While the Constitution of India bars any form of discrimination amongst citizens, yet protective discrimination becomes legal in the context of reservation. The disharmony and turmoil which is presently prevalent is due to the paradox of equality versus the visible marks of inequality which still have not disappeared from our society.

The driving force behind the idea of protective discrimination was that certain groups, castes or races, have special claims in society which cannot be overlooked to merely pursue individual excellence. Ass Dushkin says*1 “India’s system of official discrimination in favour of the most backward section of her population is unique in the world.” It has already been discussed in the previous chapters that the Constitution of India was categorical in reservations for the Schedule Castes and Scheduled Tribes, it was ambiguous about the Other Backward Classes or OBCs. This was due to the ambiguity at that time in identifying the beneficiaries, specifying the type of benefits that would accrue to them, as well as implementing the policy of preferential treatment. Different Commissions and committees have therefore gone into the question of reservation under Articles 15 (4) and 16 (4) appointed by the Central and State Governments. While various state governments have appointed different Commissions and committees, the central government appointed the Kalelkar Commission in 1953 and Mandal Commission in 1979 (which already been discussed in detail in the previous chapters).

*1 Lalah Dushkin, “Schedule Caste Politics” in J.M. Mahar Untouchables in contemporary Indian, P-165
for determining the quantum of reservation as well as identifying those who were eligible for such protective discrimination.

However, the goal of protective discrimination was to integrate the Scheduled Caste and Scheduled Tribes with the rest of the population than the system of quotas in jobs, scholarships, and reserved constituencies have only strengthened their separate identity and caused heart burning to the members of general category people who are similarly deprived and for whom there is no reservation. In adopting, retaining and even extending the range of the policy of protective discrimination, the claims of the individuals as against those of the group, of the reward given to merit as against those of need have to be balanced. Again it would be erroneous to assume that by making concessions to communities and castes, the needs of every individual is satisfied. Classification of castes and communities embodied in itself the concept of discrimination. So in destroying old inequalities we should not create new ones.

Discrimination is dangerous instrument, no matter how pure the intentions are of those who use it and how careful we have to be in using it even for a desirable end. Thus, after 62 years of India’s independence it is high time to assess that how far there is the necessity to retain those affirmative provisions in the Constitution which are discriminatory in nature for those of the general category people, who are similarly deprived and really weaker sections of the society, having very poor economic and social background.
6.1 Creamy layer: Why not applied to Scheduled Caste and Scheduled Tribes:

Here in this context a logical question will surely struck one's mind that why the 'Creamy Layer' test is not applicable to Scheduled Caste and Scheduled Tribes, while such is applicable solely to identify the Other Backward Classes. The so-called logic of the Supreme Court behind such principle is that it is not applicable to Scheduled Caste and Scheduled Tribes as they were Constitutionally recognized to be a separate class. But in a 62 years old democratic republic country, which always claims to be one of the developed countries of the world, where in there are so many schemes and plans have already been executed for the upliftment and advancement of this constitutionally recognizes SCs/STs and OBCs at the same level, then why the judiciary has taken the pain to discriminate within the specified classes that Creamy Layer concept is applied only to OBC, but not to SCs and STs. Now it is high time to think about that after about three decades of the operation of the policy of protective discrimination, the parameters of the socio-economic situation has changed enough. Now the Scheduled Caste and Scheduled Tribes are no longer as uniformly backward as they have been when the Constitutional provision for preferential facilities for them were made. Individuals from several caste and tribes included in the Scheduled had moved up in terms of education, employment, occupational and economic status. As individuals they had reached a point at which they seemed to be much less deserving of preferential provisions than the mass of the population to which they belong. Therefore the Creamy Layer test should also be
applied to the SCs and STs for identifying the actual beneficiaries under the Schedule, prepared for them only.

6.2 No exact definition of Scheduled Caste, Scheduled Tribes and Other Backward Classes till date:

Again at another level, with respect to the more immediate challenge of advancing the quality of life of the Scheduled Caste and Scheduled Tribes, the failure to define the terms has other far reaching implications. Because of the 'denotative' approach there is tendency to lump the various castes and tribes together as an undifferentiated mass of backward and disadvantaged people. Very little is done till date to focus action on the exact inadequacies suffered. This is unfortunate. The acclaimed studies in to the substance of the disadvantages suffered by the Scheduled Caste/Tribes, and their impact, as also the steps taken to help them to remove these disadvantages are as yet very meagre. But the few that are available clearly suggest that there are several disadvantages that constrain the advance of the Scheduled Caste and Scheduled Tribes and that it is necessary to understand each of these carefully to direct appropriate ameliorative or remedial action. Despite this, the continued reluctance to define the elements that constitute the 'backwardness' of the Scheduled Caste and Scheduled Tribes results in a failure to recognize and attend to the specificities of their situation. It reduces to mechanical, administrative measures what should be carefully designed strategies for the advancement of a historically disadvantage section of Indian society. Thus, it is a harsh reality that till now there is no exact definition, neither any yard stick
through which the Scheduled Caste, Scheduled Tribe and Other Backward Classes could be defined.

6.3 **Economic Criteria suggested for identification of caste or class:**

It can be suggested that economic criteria should be the basic consideration for judging whether a particular individual is eligible for or deserves some special protection or not, along with his social background. Simply on the basis of educational and social backwardness as indicated no one should be judged as belongs to a particular castes or class, otherwise it will lead to further discrimination despite the special protection for certain classes leaving behind the poor persons, who does not belong to any reserved category.

As mentioned earlier, the application of economic criteria to determine, “socially and backward classes” has often been put before the scrutiny by the Indian courts, starting right from Kumari Jayasree vs-State of Kerala*2 in which Supreme Court hold the view that economic criteria is a valid criteria for classification, as economic backwardness leads to social and educational backwardness. It can be assumed that economic criteria alone may not help much as the sole basis of classification, but together with other symptoms of backwardness, it can be given primary importance. A revolutionary judgment in this regard is K.C. Vasanth Kumar vs- State of Karnataka*3 in which Justice Desai took the view that economic consideration should be the sole criteria for determining social backwardness. He concluded that economic criterion

*2 AIR 1976 SC 2381
*3 AIR 1985 SC 1495
was a more accurate criterion than caste to determine socially and educationally backward classes. Thus, if economic criteria is adopted for implementation of protective discrimination, it would lead to destruction of the caste system in turn enhancing the secular character of the nation. It would also lead to poverty alleviation, which is the present need of the hour.

In considering an individual or a community as backward in India, one would have to consider both the economic and sociological factors. While the stigma of caste and the isolation of the tribals may persist, even hardened cynics would agree that the sense of distance and discrimination between castes today has been reduced. However, economic inequality and poverty have not registered a significant decrease, so that visible and glaring evidence of poverty can be seen in both rural areas as well as in Urban areas. Poverty, illiteracy and ill-health are not exclusive problems of the Scheduled Castes, Scheduled Tribes and Other Backward Classes, as Jagjivan Ram had once said, "problems of a poor Brahmin and poor Harijan are the same"

6.4 Caste, Caste and Polity and Census 2011:

When India became a republic and adopted its Constitution in 1950, it was recognized that the nation needed to move towards a casteless society. But the very fact of 'untouchability' being accepted as a reality in the Constitution implied that caste was pervasive in society. Untouchability is nothing but the symptom of disease, namely, the 'Caste' system. Justice Markandey Katju, who is a Judge of
the Supreme Court has stated in one of his articles\textsuperscript{4} that the following facts may be considered to realize how strongly caste is still entrenched in our society like—

a) our politics is largely governed by caste \textbf{vote banks}.

b) not only the illiterate people, even the so-called intellectuals tend to operate on caste lines.

c) many castes wants to be declared Other Backward Classes (OBCs) or Scheduled Caste to get the benefit of reservations. Even some OBCs strive to be declared as the Most Backward Castes (MBCs) or Scheduled Castes.

d) fake caste certificates have become rampant to secure jobs or admissions to educational institutions.

e) marriage are still performed within one caste

Again, there is visible link between caste identity and political affiliations in almost all parts of the country. The discipline of sociology in India is dominated by the analysis of caste factor and its open usage in the media and public forums defeats the noble idea enshrined in the Constitution. It may be argued that direct elections and the growth of political parties have helped the growth of caste consciousness.

Communal politics, minority politics and the politics of backwardness were encouraged by the British to counterbalance the

\textsuperscript{4} The Hindu, 08/01/2009
freedom movement and they are a fact of life in contemporary Indian politics, which is heavily dependent on the concept of 'Vote Banks' for the major political parties and their partisan ends. There is no perfect correlation between the ritual status of caste and their actual material condition. The Supreme Court's conservative interpretation that the interest of the Scheduled Caste and Tribes have been given Constitutional protection, it seems anachronistic to increase the scope of positive discrimination to such an extent that an individual's caste becomes a relevant factor in determining his entitlements.

The Caste system is one of the greatest social evils plaguing Indian today. It is acting as a powerful social and political divisive force at a time when it is essential for us to stay united to face the challenges of the global world order. It is a curse which must be speedily eradicated if we wish to progress. But indeed it will stand effaced in a decade or two, for its basis has been destroyed. In fact it will be destroyed and is being destroyed in India by the advance of technology, through people's struggle and inter-caste marriages.

As regards the advance of technology, it is true that in a modern industrial society, the division of labour can not be on the basis of one's birth, but on the basis of technical skills. Hence, industrialization destroys caste system. As regards people's struggles, these are in fact going on every where in view of the harsh economic conditions in India marked by price rise, unemployment and so on. People in India are realizing that united they stand and divided they fall,
and that caste is certainly a dividing force. Inter caste marriage should be encouraged to destroy the caste system in the national interest.\(^5\)

But despite all these realities and probabilities to end the caste system in India, the inclusion of 'Caste' again in Census 2011 has been a vexed question for the polity and showing now a very clear indication that 'caste' will continue to be a pervasive marker of identity of Indian society with an indefinite end. The strongest point in favour of conducting caste-based Census was that it would help to devise an evidence-based social policy. There is wide disparity in caste figures, particularly in the number of Other Backward Classes. The implementation of several social policies meant for particular class or caste depends on knowing their exact numbers. Caste based Census, its proponents say, will generate a reliable and comprehensive data based on "issues such as interrelations between caste and socio-economic condition." This will also help the judiciary on adjudicating on important measures such as reservation of government and public sector jobs in states where reservation has crossed the Constitutionally mandated 50 percent (as in Tamil Nadu where reservation is 69 percent). Caste based census will also give details in the differences in the socio-economic conditions of various castes.\(^6\) But, howsoever and whatever may be the outcome of such census, the above stated are mere expectations like other Governmental schemes and plans, unless and until it is reported. Sceptics say that in a caste based census, there is the possibility of upper castes misreporting their caste and claiming to

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\(^5\) The Hindu 09/01/2009

\(^6\) frontline September 10, 2010, P-107
belong to backward classes or of backward castes inflating their numbers for political and material benefits, because the process of collecting census data is a private activity and not one conducted in public. Here, in this regard it can be suggested that ‘caste’ based Census should be taken in its right spirit, with genuine democratization which will help the nation to move towards caste equality and a caste free society, with silent revolution of social and economic development of the common masses in the years to come.

6.5 Reservation for women: A vexed question:

Article 15 (3) empowers the state to make special provision for women and children too with the objective to eliminate the socio-economic backwardness of women and empower them in such a manner as to bring about effective equality against gender discrimination. The march of law in this regard has already been discussed in chapter 4 of this research study along with subsequent Constitutional developments under Articles 243D(3) and 243 T (3) and the passing of the women Reservation Bill or 108th Constitutional Amendment Bill 2008 in Rajya Sabha (Upper House of Parliament).

The basic logical point behind all such provisions are that women are considered to be the weaker sections of the society. But it is regrettable that why the right minded people do not think that such reservation will have no effect unless the social structure of Indian society is not changed. Reservation will work merely as a blocked upon the mental setup of women making them as male clones, paralyzing
their intellectual capacity to a certain extent. Another objectionable ground is that if our country really want to wipe out gender discrimination, then why only in political field they are safeguarded ignoring their educational, appointment in service (except in few states) and other co-related aspects to their dignity and respect in our society. Everyday women are being victimized sexual harassment at work place, domestic violence, rape, maltreatment and so on. Thus reservation only in the political segment is not enough, what we need is to make us morally and educationally strong to wipe out gender discrimination.

6.6: Articles 15(4) and 16(4) of the Constitution of India, whether enabling provision or guaranteed rights:

The object of the framers of the Constitution must be to wipe out the cancer of caste even from Hindu society. Only with the greatest reluctance they agreed to allow reservations for the Scheduled Castes and Scheduled Tribes, for they felt that doing even this much would perpetuate caste distinctions. It must be remembered that these provisions were crafted carefully to be just as enabling provisions. They conferred only a discretionery power on the state and did not confer a right on any one. Thus, regarding Articles 15(4) and 16 (4) the predominant view is that these are only enabling provisions which do not grant SCs, STs and socially and educationally backward classes the right to reservation. However, the march of law includes a number of cases where views to the contrary have been expressed.
In M.R. Balaji-vs State of Mysore Gajendragadkar. J. observed that Article 15 (4), like Article 16 (4) was in the nature of an enabling provision and imposed no positive obligation on the state. This, however did not constitute ratio-decidendi of the judgment. One of the first cases in which it was laid down as part of the ratio decidendi, that Article 16 (4) does not grant a fundamental right to the backward classes is C.A. Rajendran vs-Union of India A petition was filed under Art 32 praying for the issue of writ quashing an O.M. (Office Memorandum) providing for no reservation for Scheduled Castes and Scheduled Tribes in posts filled by promotion. The court rejected the petition and held that the language of Art 16(4) had to be interpreted in the context and background of Article 335 of the Constitution. It was observed that Art. 16 (4) does not confer any right on the petitioner and there is no Constitutional duty imposed on the Government to make a reservation for SCs and STs, either at the initial stage of recruitment or at the stage of promotion. Thus, Art 16 (4) was described as an enabling provision which confers a discretionary power on the state to make reservation of appointment in favour of backward classes of citizens.

In P. and T. Scheduled Caste/Tribe Employees' Welfare Association (Regd)-vs- Union of India the Supreme Court hold the same view and laid down that no writ could be issued by the Court directing the state to implement reservations. In the words of the court:

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* 7 AIR 1963 SC 649
* 8 Anirudh Krishnan, Harini Sudersan- Law of reservation & Anti Discrimination with special emphasis on education and employment. P-488
* 9 AIR 1968 SC 507
* 10 AIR 1989 SC 139
"while it may be true that no writ can be issued ordinarily compelling the government to make reservation. Under Art 16 (4) which is only an enabling clause, the circumstances in which the members belonging to the Scheduled Caste and Scheduled Tribes in the Post and Telegraph Department are deprived of indirectly, the advantage of such reservation which they were enjoying earlier while others who are similarly situated in the other department are allowed to enjoy it make the action of Government discriminatory and invite intervention by this court"*11

while observing this, the court also laid down that the state had the discretion to implement welfare measures for SCs and STs and could choose any method it deemed fit so long as it was not discriminatory vis-à-vis SCs and STs in other departments.

Again, in State Bank of India Scheduled Caste/Tribes Employees Welfare Association –vs- State Bank of India*12 it was enunciated that Art 16 (4) was merely an enabling provision. However, case laws to the contrary rely on Comptroller and Auditor General of India, Gian Prakash, New Delhi-vs- K.S. Jagannathan*13 where as relaxation of minimum qualifying marks for SCs was prayed for by an SC candidate and ordered by the court. This amounted to stating that there was right guaranteed by Art 16 (4) that could be claim by backward classes. A similar approach was followed in Superintending Engineer, Public Health, U.T. Chandigarh-vs-Kuldeep Singh*14;

* 12 AIR 1996 SC 1838
* 13 AIR 1987 SC 537
* 14 AIR 1997 SC 2133

All the above cases were considered in Ajit Singh-vs-State of Punjab,*17 where it was contended that Art. 16 (4) conferred a power and a duty and it would be possible to enforce its duty by filing a writ of Mandamus. However, the Supreme Court rejected this contention. It is submitted that although there exists no right to reservation guaranteed by Art. 16(4), there exists a positive right to substantive equality guaranteed by Art 14. This right postulates that unequals should be treated unequally. State inaction would amount to unequals being treated equally. Hence there is a positive obligation on the state to treat the backward classes more favourably and it has discretion to decide. And failure to exercise this discretion would amount to violation of the right to substantive equality.

Therefore, it is still unsolved that whether Articles 15 (4) and 16(4) are enabling provisions or are guaranteed rights. So, a clear and certain guideline is required to be find out either by the Supreme Court or the Parliament regarding the true character of these two Articles, to make it adequate for the purpose for which they are made. Otherwise the contents of these two Articles regarding reservation and the march of case laws as discussed earlier are creating a never ending confusion in this aspect.

* 15 AIR 1997 SC 2366
* 16 (1997) 5 SCC 201
* 17 AIR 1999 SC 3471
6.7 **Reservation Riddle and Protective Discrimination: Thirst for a new social order:**

Reservation in reference to protective discrimination means reservation of the posts in the government jobs and for admissions in educational institutions for the members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes which have been discussed in detail in the preceding chapters with relevant case laws.

The Constitution has asked that 'special measures' be taken for the upliftment of the weaker section of our society. But the special measures have been reduced to reservations. Perhaps, that word is waved to fool the poor. Whether it is the best way to help the poor and disadvantaged people, whether the benefits from it are reaching the truly poor and disadvantaged one, none of these is examined.

Reservation were meaningful at the commencement of the Constitution as a temporary measure, at a time when the state was required and expected to promote with special care, the education and economic interest of the weaker sections of the people and in particular the Scheduled Caste, Scheduled Tribe and Other Backward Classes too. Our Constitution did not envisage non implementation of Directive Principles of State Policy set out in Articles 41, 45 and 46 even after 62 years and continuing reservations indefinitely Justice S. Ranganathan has observed in this book*18 that every one will agree that while certain types of reservation are necessary in principle, in some cases and for

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*18. Ranganathan S.- Constitution of India and Five Decaded. P-312*
some time, there can not be reservation of all types, for all cases and for all time. It has to be remembered that if the policy of reservation of a substantial number of seats in educational institutions, public employment and promotional avenues could tend to sap all initiative for betterment. It generates in the field of education and in public services, and atmosphere of discontent and frustration.

It is now well settled that a measure which can be considered reasonable at a given point of time may with the passage of time, become unreasonable and arbitrary. The reservation policy was envisaged as a means to an end, the end being social justice. But alas! we have made it as an end in itself. From every corner of our country people are demanding reservation in one way or other, either backed by the political parties or for ego-centric reasons as a class or caste. Politicians are buying peace by extending the scope and percentage of reservation in State after State, while the actual task of reconstructing the nation's economy, extending educational facilities and improving the quality of life for the ever increasing population remains pending. For instance the Gujjars agitation over reservation in Rajasthan for 5% reservation in jobs seems to be a political duplicity. Thus, the state thinks, its supreme and solemn responsibility is over once it meets the growing demand for reservation from the diverse groups, quite unmindful of the injury to the social system.

The real challenge before India is to free itself from the clutches of its nefarious history, if one wants to call it so, and to move
towards a new political and social order. The most important issue before India’s new social order is to make the transfer of power work. It can and must work essentially through the political process. This is neither easy nor likely to happen either by caste politics or reservations.

Needless to say that there is great deal of evidence that corruption and its twin in efficiency have reached untold heights since 1990. As norms of efficiency and integrity have been thrown to the winds, scams of massive magnitude have come to the fore. The large scale transfer of political power in recent years has been accompanied by a quantum jump in public corruption. The rule of law, ethical standards and integrity in administration are no more considered relevant. Those in power reserve the right to grab whatever they can. This is where the transfer of power in India threatens the vitals of Indian polity.

The nations of South East Asia and East Asia commenced on the same journey as India towards modernization and economic development around in 1950. By Nineteen seventy’s they had begun to turn the corner and by 1990, these nations had become the world’s economic power house. Even China which started late has now taken off as a major economic giant. India has been waiting long to turn the corner. Meanwhile hundreds of millions of the Indian people wallow in poverty. Malnutrition, hunger, ill health, illiteracy afflict almost all castes, some more, some less. Compensatory discrimination under the guise of affirmative action for a certain classes of people and its ilk have
brought Indian to compensatory backwardness. Compensatory because, if we do not go forward, the compensation is backwardness! But the simple truth is that compensatory discrimination has not worked anywhere in the world. After more than four decades of reservation in India, the aim of providing social justice remain exactly where it was.

Why it is so that reservation is not working in pushing the goal of social justice in India, a rational question arises. Perhaps the remedy is flawed or inappropriate. The theory of compensatory discrimination is built around compensation for the past social inequalities. Children born of families with a higher social status, higher educational level and perhaps a higher income enjoy a distinct advantage over those who are not. If this diagnosis is correct, then the remedy to social inequalities lies not in political or legal action, but in changing the social structure and attitude, all together.

The founding fathers of the Indian Constitution envisioned the policy of reservation consistently with the 'generic principle' of equality of opportunity to all. They did it by confining the scope of reservation to the principle of 'exception to the rule' and not vice-versa. The exception was to remain, restricted to that segment of society which for historical reasons was excluded from the main stream of social life. Such positive provisions of reservation was not to be in perpetuity, for that was good neither for the direct beneficiaries, nor for the envisaged social order. However during the course of its operation, the envisaged perspective of reservation some how or the other got lost on the way.
With an all round clamor for more and more reservation, the exception is continually eating up the rule with scant regard for the Supreme Court by of “not more than 50% rule”. Hence, we are crediting ourselves for creating new divides by splitting society into an ever increasing number of castes, classes, tribes and minority groups with no time constraint, which in other words implies that we are destined to become more and more backward-socia{lly, economically and politically too.

Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunates in the main stream of society, by bringing them to the level of others which they can not achieve unless protectively pushed. Once it is done the protection needs to be withdrawn in the own interest of protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level of betrays the bigwigs desire to keep them crippled and crippled forever.*19 Therefore any reservation, apart from being sustainable on the Constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability, one of the factors to be taken in to consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the nation constantly rising to higher level. In the era of globalization, where the nation as a whole has to compete with the other nations world se as to survive, excellence can not be given an unreasonable go by and certainly not compromised in its entirety.*20

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* 20 AIIMS Student’s Union-vs-AIMS, (2002) 1 SCC 428
However, after about four decades of the operation of the policy of protective discrimination, the parameters of the situation has changed. The SCs and STs are no longer as uniformly backward as they had been when the Constitutional provisions for preferential facilities for them were made. Individuals from several caste/tribes included in the Scheduled has moved up- in terms of education, employment, occupational and economic status. As individuals they have reached a point at which they seem to be much less deserving of preferential provisions than the mass of the population, particularly the mass that stand below the poverty line. Again in some instances entire caste/tribes have advanced to a point where they are clearly less disadvantaged than some caste/tribes not included in the Schedule. Yet as castes/tribes listed in the Presidential Schedule, they continue to be eligible for these provisions. What is even more significant is that they continue to use the provisions freely. As may be expected this causes strong resentment among the sections of people who are really disadvantaged one. Caste riots on the issue of reservation have grown to be a common phenomenon of Indian life since the mid seventies. While this reversal of status between the Scheduled castes/tribes and the other creates one set of problems, other problems arise out of the fact that the advance of the different Scheduled castes/tribes has been extremely uneven. Carefully documented studies reveal that in each state some castes/tribes have used, and continue to use, most of the facilities to the exclusion of other castes/tribes in the Schedule. Thus, usually the castes/tribes that have failed to use the facilities are backward because they are not even in a position to reach out to the support offered.
Hence, in the present scenario of our country reservation has been made a necessary evil to provide Social Justice. So, reservation should and must be adopted to advance the prospects of weaker sections of society, but while doing so care should be taken not to exclude the legitimate expectation of other segments of the community and once a class appears to have reached a stage of progress, the state will do well to review such instances and suitably revise the backward classes and any decision by the government in that regard is open to judicial review.21 When the benefit of reservation is given to a class of citizens, the same can not be allowed to continue without limitation and the same has to be reviewed periodically and the state can not be bound to in perpetuity to treat such classes of persons for all times as socially and educationally backward.22 Thus, if reservation system is to be used as carrier to proceed to the goal of social justice as envisaged in the Constitution of India, there must be a definite time bar within which all efforts must be done and achieved in fact to eradicate the ‘caste based reservation’ from this land, other wise discrimination will continue on and on with the rest of the left over masses.

6.8 A definite time frame for achieving Justice-Social to SCs/STs and OBCs:

It is true that the judicial process can not solve a complicated social and political problem just by one decision. Moreover, the court can not take a categorical stand until the society is ready to accept a particular dispensation. After all it took more than 150 years for

* 21 State of UP-VS- USV Balram AIR 1972, SC 1375
the American Supreme Court to finally strike down the policy of racial segregation. So far as the Indian problem of backward classes is concerned, the court is required to strike a balance between a number of competing values of vital importance. At the most general level, there is conflict between the values of equal treatment and social justice. Then there is conflict between administrative efficiency and equitable distribution of benefits. Yet another set of interest to be reconciled is that of the Constitutional objective of ‘Casteless society’ and the reality of ‘Caste based’ disabilities.

Hopefully, the census 2011 will help to mitigate the caste based protective discrimination by finding out an empirical data of the castes and tribes as on date in our country and then such will impulse our Parliament to fix a definite time frame within which those disadvantage masses will be tried to make advance- socially, economically and educationally. Otherwise, the competing considerations of felt grievance of nearly half of the population on the one hand and principle of merit on the other, will strike the nation year after year with no solution and the Constitutional goal of casteless society will gone in vain. Thus, reservation must contain within itself the seeds of its termination then only the real aim of protective discrimination for achieving social justice can be fulfilled.

It is also worth mentioning that division of the concept of reservation into two kinds as ‘Horizontal and Vertical’ by the Apex Court seems to be illusory and the idea of ‘interlocking reservation’ is
again vague as the state has the power to exercise its discretion in
deciding how interlocking between the two has to be made. Hence, all
these would give ample scope to the legislature to make laws regarding
reservation for their political gain leading to further fragmentation of
reservation.

Apart from this the inclusion of Art 15 (5) is an example
of legislative matrix by which it over throws and has given burial to the
legal reasoning established in T.M. Pai Foundation-vs- State of
Karnataka*23 and P.A. Inamdar-vs- State of Maharashtra.*24

Therefore, from the over all study it can be ascertained
that till date all the Legislative and Governmental action in the name of
protection of the weaker sections of society namely- SCs/STs and OBCs
and the women too, reflects the intention that they do not want to stop
the issue of reservation in one way or other, as if history paves the way
that they can not say ‘No’ to reservation within the zeal of Social
Justice. But whatever be their intention, either political diplomacy or
social welfare, it will be against the common sense and social justice
itself to give weightage to socially and educationally advance sections of
society under the false colour of ‘caste’ to which they happen to belong.

Till date there has been no set criteria for the identification
of backward classes, the National and State Commissions set up have
used various permutations of the caste- poverty- occupation criteria. The

* *23 AIR 2003 SC 355
* 24 AIR 2005 SC 3226
court also till date has not looked at overwhelming evidence regarding the changing definition of caste, (or even that caste is too fluid a concept in the first place with several conflicting theories by sociologist and anthropologists) and that there are too many conflicting theories and dissolving of the caste-occupation-poverty nexus. However the court have been directing a nationwide survey so as to make note of caste’s changing dimensions, for better identification of backward classes (including SCs and STs) and for ensuring that backwardness is not perpetuated, but little has been done by the government in this regard.\textsuperscript{25}

It is agreeable by all that the concept of equality before law and equal protection of law emphasis upon minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only among individuals, but also amongst group of people securing adequate means of livelihood to the citizens and to promote with special care the educational, social and economic interest of the weaker sections of the people, to protect them from social injustice and all forms of exploitation. But Indian law and its instrumentalities are accused of being out of step with Social Justice. Where the bulk of the people are of backware social and economic status, but the national goal is social and economic justice, the rule of law, not withstanding its mien of majestic equality, will fail its mission in the absence of a scheme to bring the system of justice nearer to the downtrodden, to the underprivileged.

\textsuperscript{25}. Arijit Pasayat in Ashok Kumar Thakur –vs-UOI MANU/SC/1397/2008
Our nation, will all its hopes and all its boosts, can never really be free and just till all its citizens, high and low, can claim equal justice through law-in-action. In short, all our country one must be lifted out of privation, privation must be erased. Inequalities based on birth must be minimized. This is best done as the framers of our Constitution envisaged by outlawing discrimination and ostracism on the one hand and by providing positive help on the other which will equip the disadvantaged to outdo others. But for this end a social transformation is needed. There is no doubt that all the disadvantaged must be helped, but all that is being done today to ponder the groups to buy votes and to dress this pondering up as 'Social Justice'. What is seen today in India is that this Social Justice has resulted in a moral and mental paralysis.

Today as we have seen in the rulings of progressive Judges, 'Social Justice' is taken to mean that the state must guarantee equality of outcomes to all, indeed in many instances that it guarantee particular outcomes to members of particular groups independently of whether or not they make the effort that is mandated for that outcome—witness the way qualifying marks are lowered, some times to near nothing, for candidates from particular castes.

Presently various groups demand various benefits. The state is tugged and pushed. It lurches from one concession to another. It becomes paralyzed. It loses its legitimacy and capturing the state become all important. And all this is done in the name of 'will of the people', the mandate by the Janata and 'Social Justice'. Justice-social
economic and political is a triune phenomenon inscribed as a pledge in the Preambular glory of our Constitution.*26 And with our independence from the British rule we have loss the excuse of blaming the British for anything going wrong, we will have nobody to blame except ourselves. So, time has come to change our attitude towards the framing of casteless society with due protection for the downtrodden and under privileged people, providing Justice- social, economic and political in the true sense of the term. From jurisprudential point of view also it is not enough to work out a just scheme of distribution, from what ever point of view, but there is the further problem of getting it accepted and keeping it acceptable, which requires constant re-distribution according to changing circumstance. Both initial acceptance and continued acceptance depend on people feeling that the scheme is at least not unjust.*27 Therefore, "wheel turns history changes". Old order may change yielding place for a new social and economic order, but the process of transition must be accompanied by honest and transparent attitude and then only Social Justice can be said to have been done.

* 26 Krishna Iyer, V.R.- Constitutional Miscellany, second edn. P-262
* 27 Dias, R.W.M., Jurisprudence, Fifth Edn. P-66