CHAPTER-5

Administrative Action vis-à-vis Social Justice

Administrative action is a comprehensive term in practice and defies exact definition. In modern times the administrative action is a by product of intensive form of government which cuts across the traditional classification of governmental powers and combines into one all the powers which were traditionally exercised by three different organs of the state. On the whole, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and it is based on subjective satisfaction where decision is based on policy and expediency.

Here ‘administrative action’ is used in the context of implementing the constitutional and statutory safeguards as well as special measures meant for a certain classes of people viz SCs/STs or Dalits and OBCs, all Minorities, women etc. and one needs to assess that after long back of 62 years of adoption of the Constitution of India, how far the administrative efficiency has reached its ultimate goal of ‘social justice.’

Social justice is a destination of the Indian Republic, though in reaching that goal there could be many problems and in the same way they are to be solved as per the mechanism provided by the Constitution. Broadly it is felt that Social Justice is a device to mitigate the same sufferings of have-nots. Fulfillment of demand therefore is always contingent to the social conditions. Reconciliation between the demand and conditions normally arranged by law. In other words Social
Justice means justice which serves the cause of the society at large without doing harm to the individual in their enjoyment of civil, constitutional and other statutory rights. However, what is social justice and how the concept of social justice is in drained and mingled up with the concept of ‘Equality’ in the Constitution of India is already discussed in chapter 3 of this research study.

The political structure and system under the Indian Constitution envisages a federal democratic form of government based on the values of equality, social justice and republicanism. It provides a frame work for the attainment of its social and economic goals. It envisages a State-centric welfare government. Fundamental Rights and Directive principles of state policy are conscience of the Constitution of India. State has social obligation.

5:1 Progress towards Social Justice and Administrative action:

The Preamble to the Constitution accords primacy to Justice-social, economic and political, in the making of the state policy and in state action. Accordingly an impressive array of legislative enactments and executive orders have provided a firm legal frame work for government action to abolish the most outrageous aspect of the caste system viz untouchability, to anchor in law the scheme of reservation for the Scheduled Castes and Scheduled Tribes in political institutions of governance, and to provide for reservations in Government services and educational institutions, to reform land relations in order to enable the weaker sections, predominantly belonging to the Scheduled Castes and
Scheduled Tribes, to access productive assets so that they work with freedoms and dignity, to provide financial and organizational resources for the Scheduled Caste and Scheduled Tribes, children to receive elementary, secondary and higher education, to prevent and penalize atrocities, to allocate plan resources under specially designed scheme for economic, educational and social development of the Scheduled Castes and Scheduled Tribes. Hence, all these are some of the segments of administrative action for the end of and in the name of social justice.

Accordingly, despite the Fundamental Rights, Directive Principles of State Policy and special constitutional safeguards for certain classes in part XVI of the Constitution, some other statutes like the Protection of Civil Rights Act, 1955, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 etc and many more state legislations are in operation till date for this end.

Administrative actions are those actions that the regulatory authority can take and enforce. So, here need to discuss how the government and administration has taken the plight to proceed with the constitutional goal to uplift the so-called downtrodden and disadvantaged people to the main stream of national life, sharing the progress and prosperity in nation building. It is also indispensable that without the judicial review over the governmental and executive power, there is large apprehension of misuse and excessive use of power by them. So, in the following way the administrative actions are put forth since independence within the constitutional
parameters, for ensuring social and legal justice to the under privileged and backward classes.

5:2 Types of Reservation:

Many things have changed since India’s independence and adoption of the Constitution. Keeping pace with the Constitutional setup the reservation system riddle with various types. Seats in educational institutions and jobs are reserved based on variety of criteria. The quota system sets aside a proportion of all possible positions for members of a specific group. Those not belonging to designated communities can compete only for the remaining positions, while members of the designated communities can compete for all positions (reserved/open). Thus the types of reservation may be –

a) Caste based: Seats are reserved for Scheduled Caste, Scheduled Tribes and Other Backward Classes (based chiefly on caste at birth) in varying ratio by the Central Government and State Government. This caste is decided based on birth and can never be changed. While a person can change his religion and his economic status can fluctuate, the caste is permanent. Now according to the 2001 census, there were over 250 million Scheduled Caste and Scheduled Tribes people who were entitled to benefits provided under the special provisions of the Constitution, of these Scheduled Caste alone number some 166 million and Scheduled Tribes number some 84 million.*1

*1 Competition success review, August 2010, P-95
b) **Gender based**: Women are being given special status by the Constitution itself. Accordingly women get 33% reservation in Gram Panchayats and Municipal Elections. Now there is a long term plan to extend this reservation to Parliament and Legislative Assemblies. The women’s Reservation Bill was passed by the Rajya Sabha on 9th March 2010, and now it will go to the Lok Sabha and if passed and assented by the President of India it will become law.

c) **Religion Based**: The Tamil Nadu Government has allotted 3.5% seats each to Muslims and Christians, thereby altering the OBC reservation to 23% from 30% since it excludes persons belonging to OBC who are either Muslims or Christians. The Governments arguments is that this sub-quota is based on the backwardness of the religious communities. The Andhra Pradesh administration has a law enabling 4% reservation for Muslims. This has been contested in Court. Kerala Public Service Commission has a quota of 12% for Muslims, as religious minority quota. The Central Government has listed a numbers of Muslim communities as backward Muslims, making them eligible for reservation.\(^{2}\)

d) **State of Domicile**: With few exceptions, all jobs under State Government were reserved to those who are domiciles under that Government.\(^{3}\)

e) **Other Criteria**:

i) Son, daughter, grandson and grand daughter of Freedom fighters.

ii) Physically handicapped.


\(^{3}\) Ibid.
iii) Sport personalities.
iv) Non Resident Indians.
v) Those who have served armed forces (Ex-serviceman quota)
vi) Those born from inter-caste marriage etc.

5:3 Constitution at work for the ends of Social Justice:

The Constitution of India is loudly solicitous about the welfare of the backward classes of the Indian society; and while expressly providing for reservation of posts in the country’s public administration for two such classes, namely, the Scheduled Caste and Scheduled Tribes, it makes a general mention of similar promotional measures for what it calls ‘other backward classes’ (OBCs). Job reservation for the Scheduled Caste and Scheduled Tribes is a specific constitutional obligation on the part of the state, but it is not exactly so for the ‘Other Backward Classes.’ Historically, the Government of India has set aside, ever since the inception of the present Constitution, positions only for the Scheduled Caste and Scheduled Tribes. Extension of these benefits to ‘Other Backward Classes’ did not win the Centre’s approval until the momentous decision by the National Front Government in 1990. What the Constitution says about the OBCs is about the state’s obligation to set up a Commission to investigate the conditions of socially and educationally backward classes and the difficulties under which they labour and to make recommendations as to the steps that should be taken to remove such difficulties and to improve their condition. Two Backward Classes Commission have been set up since the enforcement of the Constitution- one under the Kaka Kalelkar
in 1953 and the other under Bindhyeshri Prasad Mandal in 1978 (reporting respectively in 1955 and 1980).

A. The Kaka Kalelkar Commission:

In deference to the postulates of Art 340 of the Constitution, the President of India appointed the First Backward Classes Commission under the Chairmanship of Shri Kaka Saheb Kalelkar on January 29th, 1953.

The Commission submitted its report on March 30, 1955. The object and terms of the reference of the Commission were to determine the criteria to be adopted in identification of socially and educationally backward classes and setting out also their approximate numbers and their territorial distribution, to investigate the conditions of all such socially and educationally backward classes. It was also to make recommendations for the steps to be taken to improve their conditions and was to present to the President a report setting out the facts as found by them.

It is pertinent to note that the Commission could not present an unanimous report. In fact, five of its members recorded minutes of dissent. Three of them Dr Anup Singh, Sri Arunangshu De and Sri P.G. Shah opposed to one of the most crucial recommendations of the report, that is, the acceptance of 'caste' as a criterion for social backwardness and reservation of posts in Government services on that basis. While Shri Kaka Saheb Kalelkar, the Chairman, took a rather
equivocal stand on this issue. Though he did not record a formal minute of dissent in his forwarding letter to the President, he opposed the acceptance of caste as the basis for backwardness.

Recommendations of the Commission:
The Commission, in its majority report, recommended a system of reservation of posts in the country’s civil service, urging at the same time that the best candidates should, as a rule, be recruited by means of competitive examination without any regard to caste considerations. In his forwarding letter, Kaka Kalelkar, the Chairman set his face firmly and resolutely against caste being made the basis of reservation in public services. Kaka Kalelkar recognized the central role of public administration in the society and favoured recruitment of only the best men available in the land. He ridiculed the practice of reservation by categorically declaring: "Reservation of posts for certain backward communities would be as strange as reservation of patients for particular doctors. The patients are not meant to supply adequate or proportionate clientele to all the doctors, whatever their qualifications." He recommended the principle of 'no reservation', but 'generous preference.' However, this was the opinion of the Chairman Kaka Kalelkar.

The Commission wanted to "dissociate caste from social backwardness at present juncture", but it felt that "our society was not built essentially on an economic structure but on the medieval ideas of birth, caste and social hierarchy. The Commission even included in the
list of backward classes those communities about whom it had no data at all and, therefore, it had to give them the benefits of doubt. This additional inclusion enlarged the list of backward castes.

The Commission recommended that before the disease of caste is destroyed, all facts about it have to be noted and classified in a scientific manner as in clinical record. It therefore, suggested that 1961 census be remodeled and reorganized so as to secure the required information.

**Special Recommendation for women:**

The Commission showed special sympathy for the women and recommended that women as a whole should be regarded as backward as the women, in India, have lived under great social hardships. It recommended some measures for the advancement of women like free education, scholarships, residential hostels and creation of special facilities for girls etc.

**Criteria for Backwardness:**

After consideration of the social conditions in Indian society and causes for backwardness of a large section of the people the Commission laid down the following test for general guidance:

1. Low social position in the traditional caste hierarchy of Hindu society.
2. Lack of general educational advancement among the major section of a caste or community.
3. Inadequate or no representation in Government service.
4. Inadequate representation in the field of trade, commerce and industry.

The Commission emphasized that the economic backwardness had also to be kept in view in order to find out the ability of the community to take advantage of the available opportunities as also the recent trends in its advancement. It underlined that the plan for economic reconstruction of the country must include measures designed for the speedy upliftment of the Backward Classes. The Government must take necessary steps to create such situation as will ensure the natural growth of these classes. The economic and social causes that were operating to their detriment should be removed. The Commission had also shorted out some root causes of social and educational backwardness and had provided some measures for eradication of those evils. The Commission, therefore, recommended that the Government must give full assistance "to promote education among the Backward Classes." In Commission's view the social inequalities and backwardness may be removed by improving the conditions of rural India. The Commission also suggested that a new Ministry for the advancement of Backward Classes should be created both at the Centre and in the States to handle in an effective manner the problems for the advancement of the Backward Classes.

The report of the First Backward Classes Commission was finally discussed in Parliament in 1965. The Central Government once
again rejected the Caste Criteria in determination of Backwardness as it was contrary to the first principle of social justice and Constitution also.

The Commission failed to suggest a positive and practicable criteria towards identification of Backward Classes. It can not be denied that Kaka Saheb Kalelkar Commission Report suffers from grave flaws of methodology and serious internal contradictions. The report was so fragmented in its conceptual design. It is not clear from the report that how the lists of Backward Classes were derived by the application of that criteria. The Commission based its conclusion on the list prepared in 1949 by the Ministry of Education for the grants of scholarship etc. to ‘Other Educationally Backward Classes’ and not for the ‘Socially and Educationally Backward Classes’ as provided in Art 340 of the Constitution. It condemned the Caste system, yet in made it a predominant factor in identification of Backward Classes. Therefore, it failed to appreciate the Government determination to create a casteless society. As such the Commission’s work was not satisfactory in making the list of Backward Classes. The Commission’s caste classification were divisive and unfitting. It applied its criteria in a casual manner. It is true that at the last minute of submission of the report the Chairman, Kaka Saheb Kalelkar did not accept the ‘caste’ as a determinative factor.

It seems that the Commission was a house divided. The members were divided on the issue whether our Constitution permitted organization of the state policy on the basis of caste rather than class, a criterion of backwardness.
Thus the First Backward Classes Commission could not provide us a practicable criteria towards identification of Backward Classes.

B. The Mandal Commission:

The Second Backward Classes Commission was set up in 1978 by the Janata Government, under the Chairmanship of B P Mandal. The Commission had five members, all but one drawn from the Backward Castes an the remaining one from the Scheduled Castes.

The terms of 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 citizens so identified.

iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and

iv) to present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

In this connection the Commission may also examine the recommendations of the Backward Classes Commission appointed earlier and the considerations which stood in the way of the acceptance of its recommendations by the Government.
In compilation of its terms of reference the Commission is to identify socially and educationally backward classes. The Commission had furnished its various valuable views on some issues connected with the terms of references like –

**Social Backwardness and Caste:**

The Commission rightly asserted that caste were the foundation stone of Hindu social structure. The division of Hindu society in a hierarchical social order of castes had been the chief characteristics of Hindu society for centuries.

The Commission has rightly held that this ritual ranking of castes has created deep-rooted vested interest in perpetuation of this system and enabled the higher castes to hold the lower castes in bondage for ages. The Commission was of the view that the old caste system of Hindu Dharma had inherent resilience and able to adjust itself to the changing social realities. However, it was affected by the rule of law introduced by the British Government, urbanization, industrialization, mass education and above all, the introduction of universal adult franchise to youths which loosened the closed caste system. But still the caste system is the main means for mobilizing politics in India. So, the Commission concluded that it would be unrealistic to assume that the institution of caste will wither away in foreseeable future.

The Commission has emphasized on well known dictum of social justice i.e. there is equality among equals. Right to equality does not mean that all persons will be treated with mechanical equality.
irrespective of the differences of their position, circumstances and conditions. Persons are unequal by their capabilities, resources, circumstances, needs and qualifications. So, a mechanical application of equality or uniform treatment to all will lead to injustice. According to the Commission the principle of equality is double edged weapon which places strong and weak on same footing in the race of life. In this connection Commission has divide equality into three parts:

a) Equality of opportunity
b) Equality of treatment
c) Equality of results.

The Commission was of the view that equality of opportunity and treatment would amount to denial of social justice because it places weak and strong people on par. But the equality of results would be the acid test of society’s egalitarian pretension.

In pursuance of its objective test for identifying ‘Other Backward Classes’, the Commission has surveyed four states viz UP, Bihar, Tamil Nadu and Karnataka. The Commission with the help of Tata Institute of Social Sciences, Bombay, made a valuable appraisal that the division of society into backward and forward was sharper in South, which was lacking in North. The Commission, thus, concluded that the southern community was divided in minority composing forward castes and majority comprising backward castes. In North the situation was more critical due to social fragmentation in upper middle
and lower classes. Peoples of Other Backward Classes in North never unified to achieve their bright perspective in comparison to South.

**Identification of Backwardness:**

The Mandal Commission has made castes and communities as the basis of identification of Other Backward Classes into Hindu society. It has given separate criterion for the identification of Other Backward Classes in other religious communities where caste does not play an important role. The Commission, apart from the caste, has also applied stigma of low occupation, criminality, beggary and untouchability to identify social backwardness. It has also taken into account the inadequate representation in Public Services as another test for identification of Other Backward Classes.

Thus, the Commission with the help of the data collected throughout the surveys had evolved 11 indicators for determining social and educational backwardness and divided these indicators into three broad heads- social, educational and economic.

**A. Social Indicators:**

The social indicators included:

i) Caste/classes considered as socially backward by others.

ii) Castes or classes mainly depended upon manual labour for their livelihood.
iii) Castes/classes where at least 25% females and 10% males above the state average get married at an age below 17 years in rural areas and at least 10% females 5% males do so in urban areas.

iv) Castes/classes where participation of female in work is 25% above the state average.

B. Educational Indicators:
   i) Castes/classes where the number of children in the age group 5-15 years who never attended schools is at least 25% above the state average.

   ii) Castes/classes where the rate of student dropout in the age group 5-15 years is at least 25% above the state average.

   iii) Castes/classes where the proportion of matriculates is at least 25% below the state average.

C. Economic Indicators:
   i) Caste/classes where the average value of family assets is at least 25% below the state average.

   ii) Castes/classes where the number of families living in kuccha houses is at least 25% above the state average.

   iii) Castes/classes where the source of drinking water is beyond half a kilometer for more than 50% of the household.
iv) Castes/classes where the number of household having taken consumption loan is at least 25% above the state average.

The Commission has examined the following sources for the preparation of the list:

i) Socio-educational field survey.

ii) Census Report of 1961 with regard to tribes and other such persons.

iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences; and

iv) List of Other Backward Classes notified by various State Governments.

The Commission emphasized that the criteria for identification of Other Backward Classes must be a collective one and not individual. Such collectivities could be caste or other hereditary groups traditionally associated with specific occupations which were considered to be low and impure and with which educational backwardness and low income strata were associated.

After making a deep study of the problem, the Commission came to the conclusion that excluding the Scheduled Caste and Scheduled Tribes, the population of Hindu and Non-Hindu Other Backward Classes was nearly 52% of the country's population while
Scheduled Castes and Scheduled Tribes constituted 22.5% of total population of India.

**Recommendations of the Commission:**

The Commission was of the view that an essential part of the Battle against social backwardness is to be fought in the minds of backward people. By increasing their representation in Government service, the Commission gave them an immediate feeling of participation in the governance of the country. The Commission realized that major benefits of reservation and other welfare measures for Other Backward Classes would be cornered by the more advanced sections of the backward communities. The chief merit of reservation, according to the Commission was that it would erode the hold of higher castes on the services and enabled Other Backward Classes in general to have a sense of participation in running the affairs of our country.

**Quantum of Reservation:**

The Commission wanted to introduce 52% reservation in the Government service for the Other Backward Classes as their population constituted 52% of the total population of the country. The reservation of 22.5% made for Scheduled Caste and Scheduled Tribes as their population constituted 22.5% of the country’s population. Taking into account the legal constraint set by Supreme Court i.e. total quantum of reservation should be below 50%, the Commission was obliged to recommend a reservation of 27% only for Other Backward Classes. The
Commission proposed the following overall scheme of reservation for the Other Backward Classes:

1) Candidates belonging to OBC recruited on the basis 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 for a period of three years and de-reserved thereafter.

4) Relaxation in upper age limit for a direct recruitment should be extended to the dates of OBC as in the case SCs and STs.

5) A roster system for each category should be adopted in the same manner as in case of SCs and STs.*4

Thus, the above scheme of reservation should be made applicable to all recruitments to public sector undertakings both under the Central and State Governments, as also to Nationalized Banks.*5

And all private sector undertakings which have received financial assistance from the Government should also be obliged to recruit personnel on the aforesaid basis.*6

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* 5 Ibid
* 6 Ibid
A critical study of the report of Mandal Commission produces some startling results. Firstly, Mandal Commission does not use any other criterion than the caste for identification of Other Backward Classes. Though it had laid down 11 criteria to be applied in the identification process it failed to apply other ten criteria evolved by it in that process.

Secondly, the Commission has equated caste with class. It has criticized the Supreme Court's view expressed in Balaji's case\(^*7\) and has said that the Balaji dictum that caste can not be equated with class is most conservative view on the relevance of caste for determining social backwardness and on synonymity between caste and classes.

\textbf{The Commission uses the caste criterion in two ways :}

i) Caste as corporate unit and a basis of classification.

ii) Caste as a symbol of status to be identified as backward.

However, the Commission did not have before it the caste wise current data of Indian population. It accepted the data made available in 1931 Census which had prepared caste wise figures. There is vast gap between 1931 and 1979 and on the basis of the data prepared 48 years ago can hardly provide a scientific basis for a scientific classification on the basis of castes and communities of the Other Backward Classes.

\* 7 M.R. Balaji-vs-State of Mysore AIR 1963 SC 649
Thirdly, the Commission also could not appreciate the difference in the growth rate of population of 'Urban' and 'Rural' Other Backward Classes. The effect of migration from rural to urban areas, the conversion to other religion raising status among Backward Classes and other factors with regard to Other Backward Classes population have not been taken into account by the Mandal Commission.

Lastly, it has also failed to include economic criteria for identification of Other Backward Classes. Thus, the Commission does not present before us the real picture of Other Backward Classes.

Therefore, though the Mandal Commission bears the nomenclature of 'Backward Classes Commission' its report does not define the term 'class' and assumes quite innocently, that class means castes. The Constitution does not make caste as the basis of reservation, what it talks about is economic and educational backwardness. Mandal, however, believed that "the substitution of caste by economic test will amount to ignoring the genesis of social backwardness of the Indian society." In other words in his hand 'class' became 'caste'. 'Class' is a socio-economic phenomenon and admits of mobility, while caste is static, and is determined by an ascribable factor like birth. The Supreme Court of India has rightly refused to treat caste as the sole basis of reservation unless it is a Scheduled Caste for which reservation is a Constitutional obligation. In its decision in State of Madras-vs-Champakam Dorairajan.* The Supreme Court of India held the

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* 8 AIR 1951 SC 226
opinion that the Government action in regard to reservation of posts is invalid on the ground that it was based on religion, race and caste only. In other words, caste was not to be sole criterion for determining backwardness.

This Second Backward Classes Commission submitted its report on 31st December, 1980. It had identified as many as 3743 castes as socially and educationally backward classes and recommended for reservation of 27 percent Government jobs for them as mentioned earlier.

As it is well known that the Mandal Commission had been set up by the Morarji Desai Janata Government of 1978. But in the meantime the Janata Government collapsed and the Congress Party headed by the Prime Minister Smt. Indira Gandhi came to power at the center. The Congress Government did not implement the Mandal Commission Report till 1989. In 1989 the Congress Party was defeated in Parliamentary elections and the Janata Dal again came to power and decided to implement the Commission’s report. Accordingly, V.P. Singh, the then Prime Minister issued the Office Memoranda (called O.M.) on August 13, 1990 reserving 27 percent jobs for socially and educationally Backward Classes in Central Government services and public sector under takings, on the basis of the recommendations of the Mandal Commission.
5.4 The Mandal Case (Indra Sawhney vs-UOI) : Basic Law of Reservation

V.P. Singh’s announcement and the acceptance of the report of the Mandal Commission was nothing but a short of bomb shell which threw the Nation into turmoil and a violent anti-reservation movement rocked the nation for nearly three months resulting in huge lost of persons and property. A writ petition on behalf of the Supreme Court Bar Association was filed challenging the validity of the office Memoranda (O.M.) of Prime Minister V.P. Singh’s tenure and for staying its operation. The five Judges Bench of the Court stayed the operation of the OM till the final disposal of the case on October 1, 1990. Unfortunately, the Janata Government again collapsed due to defections and in 1991. Parliamentary elections the Congress party again came to power at the Centre.

The Congress Party Government headed by P.V. Narsinha Rao issued another O.M. on September 25, 1991, but made two changes in the O.M. of Janata Dal Government issued on August 13, 1990; (i) by introducing the economic criterion in granting reservation by giving preference to the poorer sections of SEBC (Socially and Educationally Backward Classes) in the 27% quota and (ii) reserved another 10% of vacancies for other SEBC economically backward sections of higher castes. The economic criterion was to be specified separately. The Five Judge Bench referred the matter to a special Constitution Bench of 9 (nine) Judges in view of the importance of the matter to finally settle the legal position relating to reservations as in several earlier judgments of Supreme Court (discussed in detail in chapter 4 of this research study).
However, despite several adjournments the Union Government failed to submit the economic criteria as mentioned in official Memoranda of September 25, 1991.

Thus in the historic case of Indra Sawhney –vs- Union of India,*9 popularly known as the Mandal case, the Supreme Court examined the scope and extent of reservation under Article 15 (4) and 16(4) respectively in detail and clarified various aspects on which there were difference of opinion in various earlier judgments. The 9 Judges Constitution Bench of the Supreme Court by 6-3 majority held that the decision of the Union Government to reserve 27% Government jobs for backward classes provided 'creamy layer' among them are eliminated, is constitutionally valid. The reservations of seats shall confine only to initial appointments and not to promotions and the total reservation shall not exceed 50 percent. Accordingly, the court partially held the two impugned notifications (O.M.) dated August 13, 1990 and September 25, 1991 as valid and enforceable but subject to the conditions that ‘creamy layer’ among Backward Classes are excluded. However, the court struck down the OM of reserving 10% Government jobs for economically backward classes among higher classes. While 50 percent shall be the rule but it is necessary not to put of consideration certain extraordinary situations inherent in the great diversity of this country and people. It is also important to note that the majority did not express any opinion on the correctness of adequacy of the Mandal Report. But the minority held the Mandal Report as unconstitutional and

* 9 AIR 1993 SC 477
recommended for another Commission for identifying the SEBC’s of citizens. The majority opinion of the Supreme Court may be summarized briefly as follows –

1. Backward Class of citizen in Art 16 (4) can be identified on the basis of caste and not only on economic basis. The majority held that a caste can be and quite often is a social class in India and if it is backward socially it would be a backward class for the purpose of Art 16 (4).

2. Art 16 (4) is not an exception to Art 16 (1). It is an instance of classification. Reservation can be made under Art 16 (1).

3. Backward Classes in Art 16 (4) are not similar to as socially and educationally backward in Art 15 (4). It is much wider. Art 16 (4) does not contain the qualifying words ‘socially and educationally’ as does clause (4) of Art 15. Hence the Backward class of citizens in Art 16 (4) takes in SCs/STs and all other backward classes of citizens including the socially and educationally backward classes.

4. Creamy layer must be excluded from backward classes.

5. Art 16 (4) permits classification of backward classes into backward and more backward classes.

6. A backward class of citizens can not be identified only and exclusively with reference to common criteria.

7. Reservation shall not exceed 50 percent.
8. Reservation can be made by ‘Executive Order’

9. No reservations in promotion.

10. Permanent statutory body to examine complaints of over-inclusion/under inclusion or non-inclusion of groups, classes and sections in the list of other backward classes.

11. Mandal Commission Report- No opinion was expressed on the correctness or adequacy of the exercise done by the Mandal Commission.

12. All objections and disputes regarding new criteria can be raised only in the Supreme Court.

The majority Judgment in the Mandal caste was welcomed by all sections of society as it was able to defuse the crisis which the nations was facing since the declaration made by the V.P. Singh Government implementing the Mandal Commission Report.

However, the Judgment of the Court in the Mandal case was criticized by an eminent jurist Nani A Palkhiwala, on the ground that it will revive casteism which the Constitution of India emphatically intended to end. The Constitution itself does not make ‘Caste’ as the basis of reservation. He had supported Dr. Ambedkar’s words who also opposed to caste discrimination in matters of reservation.
It should be remembered that reservations are part of a much larger policy package. It comprises a series of legislation, ameliorative programmes and preferential schemes, designed to benefit the weaker sections of society. The package has evolved over a long period of time and has been administered by the Central as well as the State Governments. Although the history of these policies dates back to the first decade of this century, the present set of policies derive their legal status and legitimacy from the Indian Constitution.

As has been discussed above, the Mandal case decision has laid down a workable and reasonable solution to the reservation problem and set a well founded basement for administrative action in the name of ‘social justice’ for the sake of preferential treatment of certain classes.

After the landmark judgment of the Indra Sawhney’s case (Mandal case), the politicians were still trying to dilute the effect of Mandal decision in order to make their ‘Vote Bank’ rich. Though the Court has laid down that there shall be no reservations in promotions in Government jobs, but the Government has enacted the Constitution 77th Amendment Act 1995 in order to bypass the Court’s ruling on this point. This amendment has added a new clause (4-A) to Art 16 of the Constitution and thus reservation in promotion in Government jobs will be continued in favour of SCs and STs, if the Government wants to do so. It has nullified the effect of the decision of the Supreme Court given
in Mandal case. But there was no demand for it from any section of SCs and STs. In view of this, the amendment for reservation in promotions is hardly justified.

Thus, since Indra Sawhney’s case till date, in so many times the Supreme Court of India has to intervene again and again in the administrative action for reservations. There are so many instances of judicial intervention for upholding constitutional and judicial limits set by Supreme Court regarding the affirmative action for the special classes i.e. SCs/STs and OBCs and most of those cases have already been dealt with in detail in the proceeding chapters of this research study. Thus the Indian Judiciary has pronounced some judgments upholding reservations and some judgments for fine tuning of its implementations (discussed in the proceeding chapter with relevant Articles). Lots of judgments regarding reservations have been modified subsequently by the Indian Parliament through constitutional Amendments (discusses in the proceeding chapter)

5:5 Some Administrative Actions and the goal of Social Justice:

Despite the various National Commission for Scheduled-Castes, Scheduled Tribes and Other Backward Classes, the Government of India has entrusted the task of welfare of the Scheduled Caste, Scheduled Tribes, Minorities and Other Backward Classes to the Ministry of Social Justice and Empowerment which was previously known as Ministry of welfare. The Ministry is mainly entrusted with the task of empowerment of the SCs/STs and OBCs among the others and it
performs its tasks through various legislations, schemes and activities of educational and economic development and social empowerment.

The Government, whether central or state push forward its constitutional goal of justice, whether social, legal, political, principles of non-discrimination and equality in deed within the constitutional parameters. And if it transgresses the constitutional limit the same will be treated as violation of basic features of the Constitution.

The term ‘Social Justice’ as discussed in the previous chapters figures right in the Preamble to the Constitution, which mentions securing to all citizens, justice- social, economic and political as the first four goals of the Constitution.

This goal as set forth in the Preamble is supported by the subsequent provisions of the Constitution which are already discussed in the preceding chapter 4 in detail. Despite the absolute provisions of the Constitution. Part IV of it lays down certain Directive Principles of State policy which are nevertheless fundamental in the Governance of the country and which shall be the duty of the State to apply in making laws. The very first Directive Principle (Art 38) directs the state to promote the welfare of people by securing and protecting a social order in which justice-social, economic and political shall be enjoyed by all in
the national life. Thus, Articles 38, 41, 46 and 47*10 in Part IV (Directive Principles of State Policy) of the Constitution of India are specially relevant for administrative action towards the goal of social justice and which the Govt. should strive to achieve.

In brief the administrative work of the Government in regard to affirmative action for certain classes of people like Scheduled Caste, Scheduled Tribes, Other Backward Classes and the women, who are always considered to be the most vulnerable groups in our society centers round the following safeguards.

1) Social Safeguards:

Art 17 of the Constitution abolishes untouchability, forbids its practice in any form and declares enforcement of any disability arising out of ‘untouchability’ to be an offence punishable in accordance with law.

2) Educational and Public employment related safeguards:

The following Articles of the Constitution enables reservation for SCs/STs and OBCs in admission to educational institutions and in public employment:

* 10. Art. 38 : State to secure a social order for the promotion of welfare of the people.

Art. 41 : Right to work, to education and to public assistance in certain cases like unemployment, old age, sickness and disablement etc

Art. 46 : Promotion of Educational and Economic interest of Scheduled Castes, Scheduled Tribes and other weaker sections.

Art. 47 : Duty of the state to raise the level of nutrition and the standard of living and to improve public health.
3) Political Safeguard:

The following Articles provide for reservation of seats for Scheduled Caste, Scheduled Tribes and women too in elections to various bodies. (Discussed detail in previous chapters)

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<th>Articles</th>
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Again in the nodal of administrative action, for the protection of rights and liberties of the SC’s, ST’s and OBCs, the Government of India sets forth its action plan for the implementation of the following Acts –

A. Agencies for monitoring safeguards:

Articles 338 of the Constitution of India provides for the constitution of a National Commission for Scheduled Castes and Art. 338 (A), added by the Constitution 89th Amendment 2003 provides for the establishment of a National Commission for the Scheduled Tribes. These Commissions will investigate and monitor all matters relating to the safeguards provided for them in the Constitution and under various statutes related to them. And for Backward Classes National Commission for Backward Classes (NCBC) Act was enacted in 1993.

The Parliamentary Committee on the welfare of the Scheduled Castes and Scheduled Tribes in its Fourth Report (2006-2007) had inter-alia recommended that Ministry of Social Justice and Empowerment, Ministry of Home Affairs, National Commission for the Scheduled Caste and National Commission for the Scheduled Tribes should meet regularly to devise ways and means to curb atrocities and ensure effective administration of the protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. In pursuance of this recommendation, a committee for effective co-ordination to devise ways and means to curb offences of untouchability and atrocities against SCs and STs and effective implementation of two Acts was set up under the Chairpersonship of Minister of Social Justice and Empowerment in March 2006. The Committee has so far held 9 (Nine) meetings wherein 25 states and 4 Union Territories have been reviewed.
The Ninth meeting of the committee was held on 06-02-2010, to review implementation of the two Acts in Gujrat.*

In spite of these monitoring mechanisms, yet we come across rampant casteism and are witness to its practice in various forms in our day-today lives. Atrocities in the name of caste is disturbing and the states should vigorously enforce the Acts to prevent the same.

B. Examples of some major Administrative action for the empowerment of SCs, STs and OBCs during 2009-10

I. Scheduled Castes an Scheduled Tribes:

⇒ In the year 2009-10, more than 2000 crore i.e. more than 75% of the respective Ministry’s total Annual plan was allocated for the development of Scheduled Caste and Scheduled Tribes. As such various schemes were launched in their favour for their educational and economic upliftment.

⇒ In pursuance of the announcement by the Finance Minister in his Budget speech, 2009-10, the Ministry initiated a proposal to launch a new Centrally-sponsored scheme "Pradhan Mantri Adarsh Gram Yojana (PMAGY), on pilot basis in 1000 villages having more than 50% SC population during 2009-10. The proposal is now being processed for the approval of the Government.*

* 11 ANNUAL REPORT, 2009-10, Ministry of Social Justice and Empowerment. Govt. of India P-46
* 12 Ibid P-10
A scheme of "Top Class Education" for SC students is being implemented since 2007-08 under which SC students studying in selected premier institutions (like IITs, IIMs, NITs etc) are given liberal scholarships. The list of institutions, covered under the scheme was revised in 2008-10, raising their number from 125 to 177.\footnote{13}

A High Powered Committee under the chairpersonship of the Minister (SJ&E)\footnote{14} had completed review of 25 States and 4 Union Territories up to 2008-09 in regard to implementation of the protection of Civil Rights (PCR) Act 1955 and the SCs and STs (prevention of Atrocities) Act, 1989. In 2009-10, the Committee held review meeting at Gandhi Nagar on 6-2-2010 and reviewed the implementation of the two Acts in the State of Gujrat. This followed by review of implementation of self Employment Scheme for Rehabilitation of Manual Scavengers (SRMS) in the state by the Minister of Social Justice and Empowerment (SJ&E). The Minister (SJ&E) also reviewed the implementation of protection of Civil Rights (PCR) Act and prevention of Atrocities (POA) Acts. And SRMS in Madhya Pradesh in a meeting held at Bhopal on 27-10-2009. The implementation of SRMS in the states of Assam and Meghalaya was also reviewed by the Minister (SJ&E) in Guwahati 2201-2010. \footnote{15}

\footnote{13 ANNUAL REPORT 2009-10, Ministry of Social Justice and Empowerment, Government of India P-10}
\footnote{14 SJ & E - Social Justice and Empowerment}
\footnote{15 ANNUAL REPORT 2009-2010; Ministry of Social Justice and Empowerment Government of India; p-12}
II. Other Backward Classes:

The Commission for Economically Backward Classes was constituted on 6-1-2004 to inter-alia, suggest criteria for identification of economically backward classes and to recommend the measures and quantum of reservations etc. The tenure of the Commission which was expiring on 31-07-09, was extended on its request upto 31-03-2010. What is the present position is not reported yet.

⇒ Equity Capital of Rs. 35.0 Crore was sanctioned to the National Backward Classes Finance and Development Corporation (NBC FDC) in September, 2009. With this the paid up capital of the Corporation rose from Rs. 527.35 Crore to Rs. 562.35 Crore, against its authorized share capital of Rs. 700 crore.

Thus, as a whole the Government of India, having recognized that educational and economic support for Backward Classes has not been adequate and that there is disparity between them and the non-backward sections of the people at every level, it was felt that earnest efforts are required to introduce various schemes for this group. It was envisaged that the most important initiative for improving the social and economic status of the backward communities lies in improving their access to education and training in their traditional trades. Hence, the following schemes are being implemented since 1998-99:

i) Pre-Matric Scholarship to OBC students.
ii) Post-Matric Scholarship to OBC students.
iii) Hostel for OBC Boys & girls.
iv) Assistance to voluntary organizations working for welfare of OBC’s

Further, National Backward Classes Finance and Development Corporation (NBCFDC) implement various soft loan schemes for OBC population in the country.

Besides the above stated schemes and plans the Eleventh Five Years plan of 2007-12, aims at faster and more inclusive growth for these classes. It seeks to achieve inclusiveness through significant improvements in literacy, education and health, greater employment opportunities and greater focus on disadvantaged groups. Inclusive growth connotes a growth process, which yields broad based benefits and ensures equality of opportunity for all especially the disadvantaged sections like the Scheduled Castes, Scheduled Tribes, Other Backward Classes, minorities, persons with disabilities and women.

The said XI Five Years plan, 2007-12 takes the strategy for development of Scheduled Caste, Scheduled Tribes and Other Backward Classes, in educational, economic and social development and empowerment, protective measures and reservation as such. It gives primary importance on elementary education, to encourage to prepare for various competitive examinations, fellowship for the students of these specific classes etc. For the economic development of those classes of people, importance is given on land reform laws, special programmes to reduce unemployment among these classes, and schemes
for self employment etc. The implementation of the Protective of Civil Rights Act 1955 and SC and ST (Prevention of Atrocities) Act 1989 was given utmost importance to bring about speedy justice for them. However, for caste discrimination and atrocities to end, society needs to change its attitudes towards the self created casteism. But it is easier said than done in a society where caste plays an important role.

Here, it is worth mentioning that the Scheduled Caste and Scheduled Tribes have been specified by 15 Presidential orders issued under the provisions of Article 341 and 342 of the Constitution. According to the 2001 census, about 24.40 percent of the country’s population comprised the Scheduled Caste and Scheduled Tribes. It addition, some state Governments have also specified other categories of people known as ‘Other Backward Classes’ and de-notified nomadic and semi-nomadic communities.

According to the 2001 census, there were over 250 million Scheduled Caste and Scheduled Tribes people who were entitled to benefits provided under the special provisions of the Constitution. Of these, the Scheduled Castes alone number some 166 million. The Scheduled Tribes number some 84 million. Most of them are in the states of Madhya Pradesh (12.2 million) Maharashtra (8.5 million) Orissa (8.1 million), Gujrat (7.4 million), Rajasthan (7 million), Jharkhand (7 million), Chhattisgarh (6.6 million) and Andhra Pradesh (5 million).
The Backward Classes, which include the ex-criminal tribes, have not been precisely defined yet. As mentioned earlier, Art 340 of the Constitution provides that the President may by order appoint a Commission to investigate the conditions of socially and educationally backward classes and to make recommendations as to the steps that should be taken by the Union or any state to improve their conditions.

After Mandal Commission, in the landmark judgment of Indra Sawhney’s case the Supreme Court had also directed that a statutory Commission be set up to which complaints of “under inclusion over inclusion or non-inclusion” of classes and sections in the list of backward classes could be made. Accordingly, the National Commission of Backward Classes (NCBC) Act was enacted in April, 1993. As per section 2 of the NCBC Act, Backward Classes of citizens, other than the Scheduled Castes and Scheduled Tribes, as may be specified by the Central Government in the list.

For the above purpose, section 2 also defines ‘List’ as lists prepared by the Central Government for providing reservations in appointments to backward classes of citizens, which in opinion are not adequately represented in services, “under the Government of India and any local or other authority” section 11 of the Act, entrusts the Central Govt. to undertake the revision of the lists at the expiration of 10 years from the date of coming this Act into force and every succeeding period

* 16 AIR 1993 SC 477
of ten years. The Central Government, is required to consult the NCBC while undertaking such revision.

**Central Lists of Other Backward Classes:**

In pursuance of the Supreme Court’s judgment in Indra Sawhney-vs-UOI (AIR 1993 SC 477) case, the Department of Personnel and Training Vide its OM dated 8-9-1993 inter-alia, directed that the OBC would comprise, in the first phase, the caste and communities which are common to both the lists (i.e. in the report of the Mandal Commission and the State Government lists). Accordingly, the First Central List of OBC was issued vide Resolution dated 10-09-93 of the then Ministry of Social Welfare in respect of 14 states. List for another 7 states and 4 Union Territories were issued by the then Ministry of welfare vide Notifications dated 19-10-1994 and 24-5-1995 respectively.

Since the first notification of the common list on 10-09-93 and the Constitution of the NCBC in August, 1993, till date such entries (by way of castes, their synonyms, sub caste etc) have been notified in the Central List of OBCs through 24 resolutions for 22 states and 6 Union Territories. On the advice of the NCBC, the Central Government makes changes in the Central List of OBC from time to time as mentioned above. However, caste wise census was discontinued after the 1931 census. Hence, census data is not available on population of OBC in the century. However, the Mandal Commission had estimated OBC population at 52% of the total population while the National
sample survey organizations, based on its 61st round survey (2004-05), has estimated it to be 41% as stated in its Report “Employment and unemployment situation among Social Groups in India”.

5.6 Revision of Income Criteria for Creamy Layer during 2008-09:

As per Supreme Courts judgment in Indra Sawheny’s case*17, ‘Creamy Layer’ is excluded from the reservation benefits available to OBC’s. Detailed criteria for defining ‘Creamy Layer’ are laid down in the O.M. of dated 8-9-93, which lay down the following six categories to whom the rule of exclusion will apply, which have been discussed clearly in the preceding chapter. They are –

i) Constitutional Posts.

ii) Service Category

iii) Armed Forces including Para-Military Forces.


v) Property owner and

vi) Income/wealth tax payee.

In the last category, income ceiling specific in the said O.M. dated 8-9-93 was Rs. 1 Lakh per annum. This was revised to Rs. 2.5 Lakhs per annum in 2004 which has further been again revised to Rs. 5 Lakhs per annum in October 2008, on the recommendation of NCBC.

* 17 AIR 1993 SC 477
Lack of appropriate active action coupled with exploitation of situations to their personal advantage by a few opportunities have made a mess of the entire social justice delivery mechanism and its infrastructure with an obvious result of greater social injustice. Mere policy and scheme formulations are not enough. In order to obtain a positive results of those schemes and to herald a change of mind is required to get the intents and purpose of these schemes.

Again the administrative officers of the British days were almost rulers whereas in regard to the present day set of bureaucrats holding high positions, have not been able to deliver goods to the society as per its expectations and often they have been used as tools by the higher ups. Without an efficient corruption free executing machinery, the concept of social justice is a misnomer. Again whatever the scheme may be and howsoever large may be in number, it can not achieve its cherished goal unless and until social awareness proceeds the literal implementation of any project meant for the common masses.

Therefore, all the efforts till the present day from every corner of our society as a whole and in some states particularly, every now and then cases are being reported regarding atrocities and torture upon the SCs/STs and OBCs. Is it really reflect that law is law in its own place and India really need a continuous process and procedure to curb the evil of caste discrimination or everything is cooked up drama to politicize the 'caste' factor for political gain only. The inclusion of 'caste' factor in census 2011 proves the same philosophy of our
Legislators who are actually political leaders of the country, on the contrary of being people's representatives. Thus, 'Caste' continues to be a pervasive marker of identity in Indian society today.

At last but not the least, the Ministry of Social Justice and Empowerment has some monitoring mechanisms by which the performance of different schemes is monitored through the quarterly, annual progress reports furnished by the state Government and Union Territories Administrations. Periodic review meetings are held in the Ministry from time to time. It also organizes the Annual Conferences, where in all the schemes of the Government are reviewed. States and Union Territories have also been advised to strengthen their monitoring mechanism.

Therefore, if proper monitoring and evaluation is done, then it will be easy for the Nation as a whole to achieve its goal of social justice in respect of uplifting the so-called downtrodden people and most particularly the SCs/STs and OBCs. And at the same time it is also questionable and to be ascertained that even after 62 years of independence how far we are left to achieve that goal.

However, from the study above it can be ascertained that administrative action for social justice in India seems to be diplomatic versions of the political leaders or people's representatives who seats in the Parliament for law making and delegated the task to the bureaucrats,
who are the real administrators. Sometimes the idea of social justice remains a judicial paradox. Such is the reality in India since independence regarding affirmative action made for the SCs/STs and OBCs, either under the Constitution or in several statutes meant for them and ultimately the actual goal is not achieved till now regarding their upliftment to the main stream of Indian society, and continuation of the reservation system for these people for over years and years and the constant hue and cry from each state from different classes of people for reservation is the proof of it. This can be supported with Dr. Upendra Baxi’s words that “Administrative law in India is an archive of suffering of the Indian masses and the saga of solicitude for the Indian classes.”*18

Ultimately, the concept of social justice in its true sense as we understood in the context of reservation and protective measures for SCs/STs and OBCs are completely diluted with administrative action as well as under the constitutional provisions.

* 18 Massey I.P.- Administrative Law, quoted in introduction, 4th Edn., P-XV