CHAPTER (V)

DISTRIBUTIVE JUSTICE AT WORK:

Role of Judiciary

(1) Prelude

The judiciary is an important component of the trinity of the state. In our constitutional scheme the judiciary has been assigned the role of ensuring and enforcing distributive justice in accordance with the commitment envisaged in the Preamble, Part III and the Part IV of the Constitution. It has been accorded the role to work as an instrument to profess, provide and practice a judicial philosophy which facilitates emergence of the instinct of tripartite justice promised to be secured to the people of India under our National Charter. The judiciary has been put under the constitutional obligation to hold the scale of justice in any legal combat between the rich and the poor, the mighty and the weak without fear or favour by keeping all authorities legislative, executive, administrative, judicial and quasi judicial within bounds.

The judiciary in Indian is expected to play a vital role to cherish the goal of distributive justice. It may thus rightly be called as an arm of distributive justice upholding the equality that Indians had longed for.

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(1) The word 'trinity' means the legislature, executive and judiciary.

(2) For detail see, Constitution of India, The Preamble, Part III and Part IV.
during colonial days, but had not gained — not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule. Frankly speaking, judiciary in India is the expression of the law created by Indian & for Indians. The need of the hour, therefore, is that the judiciary in India must capture the imagination of the law matters because of its special responsibility for safeguarding the spirit of distributive justice contained in our national Charter. The role of the judiciary in the conflict between the individual's rights and society's needs has been expected to be quite crucial to pave way for the establishment of the 'welfare state.'

The philosophy of distributive justice contained in our National Charter has, therefore, made the judiciary to realize that a poor man has a right to have and state has a duty to provide a system of distributive justice through social welfare schemes and further feel that the essence of the court's existence lies in an irrevocable trust reposed in it by the constitution to the effect that it shall for all time to come remain a constructive partner in a joint Venture with the legislature and executive. It cannot in the discharge of its duties afford to ignore the social, economic and

(3) Ibid, Articles 38, 39, 41-43A, 45 and 47.
political tendencies of the time which furnish the necessary background of the society. It has to keep the poise between seemingly contradictory forces. It has to draw a line between the individual interests and the social interests whenever there comes before it the question of the interpretation of the constitution.

It is in this background that the researcher has made an earnest attempt to examine as to how far the judiciary in India has been successful to highlight the goal of distributive justice intended to by the wise founding fathers of our constitution.

(ii) Judicial Response to Compensatory Discrimination Programme

In order to secure the goal of distributive Justice, Articles 15(3), 15(4) and 16(4) have been incorporated in our constitution with the hope of leveling up the lowly, the deprived and the depressed. These provisions have been envisaged in our constitution intentionally by the framers of Indian Constitution who were aware of the fact that the establishment of welfare society in India could hardly be possible in the absence of such provisions as in a caste-ridden society like our, where due to historical reasons, the people belonging to depressed classes remained for decade socially oppressed, economically condemned to live the life of penury and

educationally coerced to learn family trade or occupation and to take the education set out for each caste and class by the society. It was felt that there was a high time for the call of the moral perspective equality value which could concretize the spirit that, "equals must be treated equally. Unequals must be treated unequally", not to perpetuate the existing inequalities but to achieve and maintain a real state of effective equality.

It is on this line of thinking that the philosophy of compensatory discrimination mechanism designed in part III of Indian Constitution, takes into account the inequalities of social, economic and educational background of the people and seeks the elimination of the existing inequalities by positive measures. It is, however, unfortunate that there is an apparent tension between the guaranteed individual fundamental rights and social rights of the protected classes by recourse to the notion of compensatory equality. The judiciary in India, has, however, stood to the test of time and performed a formidable task of judicial-policy making in order to ensure that the protective schemes are confined strictly to the constitutional permissible objectives and methods. It seeks to strike a balance

between the fundamental rights of the individual and social justice to the weaker section. The earlier phase of the working of the apex court reveals that it has frustrated governmental moves to the effect of discrimination on prohibited grounds like religion, race, caste, sex and place of birth. The judicial stand expressed in *Venketraman vs State Madras* and reiterated in *State of Madras vs Champakam* dismissed the scheme of the communal G.O. reserving seats on communal basis to the admission in medical and Engineering colleges. The court upheld the claim of the student on the ground that the denial to the student of a chance to compete for other seats was only on the basis of her caste and thus violated Art. 29 (2). The court vehemently rejected the argument that the Directive Principles of Article 46 by its own force establish a principle of preference which might lawfully be embodied in legislation. It proceeded on the logic that, "The Directive Principles of the State Policy have to confirm to

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(9) A.I.R., 1950. S.C. 227


(11) Ibid
and run as subsidiary to the Chapter of Fundamental Rights." The court further clarified the fact that the Government's argument about the implication of Article 46 would render superfluous the exception in Article 16. The Supreme Court did not sacrifice the letter of the constitution to make any spectacularly progressive move in the spirit of constitution. In similar vein, the Supreme Court refused to treat the caste as dominant Criterion for determination of social backwardness of particular class in Balaji VS State of Mysore. It was further strengthened by another decision in R.Chitralekha VS State of Mysore, where in, caste was not considered at all while determining the backwardness. The similar trend was followed in the subsequent decision of the court and list of castes for admission to medical colleges was disallowed. The court also struck down the feeling of the vacancies of teaching staff on the ratio of 50 per-cent for Muslims of Kashmir, 40 per cent for Jammu Hindus and 10 per cent for others including Kashmir Pandits.

The survey of forgoing decisions of the apex court discloses the fact that the judiciary outlawed the policy of communal preferences and quotas designed for

(12) A.I.R. 1951, S.C., 225 at 228
(14) A.I.R. 1963, SC 1823.
the purpose of political accommodation. It remained crystal clear in the minds of the judges of the apex court that the constitution makers had not intended to use compensatory measures as a device to consolidate and protect the separate integrity of the communal groups. The Supreme Court has very intelligently caught the pulse of political move to perpetuate caste system and endeavored to nip in the bud the subtle attempts made by the state to strengthen the caste system which was expressly discouraged by the constitution. The judicial approach seems to have begun with a note of caution and adherent principles conducive for social balances. The apex court of India has amply made it clear that the consumers of protective discrimination are those who belong to backward classes and the power conferred upon the state can only be exercised in favour of backward classes of the citizens. The obvious reason was realized by court in these words: "In the country where there are different state of society ranging from lightly sophisticated to lowly backward the concept of equality will derive the latter to the wall. Their condition will become worse than what it is. So, in order to give a real opportunity to them to with better placed people clauses (3) and (4) are introduced in Article 16." 18

(18) Superanote, 16 at 1285.
The Supreme Court in *Janki Prasad Parimoo vs State of Jammu and Kashmir*[^19] expressed in a clear-cut words the scope of protective discrimination in the following liner: "Only those communities which are well below the state average of literacy can properly be regarded as educationally backward classes of citizens". The court, however, took strenuous objection to exclusive reliance of Mysore on Caste as a criterion of social backwardness and noted that occupational and place of habitation were also relevant to determination of backwardness of a community of person.[^20] The stand taken by the court in *Janki Prasad Parimoo* was to accept the view expressed in *Chiterlekha vs State of Mysore* wherein the court had made it clear beyond doubt that caste must be used in a restricted sense to prevent exploitation of these provisions by well-off sections with in groups that were largely backward.[^21] The court held, "If we interpret the expression "classes" as "caste", the object of constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve it. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the consideration to ascertain whether a person belongs to backward class or not. On the other hand, if the

[^20]: Ibid 959
entire subcaste, by and large is backward it may be included in Scheduled Castes by following the appropriate procedure laid down by the constitution".\(^{22}\)

It is, however, revealed from the close scrutiny of the series of decisions, given by Supreme court from time to time, that in early 1968 the supreme court moved somewhere closer to articulating the distinction between the caste units and the Caste rank. In P. Rajindran vs State of Madras\(^{23}\) the court upheld the use of caste as the unit by which Madras Backward classes were designated. The court confirmed its awareness of distinction in state of Andhra Pradesh vs Sagar,\(^{24}\) but succeeded in blurring it once more. The court found that in the context of Article 15(4), "class" meant a homogeneous section of the people grouped together because of certain likeness or common trades and who were identifiable by common attributes such as, status, rank, occupation, residence in a locality, race, religion and the life. In determining whether a particular section form a class, caste cannot be excluded together but in the determination of a class a test solely based up on the caste or community cannot also be accepted.

The study shows that the principles carved out in Sagar's case have become a judicial common place, recited at length in all discussions of backward classes.

\(^{(22)}\) Ibid, 1834; also see State of Kerala vs Jacob Mathew, A.I.R. 1964(2). Ker.53
We witness an interesting development in *Peria Karuppan vs State of Tamilnadu*\(^\text{25}\) where J. Hedge added a state forward reading: "a caste has always been recognised as a class." and cites P. Rajindran as standing for the proposition that Caste Units are permissible so long as they are shown to be socially and educationally backward. However, this line of thought was broken by some judicial observation in *U.P vs Pradeep Tandon*.\(^\text{26}\) The court in this case asserted that, "caste could not be made one of the criteria for determining social and educational backwardness. The socially and educationally backward classes of citizens are groups other than groups based on caste."\(^\text{27}\)

*The State of Kerala vs N.M. Thomas*\(^\text{28}\) opens up a new constitutional vista and much of the earlier understanding of constitutional policies of compensatory discrimination has been cast into doubt by this famous case. Dismissing the interpretation of Article 16(4) as exception to Article 16(1), justice Mathew has articulated the view of equality that implies the doctrinal shift. The equality of opportunity guaranteed by the constitution is not only formal equality with fair competition, but "equality of results",\(^\text{29}\) which implies, "affirmative

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\(^{27}\) Ibid., at 567.


\(^{29}\) Ibid., at 518.
action" by government to achieve equality that is, "compensatory State action to make people who are really unequal in their wealth, education or social environment...............equal."\(^{30}\) To quote Justice Krishan Iyer: "article 16(4) serves not as an exception to the structure of Article 16(1) and but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition. The forward sections are ordinarily entitled to....... closely examined, it is an illustration of constitutionally sanctified classification."\(^{31}\) Justice Iyer intended to confine the scope of compensatory discrimination not to all caste but to the dismal social milieu of Harijans. In order to reap the benefit of protective discrimination Justice Iyer held that social disparity must be so grim and substantial as to serve as foundation for benign discrimination.\(^{32}\) He has rightly suggested that to allow the other Backward classes to participate in these benefits may be detrimental to those who are most deserving. To quote him, "No caste, however seemingly backward......can be allowed to breach the dykes of equality of opportunity guarantee to all citizens. To them the answer is that .......equality is equality....... The heady upper birth occupants from backward classes do double injury. They

\(^{(30)}\) Ibid, at 516  
\(^{(31)}\) Id, at 535.  
\(^{(32)}\) Id, at 519.
beguile the broad community into believing that backwardness is being banished. They rob the need based bulk of the backward of the ...... advantages of the nation proffers."

It is thus evident from Thomas's case that an attentuated form of this "super-classification" argument is found in each of the four majority judgments that embrace the classification argument. Though classification argument posits a general authorization, flowing from Article 16(1) to adopt reasonable classification for purpose of securing equality of opportunity, yet it is considered that this does not include a power to employ those classifications specially forbidden in Article 16(2). Therefore each of these four "classification" opinion argues that Scheduled Castes and Scheduled Tribes does constitute a classification on the basis of caste.

The distributive potential of Thomas's case has been dramatically realized in Jagdish Ray vs State of Haryana. The full bench of Punjab and Haryana high Court swept aside the notion that reservations had to be justified by Article 16(4) as, "a relic of the old way of thinking..... The old Idea has now given way to the idea that Article 15(4) and 16(4)....... are themselves aimed at achieving the vary quality proclaimed and guaranteed by

(33) Id, at 539.
Article 14 and other clauses of Article 15 and 16. To conclude, the decision of the Supreme Court in Thomas case imposed restraints on Government, allowing it to patronize the least advantaged suggesting the imposition on Government of a new and onerous accountability to these disadvantaged, an accountability mediated through the courts.

The close scrutiny of K.C. Vasanth Kumar vs State of Karnataka acquaint us with the fact that present case is the container of the judicial opinion expressed by the apex court on the issue of reservation for examining the question of affording better employment and educational opportunities to scheduled castes, scheduled tribes and other backward classes. The court held that the means tests, that is to say, the test of economic backwardness ought to be made applicable even to scheduled castes and scheduled tribes after 2000 A.D. The court also opined that two tests should be conjunctively applied for identifying other backward classes for the purpose of reservation in employment and education; first, that they should be comparable to scheduled caste and scheduled tribes in the matter of their backwardness; and two, that they should

(36) Ibid. at 58.
(37) Supra note 34, p 394.
(39) Ibid.
(40) Id.
(41) Id.
satisfy the means tests such as a State Government may lay down in the context of prevailing economic conditions. The court also was of the views that the policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. It was also held that reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present without application of means tests for a further period not exceeding fifteen years. Justice Desai viewed that a time has come to review the criterion for identify socially and educationally backward classes ignoring the caste label. He emphasized that economic backwardness must be the criteria to be devised to identify the backward classes for the purpose of protective discrimination. He confidently philosophised that benefits of reservation should not be allowed to be snatched away by the top creamy layer of the backward caste. According to him, it is possible only when economic criteria for compensatory discrimination is firmly resorted to. It would strike at the root cause of social and educational backwardness, and simultaneously, take vital step in the direction of destruction of caste structure which in turn would advance the secular character of the nation. Justice A.P. Sen and justice Venkataramiah highlighted the need to redetermine the question of various

(42) Ibid, at 1499.
(43) Ibid.
(44) Ibid. 1496.
castes, tribes and communities for the purpose of Articles 15(4) and 16(4) in the light of latest figures to be collected on various relevant factors and to refix the extent of reservation for backward classes. Justice Venkataramiah quite carefully devised a piece of advice to the effect that at the stage of redetermination of the question of backwardness on the basis of collection of fresh data on various relevant factors connecting backwardness, some castes or communities must be weeded out of the list of backward classes prepared for Article 15(4) and 16(4).

Justice Desai equally made it abundantly clear that thousands of years of discrimination and exploitation could not be wiped out in one generation. He also felt the need to apply economic criterion by refusing preferred treatment to those amongst them who had already been benefited by it and improved their position. Justice Chinnapa Reddy however was of the view that there can be no universal test; there can be no exclusive test; there can be no conclusive test. In his opinion, it was futile to apply any rigid tests. He emphasized the need to look at the generality and the totality of the situation.

Further, the judicial approach has always

(45) Id. at 1497.
(46) Id. at 1558.
(47) Ibid. at 1507.
(48) Id. at 1510.
been to expand the philosophy of preferential treatment in scope to cover wide array of Governmental schemes and programmes. Several recent decisions suggest that the area of employment, offices and appointments under the State is controlled by Article 16 alone and preference in this area must be within scope of Article 16(4). This includes judicial offices as well as administrative posts, but it does not include an elective office. Similarly, Article 15(4) extends to all areas of Government activity which are not controlled by a more specific provision. Thus preferences in housing, education welfare schemes and local political arrangements must be within the scope of Article 15(4).

Similarly, the wording, "any provision" in Article 16(4) and "any special provision" in Article 15(4) gives the state great lee way in prescribing the method of operation for such schemes. The provision also include preferential rules of recruitment, such as waiver of age requirements, application fee and minimum educational qualification. The state may even provide such benefits as educational facilities, fee concession or other facilities enabling them to come up on par with their

(49) Supranote, 17.
fortunate brethren. 54 The Supreme court of India, while widening the scope of Art. 16(4), held that special provision for advancement is a wide expression and may include many more things beside mere reservation of seats in college. It may be by way of financial assistance, free medical, educational and hostel facilities, scholarships, free transport, concessional or free housing, exemptions from requirements insisted upon in the case of other classes and soon. 55 These adventitious aids are necessary positive steps to afford equal opportunity to the weaker sections in order to have continuous adjustment between: (i) to give equal opportunity to every citizen of India to develop his personality in the way he seeks to do; and (ii) to enable the backward classes to face boldly the competition's life. To quote K. Suba Rao, Former chief Justice of India: "In the race of life, unless adventitious aids are given to the under privileged people, it would be impossible to suggest that they have equal opportunities with the more advanced people. This is the reason and justification for the demand of social justice that the under privileged citizens of the country should be given preferential treatment in order to give them an equal opportunity with other more advance section of the

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community."  

The judiciary has also played an active role in highlighting the scope and extent of preferences with regard to the minimum and maximum limit of the reservation of posts in the Government employments. In Venketraman Vs State of Madras, the Supreme Court upheld the reservation for Harijans and backward Hindus of 19.7 percent of posts filled by competitive examination. However, in Trilok Nath vs State of J&K, the Supreme Court rejected the State policy of giving 50 percent Government posts to Kashmir Muslims 40 percent to Jammu Hindus, and 10 percent to Kashmir Hindus, on the ground that "in effect the state policy was a policy not of reservation of some appointment or posts; it was a scheme of distribution of all the posts community wise." Such distribution was held to be contrary to Article 16(1) and (2) and was not saved by Article 14. In Balaji vs State of Mysore, the Supreme Court has endeavored to supply a constitutional limit to the extent of preference, not on narrow technical constructions of "reservation", which was available to it. Since the reservation was under Article 15(4) rather than Article 16(4) but on broader grounds of policy. Proceeding from the notion that Articles 15(4) and 16(4) .......
are provisions of a special and exceptional character, rather than principles that can be given general operation, the court finds that these provisions should not be read as completely excluding or ignoring the fundamental rights of all citizens. The court has characterised the purpose of these special provisions not merely as conferring special privileges on the backward but serving the interest of the whole society by promoting the advancement of its weakest elements. Thus, any scheme for preference can be weighed in terms of the interest of the whole society. In considering reservations in institutions of higher education, it is necessary then to balance the policy of advancing the backward against the national interest in the full utilization of talent.\textsuperscript{60} The court held that the special provisions for the backward class must be within "reasonable limits" and the interest of the weaker sections of the society which are a first charge on the states and centre have to be adjusted with the interest of the community as a whole.\textsuperscript{61} The court, therefore, held that reservation of 68 percent made by the impugned order was plainly inconsistent with the concept of special provisions authorised by Article 15(4).\textsuperscript{62} The court indicated that a special provision should be less than 50 per cent depending on the relevant prevailing circumstances in each case. The

\textsuperscript{60} Supra note 17, pp 400 - 401.
\textsuperscript{61} Supra note 59, p.663.
\textsuperscript{62} Id.
majority found that any reservation greater than 50 per cent was a fraud on the constitution and effect the guarantee contained in Article 16(1) or at best make it illusory. The Gajendragadakar formula of deciding the extent of reasonableness was applied even while considering appointment to public services in Devdasan vs Union of India. Wherein the supreme Court struck down the 'carry forward' rule of the Central Government. The startling effect of the carry forward rule was that there was 90 percent reservation in favour of Scheduled Caste and Scheduled Tribes. While finding the reservation to the extent of 90 percent as patiently unjust, Mudhokar J. remarked that "though under Article 16(4) of the constitution a reservation of reasonable percentage of posts for members of the Scheduled caste and Scheduled tribes is within the competence of State, the method evolved by the Government must be such as to strike a reasonable balance between the claim of the backward classes and those of other citizens in order to effectuate the guarantee contained in Article 16(4)."

The court contemplated that "the steps for the advancement of weaker elements" must be balanced with the requirements of the community at large. It was made

(63) Id.
(64) Id.
(66) Ibid.
clear by the hon'ble court that there should be some limit up to which carry forward rule may apply and beyond that it should be deemed as unreasonable and irrational. Similarly, State of Kerala vs N.M. Thomas 68 is a landmark decision in field of protective discrimination. The Balaji formula was seriously undermined. Chief Justice A.N. Ray in the majority judgment, found the Kerala High court mistaken in condemning the 34/51 as excessive. To quote him, "The promotions made in the services as a whole are nowhere near 50 per cent of the total number of posts. The scheduled castes and scheduled tribes constitute 10 per cent of the state's population. Their share in the gazetted services of the State is said to be 2 per cent, namely 184 out of 8780. Their share in non-gazetted appointment is only 7 per cent, namely 11437 out of 162784...... therefore..... the orders are meant to implement not only..... Article 335 but also the Directive Principles under Article 46."69 The relevant touchstone of validity, as carved out in Thomas, was to find out whether the rule of preference secured adequate representation for the unrepresented backward community or goes beyond that.70 It was made clear that classification of the members of the Schedule Castes and Scheduled Tribes already in service made under Rule 13-AA and the challenged orders for exempting them for a temporary period from passing special

(69) Ibid.
(70) Ibid, at 500.
tests were within the purview of constitutional mandate under Article 335 in consideration of their claims to redress imbalance in public service and to bring about parity in all communities in public services.\(^{71}\)

The court, laid emphasis on the fact that it was quite imperative to adopt pragmatic approach. While construing the Articles of the constitution was not an exercise in mere syllogism. It rather necessitated an effort to find the true purpose and object that underlied that Article. The court felt the need that historical background, necessities of time, balancing of conflicting interests must enter into the crucible when the court is engaged in the delicate task of construing the provisions of the constitution.\(^{72}\) Therefore, in the words of Krishna Iyer, J. "we have to discover a note of unison in Article 16(1), (2) and (4) as well as Articles 46 and 335, the background tune being one of profound effort first to equalize and then to march together without class- creed distinction. The social engineering know-how of our constitution, viz., levelling up the groups buried under the debris by the generous consideration and thereafter enforcing strict equality among all this two-tier process operating symbolically, is the life of the law and the key to the 'equal opportunity' mechanism. Equally emphatic is the grave concern shown for a casteless and classless

\(^{71}\) Id. at 501.
\(^{72}\) Id. at 510.
society - not in magic instant but through a careful striving and for the standards of performance of the Administration, noted from Curizon's days for drowsiness."73.

The question of extent of reservation was also discussed at length by the Supreme Court in K.C. Vasantha Kumar vs State of Karnataka74. The court on perusal of the record before it, observed that there was neither statistical basis nor expert evidence to support the assumption that efficiency is necessarily impaired if reservation exceeded 50 percent, if reservation is carried forward or if reservation is extended to promotional post.75 The court, however, was of the view that there were some services where expertise and skill were of essence. In such services or posts there can be no room for reservation of posts; merit alone must be sole and decisive consideration for appointments.76 The court however, did not agree with the approach that question of reservation was in conflict with the meritarian principle. In the words of Chinnippa Reddy, J: "Efficacy is not a 'Mantra' which is whispered by Guru in the Shishya's ears. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses among other qualities the capacity to understand with

(73) Id. at 534.
(75) Ibid., at 1509. also see Raj Kumar vs Gulbarga University (full bench) KANT. A.I.R. 1990. KNT. 320.
(76) Ibid, at 1497.
sympathy and, therefore, to tackle bravely the problem of large segment of population constituting the weaker sections of the people. And, who better than the one belonging to those very sections. Why not ask ourselves why thirty five years after independence, the position of Scheduled castes, etc. has not greatly improved., Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and the Central Bureaucrats been drawn in large number from these classes. We don’t mean to say that efficiency in the civil service is unnecessary or that it is the myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only best may be appointed and for certain courses of study only the best may be admitted. if so, rules may provide for reservation for appointment to such posts and for admission to such courses...... we don’t, therefore mean to say that efficiency is to be altogether discounted. All that we mean to say is that it cannot be permitted to be used as a camouflage to let the upper classes take the advantage of backward classes in its name and to monopolize the services, particularly the higher post and professional institutions." Thus, decision of the Supreme Court undoubtedly supports the philosophy that the controversy between meritarian and the compensatory principle can not be allowed to clot the issue of the claims of weaker

(77) Ibid., at 1509-1510.
sections of the society. The Court paid much attention towards the problem of helping the weaker sections instead of wasting time on discussion with regard to the meritocracy claims by the affluent section of the society.

Thus the foregoing discussion on the 'judicial Response to the Protective Discrimination Programme' can be summed up in the following words:

1. that though the courts have not laid down any final test for determining socially and educationally backward classes yet the following criterion have emerged:

   a. In ascertaining whether a class is backward, the caste may be taken in to considerations but it cannot be sole or dominant criterion

   b. if the whole caste is backward, entire caste may be treated as backward class;

   c. backwardness should be decided on the basis of economic condition, occupation and on geographical criteria;

   ii. Whether a particular class is backward or is not backward is justiciable issue and be decided on rational basis by the court.

   iii. any reservation for backward classes should not exceed 50 percent of total number of available seats, taken together with the seats reserved for scheduled castes and Scheduled tribes.

   iv. Burden of proof lies on the State to establish that the class is backward and that reservation is reasonable.
(III) Judicial Response to woman and child Welfare

Gone are the days when the philosophy of 'Shastric' Hindu law was given a great coinage. Manu was considered to be final interpreter of the status of woman in India. Manu stated that woman was not entitled to independence, for the father protected her in childhood, the husband in her youth and the son in her old age. The same was the fate of woman in Muslim, Christian and other communities. However, the emergence of independent India marked a watershed in the attainment of equality of status for women. Our National Charter has completely done away with the old philosophies of status of woman and has enunciated the goals of securing the social economic and political justice for the women on par with the men. It guarantees equality before law and equal protection of laws, non discrimination and equality of opportunity as fundamental rights to both men and women. Accordingly, a plethora of legislations have been enacted with an aim and object to bring about a change in the status and role of woman on the footing of equality. Generally speaking, change in the status of woman depends upon three instrumentalities: First, the legislature which enacts the laws; Second, the executive which executes the laws, and third, the courts which interpret the laws. Since the author has already dealt with the role of the Legislature and the Executive in the foregoing chapter hence an earnest effort has here been made to assess the role of Judiciary as an effective instrument to improve the status of women.
in accordance with the spirit of the constitution. The author has endeavoured to examine to what extent the Judicial process has aided or impeded social change in relation to the status of woman and children in India in the form of interpretation of legislations.

The judicial response with regard to the interpretation of women welfare legislations may generally be discussed under two small groups: (a) laws unfavourable to women and judicial response, and (b) laws favourable to women and judicial response. The close scrutiny of the decisions of the courts reveal that in the earlier phase the Indian courts relied heavily on the American decisions and allowed discrimination against women on the grounds of sex. It is clear from the decision of Madras High Court where admission to a woman in the Mahatama Gandhi Memorial College, Udupi was refused on the ground that the college was open to men only and college did not have the faculties for women. The denial of admission to the women on ground of 'sex' was upheld as reasonable classification. Rajmannar.C.J. evolved technical approach and held that since college was not a state there was hardly any question of violation of Art 15(1). The court laid emphasis on Article 29 and was of the view that since Article 29(2) did

(78) For instance, The Madras High Court kept into mind pre Browe vs Board of Education 347.U.S. 483 (1954) position and relied on separate but equal doctrine. In America on sex ground the denial of woman right to practice was upheld. Bradwall vs State (1873) 83.U.S.(130). The High Court however relied on Nego treatment.
not include 'sex' as a prohibitory ground for
discrimination so it could be hardly of much avail to the
petitioner. The court did not agree to read Articles 15(1)
and 29(2) together. The judicial lack of awareness is
also equally reflected in *Mrs. Raghubans vs The state of
Punjab and others* wherein Hon'ble J. Sandhawalia again
relied heavily on the decision of the Supreme Court of
United States and held the Ante constitution order of
Governor making Woman ineligible to posts in men's jail on
the grounds of non suitability of women to hold these posts
as valid. Making a reference from the classic
observations of Mr. Justice Brewer speaking for the United
State's Supreme Court in *Curt Mullar vs State of Oregon,
(1907)*, 208.U.S. 412, the court seems to have proceeded on
the philosophy that "the two sexes differ in structure of
body, in the functions to be performed by each, in the
amount of physical strength, in the capacity for long
continued labour, particularly when done standing, the
influence of vigorous health upon the future well-being of
the race, self-reliance which enable one to assert full
rights, and in the capacity to maintain the struggle for
substance. This difference justifies a difference in
legislation, and upholds that which is designed to
compensate for some of the burdens, which rest up on
her....... Differentiated by these matter from the other

(79) University of Madras vs Shantibai, A.I.R. 1954. Mad.67
(81) Ibid, at 120.
sex, she is properly placed in a class by herself and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. Relying on the American judicial philosophy, the court held that classification on the grounds of sex is permissible provided that classification is the result of other consideration besides the fact that the persons belonging to that caste are of a particular sex.

However, there is witnessed a sea change in the judicial attitude after 1972. In a famous case of Walter Alfred Baid vs Union of India & others, the court held that, "unlike Article 14, article 16(2) does not permit any classification which is solely based on any of the differential such as sex, which is specifically mentioned in clause (2) except in so far as it may be saved by clause (3), clause (4), and (5) of that Article and there is, therefore, no question of any ineligibility or discrimination on sex ground alone being saved by the existence of any nexus between such differential and objects sought to be achieved. In that sense Article 16(2) incorporates a concept of equality which is more unqualified in term than that in Article 14."

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(82) Ibid.
difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex 'alone' because it is based on "other consideration" even though those consideration have their genesis in sex itself. Sex and what it implies cannot be severed".... Such a discrimination having its genesis in sex would be hit by Article 16(2) and none of considerations which have their foundation in sex would be able to save such a discrimination from the challenge of unconstitutionality on the ground of violation of Article16(2)." Thus the principle curved out in the present case was that discrimination on ground of sex violates Article16(2) and is unconstitutional.

Further, the Supreme Court developed a great deal of senstivity towards the welfare of Indian women in the last decade of Eighties. The court gave a patient hearing to the feelings of Miss. C.B. Muthamma who pathetically alleged, "Sex prejudice against Indian womanhood pervades the service rule even a third of a century after freedom. There is some basis for the change of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rule. If high officials lose hopes of equal justice under the rules, the

(85) Ibid.
(87) C.B. Muthamma vs Union of India, A.I.R. 1979 S.C.
legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess".\textsuperscript{88} She complained that she had been denied promotion to Grade I of the Indian Foreign Service illegally and unconstitutionally. In her own words, "one of the reasons for her suppression is the long standing practice of hostile discrimination against woman. Even at very threshold when she qualified for the Union Public Services at the time of her interview, the Chairman of the U.P.S.C. tried to persuade (dissuade) the petitioner from joining the Foreign Service...... That on numerous occasions she had to face the consequences of being a woman and thus suffered discrimination though the Constitution specially under Article 15 prohibits discrimination on the ground of religion, race, caste, sex, or place of birth and Article 14 of constitution provides the principles of equality before law....... That members of the Appointments committee of the Union Cabinet and the respondent no. 2 are basically prejudiced against woman as a group. The Prime Minister of India has been reported in the Press as having stated--------- it will not be irrelevant to mention that most of the women who are in the service at seniors levels are being very systematically selected for posts which have traditionally been assigned a very low priority by the ministry".\textsuperscript{89} C.R. Muthamma alleged rule 8(2) of the Indian

\textsuperscript{88} Ibid; p. 1869.
\textsuperscript{89} See Indian Foreign Service (Conduct and Discipline), Rules (1961). Rule 8(2).
Foreign Services (conduct and Discipline) Rules, 1961 as a glaring example of discrimination against the female employees in Government Services. It reads as follows; "a woman member of the service shall obtain the permission of the Government in writing before her marriage is solemnized. At any time after the marriage, a woman member of the Service may be required to resign from service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service".  

The Supreme Court gave an eye opener judgment upholding the spirit of equality between man and woman. It successfully, with open mindedness, appreciated the feelings of Indian woman spoken through Miss C.B. Muthamma and declared that the provision in Indian Foreign Services Rules, 1961, requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnized and denied right to be appointed on ground that candidate is a married woman are discriminatory against woman. The court, very lucidly, summed up the factual position of the Indian woman in the following heart-moving words: "At the first blush this rule is in defiance of Article 16. If a married man has a right, a married women other thing being equal, stands on no worse footing. This misogynous posture is a hang over of the

(90) Supra 88 at 1870.
masculine culture of manacling the weaker sex for getting how our struggle for National freedom was also a battle against woman's thralldom. Freedom is indivisible, so is justice. That our founding faith enshrined in Article 14 and 16 should have been tragically ignored viz-a-viz half of Indian's humanity, viz. our women, is a sad reflection on the distance between constitution in the book and Law in action. And if the executive as the surrogate of parliament makes rules in the teeth of Part III, specially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender party is inevitable.91 Similarly, the Court has endeavored to uphold the dignity of Indian woman in Air India vs Nergesh Meerza.92 Rules 46 and 47 of Air India Employees Service Regulation were held unreasonable on the ground that there was no reason why pregnancy should stand in the way of women continuing in service when the regulation 46 does not prohibit marriage after 4 years. The court opined that having taken the Air Hostess in service and after utilizing her service for four year, to terminate her service by the management if she becomes pregnant amount to compelling poor Air Hostess not to have any children and thus interfere with and divert the ordinary course of human nature. The court held, "the termination of the services of an Air Hostesses under such

91 Ibid.
circumstance is not only a callous and cruel act but an open insult to Indian Womanhood, the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorrent to the notion of civilized society. Apart from being grossly unethical, its smacks of a deep rooted sense of utter selfishness at the cost of human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14. Similarly, Regulation 12 of Indian Air lines (Flying Crew) Service Regulations was declared unconstitutional on account of excessive delegation. The court observed, "the power conferred on the General Manager to retain an Air Hostess' up to the age of the 40 years will have to be struck down as invalid because it does not lay down any guidelines or principles. Further more, as the cases of 'Air India' Air hostess and Indian Airlines Corporation Air Hostess are identical, an extension to the age of 45 in the case of one and 40 in the case of other, amounts to discrimination enter se in the same class of Air Hostess and must be struck down on that ground also. However, while explaining the scope of Article 15(1) and 16(2), the court was of the view that what Articles 15(1) and 16(2) prohibited was that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution,

(93) Ibid, at 1831 and 1850.
(94) Ibid, at 1830.
however, did not prohibit the state from making discrimination on the ground of sex coupled with other considerations.\(^{(95)}\)

The most radical approach came in the case of \textit{Datta\-reya Moti Ram More vs State of Bombay}\(^{(96)}\). The court endeavored to uphold the validity of certain provisions of the Bombay Municipal Boroughs Act, 1925 which provided for the reservation of seats for woman in the elections to the \textit{Jalgaon} Municipality. It was held by the court that as a result of joint operation of Articles 15(1) and 15(3) the State could discriminate in favour of women against men, but it may not discriminate in favour of men against women.\(^{(97)}\)

The positive attitude of the judiciary in favour of securing political rights to woman is also quite visible from \textit{Ramachandra vs State of Bihar}\(^{(98)}\). The court upheld the validity of section 5(1)(v)(9) of Bihar Panchyat Samities and Zila Parisad Act, 1961 with the justification that conferment of Right to participate in political sphere was essential for women to be elevated to the status of men in the society. The court gave to the expression 'any provisions', appearing in Article 15(3), widest amplitude to enhance the social status of women. The court, while supporting the cause of women daringly, added: "women have taken part in freedom struggle and on times they are

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\(^{(95)}\) Ibid.

\(^{(96)}\) A.I.R., 1953 Bom. 311.

\(^{(97)}\) Id. at 314.

\(^{(98)}\) A.I.R., 1966 Pat. 214. at 216.
also elected to various bodies including Parliament and State legislatures, but still they cannot be said to have reached the point where they can be said to be at par with men in these matters." The words of the Supreme Court expressed in the above said case make every body to realize that despite many legislative measures, the women in India have really not been in a position to reap satisfactorily the statutory benefits with the result that they are still quite far away to join the mainstream of the national Life.

The Court has also shown quite an encouraging positive attitude in affording preferential treatment to women in the area of public employment. The Hon'ble High Court of Punjab and Haryana in its majority judgment rightly came to the conclusion that the scope and content of the exception in clause (3) of Article 15 would extend to the entire field of State discrimination, including that of Public employment. However, the court was of the view that only such special provision in favour of women could be made under Article 15(3) which were reasonable and did not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2). This point may now be taken to have been finally settled by the decision of the apex court.

(99) Ibid.
(101) Ibid, at 376.
court in *Air India vs Nargesh Meerza*,\(^{102}\) Where the Supreme Court held that what Articles 15(1) and 16(2) prohibited, was that discrimination can not be made only and only on sex ground. However the Court concluded that Art. 15(1) and 16(2) of the Constitution did not prevent the State from making discrimination on the grounds of sex coupled with other considerations.\(^{103}\)

Similarly, the judicial trend reflected in *Pratibha Rani vs Sauraj Kumar*\(^{104}\) equally reveals that the Supreme Court in India has actively functioned as the protector of women proprietary interest and afforded timely help to render justice to the women who has been treated as the weakest creature in the society. The Supreme Court in the present case, rightly rejected the theory of matrimonial home and stridhan becoming a joint property of the two spouses as pounded by the High Court in *Vinod Kumar vs State of Punjab*.\(^{105}\) The view taken by the High Court in Vinod Kumar that the stridhan property of a married woman becomes a joint property of the two spouses as soon as she enters her matrimonial home was superseded and new philosophy was coined to safe-guard the right of woman in her stridhan: The Supreme Court has rightly held that wife is the absolute owner of her stridhan and it is the indispensable duty of the husband to keep it as

\(^{102}\) A.I.R., 1981, S.C. 1829.  \(^{103}\) Ibid; at 1842.  
trustee. The Court upheld the spirit of the philosophy of Katyayana which lucidly holds that, "Neither the husband, nor the son, nor the father, nor the brother has power to use or to alienate the legal property of a woman and if any of them shall consume her property against her own consent he shall be compelled to pay its value with interest to her and shall also pay a fine to the King." 106 The court seems to have gone a step forward by holding that "wife is the absolute owner of stridhan property and can deal with it in any manner she likes: She may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distrust, as in famine, illness or the like the husband can utilize it but he is morally bound to restore it or its value when he is able to do so. The husband has no right to proceed against stridhan even in execution of decree or debt." 107 The Supreme Court, moved by the sad story of a helpless married woman, turn out by her husband, has rightly given birth to the philosophy of Absolute Ownership of wife in her stridhan and subjected the husband to the criminal liability for misappropriation of her stridhan property. 108

(106) Ibid., at 631.
(107) Ibid., at 632.
(108) Ibid., at 630; also see Section 405 and 406 of Indian Penal Code, and Section 482 of Criminal Procedure Code (c1.2 of 1974).
A strong ray of hope seems to have been built up in favour of downtrodden women by the landmark decision of Supreme Court in *Mohd. Ahmed Khan vs Shah Bano Begum* and others.109 This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under section 125 of the Code of Criminal Procedure, raised a straightforward issue which was of common interest not only to Muslim women, but to all those who, were aspired to create an equal society of men and women in consonance with the true spirit of the constitution. To ensure equal justice to the women section, the Supreme Court daringly paved a new path for Muslim women by laying down the following propositions of law.110

(a) That Clause (b) of the Explanation to section 125(1) which defines 'wife' as including a divorced wife, contains no words of limitations to justify the exclusion of Muslim women from its scope. Therefore, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose section 125.

(b) That Section 125 overrides the personal law and hence the statutory rights available to her under section 125 is unaffected by the provisions of the personal law applicable to her.

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(110) Ibid, at 949.
(c) That Muslim husband is liable to provide maintenance for divorced wife who is unable to maintain herself.

(d) That here is necessity of Uniform Civil Code in the country to provide equal justice to the people belonging to different religions.

Thus Shah Bano case can definitely be said to be a landmark of a far-reaching significance especially to large segment of society which have been traditionally subjected to unjust treatment. The impact of this case is that the old philosophy contained in (Quran) has been discouraged and efforts have been made to create an equal society of men and women. The exploitation of woman by the cruel husband has been discouraged and he has been put under statutory obligation to maintain his wife irrespective of provision of personal law to which she belongs. 111

Similarly, the Supreme Court of India has endeavored to give justice even to the relatives of woman who commit suicide for want of dowry. In a famous case of Brij Lal vs Prem Chand 112 the supreme court has held the husband of deceased wife liable for abetment of suicide.

The court, as a matter of severe punishment, enhanced the sentence of fine from Rs. 500 to Rs. 20,000 and also directed accused husband to pay a sum of Rs. 18,000 to the father of the deceased for bringing up deceased minor son.\(^{113}\) It was in the similar spirit that the Supreme court of India convicted the husband under section 498-A for harassment for dowry.\(^{114}\) It was again in the subsequent case of Vedde Rama Rao vs State of Andhra Pradesh\(^{115}\) that the court convicted the accused husband under section 304-B for his actual participation in the commission of dowry death. The court made it clear that law under section 304-B of I.P.C. read with section 13-B of the Evidence Act, authorises a presumption that the husband has caused the death of a woman if she happen to die in circumstance not normal and that there is evidence to show that she was treated with cruelty or harassment before her death in connection with any demand for dowry.\(^{116}\)

The philosophy contained in Section 304-B has been rightly highlighted in Soni Devraj bhai vs State of Gujarat\(^{117}\) in the following words:

"Section 304-B and the cognate provisions are meant for

\(^{(113)}\) Ibid, at 1662.
eradication of the social evil of dowry which has been the ban on Indian society and continues unabated inspite of emancipation of women and the women liberation moment. This all pervading malady in our society has only a few lucky exceptions in spite of equal treatment and opportunity to boys and girls for education and career. Society continues to perpetuate the difference between them for the purpose of marriage and it is this distinction which makes the dowry system thrive. Even though for eradication of this social evil, effective steps can be taken by the society itself and the social sanctions of the community can be more deterrent, yet legal sanctions in form of its prohibition and punishment are some steps in this direction. The apex court of India has very earnestly worked hard to eradicate the problem of dowry deaths and has on several occasions held the accused guilty of murder for the death of bride caused due to burning. The court very lucidly held, "Bride burning is a shame of our society. Poor never resort to it. Rich do not need it. Obviously because it is basically an economic problem of a class which suffer both from ego and complex." The need to find out immediate solution to solve dowry death problem has been equally echoed in a landmark case of Ashok Kumar.

(118) Ibid.
The court asserted the need for the solution of the dowry death problem in the following words: "How to curb and control this evil? Dowry killing is crime of its own kind where elimination of daughter-in-law becomes immediate necessity if she or her parents are no more able to satiate the greed and avarice to make the boy available, once again in the marriage market. Eliminate it and much may stand resolved automatically. Social reformists and legal jurists may evolve a machinery for debarring such a boy from remarriage irrespective of the member of the family who committed the crime and in violation penalize the whole family including those who participate in it. That is social ostracisation is needed to curtail increasing melody of bride burning."

Similarly, the role of Judiciary in India has been quite significant in promoting the child welfare. Mr. Justice Subba Rao, the former chief justice of India rightly remarked: "social justice must begin with child. Unless tender plant is properly nourished, it has little chance of growing into strong and useful tree. So, first priority in the scale of social justice should be given to the welfare of the children." It is in this spirit that

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120. Ibid., at pp. 50-51.
121. Ibid.
the apex court has laid emphasis on the fact that the important task of distributive justice is to take care of the child, for in him lies the hope of nation's future. The court in its famous case of Vikram Deo Singh Tomar vs State of Bihar 123 has rightly held that it is the constitutional duty of the State to abide by the constitution standard and provide at least the minimum conditions ensuring child's dignity. Describing the 'Care home', Patna as a crowded hovel, in which a large number of human beings had been thrown together, compelled to subsist in conditions of animal survival, the Supreme Court directed the State of Patna to take immediate steps to comply with the various directions given by the court for the welfare of the children of the care Homes. The court also made it clear that in the event of non-compliance with the directions it would be compelled to reopen the case for further steps, as may be necessary for enforcing the directions. The court laid special emphasis on the protection and well-being of the children and sought to improve their economic and social status on the basis of constitutional guarantee spelled out in its provisions. The Hon'ble Court showed a particular regard for women and children and felt the need to afford them opportunities to live with human dignity and maintain establishments for the care of these unfortunates who were the castaways of an

imperfect social order and for whom, therefore, of necessity, provision must be made for their protection and welfare. The court added that State was required to do so for the sake of humanity and considerations of law. The court was highly critical about the miserable conditions of the establishment where the children and women were detained, compelling most of them to sleep on broken floors, in damp and dank conditions with no covering whatever to protect them from the chilly wind and near freezing temperatures of the North India winter, who were fed a wretched health denying diet, were denied the basic amenities of convenient toilets and a private bathing place, who, if they complained were beaten up although attacked by disease and illness were unable to find timely medical relief. It was in this background that the highest court of land directed the State Government of Bihar to provide suitable alternative accommodation expeditiously for housing the inmates of the "Care Home". The court directed the State Government to renovate the existing building, in which the inmates were housed and provide sufficient amenities by way of leaving rooms, bath-room and toilets within the building, and also to provide adequate water and electricity. A suitable range of furniture, including cots and an adequate number of blankets and sheets, besides clothing, were directed to be supplied to

124. Ibid., at 1783.
the women and children of the "Care-Home". The welfare department was also directed to appoint a full time Superintendent to take care of the home, and to ensure that a Doctor visits the home daily.

The court was equally aware of the need to provide justice to these unfortunate fellow-beings and thus the court held vehemently: "The time has come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as up-holders of the established order and the status-quo. They must be sensitized to the need of doing justice to the large masses of the people to whom justice has been denied by a cruel and heartless society for generation."

The court directed the Government to the fact that whenever that the labour laws are strictly observed. It was also observed that Government should institute an effective system of periodic inspection coupled with occasional surprise inspections by the higher officers in order to ensure that there is no violation of provisions of labour laws and the poor workmen are not denied the rights and benefits to which they are entitled under such provisions. The court held that it was the constitutional

125. Ibid., at. 1784.
126. Ibid.
obligation of the state to take necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who was transgressing the same. In order to save the children from professional hazards, the court held that the employment of children under the age of fourteen years must be prohibited in every type of construction work. No child below the age of 14 years should be employed in the construction work and the union of India as also every State Governments must ensure that this constitutional mandate is not violated in any part of the country. Accordingly, the court directed every State Government to amend Schedule of Children Act, 1938 so as to include construction industry under section 3-A of the Employment of Children Act, 1938 without any undue delay, because construction work was clearly a hazardous occupation. 128

The Supreme Court also made the Union of India to realize that social justice was the signature tune of our constitution and it was their solemn duty to enforce the basic human rights of the poor vulnerable sections of the community and actively help in the realization of the goal of distributive justice envisaged in our National

Frankly speaking, the court has played a parental role while directing the Central Government to persuade the workmen to send their children to nearby school and arrange not only for the school to be paid but also provide free of charge, books and other facilities such as transportation. The court also put forth the suggestion that whenever the Central Government undertakes a construction project which is likely to last for some time, the Central Government should provide that the children of the construction workers who are living at or near the project sites should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work any part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor. 130 Besides, it was held that construction work was a hazardous employment and no child below the age of 14 years must therefore be allowed to be employed in construction work by reason of prohibition enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government. The court, however, took a realistic view of the position of children and was

129. Ibid., at 1478.
in agreement with the prevailing conditions of Indian society. The court agreed that so long as there was poverty and destitutions in this country, it was difficult to eradicate child labour. The court however, pleaded for the positive role to be played by the Government and desired that attempt must be made to reduce, if not eliminate the incidence of child labour, because it was absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development of the country. It is in the background that Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employment. 131

Similarly, the Supreme court of India has played an active role to improve the dignity of the children born to prostitutes. The approach reflected in Gaurav Jain vs Union of India 132 reveals that sincere efforts have been done by the court to uphold the dignity of the children born to prostitutes by rejecting the submission that provision should be made for separate schools and hostels for children of the prostitutes. The

court was of the view that regregating prostitute's children by locating separate schools and providing separate hostels would not be in the interest of such children and of society at large. The court further added that children of prostitutes should not be permitted to live in inferno and the undesirable surroundings of prostitute homes. This is particularly so for the young girls whose body and minds are likely to be abused with growing age for being admitted into the profession of their mothers. Therefore, the court directed the union of India that accommodation in the hostels and other reformatory homes should be adequately available to help regregation of these children from their mothers living in prostitutes homes as soon as they are identified. The court equally impressed the sad state of affair in the following words, "Legislation has been brought to control prostitution. Prostitution has, however, been on the increase and what was once restricted to certain areas of human habitation has now spread into several localities. The problem has, therefore, become one of serious nature and requires considerable and effective attention." Accordingly, instead of disposing of this writ petition with a set of direction, a committee, comprising of seven

133. Ibid.
134. Id.
members, was constituted to examine the material aspects of the problem and submit a report containing recommendations to the court on the basis of which further order were to be made. 135

It is thus evident from the judicial trend that the issue of child welfare remained always under the active consideration of the apex Court. Bhagwati, J. (as he then was) in Laxmi Kant Pandey vs union of India 136, while emphasising the importance of children has expressed his viewpoint in the following words: "It is obvious that in a civilized society the importance of child welfare can not be over emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a supremely important national asset and the future well-being of the nation depend on how its children grow and develop." 137 Perhaps, it was due to this reason that the hon'ble Supreme Court thought it appropriate to give certain directions in this regard to State Governments and Union territories. The question of the child welfare seems to have caused considerable anxiety to the court in

137. Ibid, at 474.
eradicating sexual exploitation of children. Thus, bestowing courts deep and anxious consideration on this matter the following directions were made to the State Governments and Union Territories:

(i) All the State Governments and the Governments of Union territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness.

(ii) The State Governments and the Governments of union Territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of Law Department, sociologists, criminologist members of the women's organizations, members council of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations an association etc., the main objects of the advisory committee being to make suggestions of:

(a) the measure to be taken in eradicating the child prostitution, and

(b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.
(iii) All the State Governments and the Governments of the Union Territories should take steps in providing adequate and rehabilitative homes manned by well-equipped trained social worker, psychiatrists and doctors.

(iv) The union Government should set up a Committee of its own in the line suggested under direction No. 2, the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation, etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

(v) The Central Government and the Government of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestion that would be made by the respective Committees.

(vi) The Advisory Committee can also go deep into Devdasi system and Joging tradition and give their valuable advice and suggestions as to what best the Government can do in that regards.

To conclude, the foregoing study reveals that Supreme Court has always been in a haunt for the improvement of the welfare of the children in accordance with the spirit contained in the constitutional mandate. However, it is unfortunate that nothing praise worthy has
so far been achieved in their favour. S. Ratanavel Pandian and K. Jaya Chandra Reddy, J.J., while concluding the net result of the welfare of the children, expressed their view point in the following words: "In spite of the stringent and rehabilitative provisions of law under various Acts, it can not be said that the desired result has been achieved. It can not be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measure to weed-out the vices of illicit trafficking. Thus malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than positive. 138

(iv) Judicial Response to Agrarian Reforms.

Our Constitution empowers the judiciary to act as its guardian and also to act as the protector of Fundamental Rights of the citizen. Naturally, therefore, the

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Courts have played a very crucial and effective role in this regard. Sometimes, they have found themselves in the unpleasant situation of having to invalidate legislative enactments on important matters of public policy relating to this right. At times this created stir in the public and brought the very doctrine of judicial review under heavy fire. On the other hand, the Government answered the judicial verdict by initiating Constitutional amendments. The Courts indeed faced a difficult and delicate task. This is so because the Indian Bill of Rights is based on an entirely new concept of supremacy of individual's Fundamental Rights.

It is with this approach in mind that an analysis of the judicial decisions dealing with the right to property has been made here by the author with a view to assess the overall role of the judiciary, played from time to time to realize the goal of distributive justice. To be true, the Right to property has always been the bone of contention between the Supreme Court and the Parliament. Due to the interpretation and decisions in regard to fundamental right to property, Supreme Court has been the target of severe criticism and it is in this context that many critics too often accused the court of weighing a road-block in the way of distributive justice. The first challenge to the constitution
came when the Supreme Court held the abolition of Zamindari as void on the ground that it discriminated between the rich and the poor in determining the compensation for the acquired property.  

The Court held that the compensation provided in the Act was unjust, inequitable and illusory. Barring Shanti Lal's Case, Reddy's case and Pathak case and in other cases that is, Kameshwar Singh case, Bela Banerji case, Vajravelu case, Metal Corporation case, Golak Nath Case, R.C. Cooper case etc. Supreme courts interpretations were conservative and narrow. It rejected the view of the Constituent Assembly that on adequacy of compensation the field of judicial review is narrow. The difficulties arose because the Court had given a very wide meaning to clauses (1) and (2) of Article 31 regarding the limitations against compulsory acquisition of the property.

(140) Ibid.
(143) (1978) 2 S.C.C. 50
(144) Supra note, 138.
The judicial decisions interpreting fundamental rights raised serious difficulties in the implementation of the social revolution programmes such as fixing the limits on agricultural holdings, conferment of rights on tenant, property planning of urban and rural areas, clearance of slums, requisition of property for commercial or industrial undertaking in public interest. The most unfortunate situation arose when Kerala Agrarian Relations Act, 1961, The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, The Rajasthan Tenancy Act, 1955, Maharashtra Agriculture Act, 1961; were struck down by the judiciary. The Supreme Court failed to encourage the implementation of distributive justice programmes designed under these reformative legislations. The situation became more complicated when the Supreme Court held that Fundamental Rights could not be impaired even through the process of amendment. The three decisions of the Supreme Court shattered all the hopes of the Government to the philosophy of distributive justice. It was felt that the triple decisions combined together had crippled the State machinery and paralysed the movement of socio-economic transformation intended to by the founding fathers of the constitution.

The unfortunate situation further arose

when the Court construed the word "compensation" to mean "just" and "Equivalent" compensation for the properly acquired. Following this standard the court held the statutory provisions on compensation ultra-vires on the ground that it was arbitrary and had no relation to market value of the land on the data of acquisition which might be much more than on the earlier date prescribed. 152 The judiciary's emphasis on the payment of full market value really created a great hurdle in the realization of the goal of distributive justice and hence was regarded as putting a great burden on the resources of the state required for the implementation of the various socio-economic programmes of the infant Republic. The history of the cases decided by the apex court in the first two phases of independence makes it abundantly clear that court failed to give fillip to the philosophy of distributive justice and was highly in favour of the supremacy 153 of the Fundamental Rights of the individual in relation to their property contained in Part III of the constitutions.

To be brief, all this led to enacting the constitutional amendments 154 with a hope of to realize the goal of socio-economic transformation as envisaged in the

(154) For detail see, First Amendment Act, 1951; Fourth Amendment Act 1955; Seventh Amendment Act, 1964; twenty Fourth Amendment Act, 1971; Twenty Fifth Amendment Act, 1971; Twenty-Sixth Amendment Act, 1971.
constitution. The objective of First Amendment Act, 1951 was to protected Zamindari and Jagirdari laws and bring land reforms in pursuance of the objectives contained in Article 39 (b) and (c). Hence Ninth Schedule came into being to preclude the judicial review of the Acts in the Schedule. It was for this purpose that Article 31-A and 31-B were added to the constitution. Similarly, the constitution Fourth Amendment Act, 1955 interdicted a major change in Article 31(2). The amendment withdrew the powers of the court to determine the adequacy of the compensation. It was made the sole business of the legislature to determine the amount of compensation or to lay down the principles or the manner in which it will be paid. The amendment also enlarged the Ninth Scheduled so as to remove many more kinds of essential welfare legislations from the jurisdiction of the court. The ultimate purpose of Fourth Amendment was to empower the Government to put a ceiling on the extent of the individual holdings of agricultural land and to provide for the acquisition of the land in excess of the prescribed maximum for being distributed among landless. The sum and substance of the Fourth Amendment was that it was urgently necessary to avoid the interference of the Court for the establishment in India of a socialistic pattern of society in order to secure to the people at large economic and social justice of a welfare state. Further the Constitution (Seventeenth Amendment) Act, 1964 was necessitated to undo the effect of Supreme Court
Judgment in K. Kochini vs Madras and Kerala, in which Kerala Agrarian Relations Act, 1961 was declared unconstitutional on the ground that it violated Articles 14, 19, 31 of the constitution of India. The decision in this case seriously hit the move for equitable distribution of land which was one of the policies contemplated by Article 39 of the Constitution to give effect to the Directive Principles for the attainment of social and economic justice. Reacting sharply to the Supreme Court decisions, Parliament came forward with Seventeenth Amendment Act, 1964 and widened the definition of the ward 'Estate' used in Article 31-(A)2, so as to include the land under Ryotwari Settlement as well as other land in respect of which adequate provisions were not made in the land Reforms Enactment. In fact the Twenty Fourth Amendment Act 1971, is an answer to Golak nath, Twenty-fifth Amendment Act, 1971 to Bank nationalization and Twenty Sixth Amendment Act, 1979 to Privy Purse Case. These amendments were necessitated to achieve the goal of distributive justice by providing equal opportunity for all in the process of development. Hence parliament was empowered expressly to amend any provisions of the constitution including the provisions of Part III within the scope of its amending power. The Twenty-Fifth Amendment Act 1971

(156) Ibid.
(157) A new Clause (Cl.4) has been added to Article 13 which reads as, "Nothing in this Article shall apply to any amendment of this constitution made under Article 368".
recognized the primacy of the Directive Principles enunciated in Article 39-B and C. The effect of this amendment was to empower the parliament to determine the quantum of compensation for property for public purpose and sought to protect laws giving effect to the policies of the State towards recurring the object of the directive specified in Article 39(b) and (c).

A radical shift in the attitude of the Supreme Court can however be witnessed in Kesavananda Bharti's Case. The Court echoed a novel philosophy by holding that the entire concept of the Fundamental Right and specially that of property Rights should have social utility and be social service oriented. The court said that property could justifiably be conditioned in the context of demand of the society at large if a community of equals is to be established which is an elaboration of the ideal of justice—economic, social and political. Thus the court upheld the validity of Twenty-Fifth Amendment Act, 1971 and allowed precedence to the Directive Principles contained in Article 39(b) and (c) over Fundamental Rights to discourage concentration of the ownership of material resources and the means of production. M.H. Beg, J. rightly observed: 'Perhaps the best way of describing the relationship between the Fundamental Rights of individual citizens, which imposes corresponding obligations upon the State and the

(158) This was achieved by changing Article 31-2 and also by inserting a new clause (c) in Article 31.
Directive Principles, would be to look upon the Directive Principles as laying down the path of the country's progress toward the allied objective and aims stated in the Preamble, with Fundamental Rights as the limits of that path, like the banks of a flowing river which could be mended or amended by the displacement, replacement or curtailment or enlargements of any part according to the needs of those who had to use the path. Chandra Chaud, J. went even to the extent of saying "If the state fails to create conditions in which the Fundamental Freedom could be enjoyed by all, the freedom of the few will be at the mercy of many and then all the freedom will banish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."160

It was in the similar vein that Supreme Court laid great emphasis on the importance of the Directive Principles. The court held that in an organized society no right can be absolute, right of one must be consistent with the right of the others. When it is not so the State has to step in and to correct the imbalance and disharmony. It is then that Directive Principles has a positive role to play and oblige the State to make laws that would regulate the conduct of men and their affairs.162 Chandra Chud, J. in one sentence uttered in the

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(160) Ibid., at 1970.
(161) Id.
course of his judgement: "Trust in the elected representative is the cornerstone of the democracy, when that trust fails every thing else fails."

Thus, it is revealed that a great attention was paid by the apex court with regard to these amendments and avoided a major direct confrontation between the parliament and the judiciary. The court reversed its earlier decision in Kesavananda Bharti case and upheld parliament's right to amend the constitution including Fundamental Rights. The decisions of the apex court reflect the consensus of public opinion manifested in 1971-72 General Elections to Parliament and Assemblies of the States, for effecting radical quick economic changes to usher in an era of more equitable distribution of wealth among all the members of the society even if they incidentally impinge on the classical rights enjoyed only by the negligible section of society.

Similarly, in the State of Karnataka vs Ranga Nath Reddy on review of Kesava Nanda Bharti's case, the majority of the judge concluded that the inadequacy of the amount cannot be a ground for challenge of constitutionality of law under Article 31(2). The Court held that principles evolved for determining the amount cannot be questioned on the ground that by application of

these principles the amount determined to be paid is inadequate. The amended clause (2) of Article 31 has thus been upheld limiting the ambit of judicial review to the illusory nature of the amount fixed and the arbitrariness of the principle laid down for the determination of the amount. The proposition that the compensation fixed by the law is not justification on the ground of its inadequacy has also been affirmed in the subsequent decisions and furnish the authority of law even today.\(^\text{166}\) The court, while agreeing with the legislative intent, has held that the quantum of compensation provided by the law of acquisition cannot be subjected to judicial review on the ground that it is lower than the value of the property or that the potential value of the property has not been included. It can no longer be contended that the very word 'compensation' as it existed in the original clause obliged the State to pay full, and fair equivalent of the property taken.\(^\text{167}\) The court has made it clear that the true object of the insertion of Article 31-c by constitution (Twenty Fifth) Amendment Act, 1971 is to tide over the difficulties placed in the way of giving effect to the philosophy of distributive justice contained in the Directive Principles

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\(^{167}\) \textit{Assam Sillimanite Ltd. vs Union of India} (1992). I.S.C.J. 423 at 431.
in Part IV, by Judicial decisions.

The judicial approach to the agrarian reforms became quite clear in Minerva Mills vs Union of India. In this case Forty-Second Amendment Act, 1976 was challenged. The Act purposed to amend constitution to spell out expressly the high ideals of socialism. The Act was an attempt to make the Directive Principles more comprehensive and give them precedence over those Fundamental Rights which had been allowed to be relied upon to frustrate socio-economic reforms for implementing the Directive Principles. The philosophy contained in Section 55 of the 42nd Amendment Act, 1976 highlighted that Parliament and State legislature embody the will of the people and the essence of the democracy is that will of the people should prevail. Accordingly, Article 31(c) relating to the right to property and Article 368(A) relating to amendment of the constitution were amended. The text of the amendment was that no law giving effect to the policy of State toward, securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14, 190 31. Similarly, Article 368 of the Constitution was amended to the effect that after clause (3) the following words were added, "No amendment of this constitution (including the provision of Part III) made or purporting to

(169) See, amended Article 31(c).
have been made under this Article (whether before or after the commencement of section 55 of the Constitution (Forty Second Amendment) Act, 1976) shall be called in question in any court on any ground." The after effects of these amendments were that all the Directive Principles of State Policy were given primacy over the Fundamental Rights, and the Parliament was given ultimate power to amend the constitution with the objective in mind that there was an urgent need to accomplish the goal of distributive justice without further loss of time to avoid frustration and provide timely relief to the poverty-ridden people.

The court however did not agree with these amendments and held section 55 of Forth-Second Amendment Act, 1976 void being beyond amending powers of the parliament. The court was of the views that since the constitution had conferred a limited amending power on the Parliament, the parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed a limited amending power is one of the basic features of our constitution and therefore, the limitation on that power cannot be destroyed. In other words, parliament cannot, under Article 368, expand its amending power as to acquire for itself the right to repeal or abrogate the constitution or to destroy its basic structure.\footnote{Minerva Mills Ltd. vs Union of India, A.I.R. 1980 S.C. 1789.} The court also held section 4 of Forty Second Amendment Act, 1976 unconstitutional as it destroyed basic structure of
The majority view of the court was that Fundamental Rights occupy a unique place in the lives of the civilized society and constitute the arch of the constitution. To destroy the guarantees given by part III in order, purportedly, to achieve the goal of Part IV is plainly to sever the constitution by destroying its basic feature. The Indian constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the constitution.

The court however, was of the views that Directive Principles play a significant role in the upliftment of the society. Merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights. Bhagwati, J. was rightly of the view that "Directive Principles" impose an obligation on the state to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty become a cherished value and the dignity of the individual living reality, not only for a few privileged person but for the entire people of the country. They are intended to be operated force fully for the millions of our poor and deprived people who do not have even the bare necessities of life and are living

(171) Ibid, at 1790.
(172) Id.
below the poverty level".  

The judicial trend reflected in the Minerva Mill's case discloses that the court made sincere attempt to harmonize Parts III and IV by importing the Directive Principles in the construction of Fundamental Rights. The court laid emphasis on the fact that equality clause in the constitution does not speak mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of socio-economic justice.  

The court upheld the validity of Section 3 of Fourth Amendment Act, 1955 which amended Article 31(A) with retrospective effect to the effect that 'No laws shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, 19, or Article 31.' The court held that clause (a) of Article 31-A protects a law of Agrarian reforms which is clearly by in the context of the socio-economic condition prevailing in India, a basic requirement of social and economic justice and is covered by the Directive Principles set out in Clause (b) and (C) of Article 39 and it cannot possibly be regarded as violating the basic structure of the constitution. On the contrary, agrarian reforms leading to social and economic justice to the rural populations is an objective which strengthened

(173) Ibid., at 1791.
(174) Id.
the basic structure of the constitution. Clause (a) of Article 31-A must therefore be held to be constitutionally valid even on the basis of the basic structure test. 175

Similarly, agrarian reforms legislation were upheld in subsequent cases by the court. In a landmark case of P. Mahandran vs State of Karnataka 176 the validity of section 15 of Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 as substituted by Act 8 of 1976 came up for consideration before the Supreme Court on the ground that said Act was violative of Articles 14 and 19 of the constitution. Taking the spirit of the Agrarian reforms from Bansi Dhar vs State of Rajasthan, 177 the constitution bench of the Supreme court made declaration to the affect that since Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 was a legislation designed for the purpose of bringing out agrarian reforms, it was clear that the provisions including section 15 (as amended) contained therein were protected by Article 31(A) (1) (a) of the constitution notwithstanding the fact that some of the provisions contravened Articles 14 and 19. 178

Similarly, the validity of Goa, Daman and Diu Agricultural Tenancy Act, 1964 was upheld in Union Territory of Goa vs Lakshmi Bai Narayan Patil 179 on the ground that it aimed at the land reforms and hence the Act was entitled to

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(175) Ibid., at 1792.
(178) Supra, 176.
protection under Article 31(A) and cannot be struck down on the ground of violation of Articles 14 and 19 of the constitution. 180

The latest position about the right to property today is that it has been completely deleted from Part III of the constitution by Forty-Fourth Amendment Act, 1978. Perhaps the reasoning behind this amendment was that the Indian Legislature felt that keeping the property as a fundamental right was at all not conducive to the attainment of distributive justice and hence it was considered to be in the fitness of things to remove the property right from Part III and relegate it to an ordinary constitutional right. Consequently, Article 300-A has been inserted into the constitution which lays down that "no person shall be deprived of his property save by authority of law".

The scope of Article 300-A came up for consideration in Basanti Bai vs State of Maharashtra. 181 The facts of the case were that the constitutional validity of Maharashtra Housing and Area Development Act, 1977 was challenged on the ground that section 43 and 44(3) and (4) were ultra-vires of the constitution as the said provisions were unjust, unreasonable and unfair and deprivation of

property was not by authority of law. The court struck down the impugned provisions of the Act on the ground that the legislation providing for compensation was clearly discriminatory and did not conform to the constitutional right conferred upon the citizen under Article 300-A of the constitution. The court also concluded that section 43 and subsection (3) and (4) of section 44 were not enacted to give effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39, and therefore, the right conferred by Art 14 of the Constitution was not taken away as provided under Article 31-C of the Constitution. More so, the impugned provisions of the legislation were found unjust, unreasonable and unfair and the deprivation of the property under sections 41 and 42 of the Act was not by authority of law. It was also made very clear that the concept of reasonableness must be imported even in those cases where protection of Article 14 was not available because of application of Article 31-C. The Court also found it difficult to conclude that by deletion of Article 31 from Part III of the constitution, the Parliament intended to confer absolute right on the Legislature to deprive the citizen of his property by mere passing of a legislation without complying with the requirement that the deprivation was for a public purpose and on payment of amount which was not

illusory. The similar stand was also taken by the High Court of Calcutta in N.C. Mini Bus Owner’s Association VS District Magistrate, Where the action the state for requisition of property was declared malafide and for collateral purposes. The court was highly critical about the role of the State and held that the officers of the state were not meant for carrying out the unauthorized dictates of the ministers but they were to discharge their statutory function and they should discharge the same as were conferred upon them by the statutes. The court observed: "It is indeed a portable conditions that a citizen has to come to the Court for relief in such circumstances where their security, safely as regard to property stand imperilled though state remains simple spectator.

In the conclusion, it may be summed up that the ding-dong battle of the court on the one hand and the Government on the other caused a little bit uncertainty. Certain provisions lost their original form, because of the frequent amendments with no sign of the court abandoning its stand. Till the passing of Twenty Fifth Amendment, a good number of legislations were challenged in the court wherein major controversy centered round the question of Eminent Domain, compulsory acquisition, public propose and that of adequacy of compensation. The foregoing discussion

(183) Ibid. 367.
(184) A.I.R. 1990 cal. 269.
(185) Ibid., p. 277.
discloses that the philosophy of Supreme Court in its earlier phase remained highly legalistic and ignored the spirit of agrarian reforms underlying the amendments with the result that the movement towards agrarian reforms was badly shattered and the dream of the Parliament to provide Justice to the poor was badly marred. The judiciary sat over the judgements of the Parliament ignoring the basic reality that Parliament was the best judge to visualize the requirements of its people. However, there came a sea-change in the judicial philosophy after 1973. The Court supported the Supplementary Theory of treating Part III and IV as fundamental. The Supreme Court categorically held that where two judicial choices were available the court must give preference to social philosophy contained in part IV of constitution. Similarly, the court has shown a great sense of responsibility to uphold agrarian reforms legislations in its subsequent cases with a zeal to bring a balance between individual and social interest. The spirit reflected in these judicial pronouncements make it sufficely clear that interpretation of Article 300-A will always be based on the notions that the welfare of the people is the paramount law and public necessity is greater than private necessity.

(V) **Judicial Response to Labour Welfare Legislations**

The growth of Industrial Jurisprudence, as an instrument to engineer and strengthen the goal of distributive justice in India, can significantly be noticed not only from the view point of an acceleration in labour and industrial legislations but also from a large number of Industrial law cases decided by the Supreme Court and the High courts, which have really affected a considerable population of our country consisting of the poor laborers, workmen and their families. The significant contribution of the judiciary lies in the fact that it has endeavoured to modify the traditional law relating to the relationship between the employer and employees and has to a great extent cutdown the old theory of laissez faire based upon the "freedom of contract" in the larger interest of the society. The apex court has done away with the old notion of traditional right of an employer to 'hire and fire' his workmen at his will. It is quite evident that the Supreme Court and High courts in India have quite successfully helped in the establishment of welfare State and provided justice to the working class through the Interpretation of labour welfare legislations. ¹⁸⁹

Truelly speaking, the socialistic State of India in disregard of the Constitutional commitment, has largely carried on the legacy of the past and denied to a

vast number of daily wage employees equal pay for equal work.\textsuperscript{190} This attitude of the Government was that the principle of 'equal pay for equal work' was an abstract doctrine and had nothing to do with Article 14\textsuperscript{191}. The Supreme Court also, while agreeing with the contention raised by L.K. Jha, the Government counsel held that equal pay for equal work was an abstract doctrine and had nothing to do with Article 14 and hence there was hardly any scope for the transgression of Article 14.\textsuperscript{192} The earlier decisions of the Supreme Court of India disclose that it failed to appreciate the 'equality clause' in the context of the social reality. The trend thus set by the Supreme court in 1962 was followed for two decades until reversed in \textit{Randhir Singh vs Union of India}.\textsuperscript{193} Fortunately, the Court changed its earlier stand and concluded that application of equality clause under Article 14 enjoyed a paramount significance and hence the principle of 'equal pay for equal work' must be interpreted in the light of the goal of the welfare state as envisaged in our \textit{National Charter}. Thus, Court construed Articles 14 and 16 in the light of the Preamble and Article 39(b) and

\begin{itemize}
\item[190] Ibid, see, Contention raised by Mr. L.K. Jha and others at p. 1140.
\item[191] Ibid.
\item[192] \textit{AIR}, 1982 S.C. 879.
\item[193] Ibid, at 881
\end{itemize}
concluded that 'equal pay for equal work' was deducible from these Articles and could be properly applied to cases of unequal scales of pay based on no classification though those drawing different scales of pay did identical work under the same employer. The court also viewed that though the principle of 'equal pay for equal work' was not expressly declared by our constitution to be a fundamental right, yet it was constitutional goal. Chinnapa Reddy, J. opined that 'equal pay for equal work' was not a mere demagogic slogan, it was a constitutional goal capable of attainment through constitutional remedies, by the enforcement of constitutional rights. The court also hastened to say that where all things were equal, that is, where all relevant considerations were the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belonged to different departments. While highlighting the philosophy of equality between rich and poor, high and the low, the court felt that the principle of 'equal pay for equal work' constituted one of the means for achieving the improvement of conditions, "involving such injustice, hardship and privation to large number of people as to produce unrest so great that the peace and harmony of the world are imperilled". The court also interpreted the Directive

194 Ibid, at 882.
195 Ibid., at pp 881-882.
Principle of "equal pay for equal work" for both men and women as "equal pay for equal work for every one and as between the sexes" and read it into the fundamental rights guaranteed by Article 14 securing equality before the law and by Article 16 equality of opportunity in the matter of public employment. Justice Chinnapa Reddy was of the view that the equality provision and the term "socialist" in the Preamble would be meaningful to the vast majority of the people only if doctrine of equal pay for equal work was applied strictly; otherwise it would lead to unrest imperilling peace and harmony of the society.

It was in the same spirit that the interest of the working class was safeguarded when a dynamic Judicial Philosophy was evolved in D.S. Nakara vs union of India. The court laid emphasis on the economic equality and equal distribution of income. While giving relief to the pensioners, Justice Desai philosophized that the principal objective of the socialist state was to weed out inequality in income and status and standard of life. To him, the basic framework of socialism was to provide a decent standard of life to the working people and secure them from cradle to grave. The court went a step forward by obligating the state to require to secure that the

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197 Ibid, at 139.
198 Ibid., at 130
health and strength of the workers, men and women, and children of tender age are not abused and that the citizens are not forced by economic necessity to enter vocations unsuited to their age and strength. The court also obligated the state within the limits of its economic capacity and development, to make effective provisions for securing the right to work, to education and to provide assistance in cases of unemployment, old age, sickness, and disablement. The survey of judicial decisions discloses that the Supreme court of India has made concrete efforts to add a new dimension to labour welfare jurisprudence. The court has endeavored to save the equality doctrine from being flouted by authorities under the cover of artificial division of senior draughtsmen in the Ministry of Defence Production resulting in unequal scales of the pay for same work. The court, from time to time, has reminded the Government of the fact that it was constitutional duty of the State to function like model and enlightened employers. Accordingly, the Supreme court has directed the State government in Dharwad District. P.W.D.L.D.W.

Association vs State of Karnataka, to pay salary to the daily rated and monthly rated employees in various government establishments at the rate equivalent to the minimum pay in the pay-scales of regular employees and permitted the state to frame rational schemes to this effect. The court agreed with the prophetic words of Pandit Jawaharlal Nehru, who had stated: "Our final aim can only be a classless society with equal economic justice and opportunity to all, a society organized on a planned basis for the raising of mankind to a higher material and cultural level. Everything which comes in the way will have to be removed gently, if possible, forcibly if necessary, and there seems to be little doubt that coercion will often be necessary." Impressed by the philosophy of Pandit J.L. Nehru, the Court directed the state of Karnataka to allow daily rated and monthly rated employees to share equal benefits mandated by Part IV of the constitution with regular employees working in various government establishments under the control of State of Karnataka.

Similarly, in a landmark case of People's Union of Democratic Rights vs Union of India, it was held by the Supreme Court that the violation of labour welfare...
legislations should not be viewed with great indifference and unconcern as if they were trifling offences undeserving of judicial severity. The court viewed that Labour laws enacted for improving the conditions of workers should not be allowed to buy-off immunity by the employers by paying a paltry fine. The court held that violations of labour laws must be viewed with strictness and the errant employers should be punished by imposing adequate penalty in case the charge of violation of labour laws was establish against them. The court also was of the view that the state was under constitutional obligation to take necessary steps for the purpose of interdicting such violation and ensure observance of the fundamental rights even if transgressed by the private individual. The court with all behest at its command held that Government and its officer must examine whether the poor and the downtrodden labourers were getting their social and economic entitlements or whether they were continuing to remain the victims of deception and exploitation at the hands of the strong and powerful sections of the community and whether social and economic justice had become a meaningful reality for them or it had remained merely a teasing illusion and a promise of

\footnote{Ibid.}
\footnote{Id.}
\footnote{See, constitution of India, Articles 17, 23 and 24.}
\footnote{Supranote 206, p 1476.}
unreality 211. The court deemed it necessary to root out exploitation and injustice to ensure that the labour welfare legislations are adhered to strictly so as to assist the observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of 'have nots' and to protect them against the violation of their basic human right, which is also the constitutional obligation of the executive 212. The court also made it clear that both the Central Government and State Governments were bound to ensure observance of various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with Directive Principles of State Policy 213. The court with full enthusiasm directed the state to identify release and rehabilitate the bonded labourers so as to cherish the goal of distributive justice envisaged in our Constitution. It was held that the State Government cannot be permitted to repudiate its obligation to identify release and rehabilitate the bonded labourers. Consequently, the Supreme court asserted that it had the power to appoint commission for making enquiry into the facts relating to violation of fundamental rights contained in Articles 21, 211. Bandhya Mukti Morcha vs Union of India, AIR 1984. S.C. 412. Bandhya Mukti Morcha vs Union of India and others(1991) 3.S.C.J. 120.
213. Ibid., at 811.
23, and 24 and the Directive Principles envisaged in Articles 39, 41, and 42 of Part IV of the Constitution. To be brief, the sincere efforts of the apex court have quite vigorously persuaded the State Governments to identify, release, and rehabilitate a large number of bonded labourers especially after the commencement of the Bonded Labour (Abolition) Act, 1976. It is revealed that a total numbers of 2,14,842 bonded labourers have been identified throughout Country till 1986 and the process to identify is still going on vigorously in all the States in country. Moreover, of the 2,14,842 bonded labourers, the State Governments have successfully rehabilitated 1,75,630 bonded labourers with more and more efforts to rehabilitate the rest of the bonded labourers in near future. The remarkable feature of the success in this regard lies in the fact that bonded labourers are not only identified, freed and rehabilitated but are also integrated with antipoverty scheme. The new Twenty-Point Programme provides not only rehabilitation but its stresses complete implementation of the Bonded Labour System (Abolition) Act, 1976. The Government of India has issued instructions to all States on the basis of the Supreme court guide lines.

214. Ibid.
to take follow-up action vigorously. Impressed by the philosophy of the court the task of the rehabilitation is being taken up as part of the accelerated rural development programme in the time bound manner. The Seventh Plan outlay for this purpose was estimated to be Rs 100 Crores as Central Share as compared to Rs 25 crores under Sixth Five year Plan.217.

(VI) Distributive Justice and Emerging Judicial Trends

It is a matter of great fortune that apex court in our country has in recent times used the armoury of law in the right directions and has really waged a tough war to actualise the goal of distributive justice envisaged in our national charter. There was a time when the courts in India were contended with a traditional role perception and performance. Neutral principle of 'Mechanistic Jurisprudence' was the basic judicial philosophy. It was felt that the role of judiciary was simply to find law and apply it in a mechanical manner to a given facts situation. Therefore, judges sometimes delivered what may be termed as 'Lexical Law' and 'grammatical justice' even irrelevant to the needs of the society.

However, it is a matter of great significance that recently judiciary has rightly started realizing that like any other organ of the State, it must

also actively participate in the reconstruction of the society according to the mandate of the constitution and provide justice to the poor, unprivileged and the deprived section of the society. This transition from a traditional role to an activist role has been a remarkable development in the career of the Indian judiciary and is being hailed as a basic brick of our socialistic society.

The transition which is sweeping the entire country may be discussed mainly under three small heads—

(A) Social Action Litigation.
(B) Free Legal Aid Movement.
(C) Lok-Adalats.

(A) Social Action Litigation

The credit to expand the concept of Social Action Litigation goes to Hon'ble Mr. Justice Krishna Iyer. In Supreme Court, as early as in 1975, Justice Iyer for the first time in Bar Council of India vs M.C. Dabolkar advocated liberal interpretation of locus standi. In other cases, the Supreme Court observed that social action litigation concept has a large ambit in current legal semantics than the accepted individualistic jurisprudence of old. This new enforcement dimension of judicial activism was forcefully asserted by the Supreme Court in many subsequent cases decided by it from time to time.

Justice Bhagwati in a landmark judgment of S.P. Gupta vs Union of India, observed that there was an urgent need "to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights". Similarly in People's Union for Democratic Rights vs Union of India, Bhagwati J. (as then he was) further observed: "The time has now come when the courts must become the court for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status-quo. They must be sensitized to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. It is through Public Interest Litigation that the problem of the law is changing. It holds out great responsibility for the future".

The strategy of Social Action Litigation has really tackled a variety of problems which were eluding


221. AIR, 1982, S.C. 149.
222. Ibid.
223. AIR, 1982.S.C. 1473
224. Ibid.
a solution for a long time. Through this strategy, a vast revolution taking place in the judicial process; the theatre of law is fast changing and the problems of the poor are coming to the forefront. The court has been continuously entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. To provide justice, the judiciary has acted even on anonymous letters which had highlighted and brought out facts which had aroused the conscience of the court. Generally speaking, beneficiaries of this approach are the undertrials, prisoners, pavement dwellers, patients, bonded and immigrant labourers, children, women, unorganized groups and various other weaker sections of our society.

226. Sunil Batra Vs Delhi Administration AIR 1980 SC. 1579
The courts are trying hard to mould their interpretation and legal thoughts for the protection of fundamental rights of citizens by establishment of rule of law which is a backbone to the democratic system. The movement has been spread in all directions where gross violation of rights occurs. Undertrials as well as convicted prisoners, women in protective custody, children in juvenile institutions, bonded and immigrant labourers, untouchable and schedule tribes, landless agricultural labourers who fall prey to faulty mechanism of administration, women who are bought and sold, slum dwellers and pavement dwellers, kinds of victims of extra-judicial executions are the real consumers who flock to the threshold of judiciary for seeking justice. The courts by their judicial activism are trying hard to mould their exposition and interpretation of law in such a way as to fulfill the Directive Principles contained in our national charter. A silent revolution with a new kind of enforcement of social, economic and political rights is thus supporting and expanding the kingdom of distributive justice, solemnly resolved by, the wise founding fathers of our constitution.

The history of judicial pronouncements after 1975 reveals that court has given divorce to the neutral principal of mechanistic jurisprudence and has started actively participating in the reconstruction of society by extending justice to the poor needy, unprivileged and the deprived section of the society. In Hussainara Khatoon vs
Home secretary Bihar, the Supreme Court, moved by the plight of Bihar under-trial prisoners, ordered their release holding the 'right to a speedy trial' as fundamental right implicit in Article 21 of the constitution. The court made it amply clear that no procedure which did not ensure reasonably a quick trial can be regarded as 'reasonable' fair or just. In yet another instance of judicial intervention in the process of distributive justice, V.R. Krishna Iyer, J. by accepting a letter written by a convict from Tihar jail, alleging brutal assault by a head warder observed that whenever the rights of a prisoner either under the constitutional or other laws are violated, the writ power of the Supreme court should always run to rescue. In the similar vein, Bhagwati, J. (as he then was) issued directions to the Government to provide medical aid to the victims of police blinding case and also directed the Government to punish the police who had committed the act of blinding the under trial.

The court has also been kind enough to safeguard women from exploitation arising out of her sheer poverty. In Arun Shourie vs State, three journalists

233. Ibid. at 1369.
234. Sunil Batra vs Delhi Administration AIR. 1980 SC 1579
filed writ demanding a prohibition of trafficking in women for immoral purposes and immediate relief for their rehabilitation. The court, through interim directions, provided relief by ordering the payment of compensation to them. Similarly, the court undertook great trouble to expose the ill-treatment and custodial violence to women prisoners in police lockup in the Bombay city. The bold steps to ensure justice to the poor labourers were also taken by the court in PUDR vs union of India and other subsequent cases wherein the court directed the central Government to ensure observance of various social welfare and labour laws enacted by the Parliament for the purpose of securing to the workman a life of basic human dignity in compliance with the Directive Principles of the State Policy. The court has also equally played quite a significant role by discouraging the pernicious practice of bonded labour. The court has issued various directions, including rehabilitation of freed labourers, to the Central and State Governments with a zeal to ensure justice-social economic and political to the downtrodden sections of the society.

238. AIR, 1982. SC. 1473.
The Supreme Court has also helped a lot to improve the child welfare by expounding different schemes to promote their interest. In Sheela Berse vs union of India. The court issued the strict directives to the effect that children should not be kept in jail if the State Government had not got sufficient accommodation in its remand homes. Significantly the court also stipulated that all young offenders should be tried and either acquitted or convicted within a month of the filing of the compliant if the charge attracted punishments of less than Seven years punishment. Thus the welcome step initiated by the Hon’ble court was that it had set a time limit for criminal trial with a view to promote welfare of the children. The net result of the judicial activism with regard to the welfare of the children was that union Government and States Governments were asked to release with in a month under sixteen held illegal in Jails. In yet another case of judicial intervention in the process of social transformation, the Bombay Highcourt sought to find a solution to the problem of "rootless and roofless children". The court thus endeavored to diagnose the reasons of continuing social Malaise and pointed out the responsibility of certain agencies of the administration suggesting that they should strictly adhere to the child welfare legislations and execute them with full devotion.

242. Ibid.
and sincerity

To conclude, the apex court has devised the concept of 'Social Action Litigation' as a strategic arm of Legal aid Movement with an intention to bring justice within the reach of the poor masses, who constitute the low visibility area of the humanity. It has been used not only to achieve the purpose of enforcing the right of one individual against another, but it is intended to promote and vindicate social interest which demands that violation of constitutional or legal rights of large number of people who are poor, ignorant or in a socially and economically disadvantaged position should not go unnoticed and unredressed. The latest trend therefore, reveals that courts in India have certainly become the courts for the poor and struggling masses of the country. They have really sensitized to the need of doing justice to the large masses of people to whom justice has been denied by cruel and breathless society for generation. It is revealed that entire theatre of law has almost gone under a vast change holding out great possibility for the future to realize the goal of distributive justice enshrined in our national charter.

(B) Free Legal Aid Movement: An Arm of Distributive Justice

The rendering of 'Free legal Aid' to the poor litigant is certainly a strong step to realize the

goal of distributive justice. Effective access to justice is the fundamental requirement of a system which purports guarantee to Justice social, economic and political to the people at large. The idea of distributive justice has no meaning unless some provisions are made for assisting the poor litigant, who is denied equality in the opportunity as envisaged in our national charter. To be true, strong move for free legal aid in recent years is an outcome of emergence of socio-economic philosophy and welfare state concept. The harsh reality is that though much beneficent legislations have been enacted in favour of the down trodden, yet they are not aware of their rights. To them justice has no meaning. They have almost become dead and insensitive to wrong and injustice. So viewed our courts have rightly realized, through late, that legal aid is basic, indispensable postulate of legal system. The Gujrat Legal Aid Committee Report 1971 rightly remarked that "The legal system would be mere dream, a barren figment as unreal as castle in air, if rights and liabilities remained un ascertained, unasserted and unenforced. It is therefore, wise that we must remove this contradiction at the earliest possible moment or else these who suffer from unequality will blow up the structure of political democracy which has been labouriously built up by our freedom fighters."

Thus, first daring step in this regard was taken by the apex court in M.H. Hoskot vs. State of Maharashtra. The facts of the case were that an accused Reader holding M.Sc. and Ph.d. degrees had been convicted for offences of attempting to issue counterfeit university degrees. The court held that where the prisoner was disabled from engaging a lawyer on reasonable grounds such as indigence or in communicate situation, the court shall, if the circumstances of the Case the gravity of the sentence, and the ends of justice so required assign competent counsel for the prisoner's defence. The court also held "Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and, ergo, unconstitutional. Pertinent to the point is the requirement that there must be a provision of free legal services to a prisoners who is indigent or others wise disabled from securing legal assistance where the ends of justice call for such services." The court endeavored to hold that Article 39-A was an interpretative tool for there realization of Article 21. If a prisoner sentenced to imprisonment was virtually unable to exercise his constitutional and statutory right of appeal for want of legal assistance, there was implicit in the court under Article 142, read

245. AIR. 1978, SC. 1548.
246. Ibid., at 1549
with Article 21 and 39-A of the constitution, power to assign council for such imprisoned individual for doing complete justice" 247.

Similarly, a gesture of encouragement was shown by the highest court of the land in a significant landmark case of Hussianara Khatoon vs State of Bihar 248 wherein the facts were that thousands of undertrials in Bihar had spent long years in jails, in some cases as many as ten year, waiting trial of offences carrying lesser punishment. Bhagwati J. moved by the pathetic story of the under-trials delivered a profound verdict on poverty and justice reflecting creativity and concern for the poor. Justice Bhagwati tried to identify the short comings in the administration of criminal Justice. The court found that an unsatisfactory bail system and delays in courts had frustrated, under-trial's quest for justice and concluded that their poverty was their crimes 249. Bhagwati J. Chinnapa Reddy and Sen J.J. elaborated the theme of Right to legal aid. The court elaborated legal aid as" An absolute imperative" "equal justice in action" and "delivery system of social justice" 250. The Court held that if an accused was confronted with loss of liberty and too poor to engage a Lawyer and was not provided with free

247. Id.
249. Ibid., at 1362.
250. AIR, 1979. SC. 1377 at 1381.
legal services by the State, the trial itself may run the risk of being vitiated as contravening Article 21\textsuperscript{251}. The court ordered the release of under-trials languishing in jails for the maximum terms for which they could be sentenced on conviction even if the sentence awarded to them were consecutive and not concurrent. Thus the Hussainara's case in line with Sunil Batra\textsuperscript{252} and Hoskot\textsuperscript{253} cases, disclose the non-traditional role of the Supreme Court in the field of judicial activism and highlight the shortcomings of the administration of criminal justice, bringing to the attention of all concerned the need to streamline the investigative machinery, the bail system, the prison administration and legal services programmes; the underline philosophy contained in the above mentioned cases is the manifest recognition that poverty is no crime and that constitutional mandate makes that abundantly clear.

The affirmative stand taken by the court in the above mentioned cases obligated the state to devise such a procedure as would ensure free legal services to the poor\textsuperscript{254}. The court went even to the extent of holding that State can not be permitted to deny this relief on the plea that the State had no adequate financial resources to incur the necessary expenditure needed for improving the

\textsuperscript{251} Ibid.
\textsuperscript{252} A.IR. 1978. SC. 1675.
\textsuperscript{253} A.IR. 1978. SC. 1548.
\textsuperscript{254} Khatri Vs State of Bihar, AIR 1981 S.C. 928.
administrative and judicial apparatus with a view to ensure free legal service to those who need it most. The court held that though the State may have its financial constraints and its priorities in expenditure, yet law did not permit any Government to deprive its citizens of constitutional rights on the plea of poverty. Similarly, the court in PUDR vs union of India held that the State should ensure basic human rights to those who were in a socially and economically disadvantaged position and poverty should not stand as a bottleneck to accomplish the goal of distributive justice. It was also highlighted by the court that the protection of the law must be available to a fortunate few or that law should be allowed to be prostituted by the vested interests for protecting and up holding the status-quo under the guise of enforcement of their civil and political rights. The court also asserted that the poor too have civil and political rights and it is the duty of the state to right a wrong or to redress an injustice done to the poor and weaker section of the community whose welfare is and also must be the prime concern of the State. The policy of Free Legal Aid Movement was further reiterated in Kishore Chand vs State of H.P. where in the court firmly established that the

255. Ibid.
257. Ibid. also see, Bandhua Mukti Morcha Vs Union of India, AIR, 1984. SC. 802.
justice to the poor can be imparted if they are provided free legal aid to vindicate their rights. The court held that it was high time that senior counsel practicing in courts must voluntarily defend indigent accused.

To epitomize, the courts in India have fought a long battle to provide justice to the down-trodden by providing free legal aid to them from the State exchequer as a matter of compulsion. The foregoing discussion makes it amply clear that the State has been put under constitutional obligation to provide free legal aid to the poor to ensure effective enforcement of their fundamental rights with a view to actualize the dream of equality before law in its true perspective. The survey of the judicial decisions of the highest court of the land reveals that State cannot now avoid its constitutional obligation of providing legal aid to the poor by pleading administrative inability.

(C) Lok-Adalats and Distributive Justice

There is no denying the fact that the justice delivery system of this country is utterly alien to genius of this country. It is also equally true that the existing judicial delivery system is a smuggled system from across the shores imposed upon us by the empire builders.

for their own political motives. It has enormously benefited a few rich and is detrimental to the teeming millions. The system has given birth to the surprising growth in the arrear of the cases and has belied our hope to render justice and cherish the goal of distributive Justice. The malaise continues, sparing not even the Supreme court in its devastating sweep. It is astonishing that the total of substantive and non-substantive matters pending with the Supreme court as on June 30, 1991 has come to an astounding 1,46,112\(^{261}\). The position of arrear is also quite alarming in the High courts. The Allahabad High Court tops the list with more than 5,00,000\(^{262}\) pending cases as on June 30, 1991, with a total number of 19,34,677\(^{263}\) cases pending in the various courts of India.

The surprising growth in the arrears of cases and solution to the grave problem, which actually makes a mockery of dispensation of justice, have been subjects for deliberation by the judiciary for past eight decades. All this has made every one to realize that time is due to find out original solution to tide over the colossal problem of delay. The only way out is a complete reorientation of policies, procedure and outlook with a dynamic direction towards social justice to enable a common man to secure justice and restore confidence in judiciary.

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262. Ibid.
263. Id.
The modern version of Lok-Adalat has thus been evolved as a matter of strong concern to organize legal aid to the needy and the poor and do away with the huge arrear of cases pending in various courts in our country. That is why *Juridicare: Equal Justice to the people* (1973), submitted by F.N. Bhagwati and V.R. Krishna. Iyer.J.J. had consistently advocated the need for the revival of informal system of dispute resolution by a conciliation both in matters already pending before the courts and in matters which have not come up before the courts.

Generally speaking, the concept of Lok-Adalat is a para-judicial institution having silent evolution, being developed by people themselves still in its infancy, trying to find an appropriate structure and procedure in the struggle of common people for distributive justice. The aim and objective of the philosophy of Lok-Adalat basically is to restore the old but rational method of resolution of disputes through peaceful means and revitalize and rejuvenate this dynamic device to function as the most suitable weapon to the prevailing Indian social and economic conditions. Fortunately, judiciary, through its activist approach, has endeavored to revive the old strategy of conciliation for amicable settlement of disputes so that people get speedy and cheap justice. Frankly speaking, Lok-Adalat is 'judge-aided' and 'judge-guided' strategy evolved intellectually to reduce the time in rendering justice and clear the astonishing backlog of arrear of cases to actualize and accomplish the goal of
distributive justice.

The functioning of Lok-Adalats in India reveals that it is a voluntary process of dispute settlement based upon the principle of voluntary acceptance of the solution with the help of conciliator. True basis of the conciliation is mutual consent of both the parties. It is a form of justice not based on the evidence and legal know how, but an approach to, the problem from humanitarian aspects in the legal background. In this form, justice is not imposed or delivered but people are gently led towards disciplining their own rights and duties viz-a-viz the rights and duty of others. Parties generally accept the solution with little 'give and take'. The survey of the history of Lok-Adalat discloses the fact that Gujrat State may be said to be the Gangotri of Lok-Adalat and the former chief justice of India Mr. P.N. Bhagwati its Bhagirath, who brought this sacred 'Ganges of Justice' to the Indian soil to strengthen the Indian Legal system and to ameliorate the poor masses by vindicating their rights guaranteed to them under the National character.

It is now well established that Lok-Adalats are now busy to resolve case at pre-trial and in-trial level. Most of the cases decided by them are relating to accidents claims, matrimonial reliefs, small claims for compensation for land acquired, claims for wages, railway claims relating to goods, municipal claims, compoundable offences, traffic offences, etc. etc. Besides these cases, other cases decided by them are Revenue Cases under
Municipal Act, Shop Act, Forest Act, and Weight and Measures Act.

It is imperative to mention here that Lok-Adalats have been quite successful in lessening the burden of the courts by actively participating in the process of speedy resolution of the disputes. It is worth mentioning that despite its short life the institution has successfully decided 24,00,000 cases as on June 25, 1990\(^\text{264}\) awarding total compensation to the tune of Rs. 169,10,65,025\(^\text{265}\). It is also equally disclosed that a new legal history has been created in Vishakhapatnam with the holding of country's biggest Lok-Adalats on April 1, 1988 by settling 23,660\(^\text{266}\) cases of the total 30,107\(^\text{267}\) claimants from 61 villages involving payment of an additional compensation of Rs. 18.60 crores\(^\text{268}\), hushing up a huge litigation pending in various courts for the last twenty years. The tremendous success shown by the working of the Lok-Adalats has ultimately compelled the Indian Legislature to bring a new legislation titled: "The Legal Services Authority Act, 1987" to organize Lok-Adalats with a strong commitment that the operation of legal system promotes justice on the basis of equal opportunity. The provisions contained in the Act reflect the new legislative

\(^{264}\) See LG. U&Q 1464, August 2, 1991.
\(^{265}\) Ibid.
\(^{266}\) See, Indian Express, April 2, 1988, p. 5 (Chd. Ed)
\(^{267}\) Ibid.
\(^{268}\) Id.
policy and indicate that the classical view of judicial role, namely, that judges are not supposed to have an involvement or interest in the controversies they adjudicate to enable them to decide cases fairly and impartially, has been departed from the Act casts duty on the courts to take an active interest in the disputes so as to bring about reconciliation between the parties by taking such steps as may seem just and prudent having regard to the nature and circumstances of the case. The Act has been designed to put an end to avoidable litigation and thus to reduce the burden of the courts by cutting short a litigation which might otherwise become a protracted affair.

To be brief, it can be safely added here that during a short span of one decade, the March of law and justice has travelled along, but thorny way, the candle which was lit some years ago is still providing hope of justice to those who cannot even think of it.

The foregoing discussion about Lok-Adalat reveals that it shall prove good friend of the deprived and the down-trodden people and provide speedy, simple, effective, affectionate, and cheaper justice to the masses. It is hoped that Indian Judiciary will certainly abandon the age-old umpiral role in resolving the disputes and prove itself a strong medium to accomplish the goal of tripartite justice, that is social, political and economic, and function as strong agent to translate the philosophy of distributive justice into action.
(VII) Sum up

'Judiciary in India has really played a significant role in the realisation of distributive justice. The foregoing discussion shows that the judiciary has always endeavored hard to hold the scale of justice in any legal combat between rich and the poor and mighty and the week. The judicial-stand taken in B. Venketraman vs State of Madras,269 State of Madras vs Champakam,270 Balaji vs state of Mysore271, R. Chitralekha vs state of Mysore,272 Basalingappa vs Minichinnippa273, P. Rajendra vs State of Madras274, State of Andhra Pradesh vs Sagar,275 Triloki Nath vs State of J & K276, Periakaruppan vs State of Tamil Nadu277, and Janki Prasad Farimoo vs State of J & K278 has really prompted judicial activism in the field of awarding protective discrimination benefits to the backward classes, keeping away the chances of influence of political pressurization to include one caste or the other for the purpose of awarding benefits. The apex court has always asserted the fact that the consumers of the protective discrimination are those who belong to backward classes and the power conferred upon the State can only be exercised in

270. A.I.R., 1951. S.C. 226
favour of the backward classes of the citizens. It is revealed that the interventionist and non-interventionist attitude of the judiciary has always aimed to achieve the high ideal goal of the distributive justice in consonance with the spirit contained in our national charter. The Supreme Court has always been quite aware of the fact that goal of distributive justice can be achieved by ameliorating the conditions of the Scheduled Castes, Scheduled Tribes and backward classes. A thorough probe into the decisions of the apex court reveals that it has always exerted a lot to keep a proper balance between the interest of the weaker sections sided by social interest in amelioration of their conditions and social interest in disallowing such preferential treatments which result into development of a class interest in favour of the creamy layer of such communities. The judiciary has undertaken the responsibility of opening the policy issue and has tried to evolve a 'secular, scientific and rational' basis for determination of beneficiaries of preferential treatment. The preceding discussion also throws light on the fact that judiciary has not been the mere passive on-looker of the Government policy but has functioned as an effective instrument to correct such policies, if necessary, so as to subserve the cause of distributive justice. It has always been quite cautious to see that the

provisions of protective discrimination are not allowed to such an extent as to breed injustice to masses resulting into reverse discrimination. It is for this reason that judiciary has tried to do away with the political pressure and some time frustrated the Governmental move to treat caste as sole criteria for awarding protective discrimination, because once allowed its ugly results cannot be ruled out\textsuperscript{280}. The judiciary has always taken upon itself the task to find out whether the classes attracting preferential treatment are infact backward rather than to leave this issue in the hands of the Government.\textsuperscript{281} Similarly, the innovationists role of judiciary has also remained quite a commendable in determination of policy as to what extent the protective discrimination will be allowed.\textsuperscript{282} More over, K.C. Vastanth Kumar vs State of Karnataka\textsuperscript{283} is the polestar to guide the whole philosophy of compensatory discrimination.

Judiciary has also played a significant role in striking a proper balance between protection of women and children and social interests. The scrutiny of the discussion on judicial response to women and children makes it manifestly clear that the courts in India have favorably construed provisions safeguarding the interest of women and children, but have not at all failed to realize the social requirements. It is quite visible from the foregoing study

\textsuperscript{280} See, Supra notes 269-278.
\textsuperscript{282} See Supra note 271.
that judiciary has played a balancing role in cases of preferential treatment in favour of women, barng a few instances like *Yusuf Abdul Aziz vs State of Bombay*\(^\text{284}\), *Mrs Rajhubans vs State of Punjab & others*\(^\text{285}\) and *Walter Alfred Baid vs Union of India*\(^\text{286}\). The C.B. Muthamma vs Union of India,\(^\text{287}\) *Air India vs Nargesh Mirza*,\(^\text{288}\) *Ramchandra vs State of Bihar*,\(^\text{289}\) *Shamsher Singh vs State of Punjab*,\(^\text{290}\) *Pratibha Rani vs Suraj Kumar*,\(^\text{291}\) *Brijlal vs Prem Chand*,\(^\text{292}\) *Vadde Ram Rap State of Andhra Pradesh*,\(^\text{293}\) *Vikram Deo Singh vs State of Bihar*,\(^\text{294}\) and *Mohd. Khan Ahmed vs Shah Rano Begum*.\(^\text{296}\) are the eye opener judgments upholding the spirit of distributive justice in favour of women and children. The judiciary has appreciated the feelings of Indian women and children and endeavored a lot to improve their social, economic and political conditions in order to lift them up on par with other sections of the society. The judiciary has even gone to the extent of holding that State can discriminate in favour of women against men, but it may not discriminate in favour

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\(^{284}\) 1954. S.R. 530.  
\(^{293}\) Criminal Journal Vol. 96, Sep (1990), p. 1666.  
of men against women. It is also evident from the foregoing study that court has shown quite an encouraging attitude in upholding preferential treatment to women in the area of public employment. Further, the court has also acted as a sincere guardian to safeguard the women's proprietary interests and afforded timely help to render justice to them. A strong ray of hope has been building up in favour of the down-trodden women by the landmark decision of Supreme Court in Mohd. Ahmed Khan vs Shah Bano. The monopolistic attitude of the cruel husband has been badly discouraged and the trend of the Judiciary has always been to encourage Indian woman to vindicate her constitutional and legal rights in order to save her from all sorts of exploitation.

Similarly, the role of judiciary deserves a special praise for promoting the child welfare. The judiciary has with all behest at its command emphasised that the important task of distributive justice is to take care of the child, for in him lies the hope of nation's future. It is with this viewpoint that judiciary has very daringly obligated the State to abide by the Constitutional standard and provide at least the minimum conditions ensuring child

298. See, Supranote, 100.
299. See, Supranote, 104.
300. Supranote, 296.
301. Supranote, 119 and 122.
dignity. The preceding study further shows that courts have made all the possible attempts to protect children and improve their economic and social status. The judiciary has always pleaded for the positive role to be played by the Government and desired that attempt must be made to weed out child exploitation.

Judicial response to agrarian reforms in India has been quite crucial one. The foregoing discussion reveals that there remained a dig-dong battle between the court on the one hand and Government on the other. This trend is reflected in Kameshwar Singh Vs State of Bihar, State of West Bengal Vs Bella Banerjee, Vajeravelly Vs Deputy Collector, Union of India Vs Metal Corporation of India, Golak Nath Vs State of Punjab, and R.C.Cooper Vs Union of India. The non-reconciliation of the legislative power with judicial process caused a great uncertainty and consequently certain provisions lost their original forms, because of frequent amendments with no sign of the courts abandoning its stand till the passing of 'Twenty-fifth Amendment Act, 1971. It is revealed that the major

302. Supranote, 123 and 132.
303. Ibid.
304. A.I.R. 1954 SC 392
305. A.I.R. 1954 SC 119
306. A.I.R. 1965 SC 1017
308. A.I.R. 1967 SC 643
310. See, Supranote 154.
controversy remained of the question of adequacy of compensation, emien t domain, compulsory acquisition and public purpose. The court held the abolition of zamindari as void on the ground that it discriminated between rich and the poor in determining the compensation for acquired property. The agrarian legislations were struck down on the ground that the compensation provided in the Act was unjust, inequitable and illusory. The result was that the apex court failed badly to encourage the implementation of distributive justice programme designed under these reformative legislations.\textsuperscript{311} The situation became quite complicated when the Supreme Court held that the Fundamental Rights could not be impaired even through the process of amendment.\textsuperscript{312} This attitude of the judiciary towards agrarian reform legislations adversely affected the socio-economic reforms and shattered the dream of the Parliament to establish a socialistic society. It is amply clear from the above discussion that the judicial trend right from 1950-70 reveal that judiciary sat over the judgments of the Parliament ignoring the basic reality that the Parliament was best judge to visualize the requirements of its people and this should have the final say to reorient its philosophy towards that end.\textsuperscript{313} A radical shift in the attitude of the apex court is however witnessed in \textit{Veshra Nanda Bharti Vs

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311. See, Supra Note, 309.
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State of Kerala. Wherein the court for the first time echoed a novel philosophy of holding that the entire concept of Right and especially that of property rights should have social utility and it must be conditioned in the context of the demand of the society at large if a community of equals is to be established which is an elaboration of the ideal of distributive justice. The court has very wisely held in the subsequent cases that in an organized society no right can be absolute, right of one must be consistent with the right of others. The court even went to the extent of holding that when it is not so the state must step in and endeavour to correct the imbalance and disharmony. The court seems to have avoided the path of confrontation with legislature. More so, the judicial philosophy manifested in the judicial pronouncements after Keshvananda Bharti's case highlights the fact that court supported the supplementary theory of treating Part III and Part IV as fundamental. This is also equally reflected in lucid words of J.Bhagwati. He rightly opined: "Directive Principles impose an obligation on the state to take positive action for creating socio-economic

314. A.I.R. 1973 SC 1461
conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. They are intended to be operated forcefully for the millions of our poor and deprived people who do not have even the basic necessities of life and are living below the poverty level." The similar views have been upheld in *N.C. Mini Bus Owner's Association Vs District Magistrate*. The court, however, reminded quite critical about the role of the state and held that the officers of the state were not meant for carrying out unauthorised dictates of the ministers. The court sounded a note of caution to the effect that the officers of the state must discharge their statutory functions strictly in accordance with the spirit contained in the statute itself. The court also found it difficult to conclude that by deletion of Art 31 from Part III of the constitution, the Parliament intended to confer absolute right on the legislature to deprive the citizen of his property by mere passing of a legislation without complying with the requirement that the deprivation was for a public purpose and no payment of amount which was not illusory.

The judicial response to labour welfare

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318. Ibid.
legislations shows that courts in India have made continuous efforts to modify the traditional law relating to the relationship between the employer and employees. There was a time when principle of 'equal pay for work' was considered to be an abstract doctrine. But the court changed its stand in 1962 in *Randhir Singh Vs Union of India* \(^{321}\) and held that application of equality clause under Article 14 enjoyed a paramount significance and hence 'equal pay of equal work' must be strictly interpreted in the light of the goal of welfare state. *D.S.Nakara Vs Union of India*, \(^{322}\) *Ramachandra Iyer Vs Union of India*, \(^{323}\) *Krishan Kumar Vs Union of India*, \(^{325}\) and *Dharward District P.W.D.L.W.D Association vs State of Karnataka* \(^{326}\) reveal that judiciary has made earnest attempts to secure the working class against different forms of exploitations. The state has been obligated by the judiciary to require to secure that health and strength of the workers, men and women, and children of tenderage are not abused and forced by economic necessity to enter avocations unsuited to their age and strength. The close examination of these decisions shows that the judiciary in India has made concrete efforts to add a new dimensions to labour welfare jurisprudence. \(^{327}\)

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\(^{321}\) A.I.R. 1982 SC 879
\(^{322}\) A.I.R. 1983 SC 130
\(^{323}\) A.I.R. 1984 SC 541
\(^{324}\) (1990) 3 S.C.J. 406
\(^{326}\) A.I.R. 1990 SC 883
\(^{327}\) See, Supra Notes, 199 and 200
court has from time to time directed the State Governments to pay
salary to daily rated and monthly rated employees on par with
the regular employees.\footnote{328} A strong warning has been issued to
the effect that violation of labour welfare legislation
should be viewed seriously and the errant employees should
be punished strangely incase the charge of violation of
labour laws established against them.\footnote{329} The court has also
directed the State Governments from time to time to identify,
release and rehabilitate the bonded labourers with the impact
that more than 2,14,842 bonded labourers were identified till
1986 and 1,75,630 bonded labourers have been rehabilitated.

The significance of the role of judiciary also lies in the fact that it has recently started
realizing that there is a time to give divorce to the
and drastically
traditional role perception and performance and participate in
the reconstruction of Indian society to ensure justice to the
poor, unprivileged and deprived sections of the society.

Social Action Litigation Programme, Free Legal Aid Movement
and recent emergence the concept of Lok-Adalats stand as the
true testimony to the Judicial activism in India. The
landmark cases like, Bar-Council of India Vs M.C.Daba
Bolka,\footnote{330} PUDR Vs Union of India,\footnote{331} Bandhua Mukti Morcha Vs
Union of India,\footnote{332} Hussainara Khatoon Vs Home Secretary,

\footnote{328: See, Supranote 203}
\footnote{329: See, Supranotes 204-208.}
\footnote{330: A.I.R. 1975 SC 2029}
\footnote{331: A.I.R. 1982 SC 1473}
Bihar: Sunil Batra Vs Delhi Administration, Khatri Vs State of Bihar, Sheela Barse Vs Union of India, and Arun Shorie Vs State show that courts in India have really become the courts for the poor and struggling masses of the country, sensitized to the need of doing justice to the large masses of the people to whom justice has been denied by the cruel and heartless society for centuries together. The foregoing discussion shows that a vast revolution is taking place in the judicial thinking with the result that under trials, prisoners, pavement dwellers, patients, bonded and immigrant labourerers, children, women, and other weaker sections of our society have been benefited by the changed judicial process. The affirmative stand taken by the court in various cases has ultimately compelled the state Governments to devise such a procedure as would ensure free legal aid to the poor. Now, lack of financial resources with the State Government is at all no excuse to deny free legal aid to the poor. The court has also endeavoured to improve the justice delivery system. The emergence of the device of Lok-Adalats is an example in this direction. The courts are tirelessly busy to re-orient the policies, procedure and outlook with a dynamic direction towards social justice to

333. A.I.R. 1979 SC 1360
334. A.I.R. 1980 SC 1579
335. A.I.R. 1981 SC 921
336. A.I.R. 1986 SC 1773
338. See, Supranotes 225-231.
enable a common man to have justice and restore confidence in judiciary. The study shows that judiciary in India, through its activist approach, is fighting hard to revive the old strategy of conciliation for amicable settlement of dispute so that people get speedy and cheap justice. The surprising results have come with this new technique and it is worth mentioning that more than 24,00,000 cases have been resolved by the Lok-Adalats till June, 1990 awarding total compensation to the tune of Rs. 169,106,025.\(^{340}\) The tremendous success shown by the Lok-Adalats has ultimately paved path for the Indian legislature to bring a new legislation under the title "The Legal Services Authorities Act, 1987."

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340. See, Supranote, 265