CHAPTER – III

Constitutional Perspective of Human Dignity of Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes of Citizens

Kofi Annan, former Secretary General of the United Nations Organisation, pinpointed “Human rights are the expressions of those traditions of tolerance in all cultures that are the basis of peace and progress. Human rights, properly understood and justly interpreted, are foreign to no culture and native to all cultures”. This policy perspective indeed is the avowed promise of the Founding Fathers of the Constitution of India, who unequivocally aspired to promote and assure the human dignity of all the People of India without discrimination. Though scheduled castes, scheduled tribes and socially and educationally backward classes of citizens being vulnerable and are conceded as disadvantaged/marginalised/deprived/neglected/poor sections/groups of the Indian society, but the Constitution of India provides protective/permissible discrimination/compensatory discrimination to such groups of the Indian Nation under the protective umbrella of “affirmative action”. This constitutional scheme envisages translating “vasudhaiva kutumbkam” — an ancient concept of universality and equality without discrimination — in reality. Though casteism is devilish and reversal to “vasudhaiva kutumbkam”, the caste continues to effectuate our society. It means separation, segregation and isolation of such marginalised, etc. segments of the Indian society. It, overtly or covertly, keeps them away from the mainstream of the Indian society; it obviously defies that the Indian society has hitherto progressively moved from status to contract, and consequently, this inhumane practice, conscientiously or unconscientiously, forbids them to have free access to places of public resort including abodes of God.1

The Supreme Court of India has recently lamented: “The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality”. ²

This stark reality was and is the truth of our system from cradle to ashes or grave.

The genesis, in the backdrop of the above, is that all members of the human family possess inherent dignity and equal rights. ³ Equal dignity and equal rights is the basis of human rights philosophy. Caste discriminations defy the very idea of equality of all human beings. Human rights are the rights that a human being has a virtue of whatever characteristics he has that are both specifically and universally human. ⁴ Universal Declaration on Human Rights declares that everyone is entitled to all the rights and freedoms set-forth in it without any distinction of any kind such as race, colour etc. ⁵

All conventions on human rights whether universal or regional are based on the bed rock of “equality”. Civil and political rights ⁶, economic, social and cultural rights ⁷, rights against cruelty ⁸, right to development ⁹, right to environment ¹⁰, are recognized equally to everyone without any discrimination. International Convention on the Elimination of all forms of Racial Discrimination 1966, Convention on the Elimination of all forms of Discrimination against women 1979, Convention on the Rights of Persons with Disabilities 2006, etc. are to further and fortify the principle of “equality”.

The practice of untouchability affronts “dignity” and is inconsistent with the basic fundamental right values. Every one shall have the right to recognition everywhere as a

³ See, Preamble & Article 1, UDHR 1948.
⁵ See, Article 2.6, UDHR.
⁶ See also, International Covenant on Civil and Political Rights, 1966; European Convention for Protection of Human and Fundamental Freedoms, 1950.
⁹ See, UN Declaration on Development, 1986.
¹⁰ See, UN Stockholm Declaration, Principle 1, 1972.
person before the law. Basic fundamental right is a visibility for all of us and shall be pushed beyond the periphery of the human community’s vision. Basic fundamental right mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by and enforceable by the courts in India. Supreme Court of India has observed… “Human rights jurisprudence in India has a constitutional status and sweep…… so that this Magna Carta may well toll the knell of human bondage beyond civilized limits”.

**Policy Perceptions of Human Dignity of Schedule Castes, Schedule Tribes and Socially and Educationally Backward Classes of Citizens**

The Constitution of India seeks to abolish distinctions on the basis of caste and establish equality ensuring social, economic and political justice through protective discrimination. “We the people of India……” the opening words of the Preamble strongly express the bond of oneness of the people dismissing the divisions and the classes. Preamble secures to all citizens equality of status and opportunity. It further promises promotion of fraternity so as to secure dignity of individual and unity and integrity of the nation. Article 14 guarantees against hostile discrimination. “The state shall not deny to any person equality before the law or equal protection of the laws within the territory of India”.

Constitution of India makes equality the rule, which means equal treatment to all without discrimination. Discrimination of any citizen on grounds only of caste is prohibited by Article 15, 16, 29(2) and 325. Access to shops, public restaurants, hotels and places of public entertainment, public wells, roads and temples have been guaranteed to all without distinctions of caste. Article 17 abolishes untouchability and is the most important provision in the interest of the untouchables. It declares- “Untouchability is abolished; and its practice in any form is forbidden. The enforcement of any disability arising out of “untouchability” shall be an offence punishable in accordance with law”. Firstly, it

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13 See, Section 2(1) (d), Protection of Civil Rights Act, 1993.
establishes a new social order and public morality and frees the untouchables from the
disability of discrimination, indignities, exploitation, liabilities associated with the age
old abuses of untouchables. Secondly, it incorporates a higher legal order, rule of law. It
guarantees social justice and dignity of man, the twin privileges which were denied to a
vast section of the Indian society for centuries together. It is pertinent to note that the
National Commission to review the working of the Constitution has recommended that
Article 359 should be amended to ensure that the right under Article 17 also is not
suspended during emergency\textsuperscript{15}.

**Affirmative Action**

Affirmative action is of American origin, which was devised to eliminate all sorts of
discrimination or segregation between white and black\textsuperscript{16}. It is known as “Protective
Discrimination” or “Permissible Discrimination” or “Compensatory Discrimination”\textsuperscript{17}
under the Indian Constitution. It refers to action that is designed to assure future fairness
of treatment in the absence of any specific legal finding of discriminatory practices
whose consequences are to be remedied. It further defines it as a set of actions designed
to eliminate existing and continuing discrimination, and to create systems and procedures
to prevent future discrimination.

Affirmative action in India is fully supported by constitutional provisions\textsuperscript{18}. The
Constitution of India identifies for affirmative action the castes which suffered the
indignity as Schedule Castes (SCs). Article 341 provides for enlisting them via
presidential order which can be amended by law of Parliament.\textsuperscript{19} The State is enabled
to adopt protective discrimination to integrate the people into the mainstream of national
life. Article 15(4) inserted by First Constitutional Amendment Act, 1951 enables the state
to make special provisions for the advancement of SCs and STs notwithstanding the
right against discrimination for all citizens. This amendment was necessitated owing to

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\textsuperscript{15} See, S.Jayakumar, *Untouchability: Human Rights Perspectives and Response of Law in the Post-
Independent India*, pp.5-7, 2002.


\textsuperscript{17} See, Black’s *Law Dictionary*, 7\textsuperscript{th} Edition, p. 479, 1999.


the Supreme Court’s decision in the *State of Madras v. Champakam Dorairajan*\(^{20}\) which held that caste based reservation for admission to medical colleges was violative of Art. 15.

Furthermore, clause (5) was added to Article 15 enabling the state to make special provisions by law relating to admission of SCs and STs in educational institutions including private institutions aided or unaided by government\(^{21}\). Pursuant to this, laws have been made to reserve seats and relax marks in qualifying exams/admission tests, remission in fees (admission, exam, re-evaluation, etc.) and scholarships. The positive action programmes thus envisaged seems wider than mere reservation of seats\(^{22}\).

Article 16(4) enables reservation for the backward classes including SCs and STs in public employment in the state if in the opinion of the state they are not adequately represented in the services under the state. Art.16 (4) originally provided for affirmative action. In 1995, by Seventy- Seventh Amendment, clause (4A) was inserted in the Article to enable reservations in promotions as well for SCs and STs\(^{23}\). In 2001, Eighty- fifth Amendment amended 16(4A) to protect promotions with consequential seniority of SCs and STs. Supreme Court of India had laid down a ceiling of 50% in reservations\(^{24}\). Unfilled vacancies reserved for SCs and STs when added to the current year reservations crossed the 50% ceiling. By Eighty- First Amendment, 2000 clause (4B) was added to the Article 16. Whereby State was enabled to consider unfilled vacancies of a year were reserved as a separate class without 50% ceiling rule coming in the way. By Eighty- Second Amendment Act, 2000, a proviso was added to Article 335, which enjoins that the claim of SCs and STs shall be taken into consideration consistently with the maintenance of efficiency of administration. The amendment ensured that the rule in the Article shall not prevent in making of any provision in favour of the members of the SCs and STs for relaxation in qualifying marks in any examination or lowering the standards of evaluation for reservation in the matters of promotion to any class or classes of

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\(^{20}\) AIR 1951 SC 226.

\(^{21}\) See, Ninety- third Amendment Act, 2005.


services or posts in connection with the affairs of the Union or of a State. Just social
order is an avowed commitment of the founding fathers of the Constitution. State is
obliged to remove inequalities and backwardness from the society. Article 38 mandates
the state to secure a social order in which justice- social, economic and political shall
inform all the institutions of national life. State has a specific duty under Article 46 to
promote with special care the education and economic interests of the weaker sections
of the people, and in particular, of the SCs and STs and shall protect them from social
injustice and all forms of exploitation. Article 46 supplements Articles 15(2), 15(4), 16,
17 and 29(2). The directive principles are designed to usher in a social and economic
democracy in the country. Articles in Part IV of the Constitution indicate that it is the
state’s obligation to create social atmosphere befitting human dignity for citizens to live
in.

In the background of the above, it discerns that the Constitution intend to remove social
and economic inequality to make equal opportunities available. In reality the right to
social and economic justice envisaged in the Preamble and elongated in the fundamental
rights and the directive principles of state policy of the Constitution are to make the
equality of the life of the poor, disadvantaged, disabled, minorities, underserved citizens
of the society meaningful. This in brevity may be designated as affirmative action
compatible with the Constitution and its language. Affirmative action tends to
empowerment of those underprivileged or underserved or weaker sections of the Indian
society which have been neglected lot of the society and bring them at par with those who
are not underserved or underprivileged. Reservation in India is considered as a kind of
Affirmative action or positive discrimination or preferential compensatory justice or
preferential treatment or protective discrimination designed to improve the well-being of
underserved. Affirmative action is not a government largesse or bounty; it is a positive
measure taken by the State to improve the competitive ability of the disadvantaged
sections of the society. It includes not only reservation or taking of positive steps for
improving the competitive ability of the deprived sections of society but also such

26 CAD VII, p. 493.
28 See, Indra Sawhney v. Union of India, AIR 1993 SC 477
measures as giving some weightage with a view to neutralize the lower scores of the socially disadvantaged candidates. Reservation may be the most effective means of ensuring the avowed/intended results. Affirmative action is intended to promote the opportunities of defined groups within a society. It is often instituted in government and educational settings to ensure that minority groups within a society are included in all programmes. The justification for affirmative action by its proponents is that it helps to compensate for past discrimination, persecution or exploitation by the upper strata and address the existing situation of discrimination in such a way that it is not being allowed to perpetuate rather address the policies/schemes/actions in such a way that its soup and sauce is being evaporated.

Controversy and Judicial Trends

In *State of Madras v. Champakam Dorairajan*, the contentious constitution conviviality was with regard to Madras Government Order (famously known as communal G.O.) wherein the scheme of reservation of seats in state Medical Colleges was made on community-wise: Non-Brahmin Hindus 6; Backward Hindus 2; Brahmins 2; Harijans 2; Anglo Indian and Indian Christians 1; Muslims 1. A Bench of Seven Judges struck down the G.O. declaring it invalid, because it classified or categorised the students merely on the basis of caste and religion irrespective of their merit. The classification was based on caste, religion and race for purpose of admission to educational institutions on the ground that Article 15 did not contain a clause such as Article 16 (4). Thus, the meritorious students can’t be denied admission on the grounds of caste and religion. The Madras government order of reservation was declared as communal order and was struck as illegal and unconstitutional as it was against the scheme of equality envisioned in Articles 14, 15 and 16 of the Constitution of India. Be that as it may, it may, however, be submitted that the Apex Court of the country expounded to make India as an egalitarian society, which could be a casteless and classless society *per se*. This ruling led to the insertion of a provision in the Constitution, i.e. Art. 15(4), by first amendment in 1951, which reads as: “Nothing in this article or in clause (2) of

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29 AIR 1951 SC 226.
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.” It appears that Article 15(4) does not permit caste based reservation but permits affirmative action where people who may incidentally belong to a caste may also be conferred benefits. Consequentially, Article 15(4) read with Article 29(2) implies that reservation based on caste would be violative of Article 29(2) unless the reservation is made for the backward classes of citizens --- a homogenous class identified for a host of relevant factors of which the caste may be one of the factor but not the sole or only factor. The argument that classification may be any caste plus method is neither justified nor tenable nor compatible as the classification would then predominantly be on the basis of caste alone which, it is submitted has been specifically rejected by the Apex Court in a number of cases. It seems that Article 15(4) was inserted as an affirmative measure to ameliorate the conditions of backward classes of citizens. It seems that Article 15(4) is only an enabling provision. It only confers discretion on the State and does not create any constitutional obligation or duty. It is for the respective States either to enact legislation or issue an executive instruction providing reservation for the categories identified in the said Article. Article 15(4) is discretionary and no writ can be issued to effect reservation either by legislation or an executive instruction.\textsuperscript{30} It also seems that the architect of first amendment felt that it had made an ample road for caste based reservation and as such the affirmative action ought to have been on the basis of economic criteria, which speaks volumes of the intent with which the first amendment was made\textsuperscript{31}. In M. R. Balaji v. State of Mysore,\textsuperscript{32} the first case under this clause, the Supreme Court has put 50% cap on reservation, but has invalidated the test of backwardness which was based predominantly on caste and community. The contentious facts and issues involved in this case were like this.

The Mysore government issued an order under Article 15(4) reserving 50% seats for admission to the State medical and engineering colleges for backward classes and more backward classes. This was in addition to the reservation of seats for the Scheduled Castes (15%) and the Scheduled Tribes (3%). Backward and more backward classes were

\textsuperscript{30} See, Dr. Gulshan Prakash v. State of Haryana, AIR 2010 SC 288.

\textsuperscript{31} See, Pt. J.L.Nehru, the first Prime Minister of India and the architect of the first amendment to the Constitution, quoted in Ashok Kumar Thakur v. Union of India, AIR 2008 SC 1.

\textsuperscript{32} AIR 1963 SC 649.
determined on the basis of castes and communities. So, on the whole, the reservation was made to the extent of 68%. The Supreme Court declared Article 15(4) as an exception to Article 15(1) and Article 29(2) as well: “There is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2).” The Apex Court further declared the government order bad on these grounds, viz., first, the government order suffered from the defect that it was based solely on caste without regard to other relevant factors to determine backwardness of the classes of citizens, and this was not permissible under Article 15(4). Hence, the government order was incompatible with the constitutional permissibility. Secondly, the test adopted by the State government to measure educational backwardness was defective inasmuch as the basis of the average of student population in the last three high school classes of all high schools in the State in relation to a thousand citizens of that community. This average for the whole State was 6.9 per thousand. However, the Apex Court stated that assuming that the test applied was rational and permissible to judge educational backwardness, it was not validly applied. The Court explained that only a community well below the State average could properly be regarded as educationally backward, but not a community which came near the average. The government order suffered from the vice that it included in the list of backward classes castes and communities whose average was above or near or just below the State average. For example, Lingayats with an average of 7.1% were mentioned in the list of backward communities.

Thirdly, the Court unequivocally held that Article 15(4) does not encapsulate classification between ‘backward’ and ‘more backward’ classes as was made by the State government order. Fourthly, the Court ruled that reservation must be reasonable, and it should, in no circumstances, be such as to defeat or nullify the main objective of equality engraved in Article 15. It ought to be, in a broad and general way, less that 50%, “how much less that 50% would depend upon the relevant prevailing circumstances in each case”.

The Apex Court could sense the danger in treating caste as the only or sole criterion for determining social and educational backwardness. And as such, the Court adopted a realistic approach in saying that economic backwardness would provide a much more
reliable yardstick for determining social backwardness because educational backwardness is the outcome of social backwardness.

It seems that in *Chitralekha v. State of Mysore*[^33] the Supreme Court took two factors, viz., economic conditions and profession, to define backwardness, ignoring caste as the only criterion to determine social and educational backwardness. The judgments of 1963 and 1964 were progressive in nature to identify the tests, viz., economic poverty and the occupation, to determine social and educational backwardness of citizens making India a pure egalitarian State.

However, in subsequent cases the judicial thinking has been confounding the confusion instead of expounding the jurisprudence of dignity. This was due to a shift or departure in judicial attitude. In *P. Rajendran v. State of Madras*[^34], the Supreme Court applied the test of caste in determining ‘social and educational backwardness’, of course, reiterating in not permitting more than 50% reservation, and held that it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Article 15(4).

In *U.S.V. Balaram v. State of A.P.*[^35] the supreme Court reiterated its opinion that a caste is also a class of citizens that is socially and educationally backward, and if after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward the reservation made of such persons will have to be upheld notwithstanding the fact that certain individuals in that group may be both socially and educationally above the general average. In this case, a list prepared by the Backward Classes Commission appointed by the government of Andhra Pradesh was held valid even though backward classes were enumerated mainly by their caste names. The court assigned the reasons for such an approach that the Backward Classes Commission had prepared the list after a detailed enquiry and applying several tests like general poverty, occupations, caste and educational backwardness.

[^33]: AIR 1964 SC 1823
[^34]: AIR 1968 SC 1012
[^35]: AIR 1972 SC 1375
There seems a danger in the abovementioned judicial trend, aftermath of *M.R.Balaji* and *Chitralekha* that it shall give a lease of life to the propagators of caste system in India, and the inquest for searching factors for determining backwardness, delinking from the caste system, will eclipse in the background. As already discussed, the soup and sauce of an egalitarian casteless society in the future shall evaporate.

However, in *Triloki Nath Tickoo v. State of J&K*, the Supreme Court, on the peculiar type of reservation formulae made by the State government, opined with the observation that the State government Order reserving 50% of the vacancies for Muslims of Kashmir, 40% for the Hindus of Jammu and 10% for the Kashmiri Hindus was not synonym of backward caste or backward community as a test to determining the ‘social and educational backward classes’.

In *State of Kerala v. N. M. Thomas*, Justice V. R. Krishna Iyer observed that the better-off among the Harjans, who should be given protection in the matter of employment, should not be permitted to negative the benefits of preferential treatment to Harijans as a class.

*K. C. Vasanth Kumar v. State of Karnataka* seems to be confounding confusion instead of expounding the certain judicial thinking. In this case, five Justices of the constitutional Bench expressed five separate judicial opinions. Firstly that the backward classes ‘should be comparable to the Scheduled Castes and the Scheduled Tribes in the matter of their backwardness and they should satisfy the necessary test that a state government may lay down in the context of prevailing economic conditions.’

Second, opined that; ‘the only criterion which can be realistically devised is the one of economic backwardness’. Thirdly, ‘Class poverty, not individual poverty, is, therefore, the primary test. Despite individual exceptions, it may be possible and easy to identify social backwardness with reference to caste, with reference to residence, with reference

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38 AIR 1967 SC 1283.
39 AIR 1976 SC 490.
40 AIR 1985 SC 1495.
to occupation or some other dominant feature. Fourthly, ‘the predominant factor for making special provisions under Art. 15(4) or reservation of posts and appointments under Art. 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 Castes or Scheduled Tribes’. Fifthly it was concluded while favouring a test in which lowest among the castes similar to Scheduled Castes and Scheduled Tribes, the means or economic condition and the occupation may all be counted in making a determination of backwardness.

Mandal Commission Report took caste as the dominant or sole criterion for determining socially and educationally backward classes. To effectuate the Mandal Commission report the central Government issued Office Memorandum purported to make 27% reservation in addition to 22.5% already reserved for SCs and STs for giving preference to the poorest of SEBCs and additional 10% reservation by giving preference to ‘other economically backward sections of the poor’. This criterion of reservation was considered to be explosive and was a contentious issue in the nature of ‘new-found hope’ and ‘extremes of despair’ before a nine Judge Bench of the Supreme Court in *Indra Sawhney v. Union of India*⁴¹ The majority 6:3 constitutionally upheld the Office Memorandum prescribing 27% reservation with certain modifications, alterations and deletions. The Supreme Court was hesitant to constitutionally uphold 10% reservation that gave preference to economically backward sections of the poor. The majority opinion expressed that the Constitution of India neither defines these classes [SEBCs] nor does it lay down any methodology or criterion for their determination. Though caste is not an essential denominator to determine the SEBCs or SEBCs be similarly situated with SCs and STs, but nevertheless caste in India often is a significant social class/group encompassing an overwhelming majority of India’s population, and as such one could begin with it and then go to other groups, sections and classes. The majority judicial opinion reiterated that reservation could not exceed 50%; the backward could include the more backward, but certainly creamy [elite as well forward amongst the SEBCs] layer

⁴¹ AIR 1993 SC 477.
must be excluded from SEBCs; economic criterion alone could not be the basis of backwardness although it may be a consideration along with or in addition to social backwardness; creation of a permanent body at the Central and State levels was imperative to look into the complaints concerning over and under-inclusion of SEBCs and to periodically revise the lists of SEBCs.

A doyen jurist of our country, unhesitatingly expressed his views that ‘1992 was one of the saddest years in the history of our jurisprudence as the Supreme Court continued the scourge of casteism rather than ruling in favour of an effective, cohesive, unified classless society’. In T. M. A. Pai v. State of Karnataka42 intertwined with reservation, minority’s right to establish and maintain educational institution, and right to have admission and seek education including reservation in such educational institutions. This case ‘raises more questions than it has answered’; this case follows a ‘compromising-conflict approach’. The 11 Justices delivered five judicial opinions. The majority opinion on behalf of six justices was delivered concurring opinion supporting the majority, delivered three separate opinions partly dissenting from the majority. Eleven questions were raised which were culled out in five questions, viz., (i) What are the indica for treating an institution as a minority educational institution; (ii) Whether the State or the affiliating University can regulate admission of students to minority educational institutions; (iii) Whether the ruling in Unni Krishnan case requires reconsideration/modification; (iv) What is the meaning of the expression ‘Education’ and ‘Educational Institutions’ in various provisions of the Constitution; (v) Is the right to establish and administer educational institutions guaranteed under the Constitution? The ‘conflict compromise approach’ in TMA Pai is culled out as follows43:

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42 AIR 2003 SC 355; See, Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178 wherein it was held that the right to establish educational institution can neither be a trade or business nor it can be a profession within the meaning of Article 19 (1) (g) and the same was overruled in TMA Pai Case.

1. That the right of minorities to run educational institutions, like other fundamental rights, is not absolute, and is subject to the discipline of Article 29(2).

2. That the minority educational institution does not cease to be so the moment grant-in-aid is received by the educational institution.

3. That the term ‘minority’ is Article 30(1) means and covers linguistic and religious minority. For the purpose of determining the minority, the denominator/unit will be the State and not the whole of India.

4. That linguistic and religious minority’s right to establish as well as administer educational institutions of their choice broadly indicates to cover non-professional and professional and technical educational institutions and deemed universities.

5. That there is apparently a conflict between Articles 30(1) and 29(2). Vide Article 30(1), minorities have the fundamental right to set up educational institutions of their choice, and the minority character of their institutions is not affected by the receipt of grant-in-aid from the State. Whereas Article 29(2) clearly enjoins the fundamental right of every citizen not to be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. To such a seeming conflict ‘compromising conflict approach’ or ‘balancing of conflict approach’ seems to be a seamless web resolve, viz., the minority educational institutions may admit non-minority students to a ‘reasonable extent’ so that “rights under Article 30(1) are not substantially impaired and further citizens’ rights under Article 29(2) are not infringed”.

6. That the ‘reasonable extent’ would be determined by the State on identifiable factors such as ‘type of institution’, ‘course of education’, ‘population and educational needs of minorities’. provisions of the Constitution; (v) Is the right to establish and administer educational institutions. The State is required to notify the percentage of non-minority students to be admitted in the backdrop of ‘conflict-compromise approach’.

7. That inter-se merit of ‘minority applications groups’ would be observed in case of non-professional educational institutions.
8. That passing of common entrance test held by State agency may be made a condition precedent in the case of professional educational institutions. Non-minority students, who qualify the entrance test, would be entitled to seek admission against the ‘allotted seats’ as per their own respective cumulative merit. It discerns that ‘balancing approach’ or ‘conflict-compromising approach’ seems to create a “special or privileged class of citizens” with ‘additional’ or ‘special’ rights for the minorities. Be that as it may, this seems to be against the avowed spirit of the founding fathers of the Constitution, which they did not envisage that minorities were to be considered as socially and educationally backward classed of citizens. It may be submitted that ‘cultural and educational’ rights enjoined in Articles 29 and 30 assure minorities that they should have no fear or apprehension that they would not be able to do at their expense, either in field of education or religion, what the politically powerful majority could do for themselves. Had this been kept in mind, it is submitted, the judicial exchequer time could have been saved in explaining the incongruent meaning of the expression, minority’.

9. That Article 30(1) provides at best only a ‘special safeguard’ to minority educational institutions for certain specified purposes, and not a ‘special’ or ‘additional’ right. It is submitted that once this impression of ‘special’ or ‘additional’ treatment is evaporated then there seems to be ‘no conflict proposition’ as well as ‘no balancing of conflict approach’ between Articles 29(2) and 30(1).

10. That ‘education’ though used to be charity or philanthropy in good old times, but it undoubtedly and manifestly seems an ‘occupation’ or ‘business’ or trade’ or ‘industry’.

11. That the integration between Articles 29(2) and 30(1) has been clearly recognized, namely, the expression ‘educational institutions of their choice’ used in Article 30(1) gives the right to minorities to set up ‘educational institutions of their choice’, and this is indeed a sequel to the right guaranteed under Article 29(2), i.e., the right to ‘conserve their distinct script, language or culture’. Is the right of the minorities to establish educational institutions of their choice the means or
modes of conserving minorities’ distinct script, language or culture? The answer to such a question may be presented from two fronts. The first set of educational institution is dedicated to the cause of conserving distinct script, language or culture and relatively is free from State regulatory measures or controls. The second set of educational institutions is directed to develop professionalism as well as excellence in education and certainly requires State regulatory measures or control, and as such educational institutions set up by minorities have to be regulated under the provisions of Article 19(6) which commends the State expressly to make any law relating to “the professional or technical qualifications necessary for practicing any profession, or carrying on any occupation, trade or business”\(^4\). Rights to set up educational institutions under Articles 19(1) (g) (6) and 30(1) are fundamental rights and fundamental in the good as well as sustainable governance of educational institutions and as such State can intervene by prescribing reasonable restrictions say in terms of regulatory measures. Thus, it ought not to give rise to a presumption as if the right under Article 30(1) is absolutely absolute.

12. That the analogy of Article 337 be invoked in relation to minorities. It is, however, submitted that there seems no justification to giving preferential right to minority community by invoking Article 337, because that Article makes a special provision with respect to educational grants for the Anglo-Indian community and that too subject to one specific condition, namely, they admit 40% of members from other communities. Thus, the analogy of Article 337 in relation to Articles 29(2) and 30(1) seems to be inapplicable to minority community which is not a special community to have special concession as given graciously to Anglo-Indian community transitorily as a special concession under Article 337.

13. That the law in terms of Article 141 framed in *Unni Krishnan case*\(^4\(^5\) is unconstitutional, but, of course, two propositions pronounced in this case stand approved, namely, one that primary education as a fundamental right, and second,

\(^4\)This is also recognized by the Supreme Court in *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178.

\(^4\(^5\) Ibid
that charging of capitation fees or otherwise encouraging profiteering is prohibited. It is, however, submitted that reversing of Unni Krishnan case yields no profiteering results and serves no public cause or public interest; besides, it leads to disintegration of private professional institutions from government professional institutions otherwise integrated scheme achieved by judicial wisdom.

While the ink on the opinions in the TMA Pai case was yet to dry, the High Courts were flooded with writ petitions. Because, Union of India, various State governments and the educational institutions, each understood and interpreted the majority judgment in its own way as suited them. Clarifications were sought in Islamic Academy of Education v. State of Karnataka, P.A. Inamdar v. State of Maharashtra, and M. Nagaraja v. Union of India. In Islamic Academy of Education case the majority of the Judges have handed down the following opinions in order to erase doubts unaided professional educational institutions both minority and non-minority sought clarifications from the Supreme Court:

1. In unaided professional institutions there will be full autonomy in their governance. However, the principle of merit cannot be sacrificed, as excellence in profession is in national interest.

2. The management can be given certain discretion in admitting students.

3. The management’s quota for admitting students at its discretion shall be subject to satisfying the test of merit based admissions, which can be achieved by allowing management to pick up students of their own choice from out of those who have passed the common entrance test conducted by the State or by some centralised mechanism devised by the State or by an association of similarly placed institutions in the State.

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46 AIR 2003 SC 3724
47 AIR 2005SC 3226.
48 AIR 2007 SC 71.
4. The State can provide for reservation in favour of financially or socially backward sections of the society.

5. The minority unaided educational institutions cannot hold their own admission test.

6. The prescription for percentage of allotment of different quotas, namely, management seats, State’s quota, appropriated by the State for allotment to reserve categories, etc., has to be done by the State in accordance with ‘local needs/interests’ and ‘local needs’ of that minority community in the State, and both deserving paramount consideration.

7. To ensure fairness in fees structure as well as in the conduct of common entrance test by the association of colleges, it was imperative for the State governments to appoint a permanent committees headed by retired High Court Judge(s) who shall be nominated by the Chief Justice of that State along with other two members, one member C.A. and another a representative of AICTE or MCI or other technical education as the case may be, in this perspective.

It may be submitted that the Islamic Academic case adds more riddles than solving the riddle confounded by TMA Pai case. As such, the unsettled and un-clarified questions in the abovementioned cases again came up for clarification in P. A. Inamdar v. State of Maharashtra\(^{49}\) before a Bench of seven Judges. The seven Judges Bench did not incline to pronounce their own independent opinion since judicial opinion in TMA Pai case was given by a larger Bench, and as such only inclined to clarify the doubts in TMA Pai case. In Pai Foundation case the aggrieved persons were classified in one class, that is, unaided minority and non-minority institutions imparting professional education. The judicial opinion compared the contrive between Pai’s case and Islamic case and it was unanimous on the view: Pai Foundation is unanimous on the view that right to establish and administer an educational institution as enjoined in Article 30(1) comprises of the right (a) to admit students; (b) to set up a reasonable fee structure; (c) to constitute a governing body; (d) to appoint teaching and non-teaching staff; (e) to take action if there

\(^{49}\) AIR 2005 SC 3226
is dereliction of duty on the part of any of the employees; (f) the minority educational institutions would like to exercise their right under the protection of Article 30(1) in the form of “to their hearts content”, an expression ‘of their own choice’, and “to their hearts content” approach shall be compatible to any reasonable controls/restrictions/regulatory measures/limitations which are in national interests based on considerations such as public safety, national security, national unity and integrity aimed at preventing exploitation of students and teaching community; (g) the urge or need for recognition and affiliation is imperative inasmuch as to ensuring merit, excellence of education, quality of faculty, existence of infrastructure sufficient for its growth, and preventing maladministration as obstacle in the good governance, because right to administer does not include right to mismanagement; (h) recognition and affiliation of minority educational institutions by the State is a form of regulatory measure to regulate or control admissions in such unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions, and as such this would indeed amount to nationalisation of seats which is explicitly disapproved, and as such judicial policy of disapproved cannot be reversed to make it approved; (i) imposition of quota of State or enforcing reservation policy of the State on available seats in unaided professional institutions are acts of serious intrusion on the right and autonomy of private professional educational institutions and such appropriation of seats is not within the domain of regulatory measures within the meaning of Articles 30(1) and 19(6); (j) private educational institutions, which cherish as their sole aim to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy or ‘quota reservation policy’ or ‘set sharing quota’ or ‘state quota seats’ or ‘management seats’ or ‘consensual arrangements between unaided private professional educational institutions (both minority and non-minority) and the State on the basis of local needs’ to less meritorious students certainly runs counter to the basic premise norms; (k) unaided educational institutions can have their own admissions if it is fair, transparent, non-exploitative and based on merit, and as such the State regulation ought be minimal and only with the rational object to maintain fairness and transparency in admission procedure and to check
exploitation of students by charging exorbitant money or capitation fees; (l) NRI category is a misnomer and under this category less meritorious students, who can afford to bring more money, get admission and as such a limited reservation of NRI seats, not exceeding 15%, may be made available to NRIs depending on the discretion of the management provided such seats should not be given a complete go-by, and the amount of money, in whatever form collected from such NRIs, should be utilized for benefiting economically weaker students of the society, whom, on well defined criterion; (m) a suitable legislation or regulation relating to NRIs needs to be framed lest such quota is misutilised or any malpractice makes inroad; (n) a well recognised agency is imperative to conduct Common Entrance Test (CET) that enjoys utmost credibility as well as expertise in the matter to save the students from harassment and exploitation; (o) it is imperative to provide a centralized and single window procedure to regulate admissions to promote merit, achieve excellence and curb malpractice; (p) every institution is free to devise its own fee structure but the same must be regulated in the interest of preventing profiteering; and (q) no capitation fee can be charged.

93rd Constitutional amendment has introduced Art. 15(5), which empowers the ‘State’ to make appropriate laws for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred in Article 30(1). Simultaneously, the Tamilnadu government puts its Reservation legislation under IX Schedule of the Constitution of India; and the enactment of Act No. 5 of 2007 by Parliament of India that provided for reservation of 15 % seats for SCs, 7.5% seats for STs and 27% for Other Backward Classes in Central Educational Institutions.

All this led to the conviviality in Ashok Kumar Thakur v. Union of India. A Constitution Bench of 5 Justices reviewed the reservation policy and explained the concept of affirmative action by revisiting TMA Pai case. “Reservation as an affirmative action is required only for a limited period to bring forward the socially and

50 Supra note. 21
educationally backward classes by giving them a gentle supportive push. ... If reservation is continued, the country will become a caste divided society permanently. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut. Any provision for reservation is a temporary crutch and such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society".  

The ratio is: (a) Principle of creamy layer is applied not as a general principle of reservation but for the purpose of identifying the socially and educationally backward classes; (b) legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground; (c) validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law; (d) establishment and running of an educational institution falls under the right to an occupation and right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution, reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of a unaided institution; (e) once a candidate graduates from a university, is said to be educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution; (g) if reservation is education is to stay, it should adhere to a basic tenet of Secularism, namely, it should not take caste into account; as long as caste is a criterion, a casteless society will never be achieved.

In the backdrop of the above ratio, it seems that the Apex Court of India strives to explain the constitutional vision-mission of a casteless egalitarian Indian society in the right perspective. Alas! Our policy makers do start thinking alike to achieve avowed constitutional goals. Reservation of posts in public employment under Article 16(4) (both

51 Id., p.717 para 666
in Central and State governments jobs) has not remained untouched from constitutional conviviality. In *Indira Sawhney v. Union of India* the Supreme Court upheld implementation of separate reservation for other backward classes in Central government jobs, but ordered to exclude ‘creamy layer’ of other backward classes from enjoying reservation facilities. It also ordered to restrict reservations within 50% limits. It unhesitatingly declared separate reservations for ‘economically poor among forward castes’ as invalid. However, in *General Manager, Southern Rlys. v. Rangachari*, *State of Punjab v. Hiralal* and *Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India* the Supreme Court opined that reservation of appointments or posts under Article 16(4) included promotions, but this was overruled in *Indira Sawhney’s case* in which it was held reservations rule cannot be applied in promotions. By 77th Constitution amendment [inserted Article 16(4A)] and 81st Constitution amendment [inserted Article 16(4B)] have been introduced to invalidate the judgment holding that reservations cannot be applied in promotions. In *M. Nagraj v. Union of India* the Supreme Court held the amendments constitutional and observed: (1) Article 16 (4A) and (4B) flow from Article 16(4); (2) the constitutional amendments do not alter the structure of Article 16(4); (3) backwardness and inadequacy of representation are the controlling/compelling reasons for the State to provide reservations keeping in mind the overall efficiencies of State administration; (4) government has to apply cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service; roster has to be post specific with inbuilt concept of replacement and not vacancy based; (5) if any authority thinks that for ensuring adequate representation of backward class or category, it is necessary to provide for direct recruitment therein, it shall be open to do so; (6) backlog vacancies to be treated as a distinct group and are excluded from the ceiling limit of 50%; (7) if a member from reserved category gets selected in general category, his selection will not be counted

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53 AIR 1962 SC 36
54 AIR 1971 SC 1777.
55 AIR 1981 SC 298.
57 Supra note 45.
against the quota limit provided to his class and reserved category candidates are entitled
to compete for the general category posts; (8) the reserved the reserved candidates; (9)
each post gets marked for the particular category of candidate to be appointed against it
and any subsequent vacancy has to be filled by that category alone (replacement theory as
an evolution in R.K. Sabharwal v. State of Punjab\textsuperscript{58} ; (10) the operation of a roaster, for
filling the cadre-strength, by itself ensures that the reservation remains within the 50%
ceiling/limit. On consequential seniority, the Supreme Court in \textit{Suraj Bhan v. State of Rajasthan}\textsuperscript{59} held that in view of \textit{M. Nagraj case}, if the State wants to frame rules with
regard to reservation in promotion and consequential seniority it has to satisfy itself with
quantifiable data, that is, there is backwardness, inadequacy of representation in public
employment and overall administrative inefficiency and unless such an exercise was
undertaken by the State government the rules in promotions and consequential seniority
cannot be introduced.

\textbf{Critique}

Reservations seen from human rights perspectives regime today, reverse discrimination
appears to be a well articulated strategy to achieve factual equality in the society. But,
caste status thinking and a high degree of suspicion among groups and classes can stultify
growth. Social change only helps when economic progress reaches all segments of the
society without discrimination Endeavours should be addressed in ameliorating the social
conditions of the underserved/underprivileged/marginalised classes of citizens. Recent
judicial policy pronouncement shows that egalitarian society can be achieved only with
the high social, economic and political interaction.

Upliftment of the underserved/underprivileged/marginalised is the obligation of the
State actors. Reservation and special privileges for them strive to achieve a noble goal
of an equal society by ensuring to them a fair deal to live with self dignity. Have we
achieved their aspirations as per the expectations of our policy goals? Is there visible
decisive or radical change in the depressed class of the people? These questions stir the

\textsuperscript{58} AIR 1995 SC 1371
\textsuperscript{59} AIR 2011 SC 874.
conscience of the mankind in the Indian State, which cherishes to strive to achieve an egalitarian Indian Society in reality.