not adequately represented in the service of the state. If these two conditions are complied with, the state is at liberty to make any provision for the reservation of appointments or posts in favor of the said class of citizens.

Article 16(4) uses the term “backward classes” as compared with the word “socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes” used in Article 15(4). This difference in terminology raises two questions: Firstly, whether Article 16(4) covers Scheduled Castes and Scheduled Tribes or not. Secondly, whether the term ‘backward classes’ is to be understood in the same sense as in Article 15(4), i.e., socially and educationally backward classes. As it has been held in several cases that the term backward classes under Article 16(4) covers Scheduled Castes and Scheduled Tribes,<sup>444</sup> and also the term is identical with

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<sup>443</sup> AIR 1964 SC 179.

<sup>444</sup> *General Manager, S. Railway v. Rangachari*, AIR 1962 SC 36

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any socially and educationally backward classes,” i.e., there is no difference between Art. 15(4) and 16(4) as far as the definition of backward classes goes.<sup>445</sup>

The Supreme Court in the second *Triloki Nath case*<sup>446</sup> stated that test based solely on caste, community, race, religion, sex, descent, place of birth or residence cannot be the criteria for backwardness the expression backward class is not synonymous with backward caste or backward communities. The entire caste or community may be declared to be backward but this would not be because of its characteristic as a caste or community as such, but because it is backward at a given point of time in the social, economic and educational, scale of values.

Though *Balaji*<sup>447</sup>, case was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulations enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4). It is held by the court that in dealing with the question as to whether any class of citizens is socially backward or not, it may not be relevant; its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves. The court further proceeded to hold if the caste of the group of citizens was made the sole basis of determining the social backwardness of the said group, the task would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society. How is are going to decide whether Muslims, Christians or list of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in to form the o9peration of Article 15(4). It is not unlikely that in some states some Muslims or Christians or Jains forming groups may be socially backward.

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<sup>445</sup> *Triloki Nath v. State of Jammu & Kashmir*, A I R 1967 S C 1283

<sup>446</sup> *Ibid.*

<sup>447</sup> *M.R. Balaji v. State of Mysore*, A I R 1963 S C 649.

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It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste of which the poor citizens may belong, but not only shows the relevance of both caste and poverty in determining the backwardness of citizens. The leaned today stressed the part played by the occupation, conventional beliefs and place of habitation in determining the social backwardness.

In *Janki Prasad Parimoo v. State of Jammu and Kashmir*<sup>448</sup>, the court held that Article 15(4) speaks about “socially and educationally backward classes of citizens while Article 16(4) speaks only of any backward classes of citizens. However, it is now settled that the expression backward class of citizens in Article 16(4) means the same thing as the expression “any socially and educationally backward class of citizens in Article 15(4). In order to qualify for being called a backward class citizen he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Article 15(4) and 16(4). In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji*<sup>449</sup>, case that backwardness, socially and educationally, is ultimately and primarily due to poverty. But if poverty is the exclusive list, a very large proportion of the population in India would have to be regarded at socially and educationally backward, and if reservation are made only on ground of economic considerations, an untenable situation many arise because even in sectors which are recognized as socially and educationally advanced there are large pockets of poverty. The court further held that in identifying backward classes, therefore, one has to guard oneself against including therein sections 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. Moreover, where

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<sup>448</sup> A I R 1973 S C 930.

<sup>449</sup> A I R 1963 S C 649.

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appointments and promotions to responsible public offices are made, greater circumspection would be required in making reservations for the benefit of any backward class because efficiency and public interest must always remain paramount.

In *State of U. P. v. Pradip Tandon*<sup>450</sup>, reservations in favor of rural areas was held to be unsustainable on the ground that it cannot be said as a general proposition that rural areas represents socially and educationally backward classes of citizens. Poverty in rural areas can not be the basis of classification to support reservation for rural areas.

In *Kumari K. S. Jayashree v. State of Kerala*<sup>451</sup>, it was held that the problem of determining who are socially and educationally backward classes is undoubtedly not simple. Dealing with the question whether caste can by itself be a basis for determining social and educational backwardness, the court observed that it may not be irrelevant to consider the caste of group of citizens cleaning to be socially and educationally backward. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes?

In *K. C. Vasanth Kumar v. State of Karnataka*<sup>452</sup>, the court observed that the means list, that is to say, the list of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes. After 2000 A.D. it is essential that the privileged section of the underprivileged society should not be permitted to monopolies preferential benefits for an indefinite period of time. In so far as the other backward classes are concerned two lists should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means list such

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<sup>450</sup> AIR 1975 S C 563.

<sup>451</sup> AIR 1976 S C 2381.

<sup>452</sup> AIR 1985 S C 1495.

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as a state Government may law down in the context of prevailing economic conditions.

### **4. X. THE CONSTITUENT ASSEMBLY DEBATES**

In the Constituent assembly<sup>453</sup>, the word backward, however did not occur in Article 10(3) as originally proposed by the constituent Assembly in April-May 1947. The original clause (clauses 3) reads:

“Nothing herein contained shall prevent the slats from making provision for reservation in favour of classes, who is the opinion of the slate are not adequately represented in the public services<sup>454</sup>” B.R. Ambedkar proposed a change in the clause as follows:

“Nothing herein contained shall prevent the state from making provision for reservation in public services in favour of classes as may be prescribed by the state”.

Ambedkar thought that the words “adequate represented” might give rise to a lot of litigation on the question of adequacy of representation and desired that once the appropriate authority made reservation of jobs in should continue and should not be a matter of litigation. Rajagopalachari opposed this suggestion saying that it would enable to the state to make reservation even for the majority community when the sole aim of clause 5 was to protect minorities. He thought that the word class as preferable to the word minorities as the latter then could include even political minorities. This was in reply to a suggestion by some members that the word classes should be replaced by minorities.

As we shall see, the entire trend of the debate changed when the drafting commit finally decided to confine the policy of reservation only for the backward classes and not for as religious or linguistic minority. Hence the word ‘Backward’

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<sup>453</sup> Constitution Assembly Debate, Lok Sabha Secretariate, Official Report, New Delhi.1999

<sup>454</sup> Ibid

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before the word 'classes' was added by the drafting committee in the draft Constitution. Article 10 (3) of the draft constitution provided:

“Nothing in this Article shall prevent the state from making any provision for the reservation of appointment of posts in favour of any backward classes of citizens who in the opinion of the state are not adequately represented in the services under the state<sup>455</sup>”.

This came to be as Article 16(4) of the constitution. The drafting committee had introduced the word backward before of the protective discrimination. They thought that the word class was too vague and could cover even the members of the advanced section of the society who were under represented in the state service. By using the word 'backward' the framers wanted to make it clear that except the backward classes who were socially, economically and educationally backward no other minority could be entitled to have the benefit of reservation. In the constituent Assembly divergent opinions were expressed by the members on the meaning of the terms 'backwardness' as the term was too vague; the Scheduled Castes members raised the apprehension whether they were included in the expression. Some members expressed the apprehension of the judicial review of the term 'backward', while others suggested to omit the word entirely allowing unrestricted communal reservations. Some members, on the other hand equated backward classes with Scheduled Castes and Scheduled Tribes only. Some members proposed that instead of the word "backward class", the expression "scheduled caste' 'or depressed class" should be used for the sake of definiteness. Yet there were views that the term broader covered a category to include all backward castes and communities who were socially, economically and educationally backward<sup>456</sup>.

K.M. Munshi assured the house that "at the time when the advisory committee met on the last occasion there was no question of providing safeguards for religious minority." He pointed out that "the negotiations proceeded on the footing that except

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<sup>455</sup> Ibid

<sup>456</sup> Ibid

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backward and the Scheduled Castes and tribes who have a special claim of their own, no other minority should be recognized in the constitution. Munshi felt that the scheme or reservation was pursued for the fulfillment of the social and economic needs of the backward classes who as a result of historical circumstances were equality denied of opportunity is the socio-economic life of the society. When some Scheduled Castes member raised the question whether they were intended to be included, Mnshi replied: I cannot imagine for the life of me now after an experience of one and half-year of the constituent Assembly that any honorable member of the Scheduled Castes should have a feeling that they will not be included in the backward classes so long as they are backward. I also cannot imagine a time when there is backward class in India which does not include the Scheduled Castes<sup>457</sup>.”

That expression “backward class” as used in draft Article10(3) Article16(4) covered not only the Scheduled Castes and Scheduled Tribes but also other socially, educationally and economically backward classes was feather clarified by Munshi by reading this Article with Article 301, it became class beyond doubt that the team “backward” signified” that class of people-does not matter whether you call them untouchables or touchables, belonging to this community or that a class of people who are so backward that special protection is required in the services and I can see no reason by any member should be apprehensive of regard (sic) to the word backward”.

Even often this clarification a member asked, ‘who are the backward classes?’<sup>458</sup> To this Munshi replied; “Article 301 (now Article 340) mares it clean that there will be a commission appointed for the purposes of investigating who are backward classes which includes not only the Scheduled Castes and Scheduled Tribes but also other backward classes, who are economically, educationally and socially backward. We need not therefore define or restrict the scope of the word ‘backward’ to a particular community.”

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<sup>457</sup> Ibid

<sup>458</sup> Ibid

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It is notable that Munshi repeatedly referred to the expression economically, socially and educationally backward classes as the legitimate recipients of the benefits of Article 10 (4) read with Article 340. Neither Article 16(4) nor Article 340 uses the expression 'economically' but the speech of Munshi indicates that the word "social" includes "economic" also. That the backward includes even economic backwardness is reinforced by the wording of Article 46 which directs the state to promote the "educational and economic" interest of the weaker sections' of the society particularly the Scheduled Castes and Scheduled Tribes and to protection, from 'social injustice' and "all forms of exploitation". If Article 16(4) is read with Article 340 and 46 the expression weaker section' would certainly include educationally and economically backward classes besides the Scheduled Castes and tribes. Article 46 also used the word "Social injustice" along with economic interest implying thereby that the constituent Assembly clearly intended to include even economically backward classes i.e., weaker sections of the society for the purpose of seeming social justice to those people by making reservation of job for them<sup>459</sup>.

Despite all the clarifications, a doubt still persisted among the members of the assembly regarding the exact meaning and scopes the word backward class. T.T. Krishnamachari for instance described Article 10(3) using the term 'backward class' as a paradox for lawyers, leading to a lot of litigation". Ambedkar frequently used the word caption communities and collection of communities while defending Article 10(3). The entire debates were intended to be included within its purview even Munshi at one place referred to backward community as being included in it. When asked who is a backward community, Ambedkar said "we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government." Ambedkar stated that a backward of the local Government gives due recognition of the variation in the local conditions and suggests the difficulties in formulating an universal test for determining backwardness on an all India basis. It also clarifies that the purpose of Article 16(4) is to

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<sup>459</sup> Ibid

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provide adequate representation to the underrepresented backward communities and that reservation should be of a minority of posts.

The repeated reference made by him to castes and community show that by backward classes he meant nothing but backward castes and communities, who had suffered centuries of oppressions and various forms of socio-economic disabilities precisely on the ground of being belonging to a particular caste, community or religions. But all those were the personal views of Ambedkar and not of constituent assembly as a whole. The debate of the assembly analyzed above, reflected multiplicity of the views on the meaning of the term 'backward classes', including a view that the term included economic backwardness or educational backwardness, of the people regardless of one's caste, religion or race.

In the constituent Assembly K.T. Shah<sup>460</sup> had proposed an amendment to clause (2) of draft Article 4 (now clause (3) of Article 15) for adding the word or Scheduled Castes; or backward tribes, for their advantage, safeguard and betterment." The object as stated by him was: "In regard to the Scheduled Castes and backward tribes, it is an open secret that they have been neglected in the past; and their right and claims to enjoy and have the capacity to enjoy as equal citizens happens to be denied to them because of their backwardness. I seek therefore by this motion to include them also within the scope of this sub-clause (2), so that any special discrimination in favour of them may not be regarded as violating the basic principles of equality for all classes of citizens in the country. The need and must be give for some time to come at any rate, special treatment in regard to education, in regard to opportunity for employment, and in many other cases where their present inequality, their present backwardness is only a hindrance to the rapid development the country. Ambedkar opposed Shah's amendment on the apprehension that if a clause like Article 16 (4) was introduced in Article 15 also, the state could open separate educational and other facilities exclusively for the Scheduled Castes and the scheduled tribe without

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<sup>460</sup> Constituent Assembly Debate, Lok Sabha Secretariate, New Delhi 1999.

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offending the equality guaranteed contained in Articles 14, 15 or 29. Ambedkar was not unaware the prevalence of the practice in America of segregating Negroes from educational and other public facilities with the tacit approval of the U.S. supreme court<sup>461</sup>.

It is submitted that the omission of Article 15(4) by the constituent assembly was deliberate. Presumably the assembly felt that Article 46 was broad enough to cover all compensatory measures to benefit the backward groups including preferences in educational sphere without violating Article 14 or 15. Since the framers did not incorporate any provision in chapter (iv) requiring the state to secure adequate representation to the backward classes in public services they incorporated Article 16(4) in part III of the constitution by way abundant caution when shah's amendment was rejected the constituent Assembly perhaps did not conceive that the counts might strike down compensatory discrimination measures in the absence of express provisions in the constitution to that effect<sup>462</sup>.

Soon after the commencement of the constitution a lacuna was found in the provision of reservation and that had to be remedied by an amendment of the constitution. Article 15(4) was added by First Amendment in 1951 as a result of the decision of the supreme Court in *Champakam*<sup>463</sup> in which the court struck down a madras scheme of reservation of seats in the medical and engineering colleges for caste and religion based grounds like Brahmins, non-Brahmins, Hindu, backward Hindu, Muslims and Christians. The amendment was necessitated because of some unfortunate observations of the Supreme Court to the effect that the state was not authorized to give preferential treatment outside the area of public employment Article 15(4) was added simply to authorize the state to make preferences in favour of the backward classes in all its dealings. The amendment however did not validate the

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<sup>461</sup> Ibid

<sup>462</sup> Parmanand Singh. *Who are the other backward classes? The Historical Backward*. 17 & 18 (1990-91), IBR, p.332.-333.

<sup>463</sup> Ibid

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madras G.O. and did in no way affect the correctness of the holding in *Champakam* case that caste and religion could not be the sole consideration for preferential treatment<sup>464</sup>.

The debate on Article 15(4) also centered around the question as to who were the ‘socially and educationally Backward classes’ and why was it that the parliament choose to depart from the language used in Article 16(4) ? Prof. K. T. Shah suggested an amendment for the addition of the word ‘economically’ along with the word ‘socially and educationally’ on the belief that the aim of Article 15(4) should be to remove economic backwardness<sup>465</sup>. Prime Minister Nehru expressed his unwillingness to accept such an amendment and observed; but my difficulty is that when we choose those particular words there we choose them because they own in Article 340 and we wanted to bring bodily from there. Otherwise, I would not have the slightest objection to add ‘economically.’ But if I added “economically” I would at the same time not make it a kind of cumulative thing but would say that a person who is lacking in any of these things should be helped... ‘Socially is a much wider word including many things and certainly including economically.’

The Select Committee Report also made similar clarifications for not including the word ‘economically’ in Article 15(4). Nehru conceded that giving recognition to caste and communities went against the principle of equality and non-discrimination but at the same time he felt that: we have to deal with the situation where for a variety of causes for which the present generation is not to blame the past has the responsibility, there are groups, individuals, communities, if you like, who are backward. They are backward in many ways – economically, socially, educationally – sometimes they are not backward in one of those respects and yet backward in another. Nehru believed that the aim of compensatory or protective discrimination

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<sup>464</sup>Ibid .

<sup>465</sup> Ibid

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was to eliminate inequalities based on past prejudices associated with discriminatory social structure of the society.

Ambedkar, then the law minister, defended Article 15(4) refined to Article 16(4) and said, "what are called backward classes are – nothing but a collection of certain castes.

There was a considerable suspicion in the minds of many members that Article 15(4) might be misused by the state by creating communal quotas and thus perpetuating casteism and communalism in the country. The select committee, however, assured that Article 15(4) is: Not likely to be and cannot indeed be misused by any Government for perpetuating any class destination against the spirit of the Constitution by treating non – backward classes as backward for the purpose of conferring privileges on them. The assurance given by the select committee echoes the intention of framers to help the really needy and the backward classes instead of promoting the interest of the individuals or the groups of the advance classes in the name of caste or religion.

The entire debates on Article 15(4) and 16 (4) centered around the question as to which 'communities' and 'castes' were intended to be included for protective discrimination. The chief Draftsman, Ambedkar always equated backward classes with castes and communities. Munshi stressed the relevance of the factors of social, economic and educational backwardness in determining backward classes, some members pressed for economic backwardness as the only consideration for preferential treatment. Some believed that backward classes meant only the schedule castes other viewed it as broad enough to include other castes and communities as well, one member (T. T. Krishnamachari) echoed the doubt that Article 16(4) would 'a paradise for lawyer'. Ambedkar clarified that the backward classes will be designated by each state Government, but others believed that it is under Article 340 which will conclusively determine the criteria for selecting legitimate beneficiaries and that on the basis of commissions report the president determination would be final

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national list of backward classes. Yet other appreciated the variations in the local conditions and preferred the determination of backward classes at the local level rather than at the central level.

One thing is clear from the above analysis, it is that the underlying purpose of compensatory discrimination was to counterbalance the disadvantaged suffered by certain classes for past wrongs suffered by them because of unequal social structure of the Indian society. It was contemplated that only through affirmative action programmes the historically disadvantaged classes could be compensated for past losses. The debates clarify that under Article 15 (4) and 16 (4) preference had to be given to classes rather than to the individuals but the policy clearly was not to confer benefits on all members of a disadvantage class but only to those who were utterly deprived by past discrimination. The word ‘classes’ was used simply as a convenient device to identify the legitimate and deserving beneficiaries<sup>466</sup>. This might have been envisaged that the aim of Article 16 (4) and 15 (4) was not to eliminate all inequalities but only those associated with traditional social structure. Presumably the groups or classes entitled to preferences were not merely economically poor but social groups associated with disabilities and backwardness because of heredity or unjust social conditions. This is why it was the impression of many speakers in the constituent Assembly and parliament that backward classes had to be designated by “castes’ and communities” who are the victims of inherited inequalities<sup>467</sup>. In classifying the wearer sections of the society which need special protection it was realized that the specified scheduled groups discussed above do not exhaust the list of all backward classes. The constitution therefore, took rate of what are called ‘other backward classes’ who were equally or may be somewhat less backward than the Scheduled Castes and Scheduled Tribes. Unlike the scheduled groups, there is no clause defining these backward classes, nor is there any clean-cut method or agency for their

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<sup>466</sup> Supra note 462.

<sup>467</sup> Ibid.

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determination<sup>468</sup>. No definite standard has been laid down by the framers of the constitution to define backward classes. In fact, no uniform or single nomenclature has been used to denote such classes<sup>469</sup>.

### **4. XI. VIEWS OF THE NATIONAL BACKWARD CLASS COMMISSIONS**

To facilitate the task of identifying the backward classes and laying down criteria for this purpose, Article 340 authorizes the president to appoint a commission to investigate the conditions of the backward classes. Article 340 provides that the president may by order appoint a commission to investigate the conditions of socially and educationally backward classes within the territory of India. In order to identify such classes attempt have been made through various commissions, committee constituted for the purpose by the centre and states as well as by the judiciary. In pursuance to this Article, the president appointed the backward classes commission under the chairmanship of Kaka Saheb Kalelkar in January 1953, which submitted its report on March 31, 1955, under the chairmanship of Kaka Saheb Kalelkar, this commission prepared a list of 2399 communities as socially and educationally backward and recommended reservation varying from 25 to 40 per cent for them in all four classes an Government services. Having considered several criteria relevant in determination of backward classes, it ultimately decided to treat the status of caste as an important factor for that. On that basis it proceeded to make a list of backward communities. According to the commission, the relevant factors to consider in classifying such classes, would be their traditional occupation or profession, the percentage of literacy or the general educational advancement made by them, the

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<sup>468</sup> T. N. Shalla. *Dynamics of reservation policy under Indian Constitution; A Working Paper*, in D. N. Saraf. *Social Policy, Law and Protection of Weaker Sections of Society*, Eastern Book Company, Kashmere Gate. Delhi-6 1986 p 109.

<sup>469</sup> Harpal Kaur Khehra. *Job reservation resos efficiency in administration*, CILQ 1990, p. 34

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estimated population of the various communities throughout the state or their concentration in certain areas. Thus report, however, was not accepted by the Government as it did not apply any objective tests for identifying backward classes and opposed the adoption of castes as one of the criteria for backwardness<sup>470</sup>.

The Second Commission was set up on December 20, 1978 under the chairmanship of Mr. B. P. Mandal to probe the conditions of socially and educationally backward classes. The report submitted on December 31, 1980 listed 3743 castes as backward classes on the basis of caste based set of indicators as criteria evolved by it according to chairperson, the backwardness in India had got institutionalized as a result of the caste system and social organization. The result was that the communities at the lower rung, deprived of normal facilities and civil rights continued at this level for several years; As a result of India's proclaimed commitment to establish a democratic and egalitarian society the backward section now expected to have equal rights with others<sup>471</sup>. In 1961, the centre remitted the Kalelkar report to the states, directing upon reservation for backward classes in addition to existing system for Scheduled Castes and Scheduled Tribes, some states favored economic backwardness as criteria while others were inclined to stick on to the list prepared by them on the basis of castes. However centre desired that it would be better if the states apply economic lists rather than classifying people by their castes<sup>472</sup>.

Even the courts have endorsed the view that an exclusive central designation of the other backward classes is not constitutionally required. It has been held that the state Governments can list backward classes independently of either the enumeration of such classes by the president or the findings of a central backward classes commission. A presidential designation is not a condition precedent for the exercise

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<sup>470</sup>Ibid at 34.

<sup>471</sup> I did.

<sup>472</sup> Ibid

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of the power conferred by Article 15 (4), or 16 (4)<sup>473</sup>. It is submitted that the constitution gives to the centre a very minimal role to play in the area of protective discrimination. The framers clearly intended to leave the local Governments in full awareness of divergence of the state practice in this area even in the pre-constitution days. They fully realized the difficulties of prescribing universally applicable tests of backwardness and wanted to presume flexibility in the designing of ameliorative measures<sup>474</sup>.

Any exclusive central designation of the other backward classes cannot be fool-proof and there is no guarantee that such a course shall altogether be free from pressure on the part of politically dominant backward castes through some indirect methods or direct organized movements. Moreover, finding out suitable criteria on an all India basis is beset with the same difficulties as was felt by Kaka Kalelkar Commission. Moreover in the area covered by Article 16 (4) it is the opinion of the state Government and not of the president or parliament which will determine the inadequacy of representation of the backward groups<sup>475</sup>. It is worth noting that the enumeration backward classes by the commission contemplated under Article 340 (1) are not conclusive or binding on the state Governments. Article 16 (4) authorizes the state to make any provision for any backward class of citizens and not for every backward class of citizens enumerated in the commission list. The inclusiveness of the central designation of backward classes is reinforced by the fact that the commission is not a continuing body with power to revise its list. Even if a state Government appoints a local backward classes committee, it is not bound to adhere to the lists proposed by such committee and to give benefit to every backward class enumerated in such lists. The state may provide reservation even to such backward

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<sup>473</sup> Parmanand Singh. *Backward classes commissions and politics of backwardness: A profile*, 17 (3&4) IBR.1991. p. 416.

<sup>474</sup> Ibid.

<sup>475</sup> Ibid

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classes which are not enumerated is the list prepared either by central or state backward classes' commission<sup>476</sup>.

In their examination of Kaka Kalelkar Commission Report, the Government of India had specially noticed the absence of any objective tests for identifying socially and educationally backward classes. Several Supreme Court judgments have also emphasized the need for evolving such criteria on the basis of field investigations and other independent evidence. It was in view of these considerations that the Commission decided to tap a number of sources for the collection of data and Chapter III of this Report contains a brief account of this approach<sup>477</sup>.

Socio-educational field survey was the most comprehensive inquiry made by the Commission in this behalf. Right from the beginning, this survey was designed with the help of top social scientists and specialists in the country, and experts from a number of disciplines were associated with different phases of its progress.

To begin with, a Research Planning Team of Sociologists met in Delhi from June 12th to 14th, 1979 to draw up a plan of studies and researches which should be undertaken by Backward Classes Commission for determining, in a Scientific and objective manner, the criteria defining socially and educationally backward classes. The report of this team is at Appendix-12, Volume II.

Subsequently, a Panel of Experts (Appendix-13, Volume II), led by Professor M. N. Srinivas, met in Delhi from July 18th to 20th, 1979, and after detailed deliberations, prepared a complete design of the survey along with a set of schedules, dummy tables, instructions, etc<sup>478</sup>.

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<sup>476</sup> Supra note 473 at 417

<sup>477</sup> Government of India Report of the Backward Classes Commission, Chap. XI, 1980 at 50.

<sup>478</sup> Ibid

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Experts Panel agreed with the observation of Research Planning Team that the task before the Commission was to lay down the criteria for identifying recognizable and persistent collectivities and not individuals. It also observed, "in the Indian context such collectivities be castes or other hereditary groups traditionally associated with specific occupations which are considered to be low and impure and with which educational backwardness and low income are found to be associated."

With a view to providing continuous guidance at the operational level, a Technical Advisory Committee was set up under Dr. K. C. Seal, Director General, Central Statistical Organisation, with Chief Executive, National Sample Survey Organisation, and representatives of Directors of State Bureau of Economics, members<sup>479</sup>.

The experts Panel had prepared the following four schedules for canvassing during the field survey:—

- (i) Household schedule (rural).
- (ii) Household schedule (urban).
- (iii) Village schedule.
- (iv) Town schedule

These schedules were pre-tested in a number of villages in West Bengal; U.P., Maharashtra and Haryana and, validation checks carried out by the Research & Survey Wing of the Commission. The results were discussed, by Technical Advisory Committee and, after detailed examination, it was decided that rural and urban household Schedules may be combined in one composite schedule with two independent, mutually exclusive; sections for rural and urban areas. It was also decided to drop the town schedule. The combined rural and urban household schedule was fully pre-coded so as, to meet the requirements of electronic processing of data. The schedules

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<sup>479</sup> Ibid

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thus finalised and actually canvassed in the field are at Appendices 14 and 15, Volume II<sup>480</sup>.

Household schedule was divided into five parts, i.e., household particulars, particulars of Individual member particulars of students between 5-15 years, description of assets and indebtedness. Questions under well part were so framed as to get information on such social, educational and economic particulars of a household as characterized the syndrome of social and educational backwardness in the Indian conditions.

All the questions in the schedules were direct and did not involve any problems As indicated earlier; these schedule were pre-tested in four States, validation checks carried out at the headquarters and some modifications made as a result thereof .

Experts' Panel had recommended 1% purposive sample of villages at district level to be able to identify a vast majority-of-backward—classes. At a subsequent meeting of Technical Advisory Committee presided over by Director General. Central Statistical Organization, it was decided 'that for our purpose a sample of 1 % of the countries" population comprising 65 lakh person, may, be too large, especially in view "Of the limited time available to the Commission. Instead, 100% coverage of two villages and one urban block in each district of the country was considered to be quite adequate. In view of the vast experience of Central Statistical and National Sample Survey Organization in conducting surveys this recommendation of the Committee was accepted. The selection of villages and urban blocks was left to the State agencies entrusted with the survey. It was, however, emphasized that, as far as possible, the villages and urban blocks selected for survey should be of a composite nature, medium sized and should reflect typical rural or urban conditions of the con-

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<sup>480</sup> Ibid

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cerned district. A list of the villages and urban blocks surveyed in each State is at Appendix-16, Volume II.

Survey, operations were entrusted to the State Statistical Organizations of the concerned States/Union Territories. This was made possible through the good offices of Dr. K. C. Seal, Director General, Central Statistical Organization, who took up this matter at the Fourth Conference of Central and State Statistical Organizations held at Lucknow from September 20th to 24th, 1979 and persuaded the State representatives to accept this challenging task.

All the schedules, survey instructions, etc., were got centrally printed in Delhi and dispatched directly to a number of distribution centers indicated by each State. Each State nominated a Contact Officer to coordinate survey work at the State level. The actual work of survey was entrusted to District Statistical Officers who selected two investigators per village/urban block for actual canvassing of schedules in the field. It was also decided that the filled in schedules will be scrutinized at each headquarter before they are forwarded to the Commission<sup>481</sup>.

### **Indicators (Criteria) for Social and Educational Backwardness:<sup>482</sup>**

As a result of the above exercise the Commission evolved eleven 'Indicators' or criteria for determining social and educational backwardness. These 11 'Indicators' were grouped under three broad heads, i.e., Social, Educational and Economic. They are:-

#### **A. Social**

- (i) Castes/Classes considered as 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 110% males above the State

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<sup>481</sup> Ibid

<sup>482</sup> Ibid

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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.

### **B. Educational**

(v) Castes/Classes where the .number of children in the age group of 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 of 5-5 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 at least 25% above the State average.

x) Castes classes where the source of drinking water is beyond half a kilometer 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.

As the above three groups are not of equal importance for our purpose, separate weight age was given to 'Indicators' in each group. All the Social 'Indicators' were given a weight age of 3 point each, Educational 'Indicators' a weight age of 2 points each and Economic 'Indicators' a weight age of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to

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highlight the fact that socially and educationally backward classes economically backward also.

It will be seen that from the values given to each, Indicator, the total score adds up to 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which have score of 50 per cent (i.e., 11 points) or 'above' were listed as socially and educationally backward and the rest were treated as 'advanced', It is a sheer coincidence that the number of indicators minimum point score for backwardness, both happen to be eleven. Further, in case the number of household covered by the survey for any particular caste were below 20, it was left out consideration, as the sample was considered too small for any dependable inference.

The above system of listing castes as socially and educationally backward on the basis of their score may appear somewhat arbitrary. On the face of it this is a tenable viewpoint. On the other hand, points scored by a particular caste under the above system actually reflect the number of indicators of backwardness which it satisfies. Secondly, this method has the great merit of objectivity, as point system allows no subjective assessment. Thirdly, this method was found to be highly dependable in practice. For instance, as a result of its application, most of the well-known socially and educationally backward castes were identified as backward.

In the end it may, be emphasized that this survey has no pretensions to being a piece of academic research. It has been conducted by the administrative machinery of the Government and used as a rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by, practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time. All these factors obviously militate against the requirements of technicality sophisticated and academically satisfying operation.

## **THE CRITERIA FOR BACKWARDNESS**

Identification of backwardness classes for the purpose of reservation necessarily raises the questions as to what are the criteria for identifying backwardness. The constitution nowhere defines the expression “backward classes”, nor even the debates in the Constituent Assembly give any guidance in the matter as is evident from the reply given to a similar question by the Chairman of the Drafting Committee, Dr. B.R. Ambedkar that “A backward community is a community which is backward in the opinion of the government.” Various commissions appointed for the purpose have used many criteria such as caste, poverty, occupation, education, residence, etc. the apex court has from time to time tested the constitutional validity of these criteria in a galaxy of decisions.

### **(i) Caste as Criterion:**

Backwardness of certain castes and communities has been attributed to the Indian social structure in which rigid endogamous groups inherently sustain the inequality due to traditional values and taboos. But whatever might have been true in traditional India, in examining today whether caste as a whole can be treated as backward or whether caste and class are synonymous, one should not lose sight of the present day sociological realities. Today there is no necessary correspondence between caste-status and socio-economic status. Education and occupation are now relatively open to every-one regardless of one’s caste, religion or race. Some sociological studies have revealed that upward mobility among the lower-status castes is increasing with gradual disappearance of social status based upon ritual-rank-ordering. Instead of ritual status being the criteria of mobility, new criteria of occupation, education, wealth, political influence and leadership positions are instrumental in “reducing the positive relationship between ascriptive (caste) status and achieved (education, income, occupation) status and thus creating the possibilities of changing the status summation characteristic of Indian society.” With these changes in the profile of social stratification in India ‘caste’ can no longer be

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characterized as 'homogeneous' and 'non-competitive'. Today there is a great amount of differentiation among the members of a caste-group in terms of income, occupation, and status and therefore it is no longer accurate to talk of 'caste' as 'classes'.

It is unrealistic to justify a state-wide generalization of various jatis as backward class when the members of the same jati (sub-caste) in different parts of the same state and even within the same district may differ greatly in terms of social standing and economic position. Since there is no necessary congruence between caste-status and socio-economic status of its members, the prosperous actions of the caste groups will grab the lion's share of the benefits of compensatory discrimination to the detriment of the really backward. Caste criterion is unreliable because the "social and economic backwardness many easily become confused with low ritual status". The caste-status (which is determined by birth) of an individual is static or immutable but the social, economic and educational attainment (which is achievable) is dynamic and it is questionable how a static factor (caste) can determine a dynamic factor (backwardness). Moreover the non-discriminatory provisions of the Indian Constitution also reject the caste form of social organization and envision a new egalitarian and secular society. Caste today has become the strongest party in India and it shall be dangerous to confer benefits solely on caste basis.

Caste can therefore be only one of the criteria for determining backwardness and cannot be the sole determinant,

In *Champakam Dorairajan and Periakaruppan*, the Supreme Court struck down government orders reserving seats for certain "castes" as backward and held that such identification is inconsistent with the fundamental right to equality. In *Balaji Jayasree and Pradeep Tandon* the apex court accepted caste as a relevant factor for ascertaining social backwardness but opined against accepting caste as the sole or dominant criterion.

In *Venkataraman, Rajendran and Periakaruppan* cases the apex court recognized the integral connection between caste, occupation, poverty and social

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backwardness. In *Thriloki Nath* (II) the court held that “the members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class”. In *K.C. Vasantha Kumar Chinnappa Reddy*, J stated that, “if poverty be the cause caste is primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person’s caste.”

The Supreme Court in its landmark judgement in *Indra Sawhney* held by a majority of 6 to that caste being a social class in India may validity be a criterion for backwardness if it is backward socially and its educational and economic backwardness is on account of its social backwardness. In the court’s view:

“When caste, occupation, poverty and social backwardness are so closely intertwined in our society there is nothing unconstitutional in beginning the process of identification with castes, which represent explicit identifiable social classes or grouping.”

Thus in *Indra Sawhney* case, the Court upheld the methodology adopted by the Mandal Commission in identifying backward classes on the basis of caste. The majority judges were however unconvinced that caste may ever be a valid criterion in view of express prohibition against any discrimination based on caste. In the words of Sahai, J., “Caste is a reality. Undoubtedly so are religion and race”. “If caste is treated as a valid criterion”, the learned judge cautioned “then tomorrow the identification of backward classes among other communities, where caste does not exist, on race or religion coupled with these very considerations cannot be avoided”.

### **(ii) Poverty as a Criterion:**

There is no gainsaying that poverty breeds backwardness, be that social, economic or educational. But whether indigent people forms a class to qualify as backward class has been a debatable issue.

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In *Chitrlekha* the Supreme Court held that the identification of backward classes on occupation-cum-income basis unrelated to caste was perfectly valid. The court however maintained as in *Janaki Parimoo* and in *Pradeep Tandon* that poverty and poverty alone cannot be the basis of identifying social or educational backwardness, although in *Jaysree Ray*, J. opined that social and educational backwardness are not more than “the inevitable corollaries of the extremes of poverty” and *Gajendragadkar* in *Balaji* observed that “economic backwardness might have contributed to social backwardness”. Yet in *K. C. Vasantha Kumar, Desai and Sen, JJ.*, opined that poverty in the present milieu must be the predominant and sole factor for determining backwardness for the purpose of Art. 15 (4) and 16 (4), for in the words of *Desai, J.* “if economic criterion for compensatory discrimination or affirmative action is accepted it would strike at the root cause of “social and educational backwardness”. The other three judges in *Vasanth Kumar* did not agree with these two judges and validated the caste criteria coupled with economic and /or other considerations.

The apex court dilated upon this issue in its 9-judges bench decision in *Indra Sawhney* analyzing all the relevant decisions, regarding the economic criterion. The Court said that “the policy of reservation is not aimed at economic upliftment or alleviation of poverty,” The Court observed: “Poverty by itself is not the test of backwardness for if it were so most people in this country would be in a position to claim reservation.” However the court upheld a criterion based upon occupation-cum-income without reference to caste.

### **(iii) Occupation as Criterion:**

For identifying backwards among Hindus, caste may be a relevant factor but it does not work in other communities not recognizing caste-system. In such cases occupation and avocation might help in identifying backward classes among non-Hindus. The apex court in many decisions such as *Chitrlekha*, *Vasanth Kumar*, and even in *Indra Sawhney* upheld as valid the criteria based upon occupation-cum-income factors. In his minority judgment in *Indra Sawhney*, *Sahai, J.* also advocated

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the occupation criteria by saying that if among non-Hindu occupation can be a basis for identification of backwardness it can equally furnish basis for identification among Hindus itself.

Heredity and occupation has been one of the most distinguishing features of the Indian caste-system. The old four-fold stratification was based on social roles of the four Varna groups and these social roles were based upon occupation that each Varna was prescribed to follow. The choice of occupation was thus limited by birth, religious sanctions based upon Upanishads, Manusmriti and other Shastras. Many castes began to derive their cast-names from the occupations they pursued such as Washerman, blacksmith, carpenter, tailor, fisherman, scavengers. The rigidity of the cast-system has often been attributed to the non-changeability or non-mobility of occupation. But the non-mobility in occupation was also due to the tendency among the higher castes to resist any attempt by the lower castes to achieve upward occupational mobility.

It is true that today the relationship between caste-hierarchy and occupational stains is gradually decreasing due to the policy of compensatory discrimination but there are many people who because of the lack of education, wealth and other resources still stick to their traditionally low occupation with all stigma attached to it. Such persons remain utterly backward socially and educationally. Therefore the test of 'occupation' is a relevant test for determining backwardness. The test of 'occupation' has the additional advantage that it does not attract the non-discrimination provisions of the Constitution. It has been suggested that if occupation is taken as the main determinant of backwardness it would automatically absorb caste which may be described as a nothing more than "a systematization of occupational differentiation" or a "formal or historical personification or social backwardness."

But the test of occupation presents some puzzling problems. One is that a bona fide declaration of the occupation pursued by an individual or family is doubtful especially those outside the area of state employment. The desire of being included in

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the category of backward classes may induce many persons to show that they are pursuing a specified occupation. Then there are communities which do not follow any traditional occupation such as beggars, the wandering tribes and criminal tribes who have no fixed income in the economic sense.

The other problem relates to the definition of traditional occupation. A traditional occupation means an occupation followed in a family in which it is handed down by an ancestor to his posterity. Such occupations are generally occupations in which some skills are necessary like those of an artisan or a craftsman. And those occupations which do not require special skills developed by tradition and can be resorted to by anybody will not be a traditional occupation and thus cannot be the basis of a backward-class-classification.

Similarly if the father of the person who claims reservation under Article 16 (4) or 15 (4) has given up his low income occupation and has taken to a trade or a government job, it would be wrong to give to such person any benefit only because his grandfather pursued low occupation.

Besides, it is difficult to decide who the persons are belonging to a listed occupational group. For instance, it has been held that the occupation of a purohit is not an “occupation involving manual labour” as it involved merely the recitation of ‘mantras’.

Again, supposing a person is pursuing the occupation of a “petty-businessman” specified as an occupation for getting preferences. But he also does teaching as a part-time job. Can he get the benefit of the reservation order when he combines a listed occupation with some other occupation unspecified in the order? Perhaps, he will not.

The occupational test is further complicated by the changing occupation of the people. For instance, it has been held that a person, whose father was a school teacher

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but had engaged himself in agriculture after retirement, could not receive the benefit of reservation in college because the 'occupation of agriculture' specified in the order meant traditional or habitual occupation of the families and not casual or temporary occupation.

Finally, what shall be the unit for determining backwardness on the application of 'occupational test'. Presumably the unit will be the family (and not the individual) as in the case of an income test. But suppose in a family often persons, 2 pursue traditionally low and polluting occupation, 2 persons, 2 pursue middle-class status occupation and the remaining 6 persons are pursuing higher-status occupation. Will the 10 members of the family be treated as backward or only 2 members pursuing traditionally low occupation? Perhaps the answer is not so simple.

Therefore like 'caste', 'occupation' may be only one of the factors for determining backwardness. It will however be better if the test of occupation is subsumed under the test of caste because of close affinity of caste of occupation.

The use of an income test as the sole determinant of social backwardness is justified on the ground that economic inequalities among the people is largely due to the rigid-caste-structure and these disparities can be removed only by placing all emphasis on the economic backwardness. But the judicial resistance to an exclusive economic test is based on the notion that such method would enable even socially and educationally advanced sections of the society to claim benefits of reservation. And be whatever standard poverty is determined a preference based upon economic condition would encompass a vast majority of the population.

In India a vast majority of rural population is engaged in agricultural occupation and if all income ceiling in terms of money is fixed then it might discrimination in favour of those whose income is difficult to estimate such as farmers, traders and other members of the self-employed class. The income of these people is often unrecorded or concealed especially when the income is in kind like

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food grains or services. In case of these persons employment or taxation records will not be ordinarily available and thus it will be difficult to estimate their income. An income test will surely discriminate against those whose salary records are maintained such as government servants or those employed in autonomous institutions.

Then, what should be the line to demarcate between the affluent and the poor in a society like ours where large segments of the population lives outside the money-economy? The problem of the removal of poverty is a part of the general developmental programme of a welfare state which can be achieved by such measures as economic ceiling on land holdings, abolition of bonded labour, abolition of rural indebtedness, living wages to labourers, conferment of land ownership on those who till the soil, general industrial and technological advancement and provision for better education, housing and better food and health care for the poor. In our submission these re-distributive measures should not be mixed up with the notion of compensatory discrimination which is designed primarily to eliminate inequalities associated with structural and environmental factors. An exclusive income test for classifying backward classes would thus ignore the historical context under which inequalities of income, wealth, education and occupation is closely related to the rigid caste-structure. Backwardness has to be judged by one's social standing and educational attainments rather than by one's economic position alone.

And in the context of Article 16 (4) the recipients of the job reservation are required to fulfill the minimum educational qualifications and mere poverty cannot confer them and appointment. It may however, be conceded that since education depends upon income, poverty can contribute to the underrepresentation in government service for want of educational qualification. The income ceiling however, serves a useful purpose of eliminating those members of a backward community who have attained sufficient advancement. The test of income has therefore to be used conjunction with other tests for determining backwardness.

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When an income ceiling is applied sufficient care has to be taken to define clearly the term “family income” (because here again, it shall be the family and not the individual as the unit for applying the test). It will be preferable to define a ‘family’ as including the applicant to a reserved post; his/her spouse the applicant’s parents if the applicant is residing with them or dependent on them. The income ceiling will be applied by reference to the families of each group of persons specified in the reservation order having below the aggregate annual income fixed by the order.

### **IV. Education as Criterion :**

The educational backwardness of certain classes of citizens is also due to historical reasons. In the traditional India, some castes and classes were denied education under Brahmanical supremacy. The Brahmanical supremacy was put to an end with secularized and formalized system of education introduced during the British period. But even this change benefited to higher status castes more than the lower castes. The reason was that the castes were merged with occupational status and thus many lower castes were induced to pursue traditionally low occupation for which education was not necessary. And even when attempts were made by the lower castes to achieve upward mobility through education, such attempts were thwarted by the higher castes on whom the lives of many agricultural and servant castes depended. In some cases where the low castes children attended the schools, they were ill-treated and discriminated against by the high-caste teachers.

But in today’s India due to the policies of compensatory discrimination a low rittal status man has a better chance to achieve high economic and educational status. One can however, still find congruence between caste and illiteracy or low level of education due to the hangover of centuries old caste oppressions. The Kala Kalelkar Commission came to the conclusion on the basis of the caste-wise literacy figures of the 1931 census that generally lower castes wee educationally backward also. The

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causes of educational backwardness were summed up by the commission as traditional apathy for education on account of social and environmental conditions or occupational handicaps, poverty, lack of educational institutions in rural areas, living in inaccessible areas, lack of adequacy educational aids and financial grants for the purchase of books and clothing, lack of hostel facilities, unemployment among the educated and defective educational system.

The first question that arises in educational test is that how to determine educational backwardness for the purposes of reservation in services. In *Balaji* the Supreme Court has doubted the adequacy of literacy test based upon the census records, has expressed the doubt about the propriety of taking the average of the student population of each community at the level of 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> standard with the object of putting each of these communities in the list of backward classes and has indicated that even if such test is adopted by the state, only those communities which are well-below the state average could properly be regarded as educationally backward classes. Presumably according to *Balaji* the educationally backward classes will be less than half of the state average but how much below the state average will be reasonable is not clear from the judgment. But in *Balaram*, the Supreme Court has deviated from the *Balaji* “well below the state-average formula and has upheld a classification in which even those communities were included who were slightly above the state average. Such departure has been justified on the ground that *Balaji* did not lay down any hard and fast rule as it had observed that “it is for the state to consider the matter and decide the manner which is consistent with the requirement of Article 15(4).”

But *Balaji* was decided in the context of Article 15(4). Apparently the test of education will be different in the context of Article 16(4) which is related to the appointment in the state services. The level at which the list of educational attainment should be applied for delineating educationally backward classes for purpose of Article 16(4) should be reasonably related to the capabilities of the beneficiaries of job-reservation. If the literacy test of the type adopted for educational

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reservation is applied even or the purposes of Article 16(4) it would be illogical because for getting an appointment one should have the minimum educational qualifications. The level at which the test of educational attainment should be applied should be the level of minimum educational qualification required for appointment in majority of the state services. For instance, if the minimum qualification prescribed for getting class (ii) jobs is graduation, bachelor's degree should be the minimum education level for testing educational backwardness in order to make it more meaningful.

The test of educational attainment also raises membership problems. What should be the unit for determining educational backwardness? If 'family' is taken as a 'unit' it is difficult to measure the educational position of all members in a family because all the members in a family may not be uniformly less educated. If 'caste' is made the unit then it will be opposed to Articles 15(1) and 16(2). Moreover, it is difficult to determine caste-wise educational backwardness in the absence of caste-wise literacy figure.

The above discussion clarifies that the backward classes have to be delineated by the application of multiple tests. All the relevant tests have to be applied simultaneously to all groups and communities. As soon as the relevant indices are applied, the groups which have attained sufficient socio-economic advancement will be eliminated from the list. But for applying these tests the state will have to collect necessary data regarding the social and economic conditions of the people. In the context of Article 16(4) the state will have to collect adequate data of income of the families, the earning members and size of families, the income-wise number of posts held by the members of respective communities or group of communities.

Art. 15 (4) and 340 make special mention of backwardness being "educational", in addition to "social", for affirmative action. However Art. 16 (4) make use of the expression "backward class of citizens" only. Yet as was noted by the Supreme Court in *Indra Sawhney* an impression somehow gained currency that the

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expression used in all these provisions point to the “socially and educationally backward classes” which it was held has no basis and Art. 16 (4) apply to a much larger class. Nevertheless it cannot be denied that educational backwardness in Indian context is generally a manifestation of social backwardness. The courts have therefore always recognized the importance of education as an important, though not predominant, criteria.

### **V. Residence as Criterion :**

In *Pradeep Tandon* case the court had the occasion to examine the validity of reservation in favour of candidates coming from “rural areas, hill and Uttarakhand areas of U. P.” while invalidating reservation in favour of candidates from hill Uttarakhand areas in U.P. as constitutionally permissible, it was observed that when large areas of land remain sparse, disorderly and illiterate population whose property is small and negligible the element of social backwardness is present. Where people have traditional apathy for education on account of social and environmental conditions it is an illustration of educational backwardness.<sup>24</sup> As the residents of these areas do suffer on both counts reservation in their favour was held to be valid. In *Indra Sawhney* the court made an exception in favour of “population inhabiting in far flung and remote areas”. In *A. K. Gupta* the court directed the Government of U.P. to grant reservation to the residents of hill and Uttarakhand not “horizontally” under Art. 15(1), but “vertically” as OBCs under Article 15(4). In *Jagdish Negi* it was held that a 2% reservation for residents of Uttarakhand in UP was valid out of a total of 27% reservation for OBCs.

It might be worthwhile to note that in *Indra Sawhney* the 9-judges bench of the apex court has entrusted the task of entertaining examining and recommending on matters of inclusions / under inclusion / over-inclusion in the OBCs lists to permanent

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bodies / commissions whose advice is ordinarily binding upon the Government concerned.

The Supreme Court has rendered a very good number of decisions on this point. The most important among them is *M. R. Balaji v. State of Mysore*<sup>483</sup>. Though the case is related to the admissions in the professional colleges, yet the principle local down is equally applicable to the Government jobs. The state of Mysore reserved 18 percent seats of the admission in medical college. Of the total reservation of the seats 18 percent were reserved for the Scheduled Castes and Scheduled Tribes. The rest of the seats were reserved for the backward classes. The backward classes were again divided as more backward classes. The Supreme Court struck down the order as unconstitutional for its exclusive reliance as caste criterion. Gajendragadkar, J. observed that the social and educational backwardness is in the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are poor automatically become socially backward. The court further observed that there are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations also plays a major part in determining the backwardness of a community of persons. The court stressed the fact that, Article 15(4) and 16(4) used the words backward classed and not backward castes of citizens. A classification based solely on castes facts to take into account backwardness amongst Muslims and the Christians. Balaji is highly commended economic trust of backwardness and hands with the centre. Balaji was widely hailed as completely outlawing caste in the selection of OBCs. This decision also marred the policies of reservation for OBCs. The reservation policies were subjected to close and rigorous scrutiny by the courts to find compliance with the legal prescriptions. The courts began to demand recent socio-economic data for determining socially and educationally backward classes<sup>484</sup>. In *Triloki Nath Tikku v. State of Jammu and*

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<sup>483</sup> A I R 1963 S C 350

<sup>484</sup> Parmanand Singh. *Current Reservation crisis in India: Reflections on Mandal Report*, 17 (3&4) 1990 IBR & 18 (1) 1991 IBR p.212.

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*Kashmir*<sup>485</sup>, an argument was made on behalf of the state that mere under representation of certain classes in the services under the state was a conclusive evidence of their backwardness for the purposes of Article 16(4). The state sought to justify job-reservation for Muslims, Hindus, of Jammu & Kashmiri pandits who were under represented in services. Rejecting these arguments, Subba Rao C. J. ruled that although Balaji turned upon Article 15(4), the principle laid down therein equally applied to the reservations under Article 16(4). The learned chief justice observed that if the argument based upon in adequate representation was accepted, “it would really exclude the backward classes from the benefit of Article 16(4) and confer benefits only on a class of citizens who thought rich and cultured have take to other avocations of life.” He ruled that in order to invoke Article 16(4) two conditions must be satisfied:

1. A class of citizens is backward socially and educationally as explained in Balaji case;
2. The said class is not adequately represented in the services under the state.

The list of under representation of certain classes in the state services is only one of the many attributes of backwardness. This list is often applied along with other relevant tests, for the purposes of delineating socially and educationally backward classes. Even the backward classes commission applied the list of under representation in services only as indicative of backwardness of certain groups both for the purpose of Article 15(4). But Article 16(4) farther requires the state to assess the adequacy or in adequacy of representation of the backward classes as drawn. It is submitted that in the context of Article 16(4) the application of the statistics regarding under representation in services may involve two stages. One at the stage of classification of citizens as backward and non-backward and the other when the state makes an assessment of, the inadequacy of representation of the backward classes in services. It may be that certain groups which have been classified as socially and

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<sup>485</sup> A I R 1967 S C 1283.

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educationally backward classes for purposes of Article 15(4) may be adequately represented in the services under the state consequently those groups will have to be eliminated from the list prepared for the purposes of Article 16(4). Therefore, the groups drawn on the purposes of Article 15(4) read to be groups for the purpose of Article 16(4)<sup>486</sup>.

In *Chitralakha v. state of Mysore*<sup>487</sup>, the basis of backward class-classification was income and occupation. A family whose income was below Rs. 1200/- per annum and persons or classes following the occupations of agriculture, petty business, inferior service or occupations involving manual labour were in general considered to be socially and educationally backward entitled to reserved seats in professional and technical colleges. Subba Rao J. said Article 15(4)... does not speak of castes but only speaks of classes. If the makers of the constitution intended to take castes also as a unit of social and educational backwardness, they would have said so as they have said of the Scheduled Castes and Scheduled Tribes. The juxta position of the expression "Backward class" and "Scheduled Castes" in Article 15(4) also reads to a reasonable inference that the expression classes are not synonymous with caste".

It is submitted that in dealing with the question whether castes can be equated with 'classes' Subba Rao J.S opinion reflected the activities of Indian social and political structure in which various dominant caste-groups represented in the legislatures are able to exact strong political pressure to be classified as backward for getting state preference. Subba Rao J. wanted to thwart any such communal manipulation when he observed; "If are interpret 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

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<sup>486</sup> Parmanand Singh. *Equality, Reservation and Discrimination in India. A caste institutional study of scheduled caste, scheduled tribe and other backward classes*. Deep & deep publications. D-1/2 4, Rajouri Garden, New Delhi, 1985.p.146

<sup>487</sup> AIR 1964 S C 1823.

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without equaling castes with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand if the entire sub caste by and large is backward it may be included in the Scheduled Castes by following the appropriate procedure laid down by the constitution<sup>488</sup>. Subba Rao J. keyed the purpose of compensatory discrimination to Article 46 which obligates the state to promote the educational and economic interest of the weaker sections of the society. His lordship believed that the purpose of compensatory treatment was to help those who are backward due to historical reasons and not to “give weight age to progressive sections of our society under the false colour of caste to which they happen to belong” this interpretation helped the really backward classes among the backward classes. The argument of Subba Rao J. was that if cast as a whole was treated as backward it was impossible to isolate the really backward classes<sup>489</sup>.

It is also submitted that the term “backward class” is a more comprehensive term than the backward castes, tribes and communities. Backward class need not necessarily be the closed status or ascriptive groups based upon their birth but may be groups based upon many other attributes having no relation with one caste, religions or race. Backward classes can be grouped on the basis of their occupational and territorial characteristics as well<sup>490</sup>. Both Balaji and Chitralakha classified that ‘castes’ as such cannot be the unit of backwardness. Both these decisions repudiated the classification of a caste as a whole as backward. Subba Rao J. in Chitralakha emphatically observed, “under no circumstances can a class be equated with ‘caste’ though caste of an individual or a group of individuals may be considered along with other relevant factors.”<sup>491</sup>

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<sup>488</sup> *Chitralakha v. State of Mysore*, AIR 1964 SC 1823

<sup>489</sup> *Ibid.*

<sup>490</sup> *Supra* note 486 at 146

<sup>491</sup> *Chitralakha v. State of Mysore*. AIR 1964 SC 1823

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In *P. Rajendran v. State of Madras*,<sup>492</sup> in which Wanchoo e.j., upheld a backward-class-classification based solely on caste. Its lordship accepted the states contention that although the list was prepared solely on caste, each of the castes as a whole were found to be socially and educationally backward. The court did not require the state to show the material on which it had classified backward classes. The burden of proof, was this placed upon the petitioner and since the petitioner had failed to show that the castes specified as backward were really not backward, the court upheld the caste wise classification. Ignoring the dictate of Balaji and Chitrlekha, anchoo e.j., ruled, “But it must not be forgotten that caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste.” It is submitted that in equating ‘caste’ with classes’ the court in Rajendra approved of a criteria which Balaji and Chitrlekha had expressly disapproved.

In *State of Andhra Pradesh v. P. Sujan*<sup>493</sup>, the Supreme Court speaking through Shah J. struck down a caste-wise classification of backward classes as lying outside the power conferred under Article 15(4). Deviating from the Rajendran approach shah J. placed the onus of the state to show that it had applied the relevant criteria for designating backward classes. His lordship refused to accept as conclusive, the states’ averment in the affidavit as to the backwardness of the specified castes. Since the state could not discharge the burden, the law was declared to be unconstitutional<sup>494</sup>.

In *A. Periakarruppan v. state of Tamil Nadu*,<sup>495</sup> the Supreme Court relied heavily on Rajendran case as an authority for the preposition that a caste as a whole can be treated as backward. The court upheld a classification made solely on the basis

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<sup>492</sup> AIR 1968 S C 1012

<sup>493</sup> AIR 1968 S C 1379.

<sup>494</sup> Ibid.

<sup>495</sup> AIR 1971 S C 23603.

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of caste. The most striking and perhaps objectionable feature of this case is that it drew support from the report of Kaka Kalelkar commission which Balaji had discussed in detail and had repudiated it. Holding caste and class are synonymous in certain situations the court observed: there is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the fact of life<sup>496</sup>.

Ultimately the *Balaji-Chitralkha* view prevailed in the post Balaram decisions. The break-through from the *Rajendram periakaruppan – Balaram* approach was initiated by palekar J. in *Janki Prasad v. state of Jammu & Kashmir*,<sup>497</sup> involving a Jammu and Kashmir reservation order 1970 for the purposes of Article 16(4). It was held that the order was unconstitutional because the principles governing the reservation of posts in the employment the state had not been correctly applied. The court found that some of the occupation and some castes specified as low social castes could not be held as indicative of social and educational backwardness and directed the state to revise its lists. It was held that mere educational backwardness or social backwardness did not by itself make a class of citizens backward. In order to qualify for being called a backward class of citizens under Article 16(4), he must be a member of socially and educationally backward class. Retreating to *Balaji and Chitralkha*, palekar J. stated that the benefits of reservation of jobs could be given only to the really deserving and ready backward groups whose backwardness should be comparable to the Scheduled Castes and tribes. He struck a rate of caution against including the well off members of the backward communities in the list of backward classes.

The holding in *Janaki Prasad* confirms the idea underlying compensatory discrimination. The court's rejection of an exclusive economic test for backwardness indicates that the policy is not to give preference to every poor citizen regardless of his social and educations status but rather to help those whose backwardness is

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<sup>496</sup>. AIR 1971 S C 23603

<sup>497</sup> AIR 1973 S C 930.

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associated with traditional social structure of our society which denied access to certain groups and communities to have their fair share in the opportunity structure of the larger society. The court also emphasized the gradual exclusive of those groups from the task of backward cases who have shown sufficient advancement by taking advantage of the states developmental programme.

In *State of U. P. v. Pradip Tandon*<sup>498</sup>, an argument was made that all people coming from rural areas of Uttar Pradesh were socially and educationally backward classes for the purposes of reserved seats in the state's medical and engineering college. Repelling this argument Raj C. J., citing with approval the observation of Viadalingam in *Janki Prasad*, ruled that the eighty per cent of Uttar Pradesh was not homogeneous and not all of them could be regarded as backward. He observed "if poverty is the exclusive task, a large population in our country would be socially and educationally backward class of citizens poverty is evident everywhere and perhaps more so in educationally and socially affluent classes"<sup>499</sup>. Similarly, where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, it is an illustration of educational backwardness. Lack of educational institutions and educational aids and lack of awareness of the value of education also made a class of citizens, educationally backward. The most significant thing about *Pradip Tandon* is that it clearly repudiates the notion that in certain circumstances caste as a whole can be treated as backward and thus the *Rajendren* view stands discarded<sup>500</sup>. Reiterating the *Balaji – Chitrlekha* approach Raj C. J., stressed the need to interpret the expression classes in Article 15(4) or class in Article 16 (4) for the purpose of finding out the necessary attributes of backwardness. He said that the groups of citizens to whom Article 15 (4) or 16 (4) applied were the classes of citizens and not castes of citizens. He said: Broadly stated, neither caste, nor race, nor religion can be made the basis of classification for the purposes of determining social

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<sup>498</sup> A I R 1975 S C 563.

<sup>499</sup> Ibid.

<sup>500</sup> Ibid

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and educational backwardness within the meaning of Article 165 (4). When Article 15 (4) 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 recognized as a criterion of social and educational backwardness, Article 15 (4) will stultify Article 15 (1). When a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression “classes” in that cast violates the will of expression unius exclusion alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste<sup>501</sup>.

It may be submitted that the expression ‘class’ is wider and more comprehensive than the expression ‘caste’ or community. The terms class takes in all conceivable attribute of backwardness based upon caste religion, occupation, income location and the like. The common indicators of backwardness will be low social position, low level of income and occupation, low level health and nutrition inadequate housing, adverse environmental conditions etc. classifications of backward classes on the basis of the conditions of hardship and difficulty due to the environmental factors is only one of the many other forms of backward – class – classification. The pre-Pradip Tandon rulings on compensatory discriminations proceeded on the assumption that the aim of the compensatory measures was to remedy the social inequalities associated with occupational or caste stigma leading to economic backwardness but Pradip Tandon is ratable for providing new openings in the area of compensatory discrimination. It authorizes the state to provide preferential treatment even to those groups whose backwardness is not associated with traditional social structure but who are backward due to geographical or environmental reason<sup>502</sup>.

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<sup>501</sup> State of U. P. v. Pradip Tandon, A I R 1975 S C 563.

<sup>502</sup> Ibid.

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In *K.S. Jaishree v. State of Kerala*<sup>503</sup>, the impugned order of September 2, 1975, had classified families from backward classes with an annual income of Rs.10,000/- or more into a sub-class and they were denied the benefits of reservation order in respect of admission to the state medical and engineering colleges. Ray. C. J., speaking for the court emphasized the need of adopting means-cum caste / community test in classifying backward classes. He held that the rich people among the backward castes / communities ceased to be socially and educationally backward classes even though they had not required any high level of education with the economic advancement the social disabilities of the member of the backward castes and communities were to a large extent disappeared. This case urges the state Governments to shape their policies of reservation in such a way as to help the really ready and deserving. Jaishree clearly indicates that a classification based solely on caste or community without any regard to the advancement made by the members of backward classes should be discarded<sup>504</sup>.

In *K. C. Vasanth Kumar v. State of Karnataka*<sup>505</sup>, the Supreme Court had an occasion to consider the question of characterizing backward classes. The Kamala Government wanted to appoint a commission to go into this question and the Government requested the court to lay down guidelines for the commission in the discharge of its task. However, the judges expressed a diversity of views on this complex question. Five judges participating in the decision wrote five separate opinions. According to Chandrachud, C. J., two tests should be conjunctively applied for identifying backward classes: one, they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and, two, should satisfy the means test, that is to say, the test of economic backwardness, laid down by the state Government in the context of the prevailing economic conditions.

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<sup>503</sup> AIR 1976 SC 2381.

<sup>504</sup> Ibid.

<sup>505</sup> AIR 1985 SC 1495.

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Desai, J., was against 'caste' being regarded as a major determinant of backwardness. He argued if state patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimize and perpetuate caste system which contradicts secular principles and also run against Art.16(2). Also, caste based reservation had been usurped by the economically well-placed section in the same caste". According to Desai J., the only criterion which and be realistically devised is the one of economic backwardness." Adoption of an economic criterion would translate into reality two constitutional goods; one, to strike at the perpetuation of the caste stratification of the Indian society and to take a firm step towards establishing a casteless society; and, two, to progressively eliminate poverty<sup>506</sup>.

According to Chinnappa Reddy, J., "poverty, caste, occupation and habitation are the principal factors contributing to social backwardness." As regards caste his view was that the caste system has firm links with economic power and that "caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to person's caste."<sup>507</sup> According to Sen<sup>508</sup>, J., "the predominant and the only factor for making special provisions under Article 15(4) or for reservation of posts and appointment under Article 16(4) 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 caste and Scheduled Tribes." Venkatoramiah<sup>509</sup>, J., stressed upon the relevance of caste factor as an index of backwardness. According to him, the expression 'backward classes' can only refer to certain castes, races, tribes or communities or parts there of other than Scheduled Castes, Scheduled Tribes and Anglo- Indian communities, which are backward' and castes or community is an important and relevant factor in determining social and educational backwardness." He, however, suggested caste-cum-means test as a "rational task' to identify

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<sup>506</sup> K. C. Vasanth Kumar v.. State of Karnataka, AIR 1985 S C 1495.

<sup>507</sup> Ibid.

<sup>508</sup> Ibid

<sup>509</sup> Ibid

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backward people for purposes of Article 15 (4) and 16 (4) for all members of a caste read not be treated as backward. The only point on which there appears to be a unanimity of views are 'caste' cannot be the sole determinant of backwardness, but it is not an irrelevant task either and can be taken into account along with certain other factors. Also, backwardness is something comparable to the position of the Scheduled Castes and scheduled tribes. Poverty is also a relevant factor to determine backwardness.

### **Conclusion:<sup>510</sup>**

Beginning from *Balaji's* case to *K. C. Vasanth Kumar's* Case it has been firmly established that gross over inclusion will not be tolerated and only those groups can be designated as OBCs who are found to be demonstratively backward by application of tangible criteria. It has repeatedly been emphasized that the application of criteria of social and educational backwardness should be supported by adequate data, recent enough to be relied upon as reflective of current conditions. According to *Balaji's* case caste status, can in no circumstance be the sole determinant of social backwardness. In relation to Hindus, however, caste status could be one of the possible measures of backwardness to be used in conjunction with other neutral or non-communal tests of poverty, occupation, location etc. social backwardness, is on the ultimate analysis, the result of poverty, to a very large extent and social backwardness which resulted from poverty is likely to be aggravated by considerations of caste to which the poor citizen might belong but that only shows the relevance of both caste and poverty in determining social backwardness. Then the OBCs should, in the matter of their social backwardness be comparable to the Scheduled Castes and Scheduled Tribes. It has also been held that only those groups can be identified as educationally backward classes which are well below the state average of literacy. Since the aim of compensatory discrimination is to offset the

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<sup>510</sup> Parmanand Singh: Reservation Crisis in India: Reflection on Mandal Report, 17 (3&4) (1990) IBR & 18 (1) 1991 IBR 231.

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accumulated results of historic injustice, the OBCs should be both socially and educationally backward. Aggregate reservations should be kept reasonably below 50 percent of the available places so that substantial numbers of places are left open for merit competition. All these guidelines have been supplied by the Supreme Court for reconciling the competing claims of meritocracy and claims for redressal of rooted inequalities and historic injustice<sup>511</sup>.

Are the “backward castes” synonymous with “backward classes”? Mandal’s answer is in the affirmative. A team of sociologists headed by professor M. N. Srinivas advised the Commission that its task was to lay down “criteria for identifying recognizable and persistent collectivities” and not individuals and that in the Indian context “classes” would be only castes and communities. Criticizing the Balaji principle that “casts” cannot be equated with “classes”, the report says that the Balaji view represents the “most conservative view on the relevances of caste for determining social backwardness and synonymicity between ‘classes’ and ‘castes’, (p. 26). The report asserts that in some cases caste-wise classification has been upheld by the Supreme Court on the basis that “a caste is also a class of citizens”.

In identifying OBCs, the Mandal Commission uses caste in two ways. First, it uses caste groups as units or Classes to be classified, and second, it uses the castes status or caste standing of a group in the social hierarchy. As the criterion of social backwardness. The report says that “caste being the basic unit of social organization of Hind Society, castes is the only readily and clearly recognizable and persistent collectivities”. In considering the legality of Mandal, one has, therefore, to distinguish clearly the two uses of castes, one, in the sense of an endogamous or corporate group as Unit of classification and the other in the sense of caste as a status, as a measure of backwardness. In all contemporary discourse about reservation, there is a tendency to use the expression “caste based reservation”, “caste criterion,” “caste test” without clarifying whether it is the caste as a unit or caste as a measuring rod that is meant<sup>512</sup>.

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<sup>511</sup> Ibid

<sup>512</sup> Ibid

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The crucial issue is not whether ‘castes’ can be equated with ‘classes’, but, rather whether ‘classes’ under Articles 15(4) and 16 (4) (authorizing reservations) can be composed of caste and communal groups. Even if one agrees with Mandal that castes can be units of classification, the use of castes as units requires generation of data broken down along caste lines. The absence of current caste-wise population would render it exceedingly difficult to assess the current conditions of castes and communities. Mandal Commission has classified 3,743 caste and communal groups as socially and educationally backward classes<sup>513</sup>.

In considering the legality of Mandal, one has, therefore, to distinguish clearly the two uses of castes, one, in the sense of an endogamous or corporate group as a Unit of classification and the other in the sense of caste as a status, as a measure of backwardness. In all contemporary discourse about reservations, there is a tendency to use the without clarifying whether it is the caste as a unit or caste as a measuring rod, that is meant. The crucial issue is not whether ‘caste’ can be equated with ‘classes’, but, rather whether ‘classes’ under Articles 15(4) and 16(4) (authorizing reservations) can be composed of caste and communal groups. Even if one agrees with Mandal that castes can be units of classification, the use of castes as units requires generation of data broken down along caste lines. The absence of current caste-wise population would render it exceedingly difficult to assess the current conditions of castes and communities. Mandal Commission has classified 3,743 caste and communal groups as socially and educationally backward classes by extrapolating caste-wise figures from 1931 census. The commission merely assumes that the past rate of growth observed between two points of time in the past holds good for future also. By this method the OBC population has been estimated by the commission. It has failed to take into account the differentials in the growth rate between urban/rural areas and between different age groups, nor has it been able to take into account abnormal variations due to migration, conversion, sanskritisation, etc. the OBC population calculated by the commission I, therefore, based upon mere conjectures and dubious statistics. The

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<sup>513</sup> Ibid

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1931 figures cannot afford any workable guide for 1990. In some cases the courts have struck down reservation schemes because of absence of evidence that the commission has acted on concrete and reliable data for ascertaining social and educational backwardness of the listed groups. In *Balaji*, the Supreme Court insisted on much higher quality of data than has been employed by *Mandal*. The court observed that “evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way”. The judiciary, while examining *Mandal*, might like to see whether data and material referred to in the report of the commission justify its conclusions<sup>514</sup>.

### **4. XII. OBC's AMONG HINDUS**

It may be clarified that the classes, castes or communities identified as backward as a result of this survey done by the Second Backward Class Commission, belong to Hindu religion only. As the unit of identification in the above survey is caste and caste is a peculiar feature of Hindu society only, the results of the survey cannot have much validity for non Hindu communities<sup>515</sup>.

The Supreme Court has held “but it must not be forgotten that a caste is also a class of citizen and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is socially and educationally backward classes of citizens within the meaning of Article 15(4) Further, a caste has always been recognized as a class. There is gainsaying the fact that there are' numerous castes in this country which are socially and educationally backward, and, if after collecting the necessary 'data it is found that the caste as a

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<sup>514</sup> Ibid

<sup>515</sup> Government of India Report of the Backward Classes Commission, First Part, Chapter- XII, 1980. At 55.

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whole is socially and educationally backward, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. It is observed that in the Indian context such collectivities can be caste or other hereditary groups<sup>516</sup>. In fact, castes being the basic unit of social organisation of Hindu society, castes are the only readily and clearly recognizable and persistent collectivities.

In view of the foregoing, the Commission has also applied some other tests like stigmas of low occupation, criminality, nomadism, beggary and untouchability to identify social backwardness. Inadequate representation in public services was taken as another important test<sup>517</sup>.

Thus, the Commission has adopted a multiple approach for the preparation of comprehensive list of Other Backward Classes for all the States and Union Territories. The main sources examined for preparation of these lists were<sup>518</sup>:-

- i) Socio-educational field survey:
- ii) Census Report of 1961 (particularly for the identification of primitive tribes, hill tribes, forest tribes and indigenous tribes);
- iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described Chapter X of this Report; and
- iv) Lists of OBCs notified by various State Governments.

It may be pointed out that the use of personal knowledge by the Commission in the aforesaid manner has been upheld by the Supreme Court in *S. V. Balram v. State of Andhra Pradesh*". In this case the Court referred to the criticism leveled at the Commission that it had used its personal knowledge for the purpose of characterizing a particular group as backward. That, in the circumstances of the case, is inevitable

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<sup>516</sup> Ibid

<sup>517</sup> Ibid

<sup>518</sup> Ibid

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and there is nothing improper or illegal. The very object of the Commission in touring various areas and visiting the huts and habitations of people is to find out their actual living conditions<sup>519</sup>".

In this context it may also be stated that in 'some cases, the findings based on socio-educational field survey happened to be inconsistent with the living social reality. For example, the social status of Kasera caste in Bihar, Dhobi in Gujarat, Agasa in Karnataka, Kumbhar in Rajasthan, Badager in Tamil Nadu, etc. is known to' be very low. Yet these castes scored below 11 points and, thus, qualified for ranking as forward. Such aberrations are bound to occur in any sociological survey which is based on statistical methods owing to lopsidedness of the sample covered. The only corrective to these aberrations is the intimate personal knowledge of local conditions and the use of massive public evidence produced before the Commission. The results of the field survey have been carefully scrutinized and such aberrations rectified as far as possible<sup>520</sup>.

Whereas the Commission has tried to make State-wise lists of OBCs as comprehensive as possible, it is quite likely that several synonyms of the castes listed as backward have been left out. Certain castes are known by a number of synonyms which vary from one region to the other and their complete coverage is almost impossible. In view of this the Commission recommended that if a particular caste has been listed as backward then all its synonyms whether mentioned in the State lists or not should also be treated as backward.

Upholding the criteria as laid down by the Mandal commission, the Supreme Court in *India Sawhney v. Union of India*<sup>521</sup>, said that clause (4) of Article 16 does not contain the qualifying words "socially and educationally as does class (4) or Art. 15. It may be remembered that Article 340 does employ<sup>7</sup> the expression 'socially and

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<sup>519</sup> Ibid

<sup>520</sup> Government of India Report of the Backward Classes Commission, 1980.

<sup>521</sup> A I R 1993 S C 477.

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educationally backward classes and yet that expression does not find place in Article 16(4). The reason is obvious backward class of citizens' in the Article 16(4) takes in Scheduled Tribes, schedule castes and all other backward classes of citizens including the socially and educationally backward classes. This, certain classes which may not qualify for Article 15(4) may qualify for Art. 16 (4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the state, though it may be that the commission appointed there under may recommend reservation in appointments / posts in the services of the state as one of the steps for removing the difficulties under which SEBCS are laboring and for improving their conditions. This, SEBCS referred to in Article 340 is only one of the categories for whom Article 16(4) was enacted; Article 16(4) applies to a much larger class than the one contemplated by Art. 340 It would, this is not correct to say that backward classes of citizens in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4).

Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the stress was upon social backwardness. It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty-which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle. It is a well known fact that till independence the administrative apparatus was manned almost exclusively by members of the upper castes. The shudras, the schedule castes and the Scheduled Tribes and to the similar backward social groups among Muslims and Christians had practically not entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favor of such backward classes. Accordingly the court opined that the backwardness contemplated by Article 16(4) is mainly social backwardness.

#### **4. XIII. OBC's AMONG NON-HINDUS**

There is no doubt that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu Communities. Though castes system is peculiar to Hindu society yet, in actual practice, it also pervades the non-Hindu communities in India in varying degrees. There are two main reasons for this phenomenon: first, caste system is a great conditioner of the mind and leaves an indelible mark on a person's social consciousness and culture mores. Consequently, even after conversion Hindus Carried with them their deeply ideas of social hierarchy and stratification. This resulted to the Hindu converts inadvertently as Trojan horses of caste system among highly egalitarian religions such as Islam, Christianity, Sikhism etc. Secondly, non Hindu minorities living in y Hindu India could not escape from its social and cultural influences. Thus, both from within and without, caste amongst non-Hindu communities received continuous sustenance and stimulus<sup>522</sup>.

Sayyads and Sheikhs are the priestly castes like the Brahmins and the Mughals and Pathans, amous for their chivalry, are equal to the Kshatryas. There are occupational castes that are considered lower castes in the hierarchy. Thus castes are hereditary names based on their occupation and there is basic tendency among them to practice endogamy. They are descendents of the members of the Hindu clean castes who have been converted to Islam either in groups from different or as whole castes<sup>523</sup>.

On the same point Dr. Imtiaz Ahmed observes<sup>524</sup>, "There is a notion of hierarchy among the Muslims, though it is hard to say how far the criterion of the ranking among them can be said to conform to the Hindu model .... It is clear, that castes exist as a basis of social relations amongst them (Muslims) but its form has been greatly weakened and modified as it differs from the Hindu model in certain

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<sup>522</sup> Ibid

<sup>523</sup> Ibid

<sup>524</sup> Ibid

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details.

Similar is the situation' among Indian Christians. Christians in Kerala are divided into various denominations on the basis of beliefs and rituals and into various ethnic groups on the basis of their caste background ... even after conversion, the lower caste converts were continued to be treated as Harijans by all sections of the society including the Syrian Christians, even though with conversion the former ceased to be Harijans and untouchables. In the presence of rich Syrian Christians the Hanjan Christians had to remove their head-dress while speaking with their Syrian Christian masters. They had to keep their mouth closed with a hand ... It was found that, the Syrian and Pulaya members of the same Church conduct religious rituals separately in separate buildings. Thus lower caste converts to a very egalitarian religion like Christianity, ever anxious to expand its membership, even after generations were not able to efface the effect of their caste background<sup>525</sup>.

About Sikhs the Hindu caste model is almost literally replicated and the fact is too well-known to need any elaboration. But despite the prevalence of caste system among non-Hindu com communities in varying degrees, the fact, the matter is that all these religions are totally egalitarian in their Hook, they proclaim absolute equality of all their co-religionists and any social differentiation based on caste is anathema to them. In view of this, caste cannot be made the basis for identifying socially and educationally backward classes among non-Hindu communities. Commission therefore, shall have to evolve other rough and ready criteria for identifying non Hindu OBCs<sup>526</sup>. On the face of it, the criterion of poverty appears to be the most plausible, but it is full of pitfalls, For instance, even a highly respected and well educated Syrian Christian may be poor. Thus he will not satisfy the constitutional provision, of social and educational backwardness. Secondly economic criterion is very difficult to apply. A person who is poor today may be well off tomorrow and vice-versa. Moreover, verification, of economic status is very

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<sup>525</sup> Ibid

<sup>526</sup> Ibid

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tricky<sup>527</sup>.

After giving a good deal of thought to these difficulties the Commission has evolved the following rough and ready criteria for identifying non Hindu OBCs:-

- (i) All untouchables converted to any non, Hindu religion; and
- (ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples : Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai etc.).

### **4. XIV. SACHAR COMMITTEE REPORT**

On March 9, 2005 the Prime Minister issued a Notification for the constitution of a High Level Committee to prepare a report on the social, economic and educational status of the Muslim community of India. The Seven Member High Level Committee, chaired by Justice Rajinder Sachar, submitted its final report to the Prime Minister on November 17, 2006. The Sachar Committee compiled data from a number of sources. The Report says that the Features of the Hindu caste system, such as hierarchical ordering of social groups, endogamy and hereditary occupation have been found to be amply present among the Indian Muslims as well. The Census of India, 1901 listed 133 social groups wholly or partially Muslim. The present day Muslim Society in India is divided into four major groups: (i) the Ashrafs who trace their origins to foreign lands such as Arabia, Persia, Turkistan or Afghanistan, (ii) the upper caste Hindus who converted to Islam, (iii) the middle caste converts whose occupations are ritually clean, (iv) the converts from the erstwhile untouchable castes, Bhangi (scavenger), Mehtar (sweeper), Chamar (tanner), Dom and so on.

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<sup>527</sup> Ibid

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These four groups are usually placed into two broad categories, namely, 'ashraf' and 'ajlaf'. The former, meaning noble, includes all Muslims of foreign blood and converts from higher castes. While 'ajlaf' meaning degraded or unholy, embraces the ritually clean occupational groups and low ranking converts. In Bihar, U.P and Bengal, Sayyads, Sheikhs, Moghuls and Pathans constitute the 'ashrafs'. The 'ajlaf', are carpenters, artisans, painters, graziers, tanners, milkmen etc.<sup>8</sup> According to the Census of 1901, the ajlaf category includes 'the various classes of converts who are known as Nao Muslim in Bihar and Nasya in North Bengal. It also includes various functional groups such as that of the Jolaha or weaver, Dhunia or cotton-carder, Kulu or oil-presser, Kunjra or vegetable-seller, Hajjam or barber, Darzi or tailor, and the like. The 1901 Census also recorded the presence of a third category called Arzal: 'It consists of the very lowest castes, such as the Halalkhor, Lalbegi, Abdal, and Bediya. Muslim groups currently bracketed under the category 'OBC' come essentially from the non-ashraf section of the Muslim population. They are the converts from the middle and lower caste Hindus and are identified with their traditional occupation.

### **RECOMMENDATIONS OF THE COMMITTEE**

Committee's analysis shows that while there is considerable variation in the conditions of Muslims across states, (and among the Muslims, those who identified themselves as OBCs and others), the Community exhibits deficits and deprivation in practically all dimensions of development. In fact, by and large, Muslims rank somewhat above SCs/STs but below Hindu-OBCs, Other Minorities and Hindu-General (mostly upper castes) in almost all indicators considered. Among the states that have large Muslim populations, the situation is particularly grave in the states of West Bengal, Bihar, Uttar Pradesh and Assam. Interestingly, despite such deficits, the Community has lower infant mortality rates and sex-ratios. In addition to the 'development deficit', the perception among Muslims that they are discriminated against and excluded is widespread, which exacerbates the problem. The Committee

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strongly suggests that the policies to deal with the relative deprivation of the Muslims in the country should sharply focus on inclusive development and 'mainstreaming' of the Community while respecting diversity.

### **4. XV. POST SACHAR SCENARIO**

After the submission of the Sachar Committee Report several state Governments started initiative to include Muslims in the category of OBCs and provided reservation in the state's services.

The former chief minister of West Bengal Buddhadeb Bhattacharyee had I February, 2010, announced the OBC quota for Muslims, acting on the recommendation of the Justice Ranganath Mishra Commission.<sup>528</sup> In 2012, a Bill was Passed in the West Bengal Assembly that will provide 17 per cent reservation for Other Backward Classes, other than SC/ST, in two categories.<sup>529</sup> The two categories are: OBC - A, (10%) which consists of more backwards among backwards (where 99 per cent are Muslims and few are Hindus) and OBC – B (7%) where less backward (where 99 per cent are Hindu and only 1 per cent are Muslims)

### **Estimated Population of OBCs<sup>530</sup>**

Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available .But assuming that the inter se rate of growth of population of various castes, communities and religious-groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total

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<sup>528</sup> Indian Express: Updated Tue, 29 Jan 2013, 15:53 IST, Internet Edition.

<sup>529</sup> Ibid

<sup>530</sup> Ibid at 56.

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population of the country.

Working on the above basis the Commission culled out caste/community-wise population, figures, from the, census records of 1931 and, then grouped them into broad caste-clusters and religious groups. These collectivities were subsequently aggregated under five major heads, i.e. (i) Scheduled Castes and Scheduled, Tribes (ii) Non-Hindu Communities, Religious groups, etc., (iii) Forward Hindu Castes and Communities. (iv) Backward Hindu Castes and Communities; and (v) Backward Non-Hindu Communities<sup>531</sup>.

The population of Hindu OBCs could be derived by subtracting from the total population of Hindus, the, population of Schedule Castes, Scheduled Tribes and. that of forward Hindu castes and communities and it worked out to 52%. But the same approach could not be adopted in respect of non-Hindu OBCs. Assuming that roughly the proportion of OBCs amongst non-Hindus was of the same order as amongst the Hindus population of non-Hindu OBCs was also taken as 52% of the actual proportion of their population of 16.16%, or 8.40%. Thus the total population of Hindu and non-Hindu OBCs naturally, added up to nearly 52% (43.70%+ 8.40%) of the country's Population. From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, Other Backward classes constitute nearly 52% of the Indian population<sup>532</sup>.

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<sup>531</sup> Ibid

<sup>532</sup> Ibid

#### **4. XVI. REPORTS OF THE TWO NATIONAL BACKWARD CLASS COMMISSIONS**

##### **First Backward Class Commission, 1953**

Over the years there has been an ongoing debate on the question of an acceptable criterion for determining social and educational backwardness. Despite the reports of state backward classes committee, the court ruling and policy declarations, the problem of identifying backward classes has remained unresolved. Consequently the age old issue of job-reservation continues to the cause of social tensions and political conflicts<sup>533</sup>, because the constitution neither enumerates the classes of citizens who are backward nor lays down the criteria for determining backwardness. However, Article 340 envisages the setting up of a commission to investigate the conditions of socially and educationally backward classes and the difficulties under which they labour and to suggest remedial measures<sup>534</sup>.

In pursuance of Article 340, on January 29, 1953 the president of India appointed the First Backward Classes Commission with Kaka Kalelkar as its Chairman. The commission was directed to determine the criteria to be adopted in considering whether any section of people (in addition to the Scheduled Castes and tribes) should be treated as socially and educationally backward classes and in accordance with such criteria to prepare a list of such classes. The commission was also directed to investigate the conditions of all such socially and educationally backward classes and the difficulties under which they labour and make recommendations: (a) as to the steps that should be taken by the Union or any State to remove such difficulties or to improve their conditions;

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<sup>533</sup>Parmanand Singh. *Equality, Reservation and Discrimination in India. A caste institutional study of scheduled caste, scheduled tribe and other backward classes*. Deep & deep publications. D-1/2 4, Rajouni Garden, New Delhi, 1985.p.146.

<sup>534</sup>S. K. Agarwala. *Identification of Backward classes: law and social policy*, in D. N. Saraf. Social policy, law and protection of weaker Sections of Society. Eastern Book Company. Delhi. 1986. p .42.

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(b) as to the grants that should be made.

After two years of hard work the Commission prepared a list of 2,399 castes and community and recommended various measures for their economic and social advancement. The commission submitted its report on March 1955.

The Commission issued a questionnaire comprising 182 question for eliciting the views of the state Governments and the general public on various aspects of its inquiry. It also undertook extensive touring of the country to collect on the spot evidence.

After sifting and sorting the facts collected as above the Commission formulated the following criteria for identifying socially and educationally backward classes-

- (i) Low social position in the traditional caste hierarchy of Hindu society.
- (ii). Lack of general educational advancement among the major section of a caste or community.
- (iii). Inadequate or no representation in Government service.
- (iv). Inadequate representation in the field of trade, commerce and industry.

It also prepared a list of 2399 backward castes or communities for the entire country, and 837 of them were classified as most backward. The recommendations of the Commission for the upliftment of the backward classes are extremely wide-ranging and comprehensive.

### **Survey made by Backward Class Commission:**

A country-wide socio-educational survey covering 405 out of 407 Districts was conducted with the help of various states from February to June, 1980. Voluminous data gathered from the survey was computerized and 31 primary lobbies were generated from this data in respect of each state and Union Territory. On the basis of these tables, 11 Indicators or criteria for social and educational backwardness were derived and they were grouped under 3 broad heads, i.e., Social, Educational and

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Economic. In view of their relative importance, 3 points were assigned to each one of the Social Indicators, 2 to Educational Indicators, and 1 to Economic Indicators. This added up to a total score of 22 points. All these 11 indicators were applied to each state. States obtaining a minimum score of 11 points on this scale were listed as socially and educationally backward.

A large number of castes were identified as backward in each state as a result of the Socio-Educational Survey. As this survey covered only 2 villages and one urban block per District, a large number of castes were naturally left out. Moreover, in some cases, the size of the sample was so small that the results were not dependable.

In view of this two supplementary approaches were adopted to prepare complete lists of OBCs for each state. First, state-wise list of the 11 groups of primitive tribes, exterior castes, criminal tribes, etc, contained in the Registrar General of India's compilation of 1961 were culled and included in the Commission's lists of OBCs. This was done as the social and educational status of these castes and communities was more or less akin to Scheduled Castes and Scheduled Tribes. Secondly, based on the public evidence and personal knowledge of the Members of the Commission, state wise list of those OBCs were drawn up which could not be covered by the socio- educational survey.

This report, however, was not accepted by the Government as it did not apply any objective tests for identifying backward classes and opposed the adoption of caste as one of the criteria for backwardness. Five out of eleven Members of the Commission had given notes of dissent. The government felt that the commission had classified a very large section of the population as backward and if special assistance had to be extended to all these people, the really needy will be swamped by the multitude. The government was also opposed to the caste as one of the criteria for backwardness and preferred the application of economic tests.

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One serious defect noticed by the government in the report of first Backward Classes Commission was that it had not formulated any objective criteria for classifying Other Backward Classes. The need for field surveys and formulation of objective testes has also been repeatedly emphasized by the Supreme Court in several cases. In view of this, the Commission has taken special care to tap a number of independent sources for the collection of primary data.

### **Second Backward Classes Commission (Mandal Commission) Report, 1979**

By an Order made by the President of India, in the year 1979, under Article 340 of the Constitution, a Backward Class Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India, which Commission is popularly known as Mandal Commission. The term and reference of the Commission were:

- i) To determine the criteria for defining the socially and educationally backward classes;
- ii) To recommend steps to be taken for the advancement of the socially and educationally backward classes of citizen so identified;
- iii) To examine the desirability or otherwise of making provisions 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
- iv) To present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

The Commission submitted its report with a minute of dissent of one of its member on 31<sup>st</sup> December 1980. The commission appeared to have identified as many as 3743 castes as socially and educationally backward and made its recommendations.

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### **RECOMMENDATIONS<sup>535</sup>**

The upliftment of Other Backward Classes is part of the larger national problem of the removal of mass poverty. This is only partially correct. The deprivation of OBCs is a very special case of the larger national issue: here the basic question is that of social and educational backwardness and poverty is only a direct consequence of these two crippling caste based handicaps. As these handicaps are embedded in our social structure, their removal will require far-reaching structural changes. No less important will be changes in the perception of the problems of OBCs by the ruling classes of the country.

### **Reservations**

One such change in the attitude of the ruling elite pertains to the provision of reservation in government services and educational institutions for the candidates of other Backward Classes. It is generally argued that looking to the large population of OBCs (52%), recruitment of a few thousands OBCs every year against reserved vacancies is not going to produce any perceptible impact on their general condition. On the other hand, the induction of a large proportion of employees against reserved vacancies will considerably impair the quality and efficiency of the government services. It is also stated that the benefits of such reservations will be skimmed off by those sections of OBCs which are already well off and the really backward sections will be left high and dry. Another argument advanced against this approach is that the policy of large scale reservations will cause great heart burning to those meritorious candidates whose entry into service will be barred as a result thereof<sup>536</sup>.

All the above arguments are based on fairly sound reasoning. But these are also the arguments advanced by the ruling elite which is keen on preserving its

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<sup>535</sup> Government of India Report of the Backward Classes Commission, First Part, I&II, Chapter- XIII, 1980, at 57.

<sup>536</sup> Ibid

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privileges. Therefore, like all such reasoning, it is based on partisan approach. By the same token, while illuminating some immediate areas of concern it tends to ignore much larger issues of national importance.

It is not at all our contention that by offering a few thousand of jobs to OBC candidates we shall be able to make 52% of the Indian population as forward. But we must recognize that an essential part of the battle against social backwardness is to be fought in the minds of the backward people. In India government service has always been looked upon as a symbol of prestige and power. By increasing the representation of OBCs in Government services, we give them an immediate feeling of participation in the governance of this country. When a backward class candidate becomes a Collector or a Superintendent of Police, the material benefits accruing from his position are limited to the members of his family only. But the psychological spin off of this phenomenon is tremendous; the entire community of that backward class candidates feels socially elevated. Even when no tangible benefits flow to the Community at large the feeling that now it has its "own man" in the "corridors of power" acts as morale booster<sup>537</sup>.

In a democratic set-up every individual and community has a legitimate right and aspiration to participate in ruling this country. Any situation which results in a near denial of this right to nearly 52% of the country's population needs.

Apprehensions regarding drop in the quality of Government services, owing to large scale induction of S.C, S.T and O.B.C. candidates against reserved post may be justified only up to a point. But is it possible to maintain, that all candidates selected on merit turn out to be honest; efficient, hard-working and dedicated? At present, top echelons of Government services are manned predominantly by open competition candidates and if the performance of our bureaucracy is any indication, it has not exactly covered itself with glory. Of course,

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<sup>537</sup> Ibid

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this does not imply that candidates selected against reserved posts will do better. Chances are that owing to their social and cultural handicap they may be generally a shade less competent. But, the other hand they will have the great advantage of possessing test hand knowledge of the sufferings and problems of the backward sections of society. This is not a small asset for field workers and policy makers even at the highest level.

It is no doubt true that the major benefits of reservation and other welfare measures for Other Backward Classes will be cornered, by the more advanced sections of the backward communities. But is not this a universal phenomenon. All reformist remedies have to contend with low recovery along with the hierarchical adient; there no quantum jumps in social reform. Moreover, human nature being what it is, a "new class" ultimately does emerge even in classless societies. The chief merit of reservation is not that it will introduce egalitarianism amongst OBCs when the rest of the Indian society is seized by all sorts of inequalities. But reservation was certainly erode, the hold of higher castes on the services and enable, OBCs in general to have a sense of participation in running the affairs of their country.

It is certainly true that reservation for OBCs will cause a lot of heart burning to others. But should the mere fact, of this heart burning be allowed to operate as a moral veto against social reform. A lot of heart burning was caused to the British when the black left India. It burns the hearts of all whites when the black protest against apartheid in South Africa. When the higher castes constituting less than 20% of the country's population subjected the rest to all manner of social injustice, it must have caused a lot of heart burning -to the lower castes. But now that the lower castes are asking for a modest share of the national cake of power and prestige, a chorus of alarm is being raised on the plea that this will cause heart burning to the ruling elite of all the spacious arguments advanced against reservation for backward classes, there is none which beats this one about 'heart-burning' in sheer sophistry<sup>538</sup>.

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<sup>538</sup> Ibid

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In fact the Hindu society has always operated a very rigorous scheme of reservation, which was internalised through caste system. Eklivya lost his thumb and Shambhuk his neck for their breach of caste rules of reservation. The present furore against reservations for OBCs is not aimed at the principle itself, but against the new class of beneficiaries, as they are now clamouring for a share of the opportunities which were all along monopolised by the higher castes.

### **Quantum and Scheme of Reservations**

Scheduled Castes and Scheduled Tribes constitute 22.5% of the country's population. Accordingly, a *pro-rata* reservation of 22.5% has been made for them in all services and public sector undertakings under the Central Government. In the States also, reservation for SCs and STs directly proportional to their population in each State.

As stated above the population of OBCs, both Hindu and non-Hindu, is around 52% of the total population of India Accordingly 52% of all posts under the Central Government should be reserved for them. But this provision may get against the law laid down in a number of Supreme Court judgements wherein it has been held that the total quantum of reservation under Articles 15 (4) and 16(4) of the Constitution should be below 50%. In view of this the proposed reservation for OBCs would be to be pegged at a figure which, when added 12.5% for SCs and STs, remains below 50%. In view of this legal constraint, the Commission is obliged to recommend a reservation of 27% only, even though their population is almost twice this figure<sup>539</sup>. States which have already introduced reservation for OBCs exceeding 27% will remain unaffected by this recommendation.

With the above general recommendations regarding the quantum of

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<sup>539</sup> Ibid

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reservation, the Commission proposes the following over-all scheme of reservation for OBCs:-

- (1) Candidates belonging to OBCs recruited on the basis of merit in an open competition should not be adjusted against their reservation quota of 27 %.
- (2) The above reservation should also be made applicable to promotion quota at all levels.
- (3) Reserved quota remaining unfilled should be carried forward for a period of three years and dereserved thereafter.
- (4) Relaxation in the upper age limit for direct recruitment should be extended to the candidates of OBCs in the same manner as done in the case of SCs and STs.
- (5) A roster system for each category of posts should be adopted by the concerned authorities in the same manner as presently done in respect of SC and ST candidates.

The above scheme of reservation in its toto should also be made applicable to all recruitment to public sector undertakings both under the Central and State Governments, as also to nationalized banks.

All private sector undertakings which have received financial assistance from the Government in one form or the other should also be obliged to recruit personnel on the aforesaid basis.

All universities and affiliated colleges should also be covered by the above scheme of reservation.

To give proper effect of these recommendations, it is imperative that adequate statutory provisions are made by the Government to amend the existing enactments, rules, procedures, etc. to the extent they are not in consonance with the same.

### **Educational Consciousness**

Our educational system is elitist in character, results in a high degree of wastage and is least suited to the requirements of an over-populated and developing-

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country. It is a legacy of the British rule which was several criticized during the independence struggle, and has not undergone any structural changes. enough it is least started to the needs of back-ward classes, yet, they are forced to run the rat-race with others as no options are available to them. As educational reform was not within the terms of reference of this commission. We are also forced to trend the eaten track suggest only the palliative measure within the existing framework<sup>540</sup>.

Various State Governments are giving a number of educational concessions to other Backward Class students like exemption of tuition fee free supply of books and clothes, mid-day meal special hostel facilities, stipends, etc. These concessions are all right as far as they go. But they do not go far enough. What is required is, perhaps, not so much the provision of additional funds as the framing of integrated scheme for creating the proper environment and incentives for serious and purposeful studies.

It is well known that most backward class children are irregular and indifferent students and their drop-out rate is very high. There are two main reasons for this: First, these children are brought up in a climate of extreme social and cultural deprivation and, consequently, proper motivation for schooling is generally lacking. Secondly, most of these children come from very poor homes and their parents are forced to press them into doing small chores from a very young age. Upgrading the cultural environment is a very slow process. Transferring these children to an artificially upgraded environment is beyond the present sources of the country. In view of this It is recommended that this problem may be tackled on a limited and selective basis on two fronts.

First, an intensive and time bound programme for adult education should be launched in selected pockets with high concentration of OBC population. This is a basic motivational approach, as only proper motivated parents will take serious interest in educating their children. Secondly, residential schools Should be set up in

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<sup>540</sup> Ibid

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these areas for backward class students to provide a climate specially conducive to serious studies. All facilities in these schools including board and lodging, will have to be provided free of cost to attract students from poor and backward homes, separate Government Hostels for OBC students with the above facilities will be another step in the right direction.

A beginning on both these fronts will have to be made on a limited scale and selective basis. But the scope of these activities should be expanded as far as the resources permit. Adult education programme and residential schools, started on a selective basis will operate as growing-points of consciousness for the entire community and their multiplier effect is bound to be substantive, Whereas Several States are extended a number of adhoc concession to backward class students, few serious attempts has been made to integrate these facilities - into a comprehensive scheme for a qualitative up gradation of educational environment available to OBC students.

After all educational is the best catalyst of change and educating the backward classes is the surest way to improve their self image and raise their social status As OBCs cannot afford the high wastage rates of our educational system, it is Important that their educational system it is very important that their education is highly biased in favour of all reservation in services will absorb only a very small percentage of the educated backward classes, and the rest should be suitably equipped with vocational skills to enable them to get a return on having invested several year in education<sup>541</sup>.

It is also obvious that even if all the above facilities are given to OBC students, they will not be able to compete on an equal footing with others in securing admission to technical and professional institutions. In view, of this it is recommended that seats should be reserved for OBC students in all scientific,

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<sup>541</sup> Ibid

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technical and professional institutions run by the Central as well as State Governments. This reservation will fall under Article 15(4) of the Constitution and the quantum of reservation should be the same as in the Government services, i.e., 27 %. Those which have already reserved more than 27% seats for OBC students will remain unaffected by this recommendation<sup>542</sup>.

While implementing the provision for reservation it should also be ensured that the candidates who are admitted against the reserved quota are enabled to derive full benefit of higher studies. It has been generally noticed that these OBC students coming from an impoverished cultural background, are not able to keep abreast with other students. It is, therefore, very essential that special coaching facilities are arranged for all such students in our technical and professional institutions. The concerned authorities should clearly appreciate that their job is not finished once candidates against reserved quota have been admitted to various institutions. In fact the real task starts only after that. Unless adequate follow-up action is taken to give special coaching assistance to these students, not only these young people will feel frustrated and humiliated but the country will also be landed with ill-equipped and sub-standard engineers, doctors and other professionals.

### **Financial Assistance**

Vocational communities following hereditary occupations have suffered heavily as a result of industrialization. Mechanical production and introduction of synthetic materials has robbed the village potter, oil crusher, black-smith, carpenter, etc. of their traditional means of livelihood and the pauperization of these classes is a well known phenomenon in the country-side<sup>543</sup>.

It has, therefore become very necessary that adequate institutional finance and

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<sup>542</sup> Ibid

<sup>543</sup> Ibid

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technical assistance is made available to such member of village vocational communities who want to up .small seal industries on their own. Similar assistance should also be provided to those promising OBC candidates who have obtained special vocational training.

State Governments have created various financial and technical agencies for the promotion of small and medium scale industries. But it is well known that only the more influential members of the community are able to derive benefits from these agencies'. In view of this, it is very essential that separate financial institutions for providing financial and technical assistance are established for the backward classes. Some State Governments like Karnataka and Andhra .Pradesh have already set up separate financial corporations etc. for OBCs<sup>544</sup>. Cooperative Societies of occupational groups will also help a lot. But due care should-be taken I hat all the office-bearers and members of such societies belong to the concerned hereditary occupational groups and outsiders are not allowed to exploit them by infiltrating into such cooperatives.

The share of OBCs in the industrial and business life of the country is negligible and this partly explains their extremely low income levels., As a part of its overall strategy to uplift the back-ward classes, it is imperative that all State Governments are suitably advised and encouraged to create a separate network of financial and technical institutions to foster business and industrial enterprise among QBCs.

### **Structural Changes**

Reservations in Government employment and educational institutions, as also all possible financial assistance will remain mere palliatives unless the problem of backwardness is tackled at its root. Bulk of the small land-holders, tenants,

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<sup>544</sup> Ibid

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agricultural labour impoverished village artisans; unskilled workers etc. belong to Scheduled Castes, Scheduled Tribes and Other Backward Classes. “Apart from social traditions, the dominance by the top peasantry is exercised through recourse to informal bondage which arises mainly through money-lending, leasing out of small bits of land and providing house-sites and dwelling space to poor peasants. As most of the functionaries of Government are drawn from the top peasantry, the class and, caste linkage between the functionaries of Government and the top peasantry remain firm. This also tills the socio-political balance in favour of the top peasantry and helps it in having its dominance over others<sup>545</sup>.

The net outcome of the above situation is that notwithstanding their numerical preponderance, backward classes continue to remain in mental and material bondage of the higher castes and rich peasantry. Consequently, despite constituting nearly 3/4th of the country's population, Scheduled Castes, Scheduled Tribes and Other Backward Classes have been able to acquire a very limited political clout, even though adult franchise was introduced more than three decades back. Through their literal monopoly of means of production of higher castes are able to manipulate and coerce the backward classes into acting against their own interests. In view of this, until the strangle of the existing production relations is broken through radical land reforms, the abject dependence of under privilege; classes on the dominant higher castes will continue indefinitely: In fact there is already a sizeable volume of legislation on the statute books that abolish zamindari, place ceilings on land holdings and distribute to the landless. But in actual practice its implementation has been halting, half-hearted and superficial. The States like Karnataka, Kerala and West Bengal which have gone about the Job more earnestly have not only succeeded in materially helping the Backward classes, but also reaped rich political dividend into the bargain<sup>546</sup>.

It is the Commission's firm conviction that a real transformation of the

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<sup>545</sup> Ibid

<sup>546</sup> Ibid

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existing production relations is the most important single step that can be taken for the welfare and upliftment of all backward classes. Even if this is not possible in the industrial sector for various reasons; the agricultural sector, a change of this nature is both feasible and overdue.

The Commission, therefore; strongly recommends that all the State Governments should be directed to enact and implement progressive land legislation so as to effect basic-structural 'changes' in the existing production relation\_in the countryside.

At present surplus land is being allotted to SCs and STs A part of the surplus land becoming available in future as a result of the operation of land ceiling laws etc. should also be allotted to be OBC landless labour<sup>547</sup>.

### **Miscellaneous<sup>548</sup>**

(1) Certain sections of some occupational units like Fishermen, Banjaras, Bansforas, Khatwes etc. still suffer from the stigma of unsociability in some parts of the country. They have been, listed as O.B.Cs by the Commission, but their inclusion in the lists of Scheduled Castes/Scheduled Tribes may be considered by the Government.

(2) Backward Classes Development Corporation should be set up both at the Central and State levels to implement various socio educational and economic measures for their advancement.

(3) A separate Ministry/Department for O.B.Cs at the Centre and states should be created to safeguard their interests.

(4) With a view to giving better representation to certain very backward sections of O.B.Cs like the, Gaddis in Himachal Pradesh, Neo-Buddhists in Maharashtra, Fishermen in the Coastal areas, Gujjars in J & K, it is recommended, that areas of

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<sup>547</sup> Ibid

<sup>548</sup> Ibid

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their concentration may be carved out into separate constituencies at the time of delimitation.

### **Central Assistance:**

At present no Central Assistance is available to any State Government for implementing any welfare measures for Other Backward Classes. The 18 States and Union Territories which have undertaken such measures have to provide funds from their own-resources, practically every State Government pointed out that unless the Centre is prepared to liberally finance all special schemes minor the upliftment of OBCs will be beyond the available resources of the States to undertake any worthwhile programme for the benefit of other Backward classes<sup>549</sup>.

The commission fully shares views of the State Governments in this matter and strongly recommends that all development programme specially designed for Other Backward Classes should be financed by the Central Government in the same manner and to the same extent as done in the case of Scheduled Castes and Scheduled Tribes.

Regarding the Period of operation of the Commission's recommendations, the entire scheme should be reviewed after twenty years. We have advisedly suggested this span of one generation, as the raising of social consciousness is generational progress. Any review at a shorter interval would be rather arbitrary and will not give a fair indication of the impact of our recommendations on the prevailing status and life-styles of O.B.Cs<sup>550</sup>.

### **Social Backwardness and Caste<sup>551</sup>.**

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<sup>549</sup> Ibid

<sup>550</sup> Ibid

<sup>551</sup> Ibid, Chapter IV, at 14.

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Castes are the building bricks of the Hindu social structure. They have kept Hindu society divided in a hierarchical order for centuries. This has resulted in a close linkage between the caste ranking of a person and his social, educational and economic status. This manner of stratification of society gave the higher castes deep-rooted vested interests in the perpetuation of the system. The priestly castes evolved an elaborate and subtle scheme of scripture, ritual and mythology and perpetuate their supremacy and, hold the lower castes in bondage for ages. Most of our Shastras uphold the four fold Varna system and, because of this religious sanction, caste system has lasted longer than most other social institutions based on inequality and inequity<sup>552</sup>.

In view of the permanent stratification of society in hierarchical caste order, members of lower castes have always suffered from discrimination in all walks of life and this has resulted in their social, educational and economic backwardness. In India, therefore, the low ritual caste status of a person has a direct bearing on his social backwardness. Caste system has been able to survive over the centuries because of its inherent resilience and its ability to adjust itself to the ever changing social reality moreover, caste restrictions have loosened considerably as a result of the rule of law introduced by the British, urbanisation, industrialization, speed of mass education and above all, the introduction of adult franchise after independence. But all the above changes mark only shift of emphasis and not any material alteration in the basic structure of caste<sup>553</sup>.

It is generally agreed that whereas certain castes taboos have weakened as a result of the above changes, the importance of casteism in Indian politics is on the increase. This perhaps, was inevitable. Caste system provided the political leadership with readymade channel of communication and mobilization and, in view of this, the importance of caste was bound to increase in Indian politics.

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<sup>552</sup> Ibid

<sup>553</sup> Ibid

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### **Social Justice, Merit and Privileges<sup>554</sup>**

Equality before the law is a basic Fundamental Right guaranteed under Article 14 of the Constitution. But the principle of equality is a double edged weapon. To treat unequals as equals is to perpetuate inequality. The humaneness of a society is determined by the degree of protection it provides to its weaker, handicapped and less gifted members. Equality of opportunity and equality of treatment places the weak and strong on par and to that extent, it amounts to denial of social justice. In fact, it is equality of result which is the acid test of society's egalitarian pretensions. In a highly unequal society like ours, it is only by giving special protection and privileges to the underprivileged section of society that we can enable the weak to resist exploitation by the strong.

Caste is an important factor in the identification of Other Backward Classes among Hindu communities. Backwardness must be social and educational and not either social or educational. Caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)<sup>555</sup>.

### **Recommendations<sup>556</sup>**

Reservation for SCs and STs is in proportion to their population, i.e. 22.5%. But as there is a legal obligation to keep reservation under Article 15(4) and 16(4) of the Constitution below 50%, the Commission recommends a reservation of 27% for OBCs. This reservation should apply to all Government services as well as technical and professional institutions, both in the centre and the states.

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<sup>554</sup> Ibid, chapter- VI, at 21.

<sup>555</sup> Ibid

<sup>556</sup> Ibid

## ***Identification and Determination of Backward Classes***

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Special educational facilities designed at upgrading the cultural environment of the students should be created in selected areas containing highly concentration of OBCs. Special emphasis should be placed on vocational training. Separate coaching facilities should be provided in technical and professional institutions to OBCs students to enable them to catch up with students from open quota. Special programmes for upgrading the skills of village artisans should be prepared and subsidized loans from financial institutions granted to them for setting up small scale industries. To promote the participation of OBCs in the industries and business life of the country, a separate net-work of financial and technical institutions should be created by all state Governments.

The report of the Mandal commission was laid before each house of parliament and discussed on two occasions – once in 1982 and again in the year 1983. The proceedings of the Lok Sabha contains the statement of Sri R. Venkataraman, the then Minister for defence and home affairs. He expressed the view that “the debate has cut across party lines and a number of people on this side have supported the recommendations of the Mandal commission. A large number of people on the other side have also supported it. If one goes through the entire debate one will be impressed with, a fairly unanimous desire on the part of all sections of the house to find a satisfactory solution to this social evil of backwardness of Scheduled Castes / Scheduled Tribes etc. which is a festering sore in our body politic.” The Hon’ble Minister then proceeded to state, “the members generally said that the recommendations should be accepted. Some members said that it should be accepted in toto. Some members have said that it should be accepted with certain reservations. Some members said, there should be other criteria than only social and educational backwardness. All these are ideas which Government will take into account. The problem that confronts Government today is to arrive at a satisfactory definition of backward classes and bring about an acceptance of the same by all the state concerned.” Hon’ble Minister referred to certain difficulties the Government was facing in implementing the recommendations of the commission on account of the

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large number of castes identified and an account of the variance in the state lists and the Mandal commission list and stated that consultation with various departments and state Governments was in progress in this behalf the stated that a meeting of the chief ministers would be conveyed shortly to take decision in the matter<sup>557</sup>.

The report was again discussed in the year 1983. The then Hon'ble minister for home Sri. P.C. Sethi, while replying to the debates stated, "while referring to the commission whose report has been discussed today, I would like to remind the house that although this commission had been appointed by our predecessor Government, we now desire to continue with this commission and employment its recommendations."

No action was, however, taken on the basis of the Mandal commission report until the issuance of the office memorandum on 25<sup>th</sup> September, 1991. On that day, the then Prime Minister Sri. V. P. Singh made a statement in parliament in which he stated inter alia as follows: "After all, if you take the strength of the whole of the Government employees as a proportion of the population, it will be 1% we are under no illusion that this 1% of the population, or a fraction of it will resolve the economic problems of the whole section of 52%. No, we consciously want to give them a position in the decision making of this country, a share in the power structure. We talk about merit. That the section which had 52% of the population gets 12.55% in government employment. What is the merit of the system? That is class- (i) employees of the Government if gets only 4.69%, for 52% of the population in decision-making at the top echelons if is not even one tenth of the population of the country; in the power structure it hardly 4.69%, I want to challenge first the merit of the system itself before we come and question on the merit, whether on merit to reject this individual or that and we want to change the structure basically, consciously, with open eyes. And I know when changing the structure comes, there will be resistance.

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<sup>557</sup> Indra Sawhney v. Union of India. AIR 1993 S C 477. at 513.

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What I want to convey is that treating unequal as equals is the greatest injustice, and correction of this injustice is very important and that is what I want to convey.”<sup>558</sup>

Government has carefully considered the report and the recommendations of the commission in the present context regarding the benefits to be extended to the socially and educationally backward classes as opined by the commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the union and their public undertakings. 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 socially and educationally backward classes.
- (ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detail instructions relating to the procedure to be followed for enforcing reservation will be issued separately.
- (iii) Candidates belonging to SEBC recruited as the basis of merit in an open competition on the same standard prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.
- (iv) The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Government's list. A list of such castes/communities is being issued separately.
- (v) The aforesaid reservation shall take effect from 07.08.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders<sup>559</sup>.

Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the department of public Enterprises and Ministry of Finance respectively<sup>560</sup>.

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<sup>558</sup> Ibid.

<sup>559</sup> Indra Sawhny v. Union of India, A I R 1993 S C 447.

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Soon after the issuance of the said memorandum there was wide spread protest in certain Northern States against it. There occurred serious disturbance to law and order involving damage to private and public property. Some young people lost their lives by self – immolations. Writ petitions were filed in the court questioning the said memorandum along with applications for staying the operation of the memorandum. It was stayed by the Supreme Court. After the change election held in the first half of, 1991, another office memorandum was issued on 25<sup>th</sup> September, 1991 modifying the earlier memorandum dated 13<sup>th</sup> August, 1990. The later memorandum reads as follows: subject: Recommendation of the second backward classes commission (Mandal Report)-Reservation for socially and educationally backward classes in services under the Government of India. The undersigned is directed to invite the attention to O. M. of even number dated the 13<sup>th</sup> August, 1990, on the above mentioned subject and to say that in order to enable the poorer sections of the SEBCS 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 with immediate effect as follows: -

- (i) Within the 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 SEBCS candidates.
- (ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward section of the people who are not covered by any of the existing schemes of reservation.

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<sup>560</sup> Ibid.

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(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 or reservations are being issued separately<sup>561</sup>.

The O. M. of even number dated the 13<sup>th</sup> August, 1990, shall be deemed to have been amended to the extent specified above<sup>562</sup>.

The resentment against the office memorandum dated 13<sup>th</sup> August, 1990 and 25<sup>th</sup> September 1991 led to filing of several writ petition in the supreme court and resulted the case in the name of *Indra Sawhney v. Union of India*,<sup>563</sup>

In *Indra Sawhney v. Union of India*,<sup>564</sup> the court took the entire problem relating to the declarations made in two office memorandums dated 13<sup>th</sup> August 1990 and 25<sup>th</sup> September 1991 and for the convenience and clarity the court framed all the issues in question form for which the decision of the court were sought. The questions were as follows:

1. Whether the 'provision' contemplated by Article 16(4) must necessarily be made by the legislative wing of the state?
2. Whether clause (4) of Article 16 is an exception to clause (1) of Article 16?
3. Whether clause (4) of Article 16 is exhaustive of the special provisions that can be made in favor of 'backward class of citizens'?
4. Whether reservations can be made under clause (1) of Article 16 or whether it permits only extending of preferences / concessions?
5. What does the expression backward class of citizens in Article 16 (4) means?
6. Whether backward classes can be identified on the basis and with reference to caste alone?

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<sup>561</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477 at 516.

<sup>562</sup> *Ibid.*

<sup>563</sup> *Ibid.*

<sup>564</sup> *Ibid.*

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7. Whether a class, to be designated as a backward class, should be situated similarly to the SCs /STs?
8. Whether the means list can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a list is obligatory?
9. Whether the backward classes can be identified only and exclusively with reference to economic criteria?
10. Whether a criterion like occupation cum-income without reference to caste altogether can be involved for identifying the backward classes?
11. Whether the backward classes can be further categorized into backward and more backward categories?
12. To what extent can the reservation be made?
13. Whether the 50% rule enunciated in *Balaji case* (AIR 1963 S C 649) a binding rule or only a rule of caution or rule of prudence?
14. Whether the 50% rule, if any, is confined to reservation made under clause(4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?
15. Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to?
16. Whether *Devadasan* (AIR 1964 S C 179) was correctly decided?
17. Whether Article 16 permits reservations being provided in the matter of promotions?
18. Whether reservations are anti-meritarian?
19. Whether the extent of judicial review is restricted with regard to the identification of backward classes and the percentage of reservations made for such classes to a demonstrably preserves identification or a demonstrably unreasonable percentage?
20. Whether the reservation of 10% of the post in favor of other economically backward sections of the people who are not covered by any of the existing schemes of the reservations made by the office memorandum dated 25-09-1991 permissible under Article 15?<sup>565</sup>

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<sup>565</sup> Answer of these questions are presented in their respective places.

#### **4. XVII. FURTHER CLASSIFICATION OF BACKWARD CLASSES**

In *M .R. Balaji v. State of Mysore*<sup>566</sup>, it was held that the sub-classification made by the order between backward classes and more backward classes does not appear to be justified under Article 15(4). Article 15(4) authorizes special provision being made for the rashly backward classes, what the impugned order in substance purports to do is to cleanse impugned order in benefit of all the classes of citizens who are less advanced compared to the advanced classes in the state and that is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the state is treated as backward, and that illustrates how the order in fact divides the population of the state into most advanced and the rest, and puts the latter into two categories of backward and more backward. The classification of the two categories, therefore, is not warranted by Article 15(4). Chirrapa J. in *K.C. Vasant Kumar v. State of Karnataka*<sup>567</sup>, “said we do not see why as a principle there cannot be a classification into Backward classes and more backward classes, if both classes are not merely a little behind but far behind the most advanced classes. In fact such a classification would be necessary to help to more backward classes: otherwise those of the backward classes who might be a little more advanced than the more backward classes might take a way with all the seats”.

In *Indra Sawhney v. Union of India*<sup>568</sup>, the court held that there is no constitutional or legal bar to a state categorizing the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a state makes such a categorization, whether it would be invalid?

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<sup>566</sup> AIR 1963 SC 649.

<sup>567</sup> AIR 1985 SC 1495

<sup>568</sup> AIR 1993 SC 477.

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We think not. Let us take the criteria evolved by Mandal commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now it is not as if all the several thousands of castes / groups / classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between the two sets of castes / groups / classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (transitional stone-cutters in Andhra Pradesh) both included within other backward classes. None can deny that goldsmiths are far less backward than vaddes if both of them are ground together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved points leaving none for vides. In such a situation, a state may think it advisable to make a reservation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, matter for its commission is and the state and so long as it resembles down, The court may not intervene. In this connection, reference may be made to the categorization obtaining in Andhra Pradesh. The backward classes have been divided into four categories. Group-A comprises of "Aboriginal tribes, Vimukta Jatis, No Medic and Semi-No Medic Tribes etc." group-B comprise professional group live toppers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. group-C pertains to "Scheduled Castes convert to Christianity and their progeny", while Group-D comprises of all other classes / communities / groups, which are not included in groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorization was justified in Balaram case<sup>569</sup>. This is merely to show that even among backward classes, there can be sub-classes, there can be a sub-classification on a reasonable basis<sup>570</sup>.

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<sup>569</sup> AIR 1972 S C 1375

<sup>570</sup> Ibid

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There are of course types and degree of backwardness. Some are backward only economically while others are backward educationally as well as socially. Although economic backwardness at the root of social and educational backwardness on account of the caste taboo, educational and social advancement was denied even to the economically sound. The Scheduled Castes and Scheduled Tribes are, therefore, backward in all respects. Among the backward, further, the level of backwardness varies. Even among the scheduled casts and Scheduled Tribes some are more backward than other. Hence, it stands to reason that those who are backward in all respects such as the scheduled casts and Scheduled Tribes should get preference over other and among the scheduled cast and tribes who are more backward should get priority over those who are less backward<sup>571</sup>.

There is another way of looking at this issue. Article 16(4) recognizes only viz, backward classes of citizen it does not speak separately of scheduled cast and scheduled tribe, as does Article 15 (4). Even so it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression “backward class of citizens” and that separate reservations can be provided in their favors. It is a well accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Castes and Scheduled Tribes and other backward classes are lumped together, OBC. Will take away all the vacancies lumped Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorization as between more backward and backward. The state can do it; it is not impermissible in law<sup>572</sup>.

It is held that depending upon the facts of each case, sub-classification of the backward would be justifiable provided separate quotas are prescribed for each of them.

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<sup>571</sup> M. A. A. Baig. *Reservation in Educational Institutions and Judicial process*. CILQ 1990. p .56.

<sup>572</sup> Indra sawhrey v. Union of India, A I R 1993 S C 477 at.563.

#### **4. XVIII. CARRY FORWARD RULE**

In *T Devadasan v. Union of India*<sup>573</sup>, case on 19-9-1950 the Government of India published a resolution indicating their policy in regard to communal representatives in the services. The rule of such resolution was modified in 1963 and the modified rule provided that that 17½% of the total vacancies in a year would be reserved for being filled from amongst candidates belonging to Scheduled Castes and tribes. The further provided that if in any year suitable candidates were not available from amongst such classes the reserved posts would be deserved, filled by candidates from other classes and corresponding number of post could be carried forward to the next year. If in the subsequent year the same thing happened the posts unfilled by candidates from Scheduled Castes and tribes could be carried forward to the third year. In the third year the number of posts to be filled from amongst candidates of Scheduled Castes and tribes would thus be 17 ½% of the total vacancies to be filled in the years plus the total unfilled vacancies which had been carried forward from the two previous years. The sub thus permitted a perpetual carry forward of unfilled reserved regencies in the two years preceding its year of recruitment and provided addition to them of 17 ½% of the total vacancies to be filled in the recruitment year. If two successive years no candidate from amongst the scheduled cast and tribes was found to be qualified for filling any of the reserved posts, and supposing the be filled in a particular service was 100, by operation of the carry forward rule the vacancies to be filled by persons form amongst the Scheduled Castes and tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more them 50%. On the basis of reservation permitted by the carry forward rule as modified in 1955, in the year 1961, out of the 45 vacancies, actually filled, 29 went to members of the Scheduled Castes and tribes. That came to about 64% of reservation. The question for consideration was whether the carry forward

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<sup>573</sup> A I R 1964 SC 179.

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rule as modified in 1955 was unconstitutional either because its operation would practically destroy the foundational right guaranteed by Article 16(1) of the constitution or because it was violation of the guarantee contained in Article 14 of the constitution<sup>574</sup>.

The court held that the carry forward rule as modified in 1955 was bad and must be struck down as invalid and unconstitutional. The court further held that the effect of carry forward rule as modified in 1955 would be apparent if in the illustration which we have taken that there were in the third year 50 total vacancies instead of 100. Out of these 50 vacancies 9 would be reserved for the scheduled cast and Scheduled Tribes. Assign to that the 36 carried forward from the two previous years, we would have a total of 45 reserved vacancies out of 50, that is, a percentage of 90. In the case before us 45 vacancies have actually been filled out of which 29 have gone to members of the Scheduled Castes and tribes on the basis of reservation permitted by the carry forward rule. This comes to about 64.4% of reservation. Such being the result of the operation of the carry forward rule we must on the basis of the decision in *M.R. Balaji*<sup>575</sup> case hold that the rule is bad. Indeed, even in *General manager Southern Railway v. Rangachari*<sup>576</sup> which is a case in which reservation of vacancies to be filled by promotion was upheld by this court. Gajendragadkar J. who delivered the majority judgment observed:

“It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interest of other employees. In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of

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<sup>574</sup> T. Devadasan v. Union of India, A I R 1964 S C 179.

<sup>575</sup> M.R. Balaji v. State of Mysore, A I R 1963 S C 649.

<sup>576</sup> A I R 1962 S C 36.

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other employees as well as the important consideration of the efficiency of administration. It is clear from both these decision that the problem of giving adequate reorientation to members of backward classes enjoined by Article 16(4) of the construction is not to be tacked by framing a general rule without bearing in mind its repercussions from year to year. What praise method. Should be adopted for this purpose is a matter for the Government to consider<sup>577</sup>.

Finally it was held that the carry forward rules modified is declared invalid<sup>578</sup>. In *Akhil Bharatiya sashih Karamchan sangh (railways) v. Union of India*<sup>579</sup>, the supreme court of India has shown positive response towards that reservation policy, which provided 64% reservation in selection posts of the scheduled caste and Scheduled Tribes candidates, was challenged. For 2 to 3 years. Consequently to that, reservation went up to 64% this excess reservation and carry forward rule was challenged by the Sangh as unconstitutional and ultravires. The Supreme Court upheld its validity of the railway board circular and said that it was valid. The court also upheld the carry forward rule. The court observed that, mathematical precision could not be applied in dealing with human problems. It pointed out that some excess will not affect the reservation but substantial excess will make the selection void. Justice Chinnappa Reddy went a step ahead and ahead and observed that, the rule of 50% laid down in the earlier cases was only for the guidance of judges and they were not bound by its this indeed is a remarkable judicial departure from its earlier rule laid down in *Balaji and Devadasan cases*.

In *Indra Sawhney v. union of India*<sup>580</sup>, the Supreme Court overruled the decision in *Davadasan*<sup>581</sup> the court was of the opinion that on its own reserving , the

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<sup>577</sup> T. Devasasan v. Union of India, A I R 1964 S C 179.

<sup>578</sup> Ibid.

<sup>579</sup> A I R 1981 S C 298.

<sup>580</sup> A I R 1993 S C 477.

<sup>581</sup> A I R 1964 S C 179

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derision in so far as it strikes down the rule of carry forward is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, in as much as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said rule. The court further held that the same rule of 50% shall be applied here but a year should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength. The court reiterated that a carry forward rule need not necessarily be in the same terms as the one formed in *Devadasan case*<sup>582</sup>, a given rule may say that its 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, contention may be made that reserved posts remain a separate category altogether. In court's 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>583</sup>.

In *State Bank of India Scheduled Castes / Tribes Employees Welfare Association v. State Bank of India*<sup>584</sup>, the contentions of the employees that the privy council unfilled vacancies reserved for scheduled cast / tribe employees lapsed after the expiry of three years, that should not be allowed to lapse and secondly that in any given year not more than 50% of the vacancies should be available for being filled in by scheduled cast and scheduled tribe candidates, is violative of Article 16. The court held that both these contentions, namely, about the carrying forward of reserved vacancies for a period of three years at the end of which they lapse, and the contention that any given year not more than 50% of the available vacancies should be reserved, have been rejected by this court in the case of *Akhil Bharatiya Soshil Karmachari Sangh (Railway) case*. In the light of this judgment, the scheme formulated by the State Bank of India under two circulars thus cannot be faulted<sup>585</sup>.

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<sup>582</sup> Ibid

<sup>583</sup> Ibid

<sup>584</sup> AIR 1996 SC 1838

<sup>585</sup> Ibid.

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In *State of Punjab v. G.S. Gill*<sup>586</sup>, the court held that the carry forward rule is constitutionally permissible. It is an extension of the principle of providing facilitated and opportunity to sesame adequacy of the representation to dalits and tribes mandated by Article 335. It should be carried for three years. Even in the post when the vacancy as pen roster was available, but candidates were not available, same could be carried forward for three years. However, in each recruitment year, the carry forward rule cannot exceed 50% of the vacancies. That question does not arise in a situation where there is single post/cadre. The court farther held that whether or not reserved vacancies should be de-reserved is a matter falling primarily within the administrative discretion of the Government. There is no right general candidates to seek filling up of vacancies belonging to the reserved category and to insist on de reservation so long as it is possible in law to fill the reserved vacancies. In other words, carried forward unfilled vacancies reserved for dalits and tribes should be filled up only by the reserved candidates and general candidates have no right to seek direction for degeneration thereof for filling up of the sane by general candidates. It would thus be clean that carry. Forward rule is a permissible constitutional rule. Carry forward would be done for three years<sup>587</sup>.

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<sup>586</sup> A I R 1997 S C 2324

<sup>587</sup> State of Punjab v. G.S Gill, A I R 1997 S C 2324

## **CHAPTER - 5**

### **LIMITS OF RESERVATION**

#### **5. I. EXTENT OF RESERVATION**

The minority needs protection but up to what extent? There is no indication in the Constitution that the state need reserve any minimum number of post in government service or seats in educational institutions; or divert any minimum part of its resources to benefit. Preferences are not mandatory but only permitted.<sup>588</sup> In absence of any specific limits on the extent of reservation under the Constitution, various Governments have been resorting to implement reservation in educational institutions and governmental jobs to the maximum possible extents.<sup>589</sup>

The claimants of reservation under the Constitution the three categories, the Scheduled caste, the Scheduled Tribes and the Backward Classes, constitute 74.5% of the total population of India; their percentage being 15%, 7.5% and 52% respectively.<sup>590</sup> At present the Scheduled Castes are given 15 percent seats in the total number of vacancies on account of their 15 percent population. The Scheduled Tribes are given 7.5% seat and the backward classes' (OBC) are given 27% reservation.

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<sup>588</sup> Marc Galanter “*Protective Discrimination for Backward Classes in India*, J I L I 1961 p.44.

<sup>589</sup> D. K Bhatt and P. C Joshi. *Social Justice and Reservation for OBCs: An Analysis of Judicial Response*, 27(2) 2000 I B R, p. 116.

<sup>590</sup> Harpal Kaur Khehra, *Job. Reservation Versus Efficiency of Administration*, 1990 (III) C I L Q p. 26.

## *Limits of Reservation*

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Apart from this, the central Government has made a reservation of seats to the tune of 27% for *Socially and Educationally Backward Classes* in Central Educational Institutions.<sup>591</sup> The seats secured on merit by any number of persons belonging to the protected groups are not calculated with reserved seats, rather excluded and counted with general seats.<sup>592</sup> Less than 50 percent of reservation of seats in services and educational institutions has been permitted by the decision of the Supreme Court. It should not exceed that limit and how far less that would depend upon the relevant prevailing circumstance in each case. The same had been the reason for striking down “carry forward” rule so as to consider each year of recruitment as a distinct unit for applying the below 50% rule.<sup>593</sup> However, the decision on the part of some states to accelerate the ratio or percentage of reservation for backward classes in service under the state and educational institutions in contradiction to the limitation of below 50 percent has led to anti-reservation agitations.<sup>594</sup> For example the government of Karnataka since 1977 has increased the quota from 32 percent to 40 % in addition to 18% already reserved for the SCs and STs. A new reservation policy reserving 68% of government jobs and seats in educational institutions was announced in October 1986 thus covering a population of 89% for purpose of reservation in educational institutions and 92% so far as job reservation is concerned. The governments of Bihar’s policy of 1978 reserving 26% of jobs for backward classes cover 47% of the total population of the state, apart from 24 % reserved for SCs and STs. Similarly the

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<sup>591</sup> Central Government has passed the Central Educational Institutions (Reservation in Admission) Act, 2006. The 93<sup>rd</sup> Constitution Amendment introduced a new clause (5) in Article 15, which provides: “nothing in this Article or in sub clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision, by law for the advancement of any socially and educational backward classes of citizens or for the SC, or the ST in so far as such *special provision* relate to their admission to the educational institutes including private educational institutions whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of Article 30.

<sup>592</sup> Harpal Kaur Khehra, *Job. Reservation Versus Efficiency of Administration*, 1990 (III) C I L Q p. 26.

<sup>593</sup> Ibid.

<sup>594</sup> Ibid.

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state of Tamil Nadu in February 1980 has raised the quota to 50% as against 31% besides 18% already reserved for the SCs and STs. In the end of 1983 in Gujarat 10% of reservation for backward classes was pushed up to 28% in addition to those reserved for other two categories. Apart from 14% for SCs and 6% for STs the Andhra Pradesh government's decision in July 1986 has raised the reservation from 25% to 44% for backward classes.<sup>595</sup>

The limit of reservation policy is determined by, what is termed as, “the boundaries of the width of the power”. The width of the power envisages limitation in the form of ‘numerical benchmark’, that is, the ceiling – limit of below 50%, and the limitations that are somewhat abstract and conceptual in nature, and yet identifiable and measurable through “quantifiable data”. The latter limitations, called the “controlling factors”, include the compelling reason of social and educational backwardness’, exclusion of creamy layer’, inadequacy of representation’, and desirability of open competition and the overall administrative efficiency.<sup>596</sup>

In *M. R. Balaji v. State of Mysore*,<sup>597</sup> the Supreme Court, by majority, held that speaking generally and in board sense’ a special provision of reservation should be less than 50%. How much less than 50% would, however, depend upon the relevant factors and prevailing circumstances in each case. The issue of laying down the outer limit arose in the context of the peculiar circumstance. In this case the state of Mysore issued an order that all communities except those of Brahmins would fall within the definition of *Socially and Educationally Backward Classes* of citizens, Scheduled Castes and Scheduled Tribes, and that 75% of the seats in educational institutions were to be reserved for them. Holding that determining who are socially backward is undoubtedly very complex, as it involves the plethora of sociological, social and economic considerations, nevertheless reservation being a special measure,

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<sup>595</sup> Ibid.

<sup>596</sup> Virendra Kumar, *Dynamics of Reservation Policy: Towards A More Inclusive Social Order*, 50 JI L I (2008) p. 511.

<sup>597</sup> A I R 1963 S C 649.

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could exceed in no case beyond the outer limit of less than 50% of the total.<sup>598</sup> While laying down this maximum extent, the court observed “a special provision contemplated by Article 15(4).....must be within reasonable limit. The interests of weaker section of society which are first charge on the states and the centers have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, state reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad sense, a special provision should be less than 50%.<sup>599</sup>

In *T. Devadasan v. Union of India*,<sup>600</sup> the Supreme Court read the *Balaji* below 50% rules as rigid one and applicable equally to reservation under Article 16(4). *Devadasan* involved a central scheme reserving post in favor of the scheduled caste and Scheduled Tribes for promotion from grade IV to grade III post in the central secretariat service. The government had applied the carry forward rule. Under which the unfilled reserved post were carried over to the three succeeding years. The result was that for the year in question 64.4 percent of the available vacancies were reserved in favor of the favoured groups. Proceeding from the notion that Article 15(4) and 16(4) are exception to the equality clauses the court struck down the carry forward rule as unconstitutional. The court held that reservation could not be used to destroy or nullify the ideal of equality of opportunity enshrined in Article 16(1). The overriding effect of clause (4) on clause (1) and (2) could only extend to the making of reasonable number of reservation of appointments and posts in certain circumstances, and the reasonable number is that which strike a reasonable balance between the claims of the backward classes and the claims of other employees as pointed out in *Balaji* case. The purpose of Article 16(4) was described by the court as

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<sup>598</sup> Ibid.

<sup>599</sup> *M. R. Balaji v. State of Mysore*, AIR 1963 S C 649.

<sup>600</sup> AIR 1964 S C 179.

## *Limits of Reservation*

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ensuing equal opportunity for all citizens relating to employment and appointments to any official under the state. Article 16(1) was thus viewed by the court as ensuing uniform standards and protecting the claims of meritocracy and thus on every occasion for recruitment the state should see that all citizens are treated equally. The guarantee is to each individual citizens and therefore, every citizen who is seeking employment or appointment ---is entitled to be afforded an opportunity for seeking such employment or appointment.<sup>601</sup> The court suggested the following formula for striking a balance between the competing claims.<sup>602</sup> Where the objects of a rule is to make reasonable allowance for the backwardness of the member of class by reserving certain proportion of appointments for them what the state would in fact be doing would be to providing 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. Reservation are confined to certain proportion of appointments, leaving a substantial number of post open for merit competition, then the requirement of equality will be met. A reservation of more than 50 percent would destroy equality. In the State of Kerala v. N. M Thomas,<sup>603</sup> the Supreme Court made a remarkable shift from earlier precedents and declared that Article 16(4) is not an exception but is an elaboration of the equality principle contained in Article 16; and thus in appropriate cases the extent of reservation may be as high as eighty percent. This description heralded a new era in the field of reservation as it legitimized transcending the rule of 50% laid down in Balaji<sup>604</sup> which it trivialized as mere rule of caution.

The consideration of administrative efficiency has been emphasized again by the Supreme Court in different cases. The court stated that reservation cannot be stretched beyond a particular limit,<sup>605</sup> and in certain cases where expertise and skills are

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<sup>601</sup> T. Devadasan v. Union India, A I R 1964 S C 179

<sup>602</sup> Ibid.

<sup>603</sup> A I R 1976 S C 490

<sup>604</sup> M. R Balaji v. State of Mysore, A I R 1963 S C 649

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of essence,' merit alone must be the sole and decisive consideration and there would be no reservation in those cases.<sup>605</sup>

In *A. B. S. K Sangh (Rly) v. Union of India*,<sup>606</sup> Chinnappa Reddy, J., expressed his view on the ceiling of reservation as follows: “ there is no fixed ceiling to reservation or preferential treatment in favor of scheduled caste and Scheduled Tribes though generally reservation may not be far in excess of fifty percent. There is no rigidity about the fifty percent rule which is only a convenient guidance laid down by judges. Every case must be decided with reference to the present practical result yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future”.<sup>607</sup> In *R. K Sabarwal v. State of Punjab*,<sup>608</sup> the Supreme Court held that when percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the post shown at the reserve points are to be filled from amongst the member of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve categories candidates can compete for the non-reserve post their number cannot be added and taken into consideration for working out of percentage of reservation.<sup>609</sup>

For determining as to what extent reservation would be reasonable we must take into account two factors:- one its effect on the fundamental rights of the candidates of the general category under Article 15(1) and 16(1) and 16(2) of the Constitution and the other about its effect on merit and efficiency in administration. There can be no doubt that reservation adversely affect both and has to be tolerated to a reasonable extent as something necessary to compensate for injustice perpetrated by

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<sup>605</sup> Virendra Kumar, *Dynamics of Reservation Policy: Towards A More Inclusive Social Order*, 50 J I L I (2008) p. 512.

<sup>606</sup> A I R 1982 S C 298

<sup>607</sup> Chinnappa Reddy, J., holds the majority opinion in this case.

<sup>608</sup> A I R 1985 S C 1371

<sup>609</sup> Ibid.

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society on the Scheduled Tribes as well as other backward classes in the past<sup>610</sup>. In *Janaki Prasad's case*,<sup>611</sup> Supreme Court held that the protection given by special reservation must be balanced against the Constitutional rights of every citizen to demand equal opportunity. Moreover, where appointment or promotions to responsible public offices are made, greater circumspection would be required in making reservation for the benefit of any backward class because efficiency in public interest must always remain paramount.

Since every reservation under Article 16(4) claims a victim from the general category the power conferred by the said Article should be exercised sparingly with great care and caution only where others means of promoting the interest of certain weaker section of the society under Article 15(4) and Article 46 are not found sufficient. It is for this reason that Article 16(4) must be very strictly construed.<sup>612</sup>

So far as reservation of seats in educational institutions is concerned, it seems it was not contemplated in the draft Constitution because clause (4) of Article 15 was not there in Article 9 of the draft Constitution which corresponds to Article 15. Moreover, clause (2) of Article 29 expressly lays down that no citizens shall be denied admission into any educational institutions maintained by the state or receiving aid out of the state funds on grounds only of religion, race, cast, language or any of them. Clause (4) of Article was introduced in the Constitution later by the First Constitution Amendment so that reservation of seats in educational institutions for socially and educationally backward classes as well as for the SCs / STs may be made.<sup>613</sup>

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<sup>610</sup> S. M. N. Raina. *Reservation with Justice*, III, 1990, C I L Q p 13

<sup>611</sup> A I R 1989 S C 48

<sup>612</sup> S. M. N Raina. *Radical Approach to the Question of Reservation*, III, 1990, C I L Q p 1.

<sup>613</sup> Ibid note 638 at 13

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The second backward Classes Commission popularly known as Mandal Commission recommended and said that the Scheduled Castes and Scheduled Tribes constitute 22.5% of the country's population. Accordingly a pro-rata reservation of 22.5% has been made for them in all service and public sector undertaking under the central government. In the state also, reservation for SCs and STs is directly proportional to their population in each state.<sup>614</sup>

The population of OBCs both Hindu and Non- Hindu is around 52% of the total population of India. Accordingly 52% of all posts under the central government should be reserved but this provision may go against the law laid down in a number of supreme court judgment wherein it has been held that the total quantum of reservation under Article 15(4) and 16(4) of the Constitution should be below 50%. In view of this the proposed reservation for OBCs would have to be pegged at a figure which when added to 22.5% for SCs and STs remain below 50%. In view of this legal constraint, the Commission is obliged to recommend a reservation of 27% only, even though their population is almost twice this figure.<sup>615</sup>

In *Indra Sawhney v. Union of India*,<sup>616</sup> the Supreme Court observed that clause (4) of Article 16 speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportional representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. 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.

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<sup>614</sup> Govt. of India Report of the Backward Classes Commission, Vol. I & II, 1980, Chapter - XIII p. 58

<sup>615</sup> Ibid.

<sup>616</sup> AIR 1993 S C 477.

## *Limits of Reservation*

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Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits and what is more reasonable than to say that reservation under clause (4) not exceeds 50% of the appointments or posts, barring certain extraordinary situations as explained here in after. From this point of view, the 27% reservation provided by the government in favor of backward classes is well within the reasonable limits. Together with reservation in favor of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. It need no emphasis to say that the principal aim of Article 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objectives. Clause (4) is a special provision- though not an exception to clause (1). Both the provisions have to be harmonized keeping in mind the fact that both are but the treatment of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain section of society – should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being confined to a minority of seats.<sup>617</sup>

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of condition peculiar to and characteristically to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In this connection it is well to remember that the reservation under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition field on the basis of their own

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<sup>617</sup>Referred in *Indra Sawhney v. Union of India*, AIR 1993 SC 477

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merit; they will not be counted against to quota reserved for Scheduled Castes' they will be treated as open competition candidates.<sup>618</sup>

Though the draftsman of the Constitution visualized judicial review of the extent of reservation, the text of Article 16(4) itself supplies no opponent warrant for it, unless the word 'reservation' is construed to necessary imply a minority (less fifty percent) of posts – not merely a minority for any single backward group but for the aggregate of all backward groups. Some judicial control over the extent of reservations may be necessary to preserve their character as an exception and prevent government from creating it into a general principle of operation, but while a strict "percentage" limitation has the obvious advantage of definiteness, it is complicated but its connection with the question of whom the state may designate as backward. If the backward groups may be allowed reservations commensurate with their ratio in the population, would a similar limitation be placed on the total number who may be designated as backward? or if as has sometimes been the case some 90% of the population was designated as backward, may not the state commensurate number of posts.<sup>619</sup>

The extent of both reservations and benefits might be reviewed on the different ground – their conformity with the "equal protection" clauses of Article 14. This would amount to a rule of "reasonableness" which would free the courts from the arbitrariness of the "percentage" test. One can visualize "reasonable" reservations in evolving more than fifty percentages and abused involving less. Judicial control of the percentage of reservation cannot be separated from the review of standards for designated the backward. The quantum of preference is itself no indication of its legitimate constitutional use.<sup>620</sup>

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<sup>618</sup> Ibid.

<sup>619</sup> Marc Galanter "Protective Discrimination for Backward Classes in India" J I L I 1961 pp. 46-47.

<sup>620</sup> Ibid.

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In *Union of India v. Virpal Singh Chauhan*,<sup>621</sup> , the court held that the percentage of reservation has to be worked out in relation to the number of posts which form the cadre- strength and that the concept of vacancy has no relevance in operating the percentage of reservation. Honorable Dr. B.R Ambedkar said in the Constituent Assembly “of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many members of this house that every individual who is qualified for a particular post should be free to apply for that, to sit for examination and to have his qualification tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly shared by a section of this house is that, if this principle is operative and it ought to be operative in their judgment to 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 service are concerned that is the second point of view we have. Then we have quite massive opinions which insist that although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said the drafting Committee had to produce a formula which would reconcile their three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservation in favor of certain communities which have not so far had a proper look in so to say into the administration. If honorable members will bear these facts in mind the three principles, we had to reconcile they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of Article 10 of the Constitution.; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle at the same time as it said we had to reconcile this formula with the demand made by certain community that the administration which has now for historical reason been

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<sup>621</sup> AIR 1996 SC 448

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controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public service. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public service to the fullest extent, what would really happen is we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity.<sup>622</sup> Let me give an illustration supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 percent of the total posts under the state and only 30 percent are retained as the unreserved. Could anybody say that the reservation of 30 percent 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 judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.<sup>623</sup>

## **5. II. RESERVATION POLICY AND EXCUSION OF CREAMY LAYER**

The aim of civilized society should be to secure dignity to every individual. There can be no dignity without equality of status and opportunity. The democratic foundation is missing when equal opportunity to grow and give one's best to the society is denied to a sizable section of society. The goal enumerated in the preamble of the Constitution remains unattainable so long as the equality of opportunity is not ensured to all. The commitment of the founding fathers was to uplift our backward class brethren by giving them protective discrimination and ensuring their social

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<sup>622</sup>Constituent Assembly Debate (CAD), Vol. No. VIII, 4 November, 1948 – 8 January, 1948, Lok Sabha Secretariat, pp.701-707

<sup>623</sup>Constituent Assembly Debate (CAD), Vol. No. VIII, 4 November, 1948 – 8 January, 1948, Lok Sabha Secretariat, pp.701-702.

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justice<sup>624</sup>. For this reservation has been given by the Central as well as state government to backward classes in public employment as well as in educational institutions. Founding fathers wanted to minimize inequalities in status and to provide facilities and opportunities not only among individuals but also among groups of people so that they may secure adequate means of livelihood and their education and economic interests are protected.

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>625</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>626</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

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<sup>624</sup> S. K. Singh, ‘*Concept of Creamy Layer in Backward Class Reservation under Indian Constitution*’, A.I.R 2000 Journal p. 156-159.

<sup>625</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477 at 558

<sup>626</sup> A I R 1985 S C 1495.

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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?"

In *Indra Sawhney v. Union of India*,<sup>627</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

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<sup>627</sup> AIR 1993 S C 477.

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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. However, it is necessary to add that just as the backwardness of backward groups cannot be measured in terms 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

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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>628</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>629</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>630</sup>

The creamy layer concept was introduced in *Indra Sawhney case*.<sup>631</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

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<sup>628</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477

<sup>629</sup> *Ibid.*

<sup>630</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477 at 486.

<sup>631</sup> *Ibid.*

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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>632</sup>, it was held that in identifying backward classes therefore, one has to guard oneself against including there in 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.

### **5. III. DETERMINATION OF CREAMY LAYER CLASS**

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<sup>632</sup> A I R 1973 S C 930

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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 reservation meant for OBCs. State of Kerala 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 basis of guidelines of the Joseph Committee Report.<sup>633</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>634</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

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<sup>633</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>634</sup> Ibid at 144.

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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 its be made the basic for disentitlement.<sup>635</sup> Those are as follows.

1. Certain Constitutional posts qualify for the rule of exclusion e.g., posts of President, Vice-President, Judges of the Supreme Court and High Court, Chairman and Members of UPSC and State PSC, Chief Election Commissions, Controller and Auditor General of India, Governors, Ministers and Members of Legislatures.
2. The rule of exclusion covers Class I Officers of Central and State Service (direct recruitments) Public Forces, Professional Class including trades, business and industry and property owners.
3. It excludes those having gross annual income of Rupees One lakh and above.
4. In the service category the rules of exclusion will apply if either the husband or wife is a Class I officer. Where both are class I officers and one dies the rule of exclusion, applies. But if both die then the rule does not apply. Permanent incapacitation is treated as death the rule of exclusion does not apply<sup>636</sup>
5. The committee says that if before the death of either of or both spouses occurs, either of the spouses has had the benefit of employment in any international bodies like the United Nations, I M F, World Bank for a period of five years, then the exclusion rule would continue to apply on their children.
6. If a lady belonging to SEBC marries to a class I officers then she would be entitled to get the benefits of reservation.

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<sup>635</sup>J. N Pandey. The Constitutional Law of India Central Law Agency, Allahabad, (2008), p. 164.

<sup>636</sup> Ibid.

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### Group – B class II (direct recruitment)

The report says –

1. If both spouses are class II officers then the rule of exclusion would apply to their offspring. If only one spouse is a class II officer it would not apply but if male officer from class II category gets into class I category at the age of 40 or earlier than the rule of exclusion would apply to his offspring.
2. Where both are class II officers and one of them dies the rule of exclusion would apply to their children.
3. Where the husband is a class I officer and wife is class II officer and the husband dies the rule of exclusion will not apply. Also when the wife is a class I and the husband is class II and the wife dies the rule of exclusion would not apply but if the husband dies the rule of exclusion would apply on principle that one if the parent namely, the mother continues to be a class I officer.
4. The above service categories criteria also applies to officer holding equivalent or comparable post in public sector undertaking, banks, insurance organization , universities and also equivalent or comparable posts and position under private investment.
5. As regards armed forces including Para Military Forces ( not person holding civil post ) the exclusion rule would apply at the level of Colonel and above in the army and to equivalent post in the Navy and Air Force and Para Military forces.

If the wife of an armed forces officer is herself in the armed force the Rule of exclusion would apply, only when she herself has reached the rank of colonel, the service ranks below colonel of husband and wife shall not be clubbed together. Even

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if the wife of an officer in the armed forces is in civil employment this will not be a ground for applying the rule of exclusion unless she falls in the service category.

6. Professional class and those engaged in trade, business, and industry the exclusion will be determined on the basis of income and with criteria.

7. For property owners the Committee says if a person belongs to a family (father, mother and the minor children) which owns irrigated land and the extent of irrigated land is equal to or more than 65% of the statutory ceiling area the rule of exclusion would apply. The rule will not apply to person belonging to families owning only un irrigated land irrespective of the area of such land.

In the case of member of a family owning both irrigated and un irrigated lands, the exclusion rule would apply where the precondition exist that the irrigated area is 40% or more of statutory ceiling limit for irrigated land.

However, the exclusion rule on the basis of land holding will not apply to the states of Nagaland, Mizoram, Meghalaya, Arunachal Pradesh and Goa and in the Union Territory of Andman and Nicobar Island, Lakshdweep, Daman and Diu where there is no ceiling law.

8. Residuary category The Committee says that person having gross annual income of one lakh rupees or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act would be excluded from the benefit of reservation.

In *Ashok Kumar Thakur v. State of Bihar*,<sup>637</sup> the Supreme Court upholding the decision in *Indra Sawhney case*<sup>638</sup> where the court held that a person belonging to a

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<sup>637</sup> AIR 1996 SC 75

<sup>638</sup> AIR 1993 SC 477

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backward class, who becomes member of IAS, IPS or any other All India Service, his children cannot avail the benefit of reservation. The states of Bihar and Uttar Pradesh have added further condition such as salary or rupees ten thousand or more per men sum, the wife or husband to be graduate and one of them owning a house in a urban area. So far as the professional are concerned, an income of Rs. 10 lakhs per annum has been fixed as the criteria. It is further provided that the wife or husband is at least graduate and the family owns immovable property of the value of at least rupees twenty lakhs. Similarly, the criteria regarding trades, industrialist, agriculturist and other is wholly arbitrary apart from being contrary to the guidelines laid down by Supreme Court in *Mandal case*. The court further held that the protective discrimination in the shape of job reservations under Article 16(4) has to be programmed in such a manner that the most deserving section of the backward class in benefited means test by which “creamy layer” is excluded ensure such result. The process of identifying backward class cannot be perfected to the extent that every member is 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 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 higher class is in turn practiced by the affluent members of the backward class on the poorer member of the same class. The benefits of social privileges like job reservation are mostly chewed by the either 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 uniform. The job are so very few in comparison to the population of the backward classes that it is difficult to give them adequate reservation in the state service it is therefore necessary that the benefit of reservation must reach the poorer and the weaker section of the backward class. Economic ceiling to cut off the

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backward class for the purpose of job reservation is necessary to benefit the needy section of the class. The means test is, therefore imperative to skim off the affluent section of the backward class.

Justice P. B Sawant in *Indra Sawhney v Union of India*<sup>639</sup> said ‘the correct criterion for judging the forwardness of the forward among the backward classes is to measure their capacity not in terms of the capacity of other in their class, but in term of the capacity of the members of the forward classes as stated earlier. If they should be taken out from backward classes and should be made disentitled to the provision meant for the said classes. It is necessary to highlight another allied aspect of the issue, in this connection who do we mean by sufficient capacity to compete with others: is it the capacity to compete class IV or class III or higher class posts. Class IV employees children may develop capacity to complete for class III posts and in that sense, he and his children may be not secured even 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 reservation in the services is to be evaluated in terms of qualification and not mere quantitative representation, which means representation in the higher rung of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward section reaches that level or at least near that level’<sup>640</sup>

R. M Sahai, J.,<sup>641</sup> held that the exclusion of creamy layer is a social purpose. Any legislation or exclusive action to remove such person individually or collectively cannot be constitutionally invalid. The learned judge elaborated his conclusion as under “More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problems. The collectivity or the group may be backward class but the individuals from the class may have

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<sup>639</sup> AIR 1993 SC 477.

<sup>640</sup> Ibid.

<sup>641</sup> Ibid.

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achieved the social status or economic affluence disentitle them from claiming reservation, therefore while reservation for backward classes, the department should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limits can be determined by the appropriate state. Income apart, provision should be made that wards of those backward classes of person who have achieved a particular status in society either political or social or economic or if their parents are in higher service then such individuals should be precluded to avoid monopolization of the service reserved for backward classes by a few. Creamy layer, thus shall stand eliminated”

In *Ashok Kumar Thakur v State of Bihar*,<sup>642</sup> the Supreme Court, finally after examining the criteria for identifying the creamy layer as laid down in Mandal case, came to the conclusion. and approved the rule of exclusion framed by the government of India.

In *Ashok Kumar Thakur v. Union of India*,<sup>643</sup> the Court held that when socially and educationally backward classes are determined by giving importance to caste, it shall not be forgotten that a segment of that caste is economically advanced and they do not require the protection of reservation. Determination of backward class cannot be exclusively based on caste. Poverty, social backwardness, economic backwardness, all are criteria for determine action of backwardness. It has been noticed in Indra Sawhney case that among the backward class, a section of the backward class is a member of the affluent section of society. They do not deserve any sort of reservation for further progress in life. They are socially and educationally advanced enough to compete for the general seats along with other candidates.

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<sup>642</sup> AIR 1996 SC 74

<sup>643</sup> (2008) 6 SCC 499.

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The Court further held that it ought to be understood that creamy layer principle is introduced merely to exclude a section of particular caste on the ground that they are economically advanced or educationally forward.<sup>644</sup> They are excluded because unless this segment of caste is excluded for that caste group, there cannot be proper identification of the backward class. If the creamy layer principle is not applied it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC for the purpose of either Articles 15 (4), 15 (5), or 16 (4) solely on the basis of caste is expressly prohibited by various decision of this court and it is also against Article 15 (1) and Article 16 (1) of the Constitution to fulfill the condition and to find out truly what is socially and educationally backward class, the exclusion of creamy layer is essential. It may be noted that the creamy layer principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining SEBC is poverty. If that be so, the principle of exclusion of creamy layer is necessary.<sup>645</sup>

The court further held that same principle of determining the creamy layer for providing 27% reservation for backward classes for appointment need not be strictly followed in case of reservation envisaged under Article 15(5) of the constitution. The government can make a relaxation to some extent so that sufficient number of candidate may be available for the purpose of filling up the 27% reservation. It is for the union government to issue appropriate guidelines to identify the creamy layer, so that SEBC are properly determined in endurance with the guidelines given by this court.<sup>646</sup> In this case it was categorically held that the creamy layer principle cannot be applied to STs and SCs as SCs and STs are separate classes by themselves. Ray,

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<sup>644</sup> Ibid.

<sup>645</sup> Ibid.

<sup>646</sup> Ashok Kumar Thakur v. Union of India. (2008) 6 S C C 1 at 512.

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C. J., stated that scheduled caste and Scheduled Tribes are not a caste within the ordinary meaning of caste.<sup>647</sup>

The process of chronic development and the spread of education have resulted in narrowing the gap between the classes considerably. As larger percentages of backward class member attain acceptable standards of education and employment, they should be narrowed from the backward classification, so that attention is given to those classes that genuinely need help. It would be a useful exercise to review the classification of backward classes once again and also check whether the criteria used for classification of backwardness is relevant for today's conditions. If this is not done, it will provide the backward classes incentive to remain backward, because in the knowledge that, with relatively little effort and qualification the government still guarantee them adequate educational and employment opportunities. A periodical re-examination of the classification of backwardness and a progressive reduction of reservation percentage, couple with expansion of educational facilities is the policy that will suit the country best in the long term. Governments may be reluctant to reduce reservation or attempt a reclassification because of their tremendous political implications, but it would be consistent with the principle behind helping the genuinely needy only. Therefore, the creamy layer should be excluded not only among the other backward classes but also from the scheduled caste and Scheduled Tribes.

#### **5. IV. DURATION OF RESERVATION**

The ultimate objects of the Constitution makers was to establish a casteless society by gradually eliminating caste hierarchy, caste distinction and caste stigma and thus to ensure the dignity of the individual and equality of status among all the citizens on India. Special provision for Scheduled Castes and Scheduled Tribes as

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<sup>647</sup> Ibid.

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well as backward classes were introduced as a temporary measure to raise them to the status of an average enlightened citizen of India whose dignity and status depend on being an Indian and not on his belonging to this caste or that or any other subdivision of society of this nature. Once all distinction or high and low depending on race, caste or religion etc., disappear the special provision for reservation etc. would no longer be necessary.<sup>648</sup> The state is specifically directed to make special provision by law for the advancement of any socially and educationally backward classes of citizens or for the scheduled caste or the Scheduled Tribes. This is the common command under clauses (4) and the newly inserted clause (5) of Article 15. The meaning if this mandate for making ‘special provision’ is clear and specific : it is for the advancement of those who have been identified as backward for fructifying this objective, it is incumbent upon the state to go on reviewing periodically whether or not the special provision of reservation in yielding the desired result such as periodic review would provide as opportunity to the state are to rectify distortions arising out particular facts of the reservation policy, two, to exclude the beneficiaries of reservation who have ceased to be backward and instead of them ( on their exclusion ) pass on the benefits of reservation to the next incumbents from the backward class. There is yet a third related benefit of the periodical review it would afford an opportunity “to the people both backward and non- backward, to ventilated their views in a public debate on the practical impact of the policy of reservation”<sup>649</sup>

Regarding the period of operation of the Commission’s recommendations, the entire scheme should be reviewed after twenty years. We have advisedly suggested this span of one generation as the raising of social consciousness is a generational progress. Any review at shorter interval would be rather arbitration and will not give fair indication of the impact of our recommendations on the prevailed status and life-styles of OBCS.<sup>650</sup>

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<sup>648</sup> S. M. N Raina. *Reservation with Justice*, III, 1990 C I L Q , p. 10

<sup>649</sup> Virendra Kumar. *Dynamics of Reservation Policy Towards a More Inclusive Social Orde*, JILI (2008) p. 478

<sup>650</sup> Mandal Commission Report, Chapter XIII para 13.40

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The reservation of seats for SC and St in the House of the People and Legislative Assemblies of the states; was to continue only for 10 years from the commencement of the Constitution under Article 334. This means the Constitution makers expected that with the aid of the provision made for the benefit of backward class in consonance with the demands of social justice, a casteless society would be established within a period of 10 years and therefore, there would be no need for reservation at all. It is true that for the reservation under clause (4) of art. 16 no time limit was prescribed but it is obvious that once the stage is reached when the reservation of the seats in lok sabha and the legislative assemblies of the state become unnecessary there could be no need for reservation under clauses (4) of Article 16. The aforesaid time has been extended from time to time by Constitutional amendment in almost a routine manner and now it extends to 50 years. As pointed out above reservation under clause (4) of art. 16 is the only provision in the Constitution which while prompting the interest of the community causes grave hurt to another community and therefore, this power must now be excised very sparingly by the government of the nation<sup>651</sup> .

Article 16(4) of the Constitution is not intended to perpetuate reservations for all times to come and it is not to be interpreted in such a way as to negate the essential sense of the principal clause 16(1). Chapter IV – A on Fundamental Duties speaks of a fundamental duties to cherish and follow the noble ideas which inspired national unity, and struggle for freedom to uphold and protect the sovereignty and integrity of India, to promote harmony and spirit of common brotherhood amongst all people of India, irrespective of religion and to strive towards excellence in all spheres of individuals and collectivities so that nation rise to higher standard and achievement. Dr. Ambedkar was not in favor of reservation in perpetuity and he was in favour of it only for a limited period of ten years or so. His speech in the Constitution Assemble is worth quoting. He said supposing we were to concede in full the demand of these communities, who have not so far been employed in the public services to the fullest

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<sup>651</sup> S. M. N Raina. *Radical Approach to the Question of Reservation*; (III) 1990 C I L Q p. 418

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extent, what would really happen is that we shall be 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 reservations were made for community or collection of a community to total of which comes something like 70% of the total post under the state and only 30% are retained as un-reserved, could anybody say that reservation of 30% 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.<sup>652</sup>

Nobody would oppose giving of benefits to the deprived and the poor but as soon as they are brought to the level of standard where a take off stage is essential and only competition will help in that take off stage and bringing them into the mainstream of national life, the remedy is not extreme reservation but reasonable moderate benefits on the rational economic criteria.<sup>653</sup>In *Jagdish Negi v State of U. P.*<sup>654</sup> the Supreme Court held that the statutory scheme of reservation of 27% for socially and educationally backward classes of citizens may continue indefinitely till the reservation Act continues to operate. Still a given category of citizens which may form a part and parcel of that class of citizen, namely socially and educationally backward classes of citizens as on date may in future case to belong to that class. Consequently the question whether a given category of citizen at a given point of time or not has to be left to the state concerned for its objectives decision from time to time. The state cannot be bound in perpetuity to treat such classes of citizens for all times as socially and educationally backward classes of citizens. The principles on once a mortgage always mortgage' cannot be pressed in service for submitting that once a backward class of citizens, always such a backward class. In other words it is open to the state to review the situation from time to time and to decide whether a

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<sup>652</sup> B. N. Sharma and R. K Mahajan. *Fallacies in the Mandal Commission Report – Plea For the Appointment of a New Commission.* 17 (3&4) 1990 IBR &.18(I) 1991 IBR p. 444.

<sup>653</sup> Ibid.

<sup>654</sup> AIR 1997 S C 3505

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given class of citizens that has earned the benefits of 27% reservation as socially and educationally backward class of citizen has continued to form a part of that category or has ceased to fall in that category.

In *Indra Sawhney v. Union of India*,<sup>655</sup> the court held that no period for reservation has been provided but every state must keep an evaluating periodically if it was necessary to continue reservation, and for whom.

### **5. V. RESERVATION IN CASE OF SINGLE POST**

Reservation of the post in a single – post cadre amounts to 100% reservation in the cadre, while keeping it beyond the realm of reservation might render it almost inaccessible to reserved category of candidates. This dilemma of “to reserve or not to reserve” haunts the court as is evident from a conspectus of case law on this point.<sup>656</sup> In *Arati Ray Cahudhary v. Union of India*,<sup>657</sup> the Supreme Court has clearly held that the reservation for backward community should not be so excessive as to create a monopoly or to disturb unduly the legitimate claim of other communities. It has been specially indicated in the said decision that if there are two vacancies to be filled up in a particular year, not more than one vacancy can be treated as reserved. In this case the learned judges followed the earlier decision in *M.R Balaji case* that in no case reservation of seats beyond 50% could be made. In *Dr. Chakradhar Paswan v. State of Bihar*,<sup>658</sup> Supreme Court pointed out that whenever there is one post in a cadre, there can be no reservation with reference to that post either for recruitment at initial stage or for filling up future vacancy in respect of that post. The court observed that no reservation could be made under Article 16(4) so as create a monopoly otherwise, it would render the guarantee of equal opportunity, it would render the guarantee of

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<sup>655</sup>AIR 1993 SC 477 at 731

<sup>656</sup> D. K Bhatt and P. C Joshi. *Social Justice and Reservation for OBCs; An Analysis of judicial Response*, 27 (2) 2000 IBR p. 118

<sup>657</sup> AIR 1974 SC 532

<sup>658</sup> AIR 1988 SC 959

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equal opportunity contained in Article 16(1) and 16(2) wholly meaningless and illusory. A reservation, which would come under Article 16(4), presupposes the availability of at least more than one post in that cadre.

In *Indra Sawhney v. Union of India*,<sup>659</sup> 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 occasion can be made even when the post is only a single cadre post. In *Chetana Dilip Motghare v. Bhide Girls Education Society, Nagpur*,<sup>660</sup> where the Supreme Court upheld its earlier decision taken in the case of *Chakradhar Paswan*, where it was held that single isolated post cannot be reserved. In the present case Supreme Court held that the principle of reservation would not apply in the case of an isolated post and the decision of *Chakradhar Paswan* holds the fields.

In *Union of India v. Madhav*,<sup>661</sup> a 3-judges bench of the Supreme Court held that reservation in a single post neither violates Article 16 nor contravenes the mandatory 50% rule if the rule of rotation and roster is applied strictly to such post. Extension of reservation in such case, the court pointed out, is not unconstitutional. The court here overruled its earlier decision in *Chetra Dilip Motghare* wherein such reservation had been held as unconstitutional, however it prefer to follow its earlier decision in *A. R Chaudhary*<sup>662</sup> *Merry C S Rao v. Dean, Seth G. S Medical College*<sup>663</sup> 7, and *State of Bihar v. Bageshwari Prasad*. The *Madhava* judgement was followed in numerous cases involving the impugned reservation in initial appointments or even in promotion. In *Dina Nath Shukla case*,<sup>664</sup> the court held that single post of professor/reader / lecturer in various faculties / departments / speciality, which cannot be reserved due to the bar of 50% should be clubbed together and roster should be applied thereto subject to the rule of rotation. This ruling was followed in *P G I of*

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<sup>659</sup> AIR 1993 SC 477

<sup>660</sup> AIR 1994 SC 1917

<sup>661</sup> AIR 1997 SC 3074

<sup>662</sup> AIR 1974 SC 532

<sup>663</sup> (1990) 3 SCC 130

<sup>664</sup> AIR 1997 SC 1095

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*Medical Education & Research v. K. L. Narasimhan*, where it was reiterated that single – cadre post carrying same scale of pay or grade can be clubbed together for applying roster thereon. On promotion the Supreme Court in *Suresh Chandra v J. B. Agarwal*,<sup>665</sup> held that in case of solitary isolated post on the basis of the rule of rotation, the benefits and facilities should be extended to the reserved candidates. Namely, Scheduled Castes and Scheduled Tribes for appointment by promotion to the single post and, therefore application of the rule of reservation is not unconstitutional. In *Union of India v. Brij Lal Thakur*,<sup>666</sup> it was held that even though there is a single post, if the government have applied the rule of rotation and roster point to the vacancies that had arisen in the single point post and where sought to be filled up by the candidate belonging to the reserved categories at the point on which they were eligible to be considered, such a rule is not violative of Article 14 and 16(1) of the Constitution. In *State of Punjab v. G. S. Gill*,<sup>667</sup> it was held that it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and constitutional.

In *Ashok Kumar Gupta v. State of U.P.*<sup>668</sup>, the Supreme Court followed *Madhav's* case and held that reservation provided to single post on the basis of rule of rotation is not unconstitutional. It is clearly, therefore an error to hold that reservation in promotion to a single post and application of carry forward rule and of roster is unconstitutional.

The ongoing controversy was finally abated by the court's 5 judges Constitutions Bench in *Post Graduate Institutes of Medical Education and Research, Chandigarh v. Faculty Association*,<sup>669</sup> the decision of *Madhav's* case was withdrawn by the same court. The court observed that, where there is a single post cadre, the same can not be reserved neither directly nor by device of Rotation of roster points.

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<sup>665</sup> AIR 1997 S C 2487

<sup>666</sup> AIR 1997 S C 2101

<sup>667</sup> AIR 1997 S C 2324

<sup>668</sup> (1997) 5 S C C 201

<sup>669</sup> AIR 1998 S C 1767

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The reason given by the court that, if reservation is made to a single cadre through a device of rotation of roster points to the exclusion of the general members of the public, it would amount to 100% reservation which is not permissible within the constitutional framework. Besides, it also held that till there is plurality of posts in a cadre, the question of reservation will not arise. This decision cannot be fully appreciated as it excludes the members of Scheduled Castes and Scheduled Tribes from claiming reservation where there is a single post in a cadre.

## **5. VI. RESERVATION IN PROMOTION**

It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stages of promotion, it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion the member of a reserved category is enabled to frog leap over his compatriots, which is bound to generate acute heart burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance the members of reserved categories would steal a march over them, irrespective of their performance and competence. Example are given how two person (A) & (B) are belonging to O.C category and other belonging to reserve category have been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over, the members of the O. C category already there and gains further promotion and so on. This would generate, it is submitted a feeling of heartening which kill the sprit of competition and develops a sense of disinterestedness among the members of O.C category. It is pointed out that once person coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotion and that no distinction is permissible on the basis of their “birth mark”. It is also pointed out that even the

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constituent assembly debates on draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well.<sup>670</sup>

It is further submitted that if Article 16(4) is construed as warranting reservation even in the matters of promotion it would be contrary to the Mandate of Article 335 viz. maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon in-efficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (J) of Article 51A.<sup>671</sup>

The qualitative benefit along with the quantitative has been judicially well accepted now with emphasis on the constitutional requirement of due regard to efficiency. Promotion to higher posts contributes to elevating the image of the socially low rated class, serving as a modern catalyst to sanskritization. Reservation for promotions has a rough side also. These not only subordinate the element of efficiency to instant advantage, they also adversely affect the legally vested promotional opportunities of those in the line. While the legal validity of reservation for promotion is no more an issue, suggest a more rational policy should eschew over enthusiasm and lay greater stress on efficiency.<sup>672</sup>

In *General Manager, Southern Railway v. Rangachari*,<sup>673</sup> the validity of the circular issued by the Railway administration providing for reservation in favor of scheduled caste / schedule tribes in promotion was questioned. The contention was that Article 16(4) does not take in or comprehend reservation in the matter of

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<sup>670</sup> Indra Sawhney v. Union of India, A I R 1993 S C 477 at 569-570

<sup>671</sup> Ibid at 570

<sup>672</sup> V. P Bharatiya. *Egalitarian Differentiation for Job Reservation*, 33 J I L I (1991)

<sup>673</sup> A I R 1962 S C 36

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promotion as well and that it is confined to direct recruitment only. The majority view expressed by Gajendragadkar, J., as follows:

A. Matter relating to employment (in clause (i)) must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and condition of such employment.

B. In regard to employment, like other term and condition associate with an incident to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantee is equality of opportunity to all citizens who enter service”.

C. The condition precedent for the exercise of the power conferred by art. 16(4) are that the state ought to be satisfied that any backward class of citizen is not adequately represented in its service. This condition precedent may refer either to the numerical inadequacy of representation in the service or even to the quantitative inadequacy of representation. The advancement of socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of service but that they should aspire to secure adequate representation in selection posts in the service as well in the context the expression ‘adequate represented’ imports consideration of “size” as well as “value”, number as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one”.

In *State of Punjab v. Hiralal*,<sup>674</sup> validity of an order made by the government of Punjab providing for reservation in promotion, in addition to initial recruitment was questioned. The Supreme Court upheld the validity of the government order

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<sup>674</sup> AIR 1971 SC 1777

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following the Rangachari<sup>675</sup> decision. In *Ahkil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*,<sup>676</sup> the validity of a number of circular issued by the Railway Administration was questioned. The experience gained over the year disclosed that reservation of appointments / posts in favor of SCs / STs, though made both at the stage of initial recruitment and promotion was not achieving the intended result in as much as several posts meant for them remained unfilled by them accordingly, the administration issued several circular from time to time extending further concession and other measures to ensure that members of these categories avail of the posts reserved for them fully. The circular contemplated (I) giving one grade higher to SC / St candidates than in assignable to an employee; (II) carrying forward vacancies for a period of three years; and (III) provision for in – service training and coaching to raise the level of efficiency of SC / ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petition was that these circular, being incises term with the mandate of Article 335 are bad. *Rangachari* was sought to be re-opened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The division bench (Krishna Iyer, Pathak and Chinnappa reddy, JJ. not only refused to re – open Rangachari but also repelled the attach upon the circulars. It was held that no dilution of efficiency in administration resulted from the implementation of the circular in as much as they preserved the criteria of eligibility and minimum efficiency required and also provided for in- service training and coaching to correct the deficiency if any.

In *Comptroller and Auditor General v. K. S. Jagannathan*,<sup>677</sup> it was held that the reservation in favor of backward classes of citizen including the members of Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotion are to be made.

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<sup>675</sup> Ibid

<sup>676</sup> A I R 1981 S C 2981

<sup>677</sup> A I R 1987 S C 537.

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In *Indra Sawhney v. Union of India*,<sup>678</sup> the nine judges bench did not agree with the decision of the Rangachari case, that Article 16(4) contemplates or permits reservation in promotion as well. The court held that it is true that the expression “appointment” takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizen. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwire and impermissible to make any reservation at the cost of efficiency of administration that undoubtedly is the effect of Article 335. Reservation of appointments or post may theoretically and conceivably means “some impairment for efficiency but then its explain it away by saying but the risk involved in sacrificing efficiency of administration must always be borne in mind when any states sets about making a provision for reservation of appointments or post. The court further held that “we see no justification to multiply the risk which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizen at the stage of initial appointment, it would be serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of permanent separate category apart from the mainstream – a vertical division of the administrative apparatus. The member of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and heart burning among open competition members. All this is bound to affect the efficiency or administration putting the members of backward classes as a fast track would necessarily result in leapfrogging and the deleterious effect of leap-fogging need no illustration at our hands. At the initial stage of recruitment of

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<sup>678</sup> AIR 1993 S C 477 at 572

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reservation can be made in favor of backward class of citizen but once they enter the service, efficiency of administration demands that those members too compete with others and earn promotion like all others; no further distraction can be made thereafter with reference to their birth mark. They are expected to operate an equal footing with others. Clutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well known fact that direct recruitment takes place at several higher levels of class – IV and class – III. Direct recruitment is provided even at the level of all India services<sup>679</sup>.

In *Mohan Kumar Singhania v. Union of India*,<sup>680</sup> the court has taken a view that once candidates even from reserved communities are allocated and appointment to a service based on their ranks and performance and brought under the one and same stream of category, then they too have to be treated at par with all other selected candidates and there cannot be any question of preferential treatment at that stage on the ground that they belong to reserved community though they may be entitled for all other statutory benefits such as the relaxation of age, the reservation etc. reservation referred to in that context is preferable to the reservation at the initial stage or the entry point as could be gathered from the judgment.<sup>681</sup>

Clause (4-A) of Article 16 was inserted by the Constitution (Seventy- Seventh Amendment) Act, 1995 to overcome the decision in *Mandal case* that no reservation in promotions could be made under clause (4). This clause does not affect that decision as regards other backward classes but makes it inapplicable as regards the

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<sup>679</sup> *Indra Sawhney v Union of India*, A I R 1993 S C 477 at 573

<sup>680</sup> A I R 1992 S C 1.

<sup>681</sup> *Ibid.*

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Scheduled Castes and the Scheduled Tribes<sup>682</sup>. Justifying promotion to the Scheduled Castes and scheduled tribe candidates in promotion, the court had at one point held that even their seniority acquired by promotion over the general class candidates shall not be affected by subsequent promotion of the general class candidates.<sup>683</sup>

The said insertion of clause (4-A) to Article 16 was challenged in *Ashok Kumar Gupta v State of U.P.*,<sup>684</sup> as being unconstitutional. It has been held in that case that this policy of reservation is part of socio-economic justice contained in the preamble of the Constitution and the fundamental rights under Article, 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), 46 and 335 and other related Article to give effect to the above constitutional objective. Thus the contention made in that case were rejected.<sup>685</sup>

In *Union of India v. Virpal Singh Chauhan*,<sup>686</sup> it was held that if a scheduled caste / scheduled tribe candidate is promoted earlier by virtue of rule of reservation / roster than his senior general candidate and the regains his seniority over such earlier promoted scheduled caste / Scheduled Tribes candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category. In *Ajit Singh Januja v. State of Punjab*,<sup>687</sup> it was held that the members of the scheduled caste or backward class who have been appointment / promoted on basis of the policy of reservation and system of roster cannot claim promotion against general category posts in the higher grade, on basis of their seniority in the lower grade having been achieved because of the accelerated promotion or appointment by applying the roster. The equality principle requires

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<sup>682</sup> V. N. Shukla. Constitution of India. Eastern Book Company, Eastern Book Company, 34, Lal Bagh, Lucknow, 2004 at – 95.

<sup>683</sup> Jagdish Lal v. State of Haryana, AIR 1997 S C 66

<sup>684</sup> (1997) 5 S C C 201

<sup>685</sup> H. K. Saharay. *The Constitution of India An Analytical Approach*, Eastern Law House, Kolkata, 2002.

<sup>686</sup> (1995) 6 S C C 684

<sup>687</sup> AIR 1996 S C 1189.

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exclusion of the factor of extra weightage of earlier promotion to a reserved category candidate because of reservation alone when he compete for further promotion to a general category candidate senior to their in the panel.

The Apex Court held that employment includes promotion. It also stated that Article 16(1) provides to every employees otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be considered for promotion. Equal opportunity means the right to be considered for promotion, if a person satisfies the eligibility and zone criteria but is not considered for promotion, and then there will be clear infraction of this fundamental right. The court also held that Article 16(4) and 16(4-A) do not confer any fundamental right and they were enabling provision only. Article 16(4) , 16(4-A) confer a discretion but do not create any duty or obligation which could be enforced by issuing a writ of mandamus to provide reservation a relaxation under Article 32 and 226.<sup>688</sup>

In *Union of India v. Brij lal Thakur*,<sup>689</sup> the court held that appointment by promotion to the single post applying 40 percent and rule of rotation is not violative of Article 14 and 16(1) of the Constitution. In *Superintending Engineer, Public Health U T Chandigarh v. Kuldeep Singh*,<sup>690</sup> the Government of India, Ministry of Home Affairs admittedly, by letter dates June 12,1986 had given direction that since in the Union Territory of Chandigarh, the population of Scheduled Tribes is not available, the principle of alternative exchange to the scheduled caste should be adopted. Consequently, when vacancy no. 1 in the roster is available to the Scheduled Tribes, it requires to be filled by considering caste. It is therefore, clear that though scheduled tribe candidate was not available to fill up the vacancy at no. 1 in the roster, the candidate belonging to the Scheduled Castes is required to be considered

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<sup>688</sup> Sridhar Acharya. *Quota System in Higher Level of Employment and Education and Exclusion of Creamy Layer*, 27(3&4) 2000 IBR p. 142

<sup>689</sup> A I R 1997 S C 2101

<sup>690</sup> A I R 1997 S C 2133

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according to the rules and given promotion on seniority cum fitness basis which is the rule under which the candidates are required to be considered. When eligible scheduled caste candidate was available for promotion he could not be denied the same on the specious ground that as per the carry forward rule the period of three years had expired. Thus promotion could not be given to a candidate from general category in preference to the eligible scheduled caste candidate. In *Suresh Chandra v J. B. Agarwal*,<sup>691</sup> it was held that even though there is single post, if the government have applied the rule of rotation and the roster point to the vacancies that have arisen in the single point post and work sought to be filled up by the candidates belonging to the reserve 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>692</sup>

In *Jagdish Lal v State of Haryana*,<sup>693</sup> it was held by the Supreme Court that 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 and opportunities for excellence in each cadre /grade. Where therefore, that is inequality, in fact, legal equality always tends to accentuate inequality. It is therefore necessary to take into account de facto inequalities which exist in the society and in order to bring about real equality, affirmative action fills the bill and allows to give preference to the socially and economically disadvantaged person by inflicting handicaps as those more advantageously placed. Such affirmative action though apparently discriminatory, is calculated to produce equality in result on a broader basis by eliminating defects in equalities and placing the weaker section of the community on a footing of equality with the stronger and more powerful and disadvantaged section so that each member of the community, whatever is by his birth, occupation or social position, may enjoy equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence. Protective discrimination envisaged in Article 16(4) and 16(4-A) is the armour to establish the said equilibrium between

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<sup>691</sup> AIR 1997 SC 2487

<sup>692</sup> In *Suresh Chandra v J. B. Agarwal*, AIR 1997 SC 2487.

<sup>693</sup> AIR 1997 SC 2366

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equality in law and equality in result as a fact to the disadvantages. The principle of reservation in promotion provides equality in result. Facilities and opportunities should therefore be given to the dalits and tribes for promotion to higher cadre or grade, gain accelerated seniority of the erstwhile general candidates in the lower cadre or grade in accordance with the roster point. Thereby, the dalits and tribes are getting an accelerate placement in the higher echelons of cadre or grade. It is constitutionally a permissible classification bearing reasonable nexus to the object of equality in result as component of economic and social empowerment. It is just a reasonable procedure prescribed to achieve the constitutional objectives of equality in result, of status and opportunity and dignity of person to integrate them in the mainstream of the national life.

In *State of Punjab v. G. S. Gill*,<sup>694</sup> the Supreme Court while considering the question whether reservation in promotion to a single post is unconstitutional being violative of Article 16(1) and 14 of the constitution. After examining the fact and decision of the two cases namely, *Arati Ray, Chaudhary*<sup>695</sup> and *Union of India v. Madhav*<sup>696</sup> held that it is settled legal position that application of roster to single post cadre and appointment by promotion to carry forward post is valid and constitutional. With a view to give adequate representation in public service to reserved category candidates, the opportunity given to them is not violative of Article 14 and 16(1) of the constitution. In case of *Post Graduate Institution of Medical Education and Research, Chandigarh v. Faculty Association*,<sup>697</sup> it was held that there is no difficulty in appreciating that there is need for reservation for the members of the scheduled caste and Scheduled Tribes and other backwards classes and such reservation is not confined to the initial appointment in cadre but also to the appointment in promotional post. It cannot, however, be lost light of that in the anxiety for such reservation be brought by which the chance of appointment is completely taken away so far as the

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<sup>694</sup> AIR 1997 SC 2324

<sup>695</sup> AIR 1974 SC 532

<sup>696</sup> (1997) 2 SCC 332

<sup>697</sup> AIR 1998 SC 1767.

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members of other segment of the society are concerned by making such single post cent percent reserved for the reserved categories to the exclusion of other members of the community even when such members is senior in service and is otherwise more meritorious.<sup>698</sup> It was as further held that Article 14,15 and 16 including Article 16(4) and 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointment by creating reasonable opportunities for the reserved classes and also for the other members of community who do not belong to reserved classes<sup>699</sup>

As regard promotion, it is absolutely necessary that it should be objective with due regard to merit and seniority. Merit thrives on recognition and fades out if ignored. If a civil servant is superseded by a junior officer ignoring merit and seniority he is bound to lose heart in his job due to frustration and will not have the incentive to put in his best if on the basis of reservation which is found necessary for compelling reason a promotion of a junior officer is made ignoring the merit and seniority of the officer senior to him its adverse effect on efficiency should be minimized by giving the officer superseded the same scale as that of the post to which the junior is promoted from the date of promotion. Further care must be taken to post the promoted officer in some other section or place so that the senior officers who are superseded should not be required to work under his junior<sup>700</sup>.

## **5. VII. EMERGENCE OF RIGHT TO RESERVATION**

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

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<sup>698</sup> Ibid.

<sup>699</sup> Ibid.

<sup>700</sup> S.M.N Raina, *Reservation with Justice*, III. 1990 CILQ p, 1.

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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>701</sup>.

These 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 existing in equalities. 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 respect of a firm evidence of clear and legitimate identification of the backward groups<sup>702</sup>.

In *M.R. Balaji v State of Mysore*<sup>703</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 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 is 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

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<sup>701</sup> Mahendra Pratap Singh, “*Are Articles 15(4) and 16(4) Fundamental Rights?*” (1994) 3 S C C (J) p. 33.

<sup>702</sup> Ibid

<sup>703</sup> A I R 1963 S C 649 at 31.

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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 emphasize 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>704</sup>.

In *C.A. Rajendran v. Union of India*<sup>705</sup>, the petitioner based his agreement on the minority opinion of Subba Rao J, in *T. Devasasan v. Union of India*<sup>706</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 s/c s/t by the Govt. orders. Rejecting this contention the court held that the only matter which clause (4) of Article 16 covers is a provision for the reservation of appointments in favour of a backward class of citizens. It is well settled that clause (4) of Article 16 is an exception clause 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 appointments or posts the Government has to take into consideration not only backward classes but also the maintenance of efficiency of administration which is a matter of permanent importance. The court cited the majority opinion of Gajendra Gadgil, J., in *General Manager, Southern Railway v. Rangrachari*<sup>707</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 consideration the claims of the members 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 reservation at the cost of efficiency of administration. It is also true that the

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<sup>704</sup> AIR 1963 SC 469.

<sup>705</sup> AIR 1968 SC 507.

<sup>706</sup> AIR 1964 SC 179.

<sup>707</sup> AIR 1962 SC 36.

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reservation which can be made under clause 16(4) is interceded merely to give adequate representation to backward communities. It cannot be used to or eating monopolies or for unduly or illegitimately disturbing the legitimate interest of other employees".<sup>708</sup>

The court ultimately held that Article 16(4) does not confer any right on the petition 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 discretions power on the state to make a reservation or appointments in favor a backward class of citizens where in its opinion is not adequately represented in the services of the state<sup>709</sup>.

In *P to T Scheduled Castes / tribes employees welfare association v. Union of India*<sup>710</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 director should be issued to the government to issue specific orders conferring on thin such an extra advantage. The court held that the claim made in 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 used a direction to the Government of India to issue order on the behalf.

In *State of Kerala v. N.M. Thomas*<sup>711</sup>, the court held that the power to make reservation, which is conferred and 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

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<sup>708</sup> Ibid

<sup>709</sup> C.A. Rajendra case

<sup>710</sup> (1998) 4 S C C 147

<sup>711</sup> A I R 1976 S C 490 para 29.

## *Limits of Reservation*

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appointment or posts under Article 16(4) the state has to take into consideration the claims 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 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 lively to respond to such claims as a matter of enforceable right. It may be mentioned here that beginning from *Balaji*<sup>712</sup> until the nine judge bench decision of the supreme court in *Mandal*<sup>713</sup> Article 16(4) and 15(4) have been treated as enabling provisions.

In *Mohan Kumar Singhania v. Union of India*<sup>714</sup>, the court held that the constitution, no doubt, has laid a special responsibility on the government to protect the claims of sc/st 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 maintenance of efficiency of administration in the making of appointments to services or posts in connection with the affairs of the union or of a

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<sup>712</sup> M.R. Balaji v State of Mysore, A I R 1963 S C 649.

<sup>713</sup> Indra Sawhney v Union of India, A I R 1993 S C 477.

<sup>714</sup> AIR 1992 S C 1.

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state the count for the held that reservation is not a constitutional compulsion but it is discretionary one. In *Mandal case*<sup>715</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 needed in such professions and services<sup>716</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>717</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>718</sup>.

In *Union of India v Madhav*<sup>719</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

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<sup>715</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477.

<sup>716</sup> *Ibid*

<sup>717</sup> Parmanand singh, *Fundamental Right to Reservation- A Rejoinder*, (1995)3 S C C P.6-12.

<sup>718</sup> *Ibid*.

<sup>719</sup> (1997) 2 S C C 332..

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a service under the state is some of the means to render socio-economic justice<sup>720</sup>. The same consideration was held in *Ashok Kumar Gupta v State of Uttar Pradesh*<sup>721</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 every one with equal respect and concern and in this sense this policy serves the principle of equal treatment but this policy does not create any corresponding individual right in favour of the members of the beneficiary groups<sup>722</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>723</sup>. Article 15(4) and 16(4) 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 may constitutionally omit to make any such preferences<sup>724</sup>.

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

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<sup>720</sup> Ibid

<sup>721</sup> (1997) 7 S C C 201.

<sup>722</sup> (1997) 7 S C C 201.

<sup>723</sup> Marc Galanter, "*Protective Discrimination*" for Backward Classes in India, *Law and Society in India*, Oxford University Press, Delhi, 1994 p. 44.

<sup>724</sup> Ibid

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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 protesting. They guarantee citizen certain basic freedom and protect them against infusion, 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 carting socials or collective goals. In a sense, Article 16 (4) and 15 (4) could be treated as authorizing norms in kelserian sense justifying encroachment of the individual's right to the disadvantaged groups<sup>725</sup>. Professor Dworkin<sup>726</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 discriminator is thought of as serving a policy of increasing caste-has many by eliminating visible and institutionalized prejudices and increasing economic equality by removing some of the obstacles that keep the member 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 reseal ground 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>727</sup>.

The policy of reservation creates an obligation on the state to treat everyone with equal respect and cancer 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>728</sup>.

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<sup>725</sup> Parmanand Singh, *Fundamental Right to Reservation. A Re-joinder*, (1995) 3 S C C pp. 6-12.

<sup>726</sup> *Ibid.*

<sup>727</sup> *C. E. S. C. Ltd v Subhash Chandra Bose*, A I R 1992 S C 573

<sup>728</sup> *Air India Statutory Corporation v. United Lab Union*, A I R 1997 S C 645 (Justice K Ramaswamy)

## **CHAPTER – 6**

### **IMPACT OF RESERVATION**

#### **6. I. RESERVATION AND EFFICIENCY IN ADMINISTRATION**

An efficient administration is one which implements the Constitutional goals enshrined in the Preamble to the maximum extent. The ultimate goal of the Constitution is to provide social justice to all its citizens and to establish a welfare state. Reservation in jobs under Article 16 (4) and reservation in educational institutions under Article 15 (4), for backward classes are the measures to provide social, distributive as well as corrective justice to those people who are the victim of long social discrimination. Constitution provides the protective discrimination in favour of backward classes in the form of reservation. A policy of reservation automatically implies abandoning the principles of merits in the selection process. Since opportunities are few and the population large, merit is the only fair selection process. No doubt for good administration India needs able administrators at all level of government but at the same time reservation system does tend to detract from the required quality. Therefore, a proper reservation policy is needed.

The reservation was made on the principle of protective discrimination in favour of backward classes. It is a means to provide social justice to the victims of social discriminations. Article 15 (4) empowers the state to make special provision for advancement of any socially and educationally backward classes of citizen or for Scheduled Castes (SCs) and Scheduled Tribes (STs). At the same time Article 335 says that while considering the claim of SCs and STs for appointments, the maintenance of efficiency of administrations shall be kept in sight. This is a public good, which cannot be sacrificed. Article 46 says that the educational and economic

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interests of the weaker sections of the people can be promoted properly and liberally to establish social and economic equality. This has to be read with Article 15 (4) but it would be extremely unreasonable to assume that in enacting Article 15 (4) for advancement of SCs and STs, the fundamental rights of the citizens constituting the rest of the society are to be completely and absolutely ignored<sup>729</sup>.

The use of the words maintenance of efficiency of administration has been made in Article 335 of the Constitution. The heading of part XVI in which this Article appears and the wording of the provision itself shows clearly that the claims of SCs and STs in giving them adequate employment in services and while doing so, weightage should be given to the efficiency of administration. Stress on the claims of the SCs and STs cannot be denied, but simultaneously, the state has been directed to take into account the efficiency of administration as well. This Article contains a single principle, the advancement of SCs and STs but through the modes and avenues which must not detract from the maintenance of efficiency in administration<sup>730</sup>.

Ever since *Rangachari case* it has consistently been insisted that reservations should not impair the efficiency of administration although some impairment of administrative efficiency is seen as inherent in the very idea of reservation. It is implicit in the idea of reservation that a less meritorious person is to be preferred to another who is more meritorious. Although unlike Article 335 which is related to the SCs and STs only, Article 16 (4) does not limit the state's power to make reservation consistent with the maintenance of the efficiency of administration yet the courts have imported the requirement of Article 335 as a broad notion of policy applicable to all reservations. It is in the public interest which is always paramount that reservations are compatible with the efficiency in services, but who should decide whether

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<sup>729</sup> M. Sridhar Acharya, *Quota system in Higher Levels of Employment, Education and exclusion of creamy layer*, 27(3 & 4) 2000 IBR, p. 136

<sup>730</sup> Harpal Kaur Khehra, *Job Reservation versus Efficiency of Administration*, 1990 (III) CILQ

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reservations are compatible or incompatible with administrative efficiency and what standard of efficiency is constitutionally required<sup>731</sup>?

In *General Manager, Southern Rly. v. Rangachari*,<sup>732</sup> it was held that in providing for the reservation of appointments or posts under Article 16 (4) the state has to take into consideration the claims of the members 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 such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Art. 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any state sets about making a provision for reservation of appointments or posts. It is also true that the reservation which can be made under Article 16 (4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the power under Article 16(4), the problem of adequate representation of the backward classes of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration<sup>733</sup>.

In *M.R. Balaji v. State of Mysore*<sup>734</sup>, the Court struck down reservation of 68% for backward classes for admission into medical and engineering courses in the University. It said that the reservation under Articles 15 (4) and 16 (4) must be within reasonable limits. In *Jagdish Saran v. Union of India*<sup>735</sup>, in which 70% reservations

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<sup>731</sup> Parmanand Singh, *Equality, Reservation and Discrimination in India. A constitutional study of SCs and STs and Other Backward Classes*. Deep and Deep publications, D-1/24 Rajouri Garden, New Delhi (1985) P. 213

<sup>732</sup> A I R 1962 S C 36

<sup>733</sup> Ibid

<sup>734</sup> A I R 1963 S C 649

<sup>735</sup> Ibid

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for local candidates in PG admissions of medical course was struck down. Justice Krishna Iyer said in this case that “the first caution is that reservation must be kept in check by the demands of competence. The best talents cannot be completely excluded by wholesale reservation”. In *N.M Thomas case*<sup>736</sup>, all the seven Justices have uniformly insisted that a state employment preference must be consistent with efficiency of administration and even the majority of the Justices who voted for the impugned scheme they would strike down the preferential policy if they had concluded that it was inconsistent with administrative efficiency. In *A.B.S.K.Sangh (Rly) v. Union of India*<sup>737</sup>, it has been repeatedly stated by the Supreme Court that the paramount need is to maintain efficiency of administration. That is dictated by the common good, and not of a mere section of the people. This is primary and all else are subordinate. Therefore, whatever is done in considering the claims of the SCs and STs, must be consistent with the supreme need, the maintenance of efficiency of administration. A generally acknowledged and long established principle for securing an efficient administration is throwing open the doors to general recruitment, either directly or by promotion, where the governing criteria is excellence and the emphasis is solely on equality. The competitive best are collected regardless of equality. The competitive best are collected regardless of religion, caste, sex, descent, place of birth or residence<sup>738</sup>.

In *Janki Prasad Parimoo v. State of Jammu and Kashmir*<sup>739</sup>, it was held that in identifying backward classes, one has to guard oneself against including therein sections which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated. Moreover, where appointments and promotions to responsible public offices are made, greater circumspection is required in making reservations for the benefit of any backward class because efficiency and

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<sup>736</sup> A I R 1976 S C 490.

<sup>737</sup> A I R 1981 S C 332

<sup>738</sup> Ibid

<sup>739</sup> A I R 1973 S C 930

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public interest must always remain paramount. In *State of M.P. v. Nevedita Jain*<sup>740</sup>, where admission to medical course was regulated by an entrance test called pre-medical test. For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For SC/ ST candidates, however, it was 40% and 30% respectively. On finding the SC/ ST candidates equal to the number of the seats reserved for them did not qualify on the above standard, the government did away with the said minimum standard altogether. The government's action was challenged in this case under Article 15; Art. 335 had no relevance and were not applied. In the case of Article 16, Art. 335 would be relevant and any order of the lines of the order of the government of M.P. would not be permissible, being inconsistent with the efficiency of administration. The court held that in the matter of appointment of Medical officers, the government or the public service commission cannot say that there shall be no minimum qualifying marks for SC/ ST candidates while prescribing a minimum for others. It may be permissible for the government to prescribe a reasonably lower standard for the SCs and STs or backward classes--- consistent with the requirement of efficiency of administration – it would not be permissible not to prescribe any such minimum standard at all. In *State of Kerala v. N. M. Thomas*<sup>741</sup>, Justice Ray the then chief Justice 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 appointment 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 consistently with the maintenance of 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 any reservation at the cost of efficiency of administration<sup>742</sup>. The Supreme Court in a 1985 decision in *K. C.*

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<sup>740</sup> A I R 1981 S C 2045

<sup>741</sup> A I R 1976 S C 490

<sup>742</sup> A I R 1985 S C 1495.

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*Vasanth Kumar v. State of Karnataka*<sup>743</sup> speaking through Mr. Justice O. Chinnappa Reddy has firmly and irrefutably put the merit argument to rest.

One of the results of the superior, elitist approach is that the question of reservation is invariably viewed as the conflict between meritarian principle and compensatory principle. No, it is not so. 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 on the basis 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. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be started and, what is merit? There is no merit in a system which brings about such consequences. Is not a child of the SCs and STs or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and society, who has no books and magazines to read at home, no radio to listen no T.V to watch, no one to help him with his home work, who goes to the nearest board school and college whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice or any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he with all his disadvantages is able to secure the qualifying 40% or 50% of the marks at a competitive examination where the children of the upper- classes who have all the advantages, who go to St. Stephen's College and have perhaps been specially coached for the examination may secure 70%, 80% or 90% of marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life.

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<sup>743</sup> A I R 1985 S C 1495

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Chinnappa Reddy, J, further said “the mere securing of high marks in an examination may not necessarily make out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with sympathy and therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people; and who better than the ones belonging to those very sections. Why not ask ourselves why 64 years after independence, the position of the SCs and STs has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the district administrators and the state and central Bureaucrats been drawn in larger number from these classes? Courts are not equipped to answer these questions but the courts may not influence with the honest endeavors of the Government to find answers and solutions. We do not mean to say that efficiency or that it is a myth. All that we mean to say is that one need not make a *fastidious fetish* of it”<sup>744</sup>. In *Comptroller and Auditor General of India, Gian Prakash, New Delhi v. K.S. Jagannathan*<sup>745</sup>, it was held that the discretionary power conferred to the government by the Constitution through different Articles, it is transparently clear that it is discretion to be exercised in the discharge of constitutional duty imposed by Article 335 to take into consideration the claims of the members of the SCs and STs, consistently with the maintenance of efficiency of administration in the making of appointment to services and posts in connection with the affairs of the Union or a state. This duty is to be exercised in keeping with the Directive Principle laid down in Article 46 to promote with special care the educational and economic interests of the weaker section of the people and in particular of the Scheduled Caste and Scheduled Tribes and to protect them from social exploitation.

Even Subba Rao, J, in his dissenting opinion in *T. Devadasan case*<sup>746</sup> said that there is no conflict between Article 16(4) and Article 335, he said “it is inevitable in the nature of reservation that there will be a lowering of standards to some extent,”

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<sup>744</sup> Justice, Chinnappa Reddy in *K.C.Vasanth Kumar*, A I R 1985 S C 1495.

<sup>745</sup> A I R 1987 S C 537

<sup>746</sup> A I R 1964 S C 179

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but he said, “on that account the provision cannot be said to be bad in as much as in this case, the state had as a matter of fact, prescribed minimum qualifications for appointment”. This view was, however not accepted by Krishna Iyer, J., in Thomas case. He said efficiency means, in terms of good governance not marks in examinations only, but responsible and responsive service to the people. A chaotic genius is a grave danger to public administration. The inputs of efficiency rule include a sense of belonging and of accountability if its composition takes in also the weaker segments of “We the people of India”. No other understanding can reconcile the claim of a radical present and the hangover of the unjust past.

In *Indra Sawhney v. Union of India*<sup>747</sup>, it was held that it would be a misleading of Article 335 to say that the mandate is maintenance of efficiency of administration. May be, efficiency, competence and merit are not synonymous concepts, may be it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time we recognize that this much cost has to be paid, if the constitutional promise of Social Justice to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with- and may, in some cases, excel- members of open competitor candidates<sup>748</sup>. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are antimeritarian. Merit there is even among the reserved candidates and the small difference that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others<sup>749</sup>.

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<sup>747</sup> A I R 1993 S C 477

<sup>748</sup> Ibid

<sup>749</sup> *Indra Sawhney v. U.O.I.*, A I R 1993 S C 477, Para 111

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The Court further held that there are certain services and positions where either on account of the nature of duties attached to them or the level in the hierarchy, at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations<sup>750</sup> like, technical posts in research and development organization departments / institutions, in specialties and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defense services and in the establishment connected therewith. Similarly in the case of posts at the higher echelons e.g., Professors (in education), Pilots in Indian Airlines and Air India, Scientists and technicians in Nuclear and Space application, provision for reservation would not be advisable. The court opined that in certain services and in respect of certain posts, application of rule of reservation may not be advisable for the reason indicated herein before. The list given above is merely illustrative and not exhaustive. It is for the government of India to consider and specify the service and posts to which the rule of reservation shall not apply. The court said that the services / posts enumerated above, on account of their nature and duties attached are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with efficiency of administration contemplated by Article 335<sup>751</sup>.

In *Ajit Singh Januja v. State of Punjab*<sup>752</sup>, the Supreme Court held that the policy of reservation cannot be implemented in a manner to block the merit channel and to make it dry. It is so heartening to note that for whom the founding fathers introduced the provision for reservation to protect and encourage entry in service, now are able to enter into services on their own merit by competing with candidates of general category. The Court further held that when framers of the Constitution by Article 16, guaranteed equality of opportunity in matters of public employment, they

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<sup>750</sup> Ibid

<sup>751</sup>. *Indra Sawhney v. U.O.I.*, AIR 1993 SC 477.

<sup>752</sup>. AIR 1996 SC 1189

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aimed at combining democratization with efficiency. In the process of democratization Article 16(4) enabled the state to make provisions for 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. As has been pointed out by this court that Article 335 of the Constitution enjoins to take into consideration the claims of the members of the SCs and STs consistently with the maintenance of efficiency of the administration. While the making of appointments to services and posts in connection with the affairs of the Union or of a State. Thus it has been conceived by our Constitution that a process should be adopted while making appointments through direct recruitment or promotion in which the merit is not ignored. For attracting meritorious and talented persons to the public services, a balance has to be struck, while making provisions for reservation in respect of a section of the society. This court from time to time has been issuing directions to maintain a balance in the public services so that there should not be discontentment, heart burning and frustration, which can never be held to be in the larger interest of the society. The court again said and warned by saying that “all concerned who are involved and interested in the upliftment and growth of the nation have to work out a system by which the injustice done to a section of people in our society at certain period of history can be rectified by providing protections to their descendants but we have to be conscious, at the same time that the efficiency of the administration of the country is not harmed and there is no reverse discrimination.

According to Mr. *G.P. Verma*<sup>753</sup>, reservation would mean that a sizeable percentage of engineers, doctors, judges, administrators are of unproven merits and of sub-standard efficiency. By reserving jobs the country may not be getting what it should desire for, as normally a person of such lower intellects is chosen for a better one simply because the former belongs to the reserved quota, regardless of whether he deserves it or not. This may be highly undemocratic and injurious to the efficiency of the nation and as such is not justified by any argument. Such a policy which causes

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<sup>753</sup> Quoted in Harpal Kaur Khehra, *Job Reservations versus efficiency of administration* . 1990 9III) CILQ p.46

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suppression of merit by other factors may lead to gross inefficiency and may ultimately stagnate all government work. It may also amount to fraud on the Constitution which unequivocally speaks that the claims of the members of the SCs and STs shall be taken into consideration consistently with the maintenance of efficiency in administrations<sup>754</sup>.

### **6. II. RELATION OF MERIT WITH EFFICIENCY**

According to the meritarian principle of distribution, which can be traced back to Aristotle and was at its peak during the nineteenth century under the influence of individualistic thinkers, social goods should be allotted on the basis of one's merit or ability, whether natural or acquired. Leaving aside the general intricacies in the application of the principle, in such matters as admission to institutions of higher education or appointment to state services, it will require that the candidates are selected on the basis of their individual merit, i.e. their ability in terms of achievement of certain grades or marks, in an objective tests – generally a test of intelligence plus knowledge – held for that purpose. Supporters of this principle claim that it assumes best justice in so far as it allocates the rewards or goods on the basis of an objective criterion having nothing to do with such personal characteristics of an individual as his birth, race, colour, sex, castes etc. they say that it also satisfies the justice percept of “treat like cases alike and different cases differently” in so far as it provides a criterion of immediate relevance to the good to be distributed. This principle assures the selection of the ablest persons from amongst a large number for the limited goods or opportunity available for distribution. It also assumes a strong society and its overall progress in so far as it provides incentive for hard work and the development of superior mental and physical capacities<sup>755</sup>.

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<sup>754</sup> Ibid

<sup>755</sup> M.P. Singh, *Jurisprudential Foundation of reservations, 17 & 18, 1990-91, IBR p. 9*

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Though on their face these arguments appear to be attractive, a close examination will expose that they suffer from a number of serious weaknesses. To begin with, the notion of merit itself is not as objective as it might appear. It is rather subjective. What is merit? Merit has no fixed or definite meaning free from variations. It is nothing but a criterion to achieve some pre-determined social objective or value or to satisfy certain perceived social need. It does not control the objective, value or need, but is controlled by them.

Thus the merit must vary according to the variations in the social objective, value, or need set for achievement or satisfaction. For example in a society suffering from under-population due to long term war or any other reason, production of more children may be a merits and parents may be rewarded for producing more children because the society needs an increased growth of population. Production of more than one or two children may, however, become a demerit in an over populated and under developed society. Similarly, high grades or percentage of marks in educational examinations may be a merit for teaching assignment because the object is to have intellectually sound persons, but for a police or defence job where predominantly, physically strong men are needed, physical strength and not the grades in examinations may be the merit<sup>756</sup>.

This analysis of merit leads us to two conclusion, first, since merit is dependent upon the value, goal, or the objective to be achieved, a society or the dominant group in a society may set such objectives or goals for which the members of that group are most suitable and thus use the opportunity objective – looking criterion of merit to exclude other groups from the social good. For example, a warrior class or race in power may say that they need physically strong and well-built men in all walks of public life and administration and accordingly all positions will be filled on the basis of physical strength or powers. On the face of it physical strength appears to be an objective criterion, but in fact it may, as has been illustrated by

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<sup>756</sup>. Ibid at 249

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Mathew J, in Thomas case result in constant and uniform exclusion of the undernourished and the poor from these positions because there is a close proximity between being well fed and well built and between under – nourished and weak.

Since, merit is determined for serving the perceived social needs or values, of the day, satisfaction of such needs is the end and merit is simply a means to achieve that end. For example, efficiency in public administration may be an end and to achieve that end standards that may ensure such efficiency may be set as merit. A society may find that having met the ordinary common needs of the community, it needs highly intelligent and sophisticated doctors, engineers or lawyers to meet the special needs. To achieve that end it may decide that to these courses persons must be admitted solely on the basis of their intelligence measured through a pre-admission test or on the basis of marks or grades achieved in the previous school examination or both. Conversely, a society may find that it does not need as much intelligent and sophisticated doctors, engineers, or lawyers, as it needs the ones who can serve the day to day ordinary needs of the rural and tribal people and may accordingly decide that persons to these courses should not be admitted on the basis of intelligence alone, but also on the basis of their suitability to serve the rural and tribal people. If the society finds that persons with urban or affluent background are not suitable for the job because of attitude towards them, it may decide that persons with rural or tribal poor background only will be admitted to these courses or that preference will be given to them. Thus while in the first case intelligence is the merit for becoming a doctor, engineers or lawyer, in the second rural or tribal poor background acquires priority over intelligence and becomes merit<sup>757</sup>. These examples should leave no doubt that merit varies with the variance in the social needs. A society has to first determine and find out its needs and then determine the best means to ensure their satisfaction. It cannot talk of merit in the abstract.

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<sup>757</sup>.Ibid.at 248.

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A society like ours which is under a constant and serious threat of disintegration because only certain classes or groups are dominating in every walk of life leaving no place or even hope for the rest of the classes or groups may find that keeping the society together is much more important than high standards of efficiency and accordingly it may look for the means that ensure its integration and prevent disintegrations. One such means may be larger induction of excluded groups in all walks of public life so that they also develop a sense of involvement and stake in the present social arrangements. Operationalisation of this means may temporarily require reservation for the excluded groups: whether the reservation should be one hundred percent or less is a matter for determination, but whatever method is adopted, membership of an excluded groups and not intelligence, becomes the merit for selection to the seats in educational institutions and positions in public services. A society must make this kind of decision on the basis of clearly and objectively ascertainable facts test the decisions should lead to injustice, bad-blood and even quicker disintegration but that is a different matter altogether. What is necessary to be remembered at this juncture is the fact that merit changes with the context and that it is simply a means to achieve certain ends and not an end in itself<sup>758</sup>.

Again the so-called merit related to talent is not necessarily something which proves the superiority of one individual over another in terms of effort or diligence. It depends on a number of factors which one cannot influence in spite of one's best efforts and lie beyond one's control. Researchers have established that intelligence is mainly determined by heredity – specifically that about 80 per cent of the vacancy in IQ scores is genetically determined. Professor Eysenck says that 'talent, merit ability' are largely innate factors. In addition to genetic factors, talent is also conditioned by environmental factors and their interaction with genetic factors. This is clear from Jensen's assertion that "something between one half and three fourths of the average IQ difference between American Negroes and whites is attributable to genetic factors, and the remainder to environmental and their interaction with the genetic factors".

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<sup>758</sup>. Ibid. at 250

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Even where heredity is the same as in identical twins, if the social environment is allowed to vary, remarkable differences sometimes occur. Finally IQ is also dependent upon motivation and motivation to a great extent depends upon social environment which shapes future hopes, expectations and prospects.

Thus, if merits depends upon a number of factors beyond one's control, is it not as much suspect as race, caste, religion, sex or colour for the purposes of classification or allocation of social goods? We do not suggest that merit must out rightly be rejected as criterion of social justice but who argue that merit should be the sole and exclusive criterion, should not forget to take into account the factors that constitute it. If we cannot provide uniform conditions of living and development to all, we have no reason to prefer the advantaged over the disadvantaged, such arrangement in prima facie unjust in so far it ensures perpetual advancement of the former and condemnation of the latter. Many times the nexus between what we consider merits and the social objective that we want to achieve through it is grossly in adequate. For example, admission to law or medical classes on the basis of pre-law or premedical school scores does not necessarily assure that the best future lawyers or doctors that will best serve the need of the society are admitted. The admission criterion does at the most assure a good class room or examination performance. It is equally true about the tests administered for the purpose of recruitment to various public services. The test may at the most assure that the most intelligent persons are selected but do not necessarily assure that they are the most suited persons for the job<sup>759</sup>.

In view of these weaknesses of the meritarian concept of social justice and the injustice which it has led to in the past, its importance should not be over emphasized. No insistence upon it will be fair without a careful examination of the dimensions of

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<sup>759</sup>Ibid

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merit and its role in different walks of our social life. We cannot talk of merit in isolation<sup>760</sup>.

If we carefully examine the relevant provisions of the Constitution viz. Articles 15, 16, 46 and 335, we shall notice that the Constitution makers attached great importance to efficiency in administration and wanted it to be unaffected by the policy of reservation. They wanted that candidates belonging to SCs and STs as well as other backward classes should be properly equipped by financial help and special training etc. so that they may be able to face a fair and open competition with the candidates of the general category. The special provision referred to in Article 15(4) and provisions of Article 46 are meant to achieve this end. In fact Article 46 is more liberal than Article 15(4) in the sense that by using the words “weaker sections”, it includes within its scope the poorer section of the general category<sup>761</sup>. From Article 335 it appears that the Constitution makers apprehended fall in efficiency due to induction of candidates belonging to SCs and STs on reserved posts. They further realized that in view of their special concern for the educational and economic interests of the member of the SCs and STs as expressed in Article 46, it may be necessary to lower the standard for their admission to professional college such as medical and engineering colleges and this may also have an adverse effect on administrative efficiency of the services in which they are appointed on reserved posts. They therefore, lay it down in the said Article that while taking their claims into consideration, maintenance of efficiency of administration should be kept in view. It therefore, follows that while determining the number of posts to be reserved for them in a particular branch of services, the nature of the service should be taken into consideration to see how far dilution of efficiency in such service would be harmful to public interests. Similarly the lowering of standard for SC and ST candidates for admission to professional colleges such as Medical colleges and Engineering colleges should be with due regard to high degree of proficiency required for the Medical and Engineering Services. The lowering of standard, if at all necessary should be from

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<sup>760</sup>. Ibid at.252

<sup>761</sup>. S.M.N. Raina, *Reservation with Justice*, (III) 1990 CILQ . p. 17

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40% to 35% and not more than that, so that efficiency of such services may not be adversely affected<sup>762</sup>.

It is submitted that when a state provides reservations it may be presumed that it has kept in view the efficiency factor into account and the judges are very less equipped to decide on this issue. They can simply set Constitutional limitation but have to leave the state to do the required balancing, but if the courts undertake the review of this kind they have also to do a delicate balancing of the claims of meritocracy with the claims of backward classes to have more share in the administration and the national interests involved in the efficiency in service and in such balancing the courts must answer the questions of unfair burdens and stigmatizing effect as those adversely effected. It may be assumed that reservations and other preferences will inevitably injure some individuals – this is implicit in the very idea of compensatory treatment. It is equally evident that the compensatory schemes should always seek to balance the preservation of the moral and incentives of the non-favoured employees, the needs of efficiency and the claims of backward classes. Reservation cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees and the public interest involved in efficiency of administration<sup>763</sup>.

It is submitted that the mere existence of a provision for reservation does not necessarily result in the impairment of administrative efficiency or adversely affect those who are excluded unless the members of the backward classes are really represented in services. The question of efficiency of administration, the quantum of preferences, and the problem of unfair burdens and stigmatizing effect on the non-beneficiary classes closely related to the question of who should be designated as the backward class and what criteria should be applied for selecting the legitimate beneficiaries. The claims of merit and efficiency, it is submitted, is impugned more by

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<sup>762</sup>Ibid

<sup>763</sup>Parmanand Singh, *Equality, Reservation and Discrimination in India*. Deep & Deep Publication, D-1/24 Rajouri Garden, New Delhi. 1985.

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the present trend to create more and more beneficiary groups under the communal and the pressure for winning political supporters. The grumblings, the grievances and resentment are more against the political extension of the compensatory schemes to the non-deserving groups. This can be checked only by reducing the number of beneficiary groups and confining the benefits only to those who really deserve. The efficiency in service is not affected even by the size of reservations unless there are sufficient capable candidate to enjoy reservation<sup>764</sup>. Bearing in mind that the backward classes need upliftment, what appears to be necessary is increased concentration on education and financial assistance to backward classes. The purpose of the approach should be to bring these backward classes to the stage where they can take off in open competition with others in education as well in employment.

### **6. III. RESERVATION IN SUPERSPECIALITIES**

It cannot be ignored that the very idea of reservation implies selection of a less meritorious persons. At the same time, we recognize that this much cost has to be paid if the Constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with and may, in some cases, excel with members of open competitors candidates, it is undeniable that the nature has endowed merit upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are antimeritorian<sup>765</sup>

While on Article 335, the Court was of the opinion that there are certain services and positions where on account of the nature of duties attached to them or the level at which they obtain, merit as explained hereinabove alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical

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<sup>764</sup>Ibid.

<sup>765</sup> Indra Sawhney v. Union of India, A I R 1993 S C 477 at 575.

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posts in research and development/ organizations/ department/ institutions in specialities and superspecialities in medicine, engineering and other such course in physical science and mathematics, in defence services and in the establishments connected therewith. Similarly in the case of posts at the higher echelon e.g., professors in education, pilots in Indian Airlines, in Nuclear and Space Application, provision for reservation would not be advisable<sup>766</sup>

It is primarily the duty and the function of the state to inject moderation into the decision taken under 15(4) and 16(4) because justice lives in the heart of men and a growing sense of injustice and reverse discrimination fueled by unwise state action will destroy social justice<sup>767</sup>. In *A.B.S.K.Sangh v. Union of India*,<sup>768</sup> the Court held that there are some services where expertise and skill are of the essence. For example, a hospital run by the state serves the ailing members of the public who need medical services directly affect and deal with the health and life of the populace, professional expertise, born of knowledge and experiences, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. In such services or posts under the Union or States we think there can be no room for reservation of posts, merit alone must be the sole and decisive consideration for appointment.

In *Dr. Fazal Gafoor v. Union of India*,<sup>769</sup> it was held that for admission to post of MBBS courses in super specialties there should really be no reservation. Thus the basic question is how far and to what extent it would be in national interest to sacrifice merit to accommodate the backward classes particularly Scheduled Caste and Scheduled Tribes in services. The question in each case must be carefully considered looking to the nature of the posts and the degree of harm that may be caused to the people in general by appointing a person with a minimum of skill and merit on such post.

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<sup>766</sup> Ibid.

<sup>767</sup> Supra note 761

<sup>768</sup> A I R 1981 S C 298.

<sup>769</sup> A I R 1989 S C 48

## 6. IV. REVERSE DISCRIMINATION

It is said that the affirmative action in the form of reservation was causing a reverse discrimination against those who are not the recipients of this benefit, means those who come under the general category. In America both the Equal-protection clause and the Civil Rights Act came to be viewed as mandating affirmative action programmes using racial classifications. But those effected by affirmative action programmes began to fashion the weapon of equal protection clause as a shield for the argument that race cannot be a factor in affirmative action programmes. The opponent of those programs began to call such measures as “discrimination in reverse”. Although like the Constitution of India, the U S Constitution does not in terms authorize positive or protective discrimination’. It was very soon realized that it was too hypothetical to talk about equality based upon individual achievement when the deprivations and injustices were suffered by the Negroes as a group because of past and present societal discrimination but in the case of *Regents of the University of California v. Allan Bakke*,<sup>770</sup> where in a Medical School 16 seats out of 100 seats were kept reserved for minority races, was challenged on the ground that it violated the Equal Protection Clause in the Fourteenth Amendment to the Constitution and also Title VI of the Civil Rights Act, 1964. The Supreme Court of United States held three different opinions – *the view* says that the special admissions programme was a valid one and not violative of the Federal or State Constitutions or of Title VI of the Civil Rights Act, 1964. The Judges opined that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University’s remedial use of race. *The second view* says that the decision of the California Supreme Court, which invalidated the special admission programme of the University. They based their judgment mainly on Title VI of the Civil Rights Act, 1964. They opined that Bakke, a white race student and whose

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<sup>770</sup> (1978) 57 Law Ed 2<sup>d</sup> 750

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admission was denied for the sake of preference given to a Negro, was a victim of reverse discrimination and his exclusion from consideration in respect of the 16 seats being solely based on race is impermissible. The third view was totally different from other two. Though the concept of reverse discrimination was sustained in the United States but need was felt that protective discrimination is necessary to protect the victim of past or present racial discrimination.

## **6. V. RESERVATION AND SOCIAL CHANGES**

Society does not remain static. 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 movements of the last several decades, the spread of education and the advantages of the 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<sup>771</sup>. That is undeniable fact that Reservation has brought important changes in the economic, social and cultural front of the Backward Classes. They got economic stability. Now they are able to raise their voice against their exploitation. They have a voice in the Government. Even they can determine the fate of a political party in the Centre as well in the States. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatsoever their original birthmark. It can further hardly be argued that once a backward class always a backward class. At the same time reservation brought some resentment among the youth. On the other hand it is also true that the reservation policy has failed to bring the desired changes in the Indian society. Reservation devised to build a classless and casteless society, has instead perpetrated distinctions. It has created a vested interest

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<sup>771</sup> *Indra Sawhney v. Union of India*, A I R 1993 S C 477. Quoted in *Ashok Kumar Thakur v. Union of India*, (2008) 6 S C C. 1

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in backwardness and has also resulted reverse discrimination against the general or unreserved class.

The prospects of material advancement through job reservation have led to a kind of competition for backwardness among castes at the middle levels of the hierarchy. This kind of competition created a vested interest in backwardness and it combines the worst features of a hierarchical and a free market society. It strikes individual initiative without creating equality between individuals, and it obstructs the natural process through which the barriers between castes and communities can be affected.

Affirmative action gets somewhat complicated in India on account of caste politics. Undeniable, India is the most stratified society in the world. Over and above caste differentiations there are huge income disparities, religious and community. No doubt, the nature of caste and community interactions has changed over times, but consideration along ascriptive lines still remain important makers, both at the public and private domain.<sup>772</sup>

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<sup>772</sup> (2000) 6 S C C 571.

## **CHAPTER – 7**

### **CONCLUSION AND SUGGESTIONS**

Reservation is one of the many facets of equality and undoubtedly a means to bring unequal's and down-trodden to the levels of equals and to provide them social justice. It is undeniable fact that by reservation at least some families in the backward classes gained sufficient means to develop their capacities to compete with others in every field. Such change was not only because of reservation but it was a combined effect of lots of factors. With the increase of industrialization and urbanization which necessarily followed in its wakes, the advances on political, social and economic front made particularly after the commencement of the constitution, the social reform movements of the last several decades, the spread of education have played their roles.

The working appraisal of the policy of preferential treatment in the form of reservation clearly shows that the policy has failed to achieve the desired objective underlying in it. On the contrary, a vested interest has developed in it for extraneous considerations. The policy devised to build a classless and casteless society, has instead perpetuated distinctions. The policy as implemented, enlarged and perpetuated has almost completely distorted the original philosophy. It has on the one hand created a vested interest in backwardness and on the other hand resulted in what is seen as a reverse discrimination against the general or unreserved class.

The caste system- origin of which is highly controversial and we cannot say much about it with great exactitude, has put a great impact on the Indian societies. As Hindu constitutes the majority of Indian society, the caste system divided Indian societies into four different classes and determined their occupations. People of these

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classes were to follow the occupations assigned to their classes and they were not free or allowed to deviate from this. They were not allowed to even give up their occupation. The mobility to upper caste is forbidden, even today if a person of lower caste pursues the profession of upper caste, he continues to be a member of the lower castes even if his achievement are higher than of those belonging to the higher castes. In social intercourse, he has to take his assigned place.

One of the worst affects of caste system was that a particular segment of the society had been denied the bare human rights. Their educations, wages, living conditions, social status were dictated by the whims of upper strata of society, reducing them to destitution. The lower castes were denied the access to knowledge and learning. Naturally, all the posts in the administrative machinery except those of the menials were manned by the higher castes, which had the monopoly of learning. The concentration of the executive power in the hands of the select social groups had its natural consequences. It is difficult to guage the extent and depth of social and economic exploitations 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. Consequently, in a society compact, metalized on caste basis, upper caste controlled the levers of power inability themselves to run their whips, pry indicial to the interest of lower segments of the society.

Caste is an important feature of Indian society and played an important role in determining the backwardness of a people. The constitution nowhere defines the caste. Caste has always been used as a criticism for identifying backwardness of a class. In various cases, the apex court has accepted caste as a relevant factor for asserting caste as the sole or dominant criterion. Backwardness of certain castes and communities has been attributed to the Indian social structure in which rigid endogamous groups inherently sustain the inequality due to traditional values and taboos. Whatever might have been true in traditional India, in examining today

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whether caste as a whole can be treated as backward or whether caste and class are synonymous, one should not lose sight of the present day sociological realities. Today there is no necessary correspondence between caste-status and socio-economic status. Education and occupation are now relatively open to everyone regardless of one's caste, religion or race. Some sociological studies have revealed that upward mobility among the lower-status castes is increasing with gradual disappearance of social status based upon ritual-rack-ordering. Instead of status based upon ritual status being the criteria of mobility-new criteria of occupation, education, wealth, political influence and leadership positions are instrumental in reducing the positive relationship between caste status and achieved (education, income, occupation) status and thus creating the possibilities of changing the status summation characteristics of India society with these changes in the profile of social stratification in India 'caste' can no longer be characterized as homogeneous and non-competitive. Today there is a great amount of differentiation among the members of a caste group in terms of income, occupation and status and therefore it is no longer accurate to talk of caste as class.

Caste criteria are unreliable because the social and economic backwardness may easily become confused with low ritual status. The caste-status which is determined by birth, of an individual is static or immutable out the social, economic and educational attainment which is achievable is dynamic and it is questionable how a static factor (caste) can determine a dynamic factor (backwardness). Moreover the non-discriminatory provision of the Indian constitution also rejects the caste of social organization and envisions a new egalitarian and secular society. As the constitution prevents discrimination on the basis of caste, the caste as a factor to determine backwardness is something reviving the caste discrimination in the society.

The prospects of material advancement through job reservation have led to a kind of competition creates a vested interests in backwardness and it combines the worst feature of a hierarchical and a free-market society. It stifles individual initiative

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without creating equality between individuals and it obstructs the national process through which the barriers between castes and communities can be affected.

The aim of Indian constitution is to establish a socialistic pattern of society based on parliamentary democracy. The constitution of India directs that 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 national life. It has been stated that all citizens have the right to an adequate means of livelihood and that the ownership and control of the material resources of the community are as distributed as best to sub serve the common good. The directive principles also enjoin the State to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The principal aim of a socialist state as envisioned in the preamble is to eliminate inequalities in income and status and standards of life. The basic framework of socialistic is to provide a descent standard of life to the working people and especially to provide security from cradle to grave. One of the main objectives of the constitution is to building of a welfare state and an equalitarian social order in our country. The constitution of India guarantees the right to equality through Articles 14 to 18 and it is one of the magnificent corner-stone of Indian democracy. The doctrine of equality has many facets. It is a dynamic and evolving concept. Its main facets relevant to Indian society have been referred to in the preamble and the Articles under the heading right to equality. Among others the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities the inequalities not only amongst individuals but also amongst groups of people, seeming adequate means of livelihood to its citizens and to promote with special care the educational and economic interest of the weaker sections of the people, including in particular the Scheduled Castes Scheduled Tribes and backward classes and to protect them from social injustices and all forms of exploitations.

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The varying needs of different classes of persons require special treatment. A principle of reassemble classification was developed by classifying reasonably. It becomes imperative, therefore to adopt a policy of compensatory or protective discrimination as equalizer to those who were made too weak to compete with the advanced sections of the society in the race of life consonant with its resolve in the preamble to secure to all citizens. Article 16(4) is the instances of protective discrimination. The provision of protective discrimination are not intended to be negative or derogatory of the equality guarantee of Article 14, 15(1), 16(1) and 16(2) but are definitive of equality in relation to the backward groups. Article 15(4) and 16(4) therefore classify that where making a classification showing favored treatment to the backward classes, the state might use the forbidden criteria because any real classification will have to take, religion, race etc. criteria.

The protective discrimination is one of the important methods through which constitutional goals like social and economic justice can be secured to the Scheduled Castes, Scheduled Tribes and Backward Classes people. Protective discrimination means preferences given in public employment to the weaker sections of the society including the Scheduled Castes, Scheduled Tribes and other backward classes. Its aim is to balancing the benefits of a social welfare state between the haves and the have-nots.

Reservation is one of the measures adopted by the constitution to remedy the continuing evil effects of prior inequalities stemming from discriminatory practices against various classes of people which have regulated in their social, educational and economic backwardness. The purpose of reservation is to help the weaker sections of the society. It aims at seeming proper representations in administration to all sections of the society, intelligence and administrative capacity being not the monopoly of any one class, caste or community.

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The Constitution permits preferential treatment in the form of reservations for three categories of people: 1. scheduled caste, 2. Scheduled Tribes and 3. Other backward classes. The reservation of these classes are given in three specific areas: reservation of seats in the legislature reservation of jobs and reservation of seats in the educational institutions. Article 330 and 332 provide for the reservation of seats for the scheduled caste and Scheduled Tribes in the house of the people and the legislature assemblies of the states. These special provisions for the reservation of the seats in the legislature were provided purely as a transitory measure. An objective assessment of the policy of legislature reservation warrants its early reversal. To ensure the protection of backward classes of citizens it was necessary that members of backward classes be appointed in state services and so the power was given to the state to provide for reservation of such appointment. Since education is primarily the responsibility of the state government and the union government also has certain responsibility specified in the constitution as matter relating to institutions of national importance and certain other specified institutions of higher education, it is the responsibility of the governments to promote the educational opportunities of the weaker sections of society. That is why constitution provides reservation for backward classes in educational institutions.

The concept of social justice denotes a philosophy of life and sets a way in which all social life should behave. Further this concept is believed to be of a revolutionary import. There has been a historical process through which this concept, which was initially a doctrine of social philosophy, had entered into state-craft and captured the constitutional fields. Justice is generally divided into legal and social. Legal justice concerns the punishment of wrong doing and the compensation of injury through the creation and enforcement of a public set of rules. Social justice requires equitable or just distribution of the social goods and evils or of burdens and benefits. The task of just distribution in the present day society has to be performed primarily by the state and, therefore, through social justice may cover even private, or in Aristotle's language 'corrective justice', yet it is mainly concerned with distribution through the agency of the state.

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A just state would then be one which can supply in abundance the needs of her people. The welfare of the people lies in the fulfillment of their needs. In the modern phraseology, a welfare state is rightly another name for a just state. The first and greater necessity is food which is the condition of life and existence. The second is dwelling, the third clothing, the education, then right to work and leisure, then freedom from exploitation, and so on and so forth. The more a state is able to make provision for the greatest number of wants, the more she is approximate to the idea of a luxurious state. The more she is so, the more she will be able to secure social justice to her people.

As justice in the key-stone of our constitution and the equality is the very foundation of justice but our society has always been full of inequalities. In order to check furtherance of injustices and sufferings of people because of their handicaps of being born in a particular class, community or caste, our constitution prohibits the state from discriminating on grounds of religious, race, caste, sex or place of birth. The state has vast power to make reservation in employment and admission for such backward people or down-trodden people. Any state-socialistic or otherwise, which think in terms of well being of its inhabitants, has to take care of the last person of its soil. In a nation with limited resources like ours, the need to treat those unfortunate millions by distributing higher dividends could not rationally be debated. This is the supporting treatment to the less-equals to minimize the imbalance. This is the civilized society orders. It takes shape of constitutional objectives, which are, however, to be accomplished by the *modus operandi* evolved and within the parameters prescribed by the constitution itself social justice as one of the constitutional objectives, is to be aimed at accordingly. Distributions have to reach to the less equals in a proportion as commanded by the constitutional scheme

Reservations are provided for backward classes and who are these backward class people and how they are to be determined, all these questions are not answered in the constitution categorically. The Supreme Court rendered some important

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decisions on this point. Different backward class commissions have been appointed since independence to determine these questions. The commissions lay down different factors in this respect. The present reservation policy is based on the second backward class commission, popularly known as Mandal commission.

Reservation under Article 16(4) no doubt falls under part III of the constitution comprising the fundamental rights but 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 fundamental right on the existing and future laws. Still others provide for the enforcement and implementation of the fundamental rights while some other provide exceptions to the fundamental rights. It may be mentioned here that beginning from *M.R. Balaji v. State for Mysore* until the nine judge bench decision of the supreme court in *India Sawhney v union of India*, Article 16(4) and 15(4) have been treated as enabling provisions. There is no indication in the constitution that the state need reserve any minimum part of its resources to their benefits. Articles 15(4) and 16(4) do not confer on backward groups any fundamental right to such arrangements.

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. The policy of reservation does not create any corresponding individual right in favour of the member of the beneficiary group.

The present policy of reservation is based upon the recommendation of Mandal commission and the Mandal commission recommended on the basis of the caste census of 1930. After 1930 there is no caste census. It is clear that after 1930 there is tremendous changes occurred in India society and these changes influenced the Indian people. The life of backward people developed to large extent. Their social conditions also improved. After independence, our own government has taken various measures which changes the social condition of so called backward rigid caste system so to identify the true beneficiaries of reservation, a fresh caste census is inevitable.

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Moreover caste, at present time is not as rigid as it used to be in pre-independence days and it will not be proper to rely on caste only. Therefore the data supplied by the Mandal commission is not trustworthy. Any reservation made on this basis is just misleading.

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 their benefits. Preferences are not mandatory but only permitted. In absence of any specific limit on the extent of reservation under the constitution, various governments have been resorting to implement reservation in educational institutions and government jobs to the maximum extents. The claimants of reservations under the constitution are three, the scheduled caste, Scheduled Tribes and the other backward classes. Their population being 15%, 7.5% and 52% respectively. At present the Scheduled Castes are given 15%, Scheduled Tribes 7.5% seats and other backward classes are given 27% reservation.

Apart from this, the central government has made a reservation of seats to the tune of 27% for socially and educationally backward classes in the central Educational Institutions.

For determining as to what extent reservation would be reasonable we must take into account two factors: - one its effects on the fundamental rights of the candidates of the general category under Article 15(1) and 16(2) of the constitution and the other about its effect on march and efficiency in administration. There is no doubt that reservation adversely affects both and has to be tolerated to a reasonable extent as something necessary to compensate for injustices populated by society on the Scheduled Tribes as well as other backward classes in the past. Since every reservation under Article 16(4) claims a victim from the general category the power conferred by the said Article should be exercised sparingly with great care and certain

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only where other means of promoting the interests of certain weaker sections of the society under Article 15(4) and Article 16(4) must be very strictly construed.

With the increase of 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 movements of the last several decades, the spread of education and the advantages of the special provisions including reservations 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 undeniable fact.

Therefore, some members of the designated backward classes are highly advanced socially as well as economically and educationally and they constituted the forward section of that particular backward class-as forward as any other that particular back ward class-as forward as any other forward class member and that they are lapping up all the benefits of reservations 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. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birth mark.

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 members of the said class is equally backward. There are bound to be disparities in the class itself. While reservation for backward classes, the department should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate state.

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Therefore, creamy layer from the backward classes must be excluded in all circumstances. There are instances where the creamy layer even amongst scheduled caste and Scheduled Tribes are also seen and there creamy layer among these classes should also be excluded from the benefit of reservation.

Special provisions by way of reservation for scheduled caste and Scheduled Tribes as well as backward classes were introduced as a temporary measure to raise them to the status of an overage enlightened citizen of India whose dignity and status depend on being an Indian and not on his belonging to this castes or that or any other sub-division of society of this nature. Once all distinctions of high and low depending on race caste or religion etc, disappear, the special provisions for reservation etc would no longer be necessary.

The reservation of seats for Scheduled Castes and Scheduled Tribes in the house of the people and legislative assemblies of the states; was to continue only for 10 years from the commencement of the constitution under Article 334. This means that the constitution makes expected that with the aid of the provisions made for the benefit of backward class in consonance with the demand of social justice, a casteless society would be established within a period of 10 years and therefore, there would be no need for reservation at all. It is true that for the reservation under clause (4) of Article 16 no time limit was prescribed but it is obvious that once the stage is reached when there could be no need for reservation under the Constitution. Reservation of post in a single post -cadre amount to 100% reservation in the cadre. So there cannot be reservation in a single post.

Reservation in educational institutions have created problem for the educational institution system itself. The statistical data in connection with the SC/ST student's shows that out of total SC/ST candidates admitted, 13 percent did not join the course at all, 10 percent withdrew on their own and 23 percent left the course in between resulting in only 4 percent completing their studies. To this the statistical graph sadly further moves to point out that in the medical education out of 4 2 SC

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student only 4 could complete their studies in the prescribed time schedule; whereas there were 12 SC students who had to their credit 6 to 7 years and 7SC students took a record time of 7 to 8 years to pass the MBBS course. Unfortunately there is no study about the output of such pass outs<sup>773</sup>.

No one can oppose the protective discrimination in favour of backward classes because it was one of the measures to uplift the down trodden, the backward classes to level of forward classes who suffered for historical wrongs. That is why our founding father of caste evolved such measures. No doubt it is a pious and a very welcome step but it is a matter of serious concern that even after 60 years of independence or the coming into existence of free India constitution, still a large number of Indian population is backward. It shows that there is some problem with the reservation policy.

This might have been envisaged that the aim of Article 16(4) and 15(4) was not to eliminate all inequalities but only those associated with traditional social structure.

Reasons for backwardness or inadequate representation in services of backward Hindus prior to 1950 were caste division, lack of education, poverty, feudalistic frame of society and occupational helplessness. All these barriers are disappearing Industrialization has take over. Education through state effort and due to awareness of its importance, both, statistically and actually has improved. Feudalism died in fifties itself. Even the Mandal commission concepts this reality. Any identification of backward class for purposes of reservation, therefore, has to be tested keeping in view these factors as the exercise of power is in present. Importance of ward 'is' in Article 16(4) should not be lost of backwardness and inadequacy should exist on the date the reservation is made. Reservation for a group which was educationally and socially backward before 1950 shall not be valid unless the group

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<sup>773</sup> C.M. Jariwala, Reservation in Admission to Higher Education: Development and Directins; JILI 2000. P.208 – 209.

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continues to be backward today. The group should not have suffered only but it should be found to be suffering with such disabilities. It a clean or comments ceases to be economically represented than no reservation can be made as it no more continuous to be backward even though it may not be adequately represented in service or it may be backward but adequately represented.

Examining the issue of reservation from the vantage point of spirit behind the reservation one is forced to reflect upon the continuance of reservation in the light of the rationale that guides reservation policies. We cannot declare honestly that the sole aim of all reservations as they stand today is the upliftment of the weaker and disadvantaged sections of our society.

The recent proposal of the government to extend the benefits of reservation from 5- 10 percent for economically backward among the higher castes only serves to put a big question mark on the geniuses of the intentions behind the reservation measures was the government in such emergent urgency to declare the provisions, that days after having done it, it was forced to propose an amendment by addition to it ? Another instance of the responsiveness of the government perhaps? By the same logic of the proposed extensions does it not become imperative that the section of the economically advantaged among the socially backward and the scheduled caste / tribe be removed from the ambit of these provisions.

One can say that it is a case of deliberate myopia or simply that of offering the sacrifice of national interests and integrity on the demanding alter of political ambition. Such as the degradation in the image and perceived nationalism of our political leaders today that an average man on the street wonders whether the government is really interested in eradicating the evil of caste discrimination ? By consistently sticking to non viable and seemingly unfair criterion of deciding up on the beneficiaries of reservations, is the politician of today committing the nation to his individual vote bank or is he genuinely committed to an India unspoiled by caste and class raffles?

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Reservation policy is guided and influenced more by the politics of backwardness than by the prescription of the courts. The analysis of the modus operandi of the various backward classes' commission and of the state governments has amply revealed that the designation of backward classes is determined largely by caste-mobilizations, caste equations and the power game. Even the reaction over the reservation policy depends upon political consciousness and dominance of castes. There are instances where some political parties have shown vested interest in whipping up frenzy among the dominant backward castes for their own political base.

The backward classes are classified by application of multiple tests which lead to poverty. Such tests are low level of income, low level of occupation, low level of education and low level of living conditions. In either way it can be said only economic test that go by caste be applied for the identification and classification a backward classes. It has been repeatedly observed in a number of decisions of the Supreme Court that poverty is the root cause of special and educational backwardness and this poverty was the gift of the British Rule. It would be wrong to assume that all those who have been socially and educationally backward are victims of social injustices perpetrated by the upper castes. Only some of them such as SC and ST and some other communities very close to them can be said to have suffered as result of social injustices others suffered due to poverty.

The other backward classes have a very different position in Indian society from that of the Scheduled Castes and Scheduled Tribes. It is true that their traditional ritual status was low and that they were latecomers to the competition for universities degree and government jobs. Only the Harizans and Adivasis have been for centuries the victims of active social discrimination, through segregation in the first case and isolation in the second case. They alone have suffered the kind of psychological and moral injury that justifies their being now treated with special consideration. The castes and communities grouped together as the other backward classes have not suffered collectively king of injury is either the recent or the distant past. They

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include locally dominant castes, some of whose leaders are among the worst tormentors of Harizans in the rural area today.

### **SUGGESTIONS**

The existing policy of reservation needs fundamental and drastic changes. Neither it could bring about the desired social reconstruction, nor it helped to ameliorate the socio-economic conditions of the weaker sections. Instead of resorting to reservation and thus creating distrust and tension between various segments of society, a time bound programme to uplift all the weaker sections is needed.

While making a strong case of caste-wise census, Justice M. N Rao, Chairperson of the National Commission for Backward Classes said that the present form of reservation is not yielding desired results envisioned by the framers of the policy. In this respect we have to be very cautious while framing the policy of reservation. Just to provide social justice to backward classes should not respect in causing injustice to the non-recipient classes. So a harmonious approach is required. We can do that only by not enlarging the list of backward classes and by excluding the advanced classes from the backward sections of people.

It should be realized by everyone that reservation under Art. 16(4) is an extreme step to raise the level of the backward classes. The discretionary power conferred by it on the government has to be exercised with care and caution because it causes grave hurt to teenagers of the middle classes who have nothing to rely except on their merit and industry to build-up their future. For politicians it is a simple and cheap device to gain popularity and therefore, they are tempted to make use of it for the power on backward communities without realizing what grave consequence it has on the future prospects of teenager of the general categories.

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There is urgent need to identify the receivers of protective discrimination; otherwise the great edifice of our democracy might suffer a jolt and crumble and crumble to pieces under the sheen weight of its own contradictions. The benefits of this policy cannot be allowed to be squandered on the undeserving. Even if a class or a section people is found to be backward today, the courts or the legislature should not act on the presumption that class would continue to be backward for all times to come. Social scientists and the lawyers would have to conduct empirical studies periodically to assure the attainments of the members of that class in different attainments of the members of that class in different walks of life. If such studies reveal that the backwardness of class has ceased to exist, then that class should be removed from the orbit of backwardness. It should not be forgotten that national resources have to be mobilized in such a way that the benefits of our welfare state reach the teeming millions even without reservations. A stage must reach when ever without claiming protection of backwardness, or individual may be able to get non-discriminatory treatment and equality of justice.

No single criterion can be useful in identifying the Other Backward Classes. If the class as a whole is treated as backward then only the prosperous segments among the designated backward classes will get the lion's share of the benefits. So the creamy layer amongst the backward must be excluded from the purview of backwardness for the benefit of reservation. The income criteria for the exclusion of creamy layer must be revised and those whose annual income is more than rupees 180,000 per year must not get the reservation.

Caste can only be used as an evidence of backwardness and not as unit of backwardness. Caste and class are not synonymous. No single criteria can be useful in identifying the other backward classes. Today there is no necessary congruence between caste hierarchy and occupational, economic and social position even among the members of the same caste groups. Even the occupation cannot be the sole determinant of backwardness because of the changing occupations and of the difficulties of ascertaining the occupation of the communities which do not follow

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traditionally low occupation. An exclusive income test would fail the cases where it is difficult to estimate the income of the beneficiaries such as farmers, traders, self-employed and whose income record is often concealed or unrecorded. Therefore, the backward classes should be drawn by applying multiple tests. All conceivable attributes of backwardness such as low level of occupation, low level of health, nutrition, housing and adverse environmental or geographical conditions-must be taken into account. Since backwardness is a matter of degree and kinds, backward groups selected for one purpose need not be the groups for all purposes. On applying the multiple tests one might find that some groups need only health care and housing, some need educational concessions, some need only reservation in services and some need all these benefits.

Reservation should be commensurate with the degree of backwardness rather than with the percentage of backward class population. Reservation cannot be covered into a system of proportional representation. The principle that reservation should be commensurate with ratio of the population of each backward class makes sense only when the beneficiaries are properly selected. By whatever standard backward classes are selected some will be more backward than others. The term backward class contemplates plurality of backward classes. In state one backward class may be more underrepresented in services as compared to another backward class. All backward classes need not be uniformly backward. The present system of uncompartmented or aggregate reservations is benefiting only the elites among the backward classes and is operating to the detriments of the most needy and deserving backward classes and thus negating the very idea underlying compensatory justice.

Therefore, the creamy layer should be excluded not only among the other backward classes but also from the scheduled caste and Scheduled Tribes.

The process of chronic development and the spread of education have resulted in narrowing the gap between the classes considerably. As larger percentages of backward class member attain acceptable standards of education and employment,

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they should be removed from the backward classification, so that attention is given to those classes that genuinely need help. It would be a useful exercise to review the classification of backward classes once again and also check whether the criteria used for classification of backwardness is relevant for today's conditions. If this is not done, it will provide the backward classes incentive to remain backward, because in the knowledge that, with relatively little effort and qualification the government still guarantee them adequate educational and employment opportunities.

The list of the OBCs must be reviewed periodically once a backward always a backward cannot be made a rule. Review of caste as backward must be made on the caste census report. A periodical re-examination of the classification of backwardness and a progressive reduction of reservation percentage, couple with expansion of educational facilities is the policy that will suit the country best in the long term. Governments may be reluctant to reduce reservation or attempt a re-classification because of their tremendous political implications, but it would be consistent with the principle behind helping the genuinely needy only.

Reservation should be confined to initial appointments only and when a backward class is in a position to take off, it should be left for the open competition. Therefore, there should not be any reservation in promotion. It is not something confining the backward in initial jobs rather it would be an effort to make them independent, self reliant and more competitive.

By definition, the system of reservation is short lived and a temporary measures complemented by long range developmental measures which when began to produce results, the reservations can be slowly withdrawn. There is thus a need to re-orient the system of reservation rather than to pass sever judgments against its continuance. Moreover it is too unrealistic to talk of scrapping the system of reservation which can be done only by an amendment to the constitution which seems unthinkable in the light of the political realistic of today's India. What is needed today is that the state should divert more and more of its resources to increase the overall

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competitiveness of the identified beneficiary groups rather than to stick to reservation as the only best means to promote equality.

The states may have their own lists quite different from the Central list. The Commission appointed by the president under Article 340 is not a continuing body with a power to revise the list. Nor is there any provision for revision of Presidential specification of OBCs. This is why in 1956 the Home Ministry, while rejecting Kaka Kalelkar's report took the view that although there was an obligation to compile a list in accordance with requirement of Article 340, the Constitution of India did not mandate drawing of a central list. The Central government showing its helplessness to draw such a list took the view that of even if such nationwide list could be drawn, it would still be open to every State government to draw up its own lists and any all-India list would have no practical utility.

In the words of Professor B. P. Dwivedi “the class distinction in Indian Society is not of different castes but it is the distinction between the rich and the poor. The rich always treated the poor as slaves and chattels and nothing more. These oppressed and suppressed people could not imagine enjoying any status in life in the society. Thanks to the framers of the constitution in general and the Judiciary in particular who thought and tried to eliminate this distinction”<sup>774</sup>.

With all these suggestions I would like to recommend the continuation of reservation for further period. Here I would like to add one line inspiring from the Nobel Laureate Md. Yunis's speech. During his Nobel Prize speech he said, “I firmly believe that we can create poverty-free world if we collectively believe in it. In a poverty-free world, the only place you would be able to see poverty is in the poverty museums<sup>775</sup>.” So, I also firmly believe that, if the reservation policy is implemented whole-heartedly and properly, the concept of reservation would be a subject of

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<sup>774</sup> B. P. Dwivedi, *The Changing Dimension of Personal Liberty in India*, Wadhwa & Company, Allahabad, p. 237.

<sup>775</sup> [http://www.nobelprize.org/nobel\\_prizes/laureates/2006/yunus-lecture-en.html](http://www.nobelprize.org/nobel_prizes/laureates/2006/yunus-lecture-en.html)

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History and it would be found only in the Museum. The day will come and I hope that day will come soon.

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