(A) Prelude

The interests of the weaker sections of the society are first change on the states and they have to be adjusted with the interests of the community as a whole. India's system of preferential treatment for historically disadvantaged sections of the population is unprecedented in scope and extent. Our is a country of great social and cultural diversity. Often we take great pride in the country's cultural diversity. While the cultural diversity adds to the splendour of India, the others add to our shame and sorrow. The social and economic disparities are indeed despairingly vast. The Scheduled Castes, the Scheduled Tribes and the other socially and educationally backward classes, all of whom have been compendiously described as 'weaker sections of the people', have long journeys to make society. They need aid, facility, launching and propulsion. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity not for charity. The days of Dronacharya and Ekalavya are over. They claim their constitutional right to equality of status and of opportunity and socio-economic justice. Several bridges have to be erected, so that they may cross the Rubicon. Professional education and employment under the State are thought to be two such bridges.

Among the countries in the world, whether they are developed or developing, India can claim to have had more experience than any other country, with the system of public policy which sought to safeguard the interests of weaker sections through preferential treatment.

The Preamble to the Constitution silhouettes a 'justice-oriented' community. It provides, inter alia, justice - social, economic and

political; and equality of opportunity and status to all citizens including the weaker sections of the society who constitute the bulk of our population. These solemn pledges have been translated into some specific provisions of the Constitution. Part III of the Constitution guarantees certain fundamental rights to the individual which are not all negative in character but envisage positive action on the part of the State. Among these rights, the right to equality in its various facets, including the authorisation of the state to take affirmative action for the benefit of the weaker sections including scheduled castes and scheduled tribes, is representative of egalitarian concept. The same concept has been expressed with greater vigour and clarity in the directive principles of state policy in Part IV. The directives in no uncertain terms require the State, inter alia, to promote the welfare of the people by securing and protecting a social order in which justice, social, economic and political, should inform all the institutions of national life. It further enjoined the State that it should, in particular, strive to minimise the inequalities in income, 


7. Article 14 provides: "The State shall not deny to any person equality before law or equal protection of laws within the territory of India". Article 15(1) and (2) prohibits discrimination on the grounds only of religion, race, caste, sex or place of birth. Article 15(4), however, authorises the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Similarly article 16(1) and (2) provides equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State and prohibit discrimination on the ground only of religion, race, caste, sex, descent, place of birth, residence or any of them. Article 16(4), however, provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State". Article 335 provides: "The claim of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in making of appointments to services and posts in connection with the affairs of the Union or of a State". See also article 320(4).

8. Article 38(1).
and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.  

Article 46 specifically provides:

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

These principles though not enforceable in the court of law, nevertheless, they have been declared "fundamental in the governance of the country" and it is further provided that it "shall be the duty of the State to apply these principles in making laws". The directive principle embodied in article 46 is not only binding on the law makers as ordinarily understood but it should equally inform and illuminate the approach of the court when it makes a decision as the Court also is 'State' within the meaning of article 12 and makes law even though "interstitially from the molar to the molecular".

The obvious purpose of article 46 is to promote the welfare of those who are socially handicapped in the peculiar Indian context. The expression "educational and economic interests" was deliberately used to emphasize that the educational and economic interests and their advancement go hand in hand. Without education the economic assistance may not be really fruitful or effective, and that lack of education was primarily responsible for the perpetuation of social and economic injustices against them.

9. Article 38(2). This clause was instituted by the Constitution(Forty - Fourth Amendment)Act, 1978, Section 9(w.e.f.20.6.1979).See also articles 39,39A,41,42 and 43.

10. See article 37. At this place it may be mentioned that the word 'State' has the same meaning as defined under article 12 of the Constitution. (Vide Article 36).


12. See S.K.Aggarwala, "Content of Directive Principles in the Indian Constitution", in M.Hidayatullah,(ed.), Constitutional Law of India,Vol.1, 682 at 686(1984). The phraseology of article 46 has partially been borrowed from article 45(4)(1) of the Irish Constitution which provided:"The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged". The inclusion of such a clause was initially suggested by Sir, B.N.Rau,Ibid.

phrase "shall protect them from social injustice and all forms of exploitation" is both comprehensive and pertinent.\(^{13}\)

Thus, the directive principles embody a commitment which was imposed by the constitution makers on the State to bring about socio-economic regeneration of the teeming millions who steeped in poverty, ignorance and social backwardness. They incorporate a pledge to the coming generations of what the State would strive to usher in.\(^{14}\)

In addition to this, the Constitution also ensures due representation of the weaker sections (Scheduled Castes and the Scheduled Tribes) in Parliament and State Legislatures through reservation of seats.\(^{15}\) A backward class commission to make recommendations for improving the conditions of the backward classes and a commission to report on the administration of the scheduled area has to be conceived.\(^{16}\) Special provisions have also been made for such minorities as Anglo-Indians.\(^{17}\)

In consonance with the above constitutional scheme, it may be appreciated that India embraced equality as a cardinal value against a background of elaborate, valued, and clearly perceived inequalities.\(^{18}\) The notion of equality as an aspect of justice itself has two phases, namely, equality as a means of doing justice and equality as an end of justice. The road to the end is a two lane highway - one requiring the equal treatment of the equals and the other requiring the unequal treatment of unequals.\(^{19}\) The traditional view that the state is concerned only with 'formal equality' and has nothing to do in making the unequals equal, has undergone radical change. According to the new approach, justice demands 'equality of results' this case it was observed: "Social backwardness contributes to educational backwardness; educational backwardness perpetuates social backwardness; and both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition".

13. Supra note 12. Untouchability, bonded labour, discriminatory wages, usurious loans in rural areas, dowry, child marriage, discriminatory laws against women relating to marriage, divorce inheritance, are but a few examples of social injustices against, and exploitation of, weaker sections in the highly stratified society. See also E.S. Venkataramiah, "Some Thoughts on Social Justice", 25 J.I.L.I.289 at 293(1983).


15. See articles 330 and 332.


17. Articles 331, 333, 336 and 337.

18. Marc Galanter, supra note 2.


\(^{13}\) Supra note 12.


\(^{15}\) See articles 330 and 332.

\(^{16}\) Articles 339 and 340.

\(^{17}\) Articles 331, 333, 336 and 337.

\(^{18}\) Marc Galanter, supra note 2.

which can be achieved only when the inequalities of men are removed by affirmative action of the State. According to Friedman:

It is clear, however, that the principle of absolute equality between individuals of all classes and races cannot be understood in a rigid sense...it means the abolition not of natural differences, which it is not within man's power to abolish, but of man-made differences inherent in the organisation of the society...It is these which it is the task of law, in democratic societies, to remove.

The concept of social justice is primarily based on the idea that all men are equal in the society without distinction of religion, race, caste, colour or creed. It also means the absence of privileged classes in the society. The concept of social equality has been considered a sine qua non for effective exercise of the rights guaranteed in the Constitution to all citizens. "The more equal are the social rights of citizens", says Harold J. Laski, "the more likely they are able to utilize their freedom in realms worthy of exploitation. Certainly history of the abolition of special privileges has been, also the history of the expansion of what in our inheritance was open to the common man. The more equality there is in a state, the more use, in general, we can make of our freedom."

However, in a caste-ridden and economically imbalanced society, like the Indian society, wherein due to historical reasons, certain castes and classes were for decades socially oppressed, economically condemned to live the life of penury, and educationally coerced to learn the family trade or occupation and to take education set out for each caste and class by the society, the strict application of the doctrine of social equality would, in fact mean perpetuation of age-long distinction based on caste and class. The doctrine of social equality would be meaningful in the Indian society only if initial advantage or privilege is given as an equaliser to those who are too weak socially, economically and educationally, to avail of the advantage of the guaranteed freedoms on a footing of equality.

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20. For the concept of equality see supra Chapter III.
24. Supra note 22. See also H.L.A. Hart, The Concept of Law, 155 (1961). He says, "Justice is traditionally thought of as maintaining or resorting balance or proportion, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter, 'and treat different cases differently'. "And further, "Treat like cases alike (conted.)"
Compensatory treatment should be given only to those who are personally disadvantaged by the past and present discrimination and who have not been able to overcome the effect of past discrimination.  

Hence the policy behind the protective discrimination is to help the really needy and the poor. It is the socially and educationally backward individual of a group who should get the benefits of compensatory state action. The mention of caste group in the context of preferential job policies and places in the educational institutions is only a convenient method to identify the deserving beneficiaries of the Scheduled Caste order. Even the words "Weaker Sections" in article 46 are intended to the convenient devices and select the legitimate beneficiaries of the protective schemes aimed at the promotion of the educational and economic interests of backward classes.

However, the conflict between the claims of the individual to enforce his constitutional right to formal or legal equality on the one hand and the concern of the State on the other hand to accord preferential treatment to the weaker sections of the society, and in particular to the Scheduled Castes and Scheduled Tribes, in order to make the fundamental right to equality really meaningful to them, has presented a conflict between the 'merit principle' and the 'need principle'. According to the 'merit principle', benefits are to be distributed according to the contribution an individual makes to the society in terms of services and other activities and lay emphasis on individual's merit as a relevant criteria for determining his allocation of benefits and burdens. The 'need principle' on the other hand recognises that men are different in intelligence, motivation, education and in many other respects which effect their ability to contribute to the society but denies the direct relevance of most of these differences as criteria for determining the proper distribution of societies good. But the true...
position can be best explained in the following words:

To minimise the existing inequalities and bring about a just social order we will have to give due recognition to the claims and needs of those unfortunate sections of the society which have been denied equal share and equal protection for centuries. Demand for application of meritarian principle of social justice coming from those sections of the society who have been enjoying for long all the benefits and privileges based on birth regardless of any individual ability or merit is certainly unfair and unjust.28

Hence, the demand for merit criteria to be replaced by an alternative criteria which will secure social justice. Under the merit criteria there would be justice only when all have an equal opportunity to acquire meritorious characteristics or abilities. It would become invidious when persons are unable to compete on the basis of merit criteria, when they are victims of past discrimination by the social, economic, political and legal system. Thus the 'merit criteria' needs to be replaced by 'need criteria' to ensure socio-economic justice to the disadvantaged groups in the society.

The traditional concept of equality based on laissez faire liberal concept has been sought to be replaced by the new equalitarian principle based on the following propositions:

"(i) the distribution of goods and services primarily on the basis of merit is unfair unless each has a fair chance to compete on the basis of those criteria;

(ii) that the use of meritocratic criteria, without compensatory measures to permit those who suffer either from involuntary inequalities or from past invidious discrimination to improve their competitive position, simply perpetuates inequalities; and

(iii) that we must not eliminate invidious discrimination but make 'affirmative' efforts to assure equality of opportunity by adopting a variety of compensatory criteria.'

28. S.Khurshid,"The Concept of Equality", (1984) S.C.C.(J)1 at 6.M.P. Singh has also criticised the 'meritarian principle' as the basis for preferential treatment.According to him merit varies with the variance in the social needs. He further says that the merit is determined for serving the perceived social needs (or values) of the day, satisfaction of such needs is the end and merit is simply a means to achieve that end. See M.P.Singh, supra note 6 at 44-53. See also B.Sivaramayya, Inequalities And the Law, 35(1984).

29. See B.A.V.Sharma,"Concept of Equality and Preferential Treatment", in (conted)
measures such as special educational training, and
tutorial programme ... and the like. "30

In view of these propositions, the Indian Constitution envisages
certain preferences for the weaker sections of the people. These prefer­
ences are of three basic types: First, there are reservations, which allot
or facilitate access to valued positions or resources. The most important
instances of this type are reserved seats in legislatures, reservation of
posts in the government services, and reservation of places in academic
institutions especially in professional and technical institutions.Second,
there are programmes involving expenditure, e.g., scholarships, grants,
loans, land allotments, health care and legal aid - to a beneficiary group
beyond comparable expenditure for others. Third, there are special protec­
tions. These distributed schemes are accompanied by efforts to protect the
backward classes from being exploited and victimized. 31

With this backdrop in mind, an attempt will be made in this chapter
to identify the beneficiaries of the compensatory discrimination. What is
the criterion for identification of backward classes and the role which
judiciary has played in that process? What is the judicial response to the
weaker sections? What is the extent to which reservations can be made?What
are the provisions providing reservation in the legislative constituencies?
and what is the impact of conversion and reconversion on the beneficiaries?

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30. William T. Blackstone, "Reverse Discrimination and Compensatory Justice"
tarian is not a total repudiation of the traditional concept of equality.
It is that and something more, It implied action of two kinds: (1) Sto­
ppage of all kinds of discriminatory practices and (2) positive mea­
ures to correct accumulated consequences of past inequality. See T.N.
Shalla, "Dynamics of Reservation policy under Indian Constitution: A
of Weaker Sections of Society, 99 at 104(1986).

31. Supra note 2 at 43.
The first question which arises is that who are beneficiaries deserving special protection for the promotion of their educational and economic interests. According to Marc Galanter:

In common Indian usage, the generic term for the groups entitled to receive preferences is the "backward classes" ("Weaker sections" is a rough equivalent for this usage.) This group in turn may be broken down into the Scheduled Castes ("untouchables") the Scheduled Tribes, and a diverse and less well defined residuum known as the "other Backward Classes" or sometimes the "backward classes"...Thus "backward classes" =Scheduled Castes + Scheduled Tribes + Other Backward Classes; "Backward Classes" = Other Backward Classes.

Article 15(4) enables the State to make special provisions for the advancement of "any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes". 

Article 16(4) provides that the State can make reservations of appointments or posts in favour of "any backward class" of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Article 15(4) used the term "socially and educationally backward" whereas article 16(4), on the other hand, uses the term "backward class". This difference proves that these two phrases in two different clauses intended

32. Id. at 3.
33. Originally this clause was not there in the Constitution. Prof. K.T. Shah had made a proposal to amend article 15 to allow the State to make special provision for the "advantage, safeguard or betterment" of the "Scheduled Castes or backward tribes", but this was rejected by the Constituent Assembly (See VII C.A.D. 655 at 664). This clause was added by the Constitution (First Amendment) Act, 1951, section 2, to nullify the judgement of State of Madras v. Champakam Dorairajan, (A.I.R. 1951 S.C. 226), which had invalidated reservation of seats, for among others, backward classes, Scheduled Castes and the Scheduled Tribes. The object of this clause was "to remove the effect of centuries of discriminatory treatment and to raise the downtrodden to equal status". See Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643 (Per Hidayatullah, J., as he then was).
34. See also supra note 7.
to connote different meanings. Article 46 enjoins the State to promote
with special care, the educational and economic interests of the "weaker
sections" of the people and, in particular, of the "Scheduled Castes and
Scheduled Tribes". The phrase "weaker sections" in article 46 must be
deemed to comprehend the terms "socially and educationally backward classes"
and "backward classes" found in articles 15(4) and 16(4) respectively. Articles 15(4) and 16(4) are the indicators of lines through which States'
endeavour or efforts could be channelised to promote the interests of the
"weaker sections". According to Krishna Iyer, J., "The Scheduled Castes
and Scheduled Tribes have earned special mention in Art.46 and other
'weaker sections', in this context, means not every 'backward class' but
those dismally depressed categories comparable economically and educa­
tionally to Scheduled Castes and Scheduled Tribes". Thus, the Scheduled
Castes, the Scheduled Tribes and the other socially and educationally
backward classes have been compendiously described as "weaker sections of
the people".

35. See Joseph Minattur,"Protective Discrimination and the Rule of Law",
According to him, the phrase "backward classes" has a wider connota­
tion than the restricted phrase "socially and educationally backward
classes", used in article 15(4). He feels that there may be a class of
citizens which though educated yet backward and not properly represented
in the services under the State. They can still claim the benefit of
article 16(4) but they cannot claim the benefit of article 15(4) as they
are not educationally backward. However, in Janki Prasad v. State of J&K,
A.I.R.1973 S.C.930 at 936, it was observed that the beneficiaries of both
the provisions, i.e., articles 15(4) and 16(4) are the same.

36. Supra note 22 at 163.
where Vaidialingam, J., in the course of his judgement observed:"Article
15(4) will have to be given effect in order to assist the weaker sections
of the citizens, as the State has been charged with such a duty". See
also State of Kerala v. N.M. Thomas, supra note 5 at 505-06 where Khanna,
J. has observed that article 16(4) was added to give effect to the object­
ives of article 46 in the field of public employment.

38. Supra note 5 at 532. According to Fazal Ali, J., "A combined reading of
Art.46 and Clauses(24) and (25) of Art.366 clearly shows that the members
of the Scheduled Castes and Scheduled Tribes must be presumed to be back­
ward classes of citizens, particularly when the Constitution gives the
example of the Scheduled Castes and the Scheduled Tribes as being weaker
sections of the society". Id. at 549.

39. See supra note 3 at 1508. See also Laxmi Narayan v. Madan Mohan, A.I.R.
1988 M.P.142 at 143-44.
From the perusal of above analysis, it is clear that the Constitution permits preferences for the three categories of groups.

(i) Scheduled Castes,

(ii) Scheduled Tribes, and

(iii) other backward classes.

The rationale for giving favoured treatment to these groups can best be appreciated if we study the Indian social structure in its historical perspective.

(i) Scheduled Castes

The Scheduled Caste category is intended to comprise those groups which are isolated and disadvantaged by their untouchability — that is, their low status in the traditional Hindu Caste hierarchy which exposed them to invidious treatment, severe disabilities, and deprivation of economic, social, cultural and political opportunities. Broadly speaking, these depressed classes are now called Scheduled Castes. Article 366(24) defines Scheduled Castes as under:

"Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution.

40. See Articles 15(4), 16(4), 46, 330, 332, 335 and 341.
41. Ibid. See also article 342.
42. See articles 15(4), 16(4), 46 and 340. In General Manager v. Rangachari, A.I.R.1962 S.C.36, it was held that "Backward Classes" in article 16(4) includes the Scheduled Castes and Scheduled Tribes. The term "backward classes" is commonly used in two senses: (1) as a generic term including the Scheduled Castes and the Scheduled Tribes as well as the so-called other backward classes; (2) as designation of those backward groups not included in either of the first two categories (i.e., as equivalent to "Other Backward Classes") see supra note 2 at 121.
Thus, the Constitution makers eschewed any attempt at a connotative definition of Scheduled Castes. It prescribes an agency and a method for designating them.\(^{44}\) The President, in exercise of the powers conferred under clause (1) of article 341, has made the Constitution(Scheduled Castes) Order,1950, listing the Scheduled Castes in various States. This list was revised by the Parliament subsequently.\(^{45}\)

(ii) Scheduled Tribes

The general notion is that this category should include those groups distinguished by 'tribal characteristics' and by their spatial and cultural isolation from the bulk of the population. The Scheduled Tribes were defined partly by habitat and geographic isolation, but even more on the basis of social, religious, linguistic and cultural distinctiveness - their 'tribal characteristics'. Just where the line between the 'tribals' and 'non-tribals' should be drawn has not always been free from doubt.\(^{46}\) Under the Constitution the formal mechanism of designating


44. See Article 341 of the Constitution.

45. See also Constitution Scheduled Castes(Union Territories)Order,1951; Constitution(Jammu & Kashmir)Scheduled Castes Order,1956; Constitution(Dadra and Nagar Haveli) Scheduled Castes Order,1962, Constitution(Pondicherry) Scheduled Castes Order,1964; Constitution(Goa,Daman,Diu) Scheduled Castes Order,1968 and Constitution(Sikkim) Scheduled Castes Order,1978. Once the lists were promulgated, the Courts contributed little to their refinement. A somewhat exaggerated expression of judicial impotence in this area is found in the assertion of then Chief Justice Ray in State of Kerala v. N.M.Thomas, A.I.R.1976 S.C.490 at 501, that "no court can come to a finding that any caste or any tribe is Scheduled Caste or a Scheduled Tribe". In the same case Justice Krishna Iyer in his passionate defence of special protection for Harijans identified them as "this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division".Id. at 535.

46. The British attempted to protect these people by placing the areas in which they were concentrated outside of ordinary administration to permit a policy of insulating them from exploitative or demoralizing contact with more sophisticated outsiders. These enclaves were called "Backward Areas" in the Government of India Act, 1919. In the Government of India Act, 1935, they were called "Excluded Areas" or "Partially Excluded Areas". See supra note 2, at 147.
the Scheduled Tribes is identical with that of Scheduled Castes. Article 366(25) provides:

"Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution.

The President may specify, after consulting with the governors, the "tribes and tribal communities or parts of or groups within tribes or tribal communities" to be the Scheduled Tribes for each state. In exercise of the powers conferred under clause(1) of article 342 the President has made the Constitution(Scheduled Tribes) Order, 1950 listing the Scheduled Tribes in various states. Once promulgated, the list can be altered or varied only by the Act of Parliament.

Thus under the Constitution, the President and Parliament are explicitly given broad powers to define these scheduled groups and the courts have refused to review the appropriateness of the criteria applied in determining these groups. The inclusion in the list entitles the persons belonging to such groups to preferential treatment in jobs, educational institutions and proportional seats in the legislatures. Now a feeling has been generated that the inclusion in these lists has become a vested interest. If the dream of having a classless and casteless society is to be achieved, the lists of Scheduled Castes and Scheduled Tribes would have to be reduced from year to year and replaced in due course by a list based on criterion of income-cum-merit. This will help in building an

47. See article 342(1).
48. See also Constitution Scheduled Tribes(Union Territory)Order, 1951; Constitution(Andaman and Nicobar Islands)Scheduled Tribes Order, 1959; Constitution(Dadra and Nagar Haveli)Scheduled Tribes Order, 1962; Constitution Scheduled Tribes(Uttar Pradesh)Order, 1967; Constitution(Goa, Dam, and Diu) Scheduled Tribes, 1968; Constitution(Nagaland) Scheduled Tribes Order, 1970 and Constitution(Sikkim) Scheduled Tribes Order, 1978.
49. Article 342(2).
egalitarian society. The Advisory Committee for the revision of the lists of Scheduled Castes and Scheduled Tribes, which was appointed by the Central Government in 1965, had rightly suggested that more advanced communities from these lists should be taken out and a deadline be fixed when these lists would totally be dispensed with in the interest of the nation. If this is not done then the creamy layers among these scheduled lists will keep taking the benefit of the preferential treatment and making the poor more poor.

(iii) Other Backward Classes

The entire controversy today revolves round the question, who in India are "other backward classes" entitled to receive state preferences. Other backward classes" are not defined in the Constitution anywhere. Nor any exclusive method or agency for their designation is provided. The history of articles 15(4) and 16(4) also does not indicate any clear meaning of this phrase. In the Constituent Assembly it was thought that it was meant merely as a synonym for the Scheduled Castes. Some members were of the view that it might mean more. K.M. Munshi expressed the view that backward classes included the Scheduled Castes, Scheduled Tribes and other socially, economically and educationally backward classes. The Constitution, therefore, took note of what are called "other backward classes" who

To quote some examples in Haryana, Chamars among the Scheduled Castes are more fortunate to enjoy reserved jobs and sweepers are the least fortunate. In Bihar, Chamars, dusadhas and dhobi enjoy lion's share of reserved posts to the detriment of basees and musahars. In Maharashtra also the upper layers among the scheduled castes enjoy the major share of official benefits. See Parmanand Singh, "Some Reflection on Indian Experience with Policy of Reservation", 25 J.I.L.I. 46 at 53 (1983).

According to Marc Galanter: "The question of who were the Scheduled Castes was debated and roughly settled before independence within the executive and without the participation of the courts. But who are the Backward Classes is a post-independence question which the constitutional recognition of the category made one of all-India basis". See Marc Galanter, "Who are the Other Backward Classes: An Introduction to a Constitutional Puzzle", XIII Economic and Political Weekly, 181 at 182 (1978).

52. According to Marc Galanter: "The question of who were the Scheduled Castes was debated and roughly settled before independence within the executive and without the participation of the courts. But who are the Backward Classes is a post-independence question which the constitutional recognition of the category made one of all-India basis". See Marc Galanter, "Who are the Other Backward Classes: An Introduction to a Constitutional Puzzle", XIII Economic and Political Weekly, 181 at 182 (1978).

53. See Pandit H.N. Kunzru at VII C.A.D. 680; Ari Bahadur Gurung at VII C.A.D. 685; R.M. Nalavade at VII C.A.D. 686; Dharam Parkash proposed that depressed classes or Scheduled Castes should be used in place of Backward Classes, since the former had a definite meaning (VII C.A.D. 687).


55. Id. at 697.
were equally or may be somewhat less backward than the Scheduled Castes and the Scheduled Tribes. In order to facilitate the task of identifying the backward classes and laying down the criteria for the purpose, the President is authorised under the Constitution to appoint a commission to investigate the conditions of the backward classes. In pursuance of this provision, the President appointed the Backward Classes Commission under the Chairmanship of Kaka Sahib Kalelkar in January 1953. The Commission was required to determine the criteria to be adopted in considering whether any section of people should be treated as socially and educationally backward classes and to prepare a list of such backward classes in accordance with such criteria.

The report of the Commission was submitted on 30 March 1955. The Commission realized that the Indian society was not based essentially on economic structure but on the medieval concepts of varna (Caste) and social hierarchy. It felt that the evils of caste system could be combated only by taking caste into account. After taking into consideration the social conditions of the Indian society, it adopted the following criteria for general guidance.

(1) Low social position in the traditional caste hierarchy of Hindu society.

(2) Lack of general educational advancement among the major section of caste or community.

(3) Inadequate or no representation in the government service.

(4) Inadequate representation in the field of trade, commerce and industry.

It appears that having considered several criteria as relevant in determination of backward classes, it ultimately decided to treat the status of caste as an important factor. The Commission prepared a list of as many as 2399 caste-groups which were treated "socially and educationally backward". However, it is interesting to note that the Chairman of the Commission at the last minute rejected caste as the basis for identification.

56. See article 340.
58. Id. at 39.
59. Id. at 46-47.
of the backward classes. He considered caste as repugnant to India's avowed policy of casteless and classless society and as inimical to democracy. The Chairman recommended that the poor and deserving from all the communities should be helped and advocated the criteria of income and occupation rather than caste for selecting beneficiaries. The government of India did not feel satisfied about the approach adopted by the Commission as it was based on caste consideration and rejected the recommendations. As no acceptable criteria could be accepted, the Government decided not to issue any list of backward classes other than Scheduled Castes and Scheduled Tribes. The States were requested to draw their own lists of backward classes in applying non-communal test of income and occupation and render every possible help to them. In the light of this direction of the Central Government various states appointed their own commissions and committees to investigate the conditions of backward classes and to evolve some definite criteria to identify "the socially and educationally backward" classes in the states. By and large all the concerned States kept caste as a dominating factor for identifying the "backward classes".

The Central Government appointed another Commission in 1978, under the Chairmanship of B.P. Mandal, to determine the criteria for identifying "backward classes". It submitted its report on 31 December 1980. Mandal Commission also proceeded on the definite premise that in the traditional Indian society social backwardness was a direct consequence of caste status and that various other types of backwardness flowed directly from this crippling handicap. The Commission conducted a country-wide socio-educational survey covering 405 out of 407 districts. On the basis of its sample survey the Commission generated a set of eleven indicators divided into

60. See Chairman's Covering letter to the Report at XIV.
61. Id. at vii, xiv-xv.
three groups - social, educational and economic. The weightage given to these groups was also different so that a larger weightage was attached to social indicators and that minimum weightage was attached to economic indicators. The Commission felt that out of possible score of twenty-two if any caste scored eleven points it would be treated as backward. It has specified 3743 Hindu and non-Hindu castes comprising 52% population of India as "other backward classes" for the purposes of job and educational reservations. It has recommended only 27 per cent reservation, besides 22.5 per cent already reserved for the Scheduled Castes and Scheduled Tribes. The Commission has treated castes as classes on the belief that there is a "class linkage between caste ranking of a person and his social, educational and economic status."

64. The indicators were:

A. Social
   (i) Castes/Classes considered as socially backward by others.
   (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
   (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do in urban areas.
   (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. Educational
   (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.
   (vi) Castes/Classes where the rate of student dropout in the age of 5-15 years is at least 25% above the State average.
   (vii) Castes/Classes among whom the proportion of matriculates is at least 25% below the State average.

C. Economic
   (viii) Castes/Classes where the average value of family assets is at least 25% below the State average.
   (ix) Castes/Classes where the number of families living in Kutch houses is at least 25% above the State average.
   (x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.
   (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.


65. Three points were assigned to each one of the social indicators, two points to educational indicators and one point to economic indicators. See ibid.

66. Id. at 57-58.

67. Id. at 61. In reaching this conclusion the Commission has characterised (contd.)
The report of the Commission has already been criticised because of following weak points.

First, the Commission has without doubt used caste as the sole criterion of backwardness whereas caste in the sense of ritual standing can only be one of the possible measures of backwardness. According to the latest judicial thinking backward class should be drawn on the application of multiple tests and efforts should be made to eliminate the well off from the list by applying an income cut-off. 68

Secondly, the Commission has not explained why it chose to assign different weightage to social, educational and economic backwardness and particularly why it devolved educational backwardness while determining the classes who are socially and educationally backward. 69

Thirdly, the result of the proposals made would be that about 75 per cent of the India's population would be treated as backward and, therefore, the eligible beneficiaries of compensatory discrimination. This is inconsistent with the legal doctrine according to which the backward class population should be less than half. 70

Fourthly, the Commission has not applied the principle that "other backward classes" should in the matter of backwardness be comparable to the "Scheduled Castes" and "Scheduled Tribes". 71

Fifthly, the set of eleven indicators being caste-based could not be applied to non-Hindu communities. 72
Thus no uniform criteria for the identification of "other backward classes" could be laid down by both the Central Commissions. Barring few exceptions, the State practice in selecting the other backward classes has to a very large extent been influenced by judicial decisions prescribing criteria for determining other backward classes.\(^73\) Hence it is essential to study the judicial attitude in laying down the criteria for identification of backwardness.

(C) Criteria For Identification of Backwardness: Judicial Vacillation

Ever since the Constitution came into force, the judiciary has played a significant role in laying down the criteria for identification of backward classes. In *State of Madras v. Champakam Dorairajan*,\(^74\) the Madras Government with a view to help the backward classes reserved seats in the medical and engineering colleges for caste based groups like Brahmins, Hindus, Muslims and Christians without considering the merit of the students. The Supreme Court struck down the Communal Government Order as being violative of articles 15(1) and 29(2). However, the most important decision came in the year 1963 with the famous case of *M.R.Balaji v. State of Mysore*,\(^75\) in which the Mysore Government Order of 1962 classifying ninety per cent of the total population of the State as 'backward' solely on the ground of caste was challenged. The government further divided 'backward classes'...

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73. According to Marc Galanter, it has been "the Supreme Court rather than the Central Government which has been the unifying and limiting influence and presumably any new Central policy will be shaped in the light of two decades of judicial predominance in this area". See supra note 52.


75. A.I.R.1963 S.C.649. See also *Ramakrishna Singh v. State of Mysore*, A.I.R. 1960 Mys.338 and *Partha v. State of Mysore*, A.I.R.1961 Mys.220 at 230 where upholding the scheme of the State the Court indicated that the 'caste' classification will be open to challenge only if it can be shown that criterion adopted for determining their backwardness is useless as a test of backwardness, so that the preference would amount to a preference on the ground of caste alone. That is, it was permissible to use caste units, but there had to be some criterion of backwardness in addition to caste rank or standing.
into 'backward classes' and 'more backward classes'. It was argued that it violated the provisions of article 15(1) and was not saved by clause (4). The Supreme Court was faced with the onerous task of laying down a test for determining backwardness. It was held that though caste in relation to Hindu society could be a relevant factor for social backwardness of class of citizens, it could not be the sole test of backwardness. Thus it invalidated the government order in which the government had used caste as the sole criterion for determining the backwardness. Gajendragadkar, J., speaking for the Court observed:

The group of citizens to whom Art.15(4) applies are described as 'classes of citizens', not as castes of citizens. A class according to the dictionary meaning, shows the division of society according to status, rank or caste. In the Hindu social structure, caste plays an important part in determining the status of citizens...Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens.76

He further observed:

[T]hough the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves.77

Balaji, thus recommended that caste standing could be used in conjunction with other indices of backwardness, such as poverty, occupation, place of residence.78 Backward classes could, however, not be equated with backward castes.79 Realising that the aim of compensatory justice was to eliminate the inherited inequalities, the court emphasized that backward classes should be both socially and educationally backward.80 It was also ruled that the socially and educationally backward classes should, in the

76. Balaji Id. at 659.
77. Ibid.
78. Id. at 664.
79. Id. at 659.
80. Id. at 658. See also State of Kerala v. Jacob Mathew, supra note 12a.
matter of backwardness, be comparable to the scheduled castes and scheduled tribes.

In Chitralekha v. State of Mysore, the government order reserving 30 per cent of seats in professional and technical colleges was challenged. The government had made economic conditions and occupation as the basis for determining the social and educational backwardness and did not take caste into consideration. The Court commended such a scheme and ruled that caste was by no means necessary to be taken into account in determining social and educational backwardness. Subba Rao, J., speaking for the majority observed:

If the makers of the Constitution intended to take castes also as unit of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes....The juxtaposition of the expression "Backward Classes" and "Scheduled Castes" in Art.15(4) also leads to a reasonable inference that the expression classes is not synonymous with castes.

Thus, he pointed out that the expression 'classes' was not synonymous with 'Castes' and further observed:

If we interpret the expression 'classes' as 'Castes', the object of the Constitution will be frustrated... caste is taken only as one of the considerations to ascertain whether a person belongs to a backward class or not.

The underlying theme in the court's decision was that if caste as a whole could be treated as a backward class, it would be impossible to isolate the really needy and deserving. If an entire caste was found to be backward it could be included in the Scheduled Castes following the appropriate procedure. The aim of the compensatory discrimination was to help those whose backwardness was associated with discriminatory social structure and not to "give weightage to progressive sections of our society under the false colour of caste to which they happen to belong." This interpretation of the Court helped the really backward class to the exclusion of the advanced sections among the backward classes.

81. Ibid.
83. Id. at 1833.
84. Id. at 1834.
85. See Parmanand Singh, supra note 51 at 62.
86. Supra note 82 at 1833.
87. Ibid.
N. Radhakrishnan has criticised the views of the majority in Chitralekha. According to him, Mr. Chief Justice Subba Rao went farther than Balaji and ignored the intention of the Parliament evident from travaux preparatories and failed to appreciate the significance of the word "any" used before "socially and educationally backward classes" in article 15(4). Mohammed Ghouse, on the other hand has appreciated the majority ruling in Chitralekha. He has also criticised the views expressed by N. Radhakrishnan. Mr. Ghouse is of the view that it is not necessary to refer to travaux preparatories, when the meaning of "classes" read in the light of the prohibition of discrimination on the ground of caste is clear. He further says, does the word "any" expand "classes" so as to embrace "castes" also and thereby nullify the general rule in article 15(1)?

It is submitted that the views of the majority of Chitralekha and also of the learned author Mohd. Ghouse are correct. To hold otherwise, it would mean to perpetuate caste system in the casteless society which is envisaged by our Constitution.

However, a subtle shift in the approach of the Supreme Court is found in P. Rajindran v. State of Madras. In this case the Supreme Court upheld the caste based classification and stated that although the list was prepared solely on the basis of the caste, each of the castes as a whole was found to be socially and educationally backward. The Supreme Court observed:

But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste that it is a socially and educationally backward class within the meaning of Article 15(4).

Thus, in Rajendran, the Supreme Court equated "castes" with "classes" - an approach which both Balaji and Chitralekha had rejected. It is submitted

that the Supreme Court appears to have retracted its steps and made a
departure from the rule which it had laid down in Balaji that caste
should not be made the sole criterion of classification of backward
classes. P.K.Tripathi also supported this view when he observed:

Although the judgement in Rajindran case paid lip service to the rule in Balaji that caste should not be the sole criterion of classification, in effect, it marked a setback to the new trend towards retrieving the fundamental right in article 15(1).

Mohammad Ghouse while commenting on Rajindran observed: "Rajindran case revived the controversy which Balaji and Chitralekha had laid to rest...In the light of these clear pronouncements, was it open to the Rajindran Court to hold without overruling those cases that a caste is also a class of citizens, Does Article 15 seek to eradicate casteism in clause (1) and preserve it in clause (4)?" The most objectionable feature of Rajendran is that it did not even mention Chitralekha.

In Rajindran, the highest court overlooked a rudimentary distinction that exists in sociology between "class" and "caste", namely, that class is an open category, whereas caste is closed category. One remains throughout life in the caste into which one is born whereas one may change one's class in one's life-time.

It is submitted that the caste test might defeat the objective of socio-economic justice underlying the compensatory discrimination. This was made clear in Chitralekha that "if we interpret the expression 'classes' as 'castes', the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve". It cannot be ignored that within a caste there may be some sub-group which is not socially and educationally backward. To allow such advanced sub-group to have the benefit conferred on group for its backwardness will be prejudicial to the equality of opportunity of individuals belonging to non-backward groups who might be more

92. Id. at 1014-15. See also Umesh Chandra Sinha v. Singh, A.I.R.1968 Pat.8.
94. Supra note 89.
95. See B.Sivaramayya, supra note 28 at 44.
96. Supra note 82 at 1834.
meritorious. Moreover, articles 15(4) and 16(4) used the words "backward classes" and not "backward castes" of citizens.

In *State of Andhra Pradesh v. P.Sagar*, 97 reservation of seats was done solely on the basis of caste or community. There appeared to be no determination of the fact whether members belonging to such castes or communities were in fact socially and educationally backward. The Supreme Court struck down the reservation as being outside article 15(4) of the Constitution. It was observed that "in determining whether a particular section forms a class, caste cannot be excluded altogether. But in determination of a class, a test solely based upon the caste or community cannot also be accepted". 98 It was further observed:

> The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth, and the backwardness being social and educational, must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. 99

Thus, the Supreme Court once again discouraged the tendency to determine backwardness on the basis of castes.

In *Triloki Nath v. State of J&K*, 100 the job reservations by the State Government based solely on the communal considerations were struck down by the Supreme Court. It was observed:

> The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economical and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community. But because they form a class. 101

Thus, it is submitted, the Supreme Court made it specifically clear that whenever any caste as a whole is treated backward then the basis for treating them backward is not caste but a class by themselves.

98. Id. at 1382.
99. Id. at 1383.
101. Id. at 3 (Emphasis added)
The Rajindran trend which had suffered a setback in P.Sagar, was revived again by the Supreme Court in A.Periakaruppan v. State of Tamil Nadu. In this case the Court upheld a classification based on caste and observed that a "caste has always been recognised as a class". It was further observed:

There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life.

In State of A.P. v. U.S.V.Balaram, the Supreme Court again upheld a caste based classification made on the recommendation of Andhra Pradesh Backward Class Commission.

But ultimately the views of the Supreme Court in Balaji and Chitralekha prevailed in post-Balaram decisions. The breakthrough from the Rajindran, Periakaruppan and Balaram approach was initiated in Janki Prasad v. State of J&K. In this case the validity of J&K Scheduled Castes was challenged.

103. Id. at 2310(per Hegde, J.)
104. Id. at 2311. In support of this argument the Court drew support from the report of Kaka Kalelkar Commission, supra note 57. However, the important observation of the Court in this case is that "the Government should not proceed on the basis that once a class is considered as backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of reservation because once a class reaches a stage of progress which some modern writers call as take off stage, then competition is necessary for their future progress." Ibid. This view has been supported by Chaudhary, J., in Dr.M.N.Rao v. Govt. of A.P., A.I.R.1979 A.P. 223.

105. Supra note 37. B.Errabbi, is also of the view that without going into the sociological ramifications of choosing 'caste' as a criterion, the State can rely upon the criterion of caste for the identification of the socially and educationally backward classes of citizens. He feels the purpose of judicial review is not to question or scrutinise the validity or feasibility of the means or criteria adopted by the State for the purpose of identifying socially and educationally backward classes. Since article 15(4) operates an exception to article 15(1), it, in effect enables the State to do the very thing which would otherwise be prohibited in terms of article 15(1). See B.Errabbi,"Protective Discrimination:Constitutional Prescription And Judicial Perception", in D.N.Saraf(ed.), Social Policy, Law and Protection of Weaker Sections of Society, at 136-139(1986). It is submitted, with respect, that the views of the learned author are not correct. See Parmanand Singh, Equality, Reservation and Discrimination in India, at 181-182(1982) and P.K.Tripathi, supra note 93 at 203-04.
Castes and Backward Classes Reservation Rules, 1970 was challenged. The scheme was struck down, *inter alia*, on the ground that some of the occupations and some castes specified as low social castes were not backward socially and educationally. The Court, therefore, suggested the revision of list. The court emphasized that the groups to be designated as backward should in the matter of backwardness be comparable to the scheduled castes and tribes and that well off members of the community should not be included in the list.\(^\text{107}\) In analysing the decisional law the court did not even mention Rajindran, Periakarupan and Balaram. Although it was willing to commend the economic test, it rejected the argument that poverty alone could be the sole determinant of backwardness. According to the Court, an exclusive poverty test would encompass a very large population of India and "an untenable situation may arise because even in sections which are recognised as socially and educationally advanced there are large pockets of poverty."\(^\text{108}\)

In *State of U.P. v. Pradeep Tandon*, the Supreme Court again refused to accept the test of poverty as the sole determining factor of backwardness.\(^\text{109}\) The Supreme Court observed:

> If poverty is the exclusive test, a large population in our country would be socially and educationally backward class of citizens. Poverty is evident everywhere and perhaps more so in educationally advanced and socially affluent classes.\(^\text{110}\)

In this case the Court also rejected that caste could be made one of the criteria for determining social and educational backwardness.\(^\text{112}\)

In *K.S.Jayasree v. State of Kerala*, Ray, C.J., speaking for the court emphasized the need for adopting means-cum-caste/community test in classifying backward classes. He said that the rich people among the backward castes/communities ceased to be socially and educationally backward classes even though they had not acquired any high level of education. With the economic advancement, the social disabilities of the members of backward castes and communities, to a large extent, disappeared.\(^\text{114}\)

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\(^{107}\) *Id.* at 939.

\(^{108}\) *Id.* at 937.


\(^{110}\) *Id.* at 568.

\(^{111}\) *Ibid.* According to Mohd.Ghouse, the last sentence is ambiguously worded. The words "perhaps more" seem to have reference to the fact that even amongst the educationally and socially advanced classes (contd.)
Thus, in Jayasree, the Court conceded that caste could be a relevant factor although it could not be the exclusive test of backwardness. In this regard it marks a shift in the position taken by the Court in Pradeep Tandon and is compatible with its earlier rulings in Balaji and Chitralekha.

One of the most historic and eloquent judgement on the issue of backward classes was delivered by the Supreme Court in K.C.Vasanth Kumar v. State of Karnataka. Its genesis is interesting, because the formulation of guide-lines on the issue of reservations, by the court was the result of a specific request of the State Government of Karnataka, which had sought guidance for the purpose of the Commission which the state government wished to appoint for going into the question of backward classes. The main question that the Supreme Court had to deal with was as to the test to be adopted for determining backwardness. All the five judges who constituted the bench in this case, delivered separate opinion and hence it is necessary to analyse critically the opinion of each judge separately.


112.Supra note 109 at 567.
114.In Jayasree, Ibid., the means-cum-caste/community test was applied even for the members of the scheduled castes and scheduled tribes along, with the members of other backward classes. This view has been upheld by the Supreme Court in Income Tax Officer v. N.T.R.Rymbai, A.I.R.1976 S.C.670 where the well off members of the scheduled tribes were excluded in distributing benefits. Mohd.Ghouse also holds the view that once a family, with the help of the state support moved out of the shadow of backwardness, then the benefit of protective discrimination should be denied to the offsprings of that family. See supra note 111. It is submitted that the views of the learned author are correct.
115.Supra note 3.
116.Chief Justice Chandrachud, admitted in the very first para of his judgement that "we were invited by the Counsel not so much as to deliver judgements but to express our opinion on the issue of reservations, which may serve as a guideline to the Commission which the Government of Karnataka proposes to appoint, for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and Other Backward Classes". Id. at 1498.
117.The bench comprised of Y.V.Chandrachud,C.J., D.A.Desai, O.Chinnappa Reddy, A.P.Sen and E.S.Venkataramiah, JJ.
118.For the critical analysis of this judgment see P.M.Bakshi,"Reservation For Backward Class:Some Reflections", 27 J.I.L.I.318 at 323-35(1985).
Chief Justice Chandrachud expressed his opinion in the following propositions:

(a) The reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present without the application of a "means" test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.119

(b) The means test, that is to say, the test of economic backwardness ought to be made applicable to the Scheduled Castes and Scheduled Tribes after the period mentioned in (a) above. It is essential that the privileged section of unprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.120

(c) In so far other Backward Classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education. One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in matter of their backwardness, and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.121

(d) The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford opportunity (i) to the State to rectify distortions arising out of particular facets of the reservation policy and (ii) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservation.122

If one goes through these propositions of the learned Chief Justice carefully, one can discern a few areas of agreement, but also a few areas of disagreement. With regard to his first and second proposition, it is

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119. Supra note 3 at 1499.
120. Ibid.
121. Ibid.
122. Ibid.
submitted that he rightly took note of the 'upper crust' among the oppressed classes which should not monopolise the preferential treatment for indefinite period. But one fails to understand as to why he wanted to postpone the application of 'means test' to the scheduled castes and scheduled tribes for another term of fifteen years. In our submission, the 'upper crust' has already enjoyed the benefit of the preferential treatment for thirty-five years after the advent of the Constitution, and the period is sufficient to come out of the "take off stage". If we prolong this period further, the 'upper crust' will keep taking the major part of the cake and making poor and oppressed people further poor and oppressed. Thus, the 'means test' should also apply to the scheduled castes and scheduled tribes immediately. This suggestion finds support from the third proposition of the learned Chief Justice when he says that the backward classes should be comparable to the Scheduled Castes and Scheduled Tribes and that they should also satisfy the means test. One fails to understand that if backward classes should be comparable to Scheduled Castes and Scheduled Tribes then why 'means test' should not be applicable to the scheduled castes and scheduled tribes when it should be applicable to the backward classes.

The fourth proposition, it is submitted, is very good. But one wonders how much backward and non-backward people can participate in the public debate on the impact of reservation policy. Their first concern is to struggle for their existence and to come out of the poverty. In the peculiar Indian social condition it may happen that the 'upper crust' of these depressed classes may debate the policy in their favour.

(ii) Views of Justice D.A.Desai

The views of Justice Desai were centered round the twin constitutional goals: One, to strike at the perpetuation of the caste stratification of the Indian society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of mainstream of life which means eradication of poverty.123

123. Id. at 1507.
He pointed out, and rightly so, that survey of decisions on the subject would reveal the confusion and the present state of malaise because a serious doubt is now nagging the jurists, the sociologists and the administrators whether caste should be the basis for recognising backwardness.\textsuperscript{124} After pointing out the judicial vacillation on the question whether caste should be the basis for recognising backwardness, he agreed with the approach of the Court in \textit{Balaji} and observed that "if uttered the harsh but unquestionable truth that economic backwardness would provide a much more reliable yardstick for determining social backwardness because more often educational backwardness is the outcome of social backwardness."\textsuperscript{125} He supported the Rane Commission of Gujarat which had rejected caste as the basis for ascertaining social and educational backwardness.\textsuperscript{126} He pointed out that the continuous "retention of the division of the society into various castes simultaneously introduced inequality of status" which is against the spirit of the Preamble, articles 38(2) and 46 of the Constitution which envisaged a society which has to be casteless and class-less.\textsuperscript{127} He also gave following reasons for not accepting "caste" as the basis for identification of backward classes. First, it would legitimize and perpetuate the caste system.\textsuperscript{128} Secondly, caste based reservation has been usurped by the economically well-placed sections in that society and thus labelled weak exploited the really weaker.\textsuperscript{129} Thirdly, the caste as understood in Hindu society, is unknown to Muslims, Christians, Parsis, Jews etc. Caste criterion would not furnish a reliable yardstick to identify socially and educationally backward group in the afore-mentioned communities though economic backwardness would.\textsuperscript{130}

Finally he observed that the only criterion which could be realistically devised was one of economic backwardness and if it is accepted, it would strike at the root-cause of social and educational backwardness and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation.\textsuperscript{131}

\begin{thebibliography}{99}
\bibitem{124} Id. at 1500.
\bibitem{125} Ibid.
\bibitem{126} Id. at 1503.
\bibitem{127} Id. at 1504.
\bibitem{128} Id. at 1505.
\bibitem{129} Ibid.
\bibitem{130} Id. at 1506.
\bibitem{131} Id. at 1506-07.
\end{thebibliography}
But he qualified the application of the economic criterion by refusing preferred treatment to those amongst them who have already benefitted by it and improved their position.\footnote{132} He also suggested that the reservation must have a time span otherwise concessions tend to become vested interests.\footnote{133}

It is submitted that though the views of Justice Desai in establishing casteless society by applying the only criterion of economic backwardness are very well founded but they are inconsistent with the earlier approach of the Court in \textit{Janki Prasad}\footnote{134} and \textit{Pradeep Tandon},\footnote{135} where the Supreme Court was willing to commend the economic test but it rejected the argument that poverty alone could be the sole determinant of backwardness.\footnote{136} It is further submitted that the aim is not to give preference to every poor citizen regardless of his social and educational status but rather to help those who were backward due to historical reasons and unable to overcome the effect of past or present discrimination. However, Justice Desai's view that economic criterion should be applied by refusing preferred treatment and that the reservations must have a time span, are very well founded. It is submitted that by applying the test by refusing the preferred treatment the exploitation by the "upper crust" of the backward classes would be prevented.

(iii) Views of Justice O. Chinnappa Reddy

According to Justice Chinnappa Reddy whether we look at the question of backwardness from the angle of class, status or power, we find economic factor at the bottom of it all and we find poverty, the culprit-cause and the dominant characteristic. He observed: "Poverty, the economic factor brands all backwardness first as the erect posture brands the \textit{homo sapien} and distinguishes him from all other animals, in the eyes of the beholder from Mars".\footnote{137} He further observed:

\begin{quote}
Class poverty, not individual poverty, is therefore, the primary test. Other ancillary tests are the way
\end{quote}

\footnotesize
\begin{itemize}
\item[132.] Id. at 1507.
\item[133.] Ibid.
\item[134.] Supra note 106.
\item[135.] Supra note 109.
\item[136.] Supra note 110, 111. See also \textit{Aruna v. State}, A.I.R.1985 Kant.196 at 201 and \textit{Rajesh v. Maharshi Dayanand University}, A.I.R.1985 P&H 207 at 207-08.
\item[137.] Supra note 3 at 1511.
\end{itemize}
of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. Despite individual exceptions, it may be possible and easy to identify social backwardness with references to caste, with reference to residence, with reference to occupation or some other dominant feature. Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be washed away.138

With due respect to the learned Justice, it is submitted that his views are not well-founded. First, because, when he stressed on the 'class poverty' rather than on the 'individual poverty', he missed the social reality that among a particular class also there is stratification and some of the persons in a particular class may be socially and educationally advanced who may take the major part of the benefits thereby depriving the 'lower crust' of the depressed people. He showed his concern in this regard in the earlier part of his judgement when he stressed that "there is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Scheduled Tribes. Such a test would perpetuate the dominance of the existing upper classes".139 He also quoted140 the following words of caution of Krishna Iyer, J., about the evil of reservation:

A word of sociological caution. In the light of experience, here and elsewhere the danger of 'reservation', it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest amongst the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets...."141

138. Id. at 1529.
139. Id. at 1515. (emphasis supplied). This observation is also in contradiction with the observation of Chief Justice Chandrachud which he mentioned in his proposition(c). See supra note 121.
140. Id. at 1525. ...
141. State of Kerala v. N.M. Thomas, supra note 5 at 531.
However, Justice Chinnappa Reddy, entered a caveat to the criticism that the benefits of reservation are often snatched away by the "top creamy layer" of the backward class or caste. He said that this is bound to happen in a competitive society like ours. He supported his arguments by observing:

Are not the unreserved seats and posts snatched away, in the same way, by top creamy layers of society itself, Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the non-reserved seats are taken away by the top layers of the society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad, This is a necessary concomitant of the very economic and social system under which we are functioning.142

It is submitted that in the above observation the learned Justice Reddy has once again ignored the social system under which we function. In case of upper class, they have better facilities to compete among themselves. They are not the victims of past or present discrimination. They can afford the minimum required to compete in the society. Hence if among them the seats are given in job or educational institutions on merit, there is nothing wrong in that. But in case of lower strata of society who constitute the 'weaker sections' of the society, all persons are not equally placed to compete among themselves. Those who take the benefit of the preferential treatment, improve their lot and they can compete in a better way with those 'weaker part' of the society who struggle for existence and who have yet to come out of the stage of past and present discrimination. If we do not refuse the preferred treatment to those who have already improved their lot by enjoying the State benefit, the poor will become poorer and the weak will become weaker. Can we say that if one person has become doctor or engineer by taking the preferential treatment, he or his next generation should be allowed to compete with the lower rung of the society who never got any chance to come out of the exploited class, The obvious answer is no.

142. Supra note 3 at 1525. For the contrary view see supra note 114 and 132 where it was observed that the economic criterion should be applied by refusing the preferred treatment to those amongst them who have already come out of the 'take off stage' by taking the benefit of State support.
With regard to the second part of his observations that "it may be possible and easy to identify social backwardness with reference to caste", it is submitted that he is trying to introduce the 'caste' as a criterion for determining the social backwardness. This approach found favour of the Court in P. Rajendran, Periakarauppan and Balaram in late sixties and early seventies. But subsequently the Supreme Court rejected this approach and held that 'caste' cannot be equated with class. Thus the criterion which the Supreme Court disapproved long back should not be revived once again.

(iv) Views of Justice A.P. Sen

Justice Sen was of the view that the Court is ill-equipped to perform the task of determining whether class of citizens is socially and educationally backward. The Supreme Court has, however, "duty to interpret the Constitution and to see what it means and intends when it makes provision for the advancement of socially and educationally backward classes". He suggested that the Central Government should consider the feasibility of appointing a permanent National Commission for backward classes which must constantly carry out sociological and economic study from state to state and from region to region within the state. He pointed out that unfortunately the policy of the government for the upliftment of socially and educationally backward classes of citizens was hitherto caste-oriented while the policy should have been based on economic criteria. Thus he suggested that the only factor for making special provision for the advancement of the weaker sections should be poverty, and caste or sub-caste or group should be used only for the purposes of identification of

143. Supra note 91.
144. Supra note 102.
145. Supra note 105.
146. See Janki Prasad v. State of J&K, supra note 106; State of U.P. v. Pradeep Tandon, supra note 109; K.S. Jayasree v. State of Kerala, supra note 113. See also the views of Justice Desai in K.C. Vasanth Kumar v. State of Karnataka, supra note 3 at 1504-07 where he has pleaded for the rejection of 'caste' as even one of the criteria for determining the social backwardness of a class.
147. Supra note 3 at 1531.
148. Ibid. The framers of the Constitution by enacting article 340 clearly envisaged the setting up of such a high powered National Commission at the Centre.
149. Id. at 1530.
persons comparable to scheduled castes and scheduled tribes and for making them equal partners in a new social order in our national life. In his view the State should give due importance and effect to the dual constitutional mandates of maintenance of efficiency and the equality of opportunity for all persons. He also sounded a note of caution that at present only privileged groups among the backward classes are reaping all the benefits and the result is that the lowest of low who are stricken with poverty remained deprived of the preferential treatment.

It is submitted that the suggestion of the learned judge to set up a National Commission for Backward Classes is very good. If such a Commission is set up then it can review the list of backward classes from time to time and those who have already improved their lot by preferential treatment can be identified and taken out of the list of the Backward Classes. His criterion of caste-cum-poverty seems to be in consonance with the earlier approach of the Supreme Court in Jayaasree.

(v) Views of Justice E.S.Venkataramiah

Justice Venkataramiah after reviewing the various cases from Balaji to K.Jayaasree, and after analysing the various provisions of the Constitution came to the following conclusions:

(a) Backward classes should be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally.
(b) Since economic condition is also a relevant criterion, it would be appropriate to incorporate a 'means' test as one of the tests in determining the backwardness as was done by the Kerala government in *Jayasree* case.\(^{158}\)

c) For the purposes of article 16(4), however, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services.\(^{159}\)

d) Though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf.\(^{160}\)

It is submitted that from the above propositions of Justice Venkata Ramiah, it is clear that he supported the means-cum-caste test which is close to the ruling of the Supreme Court in *Jayasree*.\(^{161}\) However, he added that if on fresh determination, some castes or communities have to go out of the list of backward classes prepared for articles 15(4) and 16(4), the government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive principle contained in article 46. In reference to the weaker sections he seems to have had the economic criterion in mind because he observed that there are, in all castes and communities, poor people who, if they are given adequate opportunities and training, may be able to compete successfully with persons belonging to richer classes. The government may provide for them liberal grants of scholarships, free boarding and lodging facilities, free uniforms, free mid day meals etc., to make the life of poor students comfortable. The government may also provide them extra tutorial facilities, stationery and books free of costs.\(^{162}\)

From the perusal of the views of all the five judges who constituted the bench in *K.C.Vasanth Kumar*,\(^{163}\) it will be too much to pretend that the Supreme Court has provided any definite guidelines as to the criterion to be

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\(^{158}\) *Id.* at 1556.

\(^{159}\) *Ibid.*

\(^{160}\) *Id.* at 1536. It was pointed out that the caste system would breakdown in relation to many sections of Indian society which do not recognise castes in the conventional sense. For example, the caste test would be inapplicable to Muslims, Christians or Jains because they do not recognise the castes in them. *Ibid.*

\(^{161}\) *Supra* note 113.

\(^{162}\) *Supra* note 3 at 1558.
adopted in determining backwardness. But it is apparent from the judgment that there is a positive stress on the economic conditions of the people, even though some judges have suggested that the caste test should also be taken into consideration.\textsuperscript{164}

It is submitted that it was expected from the apex Court that it would settle the judicial vacillation once and for all in regard to the criterion to be followed in determining the backward classes, but by delivering different views the Supreme Court has failed in discharging its duty to settle the law for ever. Judiciary has the duty of mediating the conflicting demands of the society through the prism of constitutional interpretation. The judiciary turned out to be more limited as a vantage point than mainly assumed at the outset. They act as a balance wheel channelising the compensatory policies and accommodating them to other commitments, but it is the political process that shapes the larger contours of these policies and gives them their motive force.\textsuperscript{165}

(D) Nature and Extent of Preferential Treatment: Constitutional Scope and Judicial Attitude

The mandate of the Constitution is to build a welfare society in which justice social, economic and political shall inform all institutions of our national life.\textsuperscript{166} The State is under a duty to protect the interests of the "weaker sections" and protect them from social injustice and all forms of exploitation.\textsuperscript{167} The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met.\textsuperscript{168} Articles 15(4) and 16(4) are specially designed to protect the interests of scheduled castes, scheduled tribes and other backward classes. On the other hand article 335 provides:

\textsuperscript{164} See P.M. Bakshi, supra note 118 at 334. See also V. Narayan Rao v. State of A.P., A.I.R.1987 A.P.53 where full bench of the High Court while dealing with the question of criterion for the backwardness of class, though made reference to Vasanth Kumar, but could not take consistent view. The reason is that since there are no uniform guidelines from the Supreme Court so the High Courts will differ in their approach.

\textsuperscript{165} See supra note 2 at xviii.

\textsuperscript{166} See article 38(1) and the Preamble of the Constitution.

\textsuperscript{167} See article 46.

The claim of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.169

Articles 15(4) and 16(4) were added into the Constitution to achieve the object of article 46 of the Constitution.170 But the directive principles are not themselves justiciable whereas fundamental rights are justiciable. So whenever the State took any step to ameliorate the conditions of the weaker sections or protect them from social injustice and exploitation, their action was challenged as violative of various articles in Part III dealing with fundamental rights. The State action, whenever it was made to promote the interests of the weaker sections was put to the test and the judiciary had to make its own contribution in protecting the interests of the weaker sections including scheduled castes and scheduled tribes.

In Om Parkash v. State of Punjab,171 the Punjab High Court upheld reserved seats for Harijans in educational institutions on the ground that "article 46 must be taken as an exception to article 29(2)" and thus the State could constitutionally promote the educational interests of Scheduled Castes by adopting a system of reservations.

However, the first blow to the State action promoting the interest of backward classes came in the case of State of Madras v. Champakam Dorairajan.172 In this case when the Constitution came into force, the State of Madras with a view to help the backward classes issued a communal G.O. which provided that for the admission in the medical colleges and engineering colleges, for every fourteen seats the selection committee was to admit the following: Non-Brahmin Hindus - 6; Backward Hindus -2; Brahmans - 2; Harijan -2; Anglo Indian and Indian Christian - 1; Muslims

169. It may be pointed out at this place that article 335 mentions only about the Scheduled Castes and Scheduled tribes, it does not mention about other backward classes. See also article 320(4). On the other hand, article 16 mentions only about the representation of backward classes in the services and does not mention about the Scheduled Castes and Scheduled Tribes. It may also be noted that an attempt to include the other backward classes within article 335 was proposed by Dr. Deshmukh but ultimately rejected. See IX C.A.D.598.

170. See supra note 37.
172. Supra note 72.
1. A Brahmin student who would have been admitted on purely merit basis challenged this as violative of articles 15(1) and 29(2). The State defended its action that article 46 of the Constitution enjoined the state to protect the interests of the weaker sections which might be lawfully embodied in legislation. The Supreme Court rejected the plea of the government and struck down the Communal G.O. as violative of articles 15(1) and 29(2). The Supreme Court pointed out that "the directive principles of state policy have to conform and run as subsidiary to the Chapter of fundamental rights". The Supreme Court also pointed out that if the argument founded on article 46 was sound, article 16(4) providing for reservation in services for backward classes, would have been completely unnecessary and redundant.

It is submitted that the above interpretation of the Supreme Court was by no means an inevitable or unavoidable reading. Alexandrowiez has rightly pointed out that in Champakam, the Supreme Court "did not sacrifice the letter of the Constitution to make any spectacularly progressive move in the spirit of the Constitution". The result of this decision was that clause (4) was added to article 15 by way of constitutional amendment which provides:

Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

173. See Article 15(1).
174. See Article 29(2).
175. Supra note 72 at 228. See also Jagwant Kaur v. State of Bombay, 1952 Bom.461 wherein requisitioning of land for building Harijan colony was held to be violative of article 15(1), article 46 being non-justiciable. See also in Re M.Thomas, A.I.R.1953 Mad.21.
176. C.H.Alexandrowiez, Constitutional Development in India, 62(1957). See also G.S.Sharma, "Concept of Leadership Implicit in the Directive Principles of State Policy", 7 J.I.L.I. 1974-188(1965). In Golak Nath v. State of Punjab, A.I.R.1967 S.C.1643 at 1706, the then Chief Justice pointed out that "to remove the effect of centuries of discriminatory treatment and to raise the down trodden to an equal status cannot be regarded as discriminatory against any one....With all due respect (to Champakam Dorairajan) the question of discrimination hardly arose because in view of Articles 46, 340, 16(4)...any reasonable attempt to raise the status of the backward classes could have been upheld on the principle of classification.
177. It may be pointed out that in the Constituent Assembly Prof.K.T.Shah (conted.)
The purpose of this clause was to empower the State to carry out the directive principles and ensuring that the fundamental rights guaranteeing equality did not obstruct substantive equalization.\textsuperscript{178}

In General Manager v. Rangachari,\textsuperscript{179} the Supreme Court pointed out that article 16(4) covers preference not only in initial appointments but also preferences in promotion within the service. It was pointed out that the 'posts' referred to in article 16(4) included promotions as well as initial appointments but indicated that the preference permissible under article 16(4) would not necessarily extend to other aspects of employment covered under article 16(1) and 16(2). For example, salary, increment, pension and retirement age. Such matters are "absolutely protected by the doctrine of equality of opportunity and...do not form part of the subject matter of Article 16(4)".\textsuperscript{180} In Rangachari, the Court also pointed to the language of article 335 and declared the necessity of striking a reasonable balance between the claims of these classes and the efficiency of the services.\textsuperscript{181}

Earlier the Supreme Court was of the view that articles 15(4) and 16(4) do not confer any fundamental right to preferential treatment on the backward classes, scheduled castes and scheduled tribes.\textsuperscript{182} In other words, these provisions do not impose any duty on the government to make reservation for these classes but they are merely enabling provisions which confer a discretionary power on the State to make reservations.

\textsuperscript{178} See supra note 37.
\textsuperscript{179} A.I.R.1962 S.C.36. See also All India Station Masters v. General Manager, A.I.R.1960 S.C.384.
\textsuperscript{180} Rangachari, id. at 42.
\textsuperscript{181} Id. at 44.
It is submitted that this traditional approach of the court of treating articles 15(4) and 16(4) as exceptions to the main provisions of equality was not a good approach. It is further submitted that we have to keep the 'object' of preferential treatment in mind. The object is to promote and protect the interests of the 'weaker sections'. And it is "the duty of the State" to protect the interests of the weaker sections of the society. Once the object of promoting and protecting the interests of the weaker sections is not discretionary, the means through which that object is to be achieved can not be discretionary. It was in realisation of this fact and that mere provisions of formal equality would not be sufficient to bring about the desired equality of status and of opportunity, a full bench of Kerala High Court in Hariharam Pillai v. State of Kerala, observed:

> It has however been realised that in a country like India where large sections of people are backward socially, economically, educationally and politically, these declarations and guarantees (of equality) would be meaningless unless provision is also made for the uplift of such backward classes who are not in position to compete with more advanced classes. Thus to give meaning and content to the equality guaranteed by Articles 14, 15, 16 and 29, provision has been made in Articles 15(4) and 16(4) enabling preferential treatment in favour of the "weaker sections".

However, it is heartening to note that in the subsequent decisions the Supreme Court has not treated articles 15(4) and 16(4) as exceptions to the main provisions.

One of the most important questions which has knocked the doors of judiciary time and again is about the extent of preferential treatment. In other words, when preferential treatment is given to promote and protect the interests of backward classes, scheduled castes and scheduled tribes,

183. See articles 38 and 46.
184. Article 37 provides:"The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."
185. Articles 15(4) and 16(4).
186. A.I.R.1968 Ker.42.
187. Id. at 47-8. See also Viswanath v. Government of Mysore, A.I.R.1964 Mysore 132 at 136 where the Court observed:"We have pledged ourselves to establish a welfare State. Social justice is an important ingredient (contd.)
what should be the limit of that preferential treatment. There is no provision in the Constitution which prescribe the limit or extent up to which the reservation can be made to promote the interests of the weaker sections. Hence the judiciary had to lay down some limit beyond which the reservation should not exceed. This question was first considered by the Supreme Court in *Balaji v. State of Mysore*. In this case the State of Mysore passed an order reserving seats for backward classes, scheduled castes and scheduled tribes for admission to the medical colleges and engineering colleges. The order fixed 28% for backward classes, 22% for more backward classes, 15% for scheduled castes and 3% for scheduled tribes. Total reservation thus came to 68% and only 32% seats were left for the open merit. The Supreme Court declared the order unconstitutional on several grounds. The State defended the order that by making reservations for the above mentioned weaker sections, it is promoting and protecting their interest as visualised under article 46 of the Constitution. On the other hand petitioner took the plea that his fundamental rights under articles 15(1) and 29(2) have been violated. It was also pleaded that national interest would suffer if meritorious and competent students were excluded from the higher education. Gajendragadkar, J., speaking for the Court, observed:

A special provision contemplated by Art.15(4) like reservations of posts and appointments contemplated by Art.16(4) must be within reasonable limits. The interests of the weaker sections of the society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole...if under the guise of making a special provision, a state reserved practically all the seats available in all the colleges that clearly would be subverting the object of Art.15(4).

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189. Dr. B.R. Ambedkar, while defending article 16(4) in the Constituent Assembly expressed that the reservations authorised was of "a minority of seats" and gave the example of an aggregate reservation of seventy per cent of posts as falling outside the purview of this clause. VII C.A.D. 701-02.
He further observed

Speaking generally and in broad way a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.193

Thus, the court laid down that generally speaking the upper limit should not go beyond fifty per cent but regarding the lower limit the court left the question open.

The question of extent of reservation was again considered by the Supreme Court in T. Devadasan v. Union of India.194 In this case the government applied a "carry forward rule" under which unfilled vacancies from the previous two years reserve quota were to be added to the reserve quota of the current year. By this process total 64.4% vacancies were reserved for scheduled castes and scheduled tribes in the third year. Finding that the "carry-forward rule" permitted reservations over 50% in the third year, the Supreme Court, by a majority of four to one, held that the scheme was unconstitutional. The majority pointed out that "to hold that unlimited reservations could be made under clause (4) would in effect efface the guarantee contained in clause (1) or at best make it illusory."195 Thus, the overriding effect of clause (4) on clauses (1) and (2) could only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances.196

Justice Subba Rao, (as he then was), gave a dissenting opinion in Devadasan and suggested that reasonableness of a reservation is to be measured by its relation to total cadre strength and not on the basis of seats reserved on one particular occasion. He expressed the views that the words "any provision" in article 16 are broad enough to cover "any scheme" of reservation which operates for several years and in relation to the entire strength of the cadre. Thus the government was free to use any method, including reservation of hundred per cent of posts until the prescribed level is reached.197

193. Ibid. See also Kesava Iyengar v. State of Mysore, A.I.R.1956 Mysore 20, where the High Court conceded that reservations in article 16(4) signified a "small fraction" or "small portion of the main" (presumably less than one half).
195. Id. at 180.
196. Ibid.
197. Id. at 192. For the comparative analysis of Balaji, supra note 1 and Devadasan, supra note 194, see Marc Galanter, supra note 2 at 410-12.
It is submitted that Justice Subba Rao has taken an extreme view. If his views are accepted then that may result in the total deprivation of meritorious candidates in a particular year. No doubt we have to promote the interests of the weaker sections by making "any provision" but that does not mean that we should "totally deprive" the meritorious and other deserving candidates.

In *State of Kerala v. N.M.Thomas*, the Supreme Court once again had the occasion to consider the scope and ambit of articles 16(1), 16(4), 46 and 335. In this case the validity of rules 13A and 13AA of the Kerala State and Subordinate Services Rules, 1958 was challenged. Rule 13A laid down that where a departmental test was newly prescribed, a person who had not passed the test might be appointed to a post temporarily within two years of the introduction of the test. If the appointee, did not pass the test within two years of the introduction of the test he would be reverted to the original post. A proviso to Rule 13A stated that the period of exemption would be extended by two years in the case of persons belonging to Scheduled Castes and Scheduled Tribes. Rule 13AA provided that the Government might exempt for a specific period any person belonging to a Scheduled Castes or Scheduled Tribes from passing the test. As a result of orders passed pursuant to these rules, out of 51 posts of upper division clerks which fell vacant, 34 filled by Scheduled Castes employees on the basis of temporary exemption granted in their favour and only 17 were given to persons passing the test.

The Supreme Court by a majority of five to two held that the rules were valid. The common stand of the majority was that the reservation was of temporary nature. From the facts narrated above, it is obvious that the case did not concern itself with reservations of posts in the higher cadre as such but only involved classification of employees of the government into two groups - those belonging to scheduled castes and scheduled tribes and those who did not belong to scheduled castes and scheduled tribes for the purpose of giving exemption from passing one of the minimum qualifications, i.e., from passing the prescribed test within a period of

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198. *Supra* note 5.
two years. The majority upheld the rule by observing that the classification was permissible under articles 14 and 16(1) for this purpose and it also helps in achieving the goals of article 46. According to Krishna Iyer, J.,

If Art.14 admits of reasonable classification, so does Art.16(1) and this Court has held so. In the present case, the economic advancement and promotion of the claims of the grossly under-represented and pathetically neglected classes, otherwise described as Scheduled Castes and Scheduled Tribes, consistently with the maintenance of administrative efficiency, is the object constitutionally sanctioned by Arts.46 and 335 and reasonably accommodated in Art.16(1).

Beg and Fazal Ali, JJ., also supported the view that by giving them larger period for qualifying the promotion test administrative efficiency is not hampered. It was also pointed out that the purpose of articles 46 and 335 which are really extraneous to the object of article 16(1), can only be served by rules which secure preferential treatment for the backward classes and detract from the plain meaning and obvious implications of articles 16(1) and 16(2). Such treatment mitigates the rigour of strict application of the principle contained in article 16(1). Article 16(4) was designed to reconcile the conflicting pulls of article 16(1), representing the dynamics of justice conceived of as equality in condition under which candidates actually compete for the posts in government services, and of articles 46 and 335 embodying the duties of the State to promote the interests of economically, educationally and socially backward so as to release them from the clutches of social injustice. But these encroachments on the field of article 16(1) can only be permitted to the extent they are warranted by article 16(4). To read broader concepts of social justice and equality into article 16(1) itself may stultify this provision itself and make article 16(4) otiose. According to Justice Krishna Iyer, articles 14 to 16 are "the tool kit" to carry out the "testament" of articles 46 and 335.

Regarding the question relating to the permissible limits of reservation, Ray, C.J., came to the conclusion that taking into consideration the entire government service, there was no excessive concession shown

200. Supra note 5 at 502,518,521,537 and 552.
201. Id. at 537.
202. Id. at 521 and 552.
203. Id. at 522(Per Beg J.).
204. Id. at 523.
205. Id. at 533(Per Krishna Iyer, J.)
to the employees belonging to the scheduled castes and scheduled tribes
Beg, J., (as he then was) was also of the same view. Fazal Ali, J. made
the following observations:

Clause(4) of Art.16 does not fix any limit on the
power of the Government to make reservation. Since
Clause(4) is a part of Art.16 of the Constitution,
it is manifest that the State cannot be allowed to
indulge in excessive reservation so as to defeat
the policy contained in article 16(1). As to what
would be a suitable reservation within permissible
limits will depend upon the facts and circumstances
of each case and no hard and fast rule can be laid
down, nor can this matter be reduced to a mathema-
tical formula so as to be adhered to in all cases.

He further observed:

Decided cases of this court have no doubt laid down
that the percentage of reservation should not exceed
50%. As I read the authorities, this is, however, a
rule of caution and does not exhaust all categories.

Thus, the Thomas decision throws into the melting pot the decision
in Devadasan in which "carry forward rule" was called in question and
even the rule requiring that the overall limit of reservation should not
exceed 50%

Justice Fazal Ali gave the following example in support of his
reasoning:

Suppose for instance a State has a large number of
backward classes of citizens which constitute 80%
of the population and the Government in order to
give them proper representation, reserve 80% of the
jobs for them, can it be said that the percentage
of reservation is bad and violates the permissible
limits of Clause(4) of Art.16? The answer must nece-
sarily be in the negative.

It is submitted that the above illustration is against the intention
of the framers of the Constitution. Even in the earlier rulings of the
Supreme Court it has been observed that high percentage of the population

206. Id. at 554(Per Fazal Ali J.)
207. Ibid.(Emphasis supplied)
208. See supra note 194.
210. Supra note 5 at 554.
211. See supra note 89.
cannot be treated as backward. It is further submitted that the learned Justice overlooked the fact that fundamental rights are individual rights. Merely because majority group is backward, it cannot emasculate equality of opportunity of a minority by making a reservation of all or substantial number of positions in its favour.

Justice Krishna Iyer also agreed with Fazal Ali, J., when he observed:

I agree with my learned brother Fazal Ali, J. in the view that arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Over all representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre I agree with his construction of Art.16(4) and his view about the 'carry forward' rule.

However, the Supreme Court clarified the rule of "carry forward" in the selection of Scheduled Castes and Scheduled Tribes, in the case of A.B.S.K.Sangh v. Union of India. In this case the Supreme Court followed the decision in Thomas and upheld the validity of the Railway Board Circular under which reservations were made in selection posts for the Scheduled Castes and Scheduled Tribes. In this case 17% posts were reserved for Scheduled Castes and Scheduled Tribes. The "Carry Forward rule" was extended from 2 to 3 years. As a result of this reservation quota came to about 64.4%. Upholding this Krishna Iyer, J., observed:

Subject to the(sic)rider or condition that 'carry forward' rule shall not result, in any given year, in the selection or appointments of SC & ST candidates considerably in excess of 50%, we uphold Annexure 1.

Justice Krishna Iyer, in the present case did not consider the reservation upto 64.4% as excessive. He pointed out that no mathematical precision could be applied in dealing with human problems like reservations.

Justice Chinnappa Reddy sharing the views of Justice Krishna Iyer observed:

212. In Balaji, supra note 1 it was held that ninety per cent of the population cannot be treated as really backward. In Rama Krishna Singh, A.I.R.1960 Mys.338. It was held that ninety-five per cent of the population cannot be regarded as backward. In this case it was pointed out that this will amount to "fraud on the Constitution", Id. at 348. See also S.G.Pandit v. State, A.I.R.1972 Bom.242.

213. Supra note 5 at 537(per Krishna Iyer, J.)

(contd.)
There is no fixed ceiling to reservation or preferential treatment in favour of Scheduled Castes and Scheduled Tribes though generally reservation may not be for in excess of fifty per cent. There is no rigidity about fifty per cent rule which is only a convenient guideline laid down by Judges.216

Pathak, J., (as he then was) however dissented from the majority and said that the rule of 50% as laid down in Balaji and Devadasan was fair, just and reasonable.216a

It is submitted that Justice Krishna Iyer, by laying down that the reservation should not be "considerably in excess of 50%" and Justice Chinnappa Reddy by laying that it should not be "far in excess of fifty per cent", have diluted the earlier decisions in Balaji and Devadasan. Also now it is uncertain as to what is "considerably in excess" or "far in excess" of fifty per cent. Hence the upper limit of preferential treatment in favour of scheduled castes and scheduled tribes remain uncertain. Thus the position is still unclear as Devadasan has not so far been expressly overruled by any decisions of the Supreme Court.217 It is further submitted that the attempt should be made, at least by the apex Court, to settle the upper limit beyond which there should be no reservation or preferential treatment. Preferential treatment at the promotion level is more harmful than at the entry point. Because this causes resentment amongst other persons who are denied promotions and thereby it affects administrative efficiency. In A.B.S.K.Sangh, Pathak, J.,(as he then was) also pointed out that efficiency of administration is the "paramount need" to whose "primacy all else is subordinate".218

214. A.I.R.1981 S.C.298. In this case the bench was constituted by V.R. Krishna Iyer, R.S.Pathak and O.Chinnappa Reddy, JJ.
215. Id. at 327(Per Krishna Iyer, J.) Annexure I provided for extending the carry forward rule from two years to three years.
216. Id. at 339-40(Per Chinnappa, Reddy, J.)
216a.Id. at 333(Per Pathak, J.).
218. Supra note 214 at 332. However, Krishna Iyer, J., pointed out the positive and negative aspect of article 335 in the following words:"The positive accent of this Article is that the claims of SC & ST to equalisation of representation in services under the State having regard to their sunken social status and importance in the power system,shall be taken into consideration. The negative element, which is part of the Article, is that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not submersive of "the maintenance of efficiency of administration". Id. at 310. See also Marc Galanter, supra note 2 at 113; Parmanand Singh,
There is a catena of other cases where the judiciary has interpreted the scope and ambit of article 46. In Sukhvinder Kaur v. State of H.P., reservation in medical colleges for the children coming from schools in rural areas was upheld in the context of article 46, as such children are usually socially, economically and educationally poor and cannot, therefore, compete with the children of their age-group coming from the urban areas.

Urmila Ginda v. Union of India, is a case of its own kind. In this case, the petitioner was a high caste Hindu by birth. She became a member of the Scheduled Caste by virtue of her marriage with a chamar (a Scheduled Caste). Delhi High Court denying her the benefit of preferential treatment observed:

It seems to me that to permit a lady like the petitioner belonging to a higher caste to compete for a seat reserved for such socially and educationally backward class of people, merely by marrying a person belonging to such caste, might even defeat the provision made by the state in favour of such socially and educationally backward classes by reserving certain posts for them.

The Court's refusal to extend the Hindu theory of the husband and wife being one for secular purposes leaves no doubt that a woman from scheduled caste marrying a high caste Hindu would not continue to be entitled to protective discrimination.

In Krishna Murthy v. Govt. of A.P., A.P. Agricultural Indebtness (Relief) Act, 1977 which purported to provide relief from indebtedness
to agricultural labourers, rural artisans and small farmers in the State was challenged. Its constitutionality was upheld on the ground, inter alia, that the Act sought to give effect to the principles incorporated in article 46.

In Amlendu Kumar v. State, the State of Bihar had reduced the percentage of marks for admission to Medical Colleges through competitive examination, prescribed for scheduled castes and scheduled tribes, from 45% to 40% and subsequently to 35% on the ground that reserved seats still remain unfilled and invoked article 46 in support of its order. Patna High Court struck it down as violative of article 15(1). The Court observed that article 46 only enjoins promotion with special care of the educational and economic interests of the weaker sections of the people, it does not enjoin upon the State to sacrifice the Indian society as a whole for promoting the educational and economic interests of scheduled castes and scheduled tribes. Article 46 does not ignore the minimum primary need of our society. However, in State of M.P. v. Nivedita Jain, the Supreme Court upheld the order of Madhya Pradesh government which had completely relaxed minimum qualifying marks in Pre-Medical examination for the selection of students to Medical Colleges of the State in respect of Scheduled Castes and Scheduled Tribes candidates. It was argued by the State that under article 15(4), it was competent to do everything possible for the upliftment of the Scheduled Castes and Scheduled Tribes and other backward communities and it was entitled to reserve seats in medical colleges for them.

In The Comptroller & Auditor General v. K.S. Jagannathan, it was held by the Supreme Court that the discretion of relaxation of marks in cases of Scheduled Castes and Scheduled Tribes, is a discretion to be exercised in the discharge of the constitutional duty, imposed by article

223. A.I.R.1980 Pat 1 at 8,11.

335 to take into consideration the claims of the members of the scheduled tribes, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the union or of a State. This duty is to be exercised keeping in view the directive principle laid down in article 46 to promote with special care and educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes. Article 37 makes the directive principles, "fundamental in the governance of the country" and it is the "duty of the State to apply these directive principles in making laws". However, the Court pointed out that the relaxed or lower qualifying standard cannot be fixed for all times or for a number of years and notified so that the candidates appearing for the examination would know what the lower qualifying standard is.\textsuperscript{224b}

In K.C. Vasanth Kumar v. State of Karnataka,\textsuperscript{225} the Supreme Court stressed the developmental facilities of the weaker sections and pointed out the reservations of posts is not sufficient to remove the backwardness. In the words of Chinnappa Reddy, J.

\begin{quote}
[M]ere reservation of a percentage of seats in colleges and a percentage of posts in the services is not enough to solve the problem of backwardness. Developmental facility and opportunity must be created to enable the really backward to take full advantage of reservations. It indicates that the ultimate solution lies in measures aimed firmly at all sound economic and social development.\textsuperscript{226}
\end{quote}

Sharing the above view, Justice Venkataramiah, observed:

There should be at the same time united action to increase the national resources so that the operation of equality will be less burdensome and every member of the society is carried to a higher social and economical level leaving no-body below a minimum which guarantees all the basic human needs to every member of the society. If there is no united action the pronouncements by courts would become empty words....The need for social action is necessitated by the environmental factors and living conditions of the individual concerned. \textsuperscript{227}

\begin{footnotes}
\item \textsuperscript{224b} Id. at 548-49.
\item \textsuperscript{225} Supra note 3.
\item \textsuperscript{226} Id. at 1525-26.
\item \textsuperscript{227} Id. at 1533.
\end{footnotes}
The learned Justice further pointed out that the government can pursue the policy of amelioration of weaker sections of the population in accordance with the directive principle contained in article 46. There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete with persons belonging to richer classes. The government may provide the liberal grants, scholarship, mid day meals, free uniform and books. The government may also provide them extra tutorial facilities and library facilities. If these and other steps are taken in the lower classes, then the students coming from there will be able to attain high degree of proficiency in their studies. 228

It is submitted that if the government policies are framed in such a manner which ensure the all round socio-economic development of the poor classes, the right to equality can become really meaningful to them. By merely providing reservations or increasing the reservation quota from year to year is not going to solve the problem of weaker sections of the people. It is only through the all round socio-economic development that they can be protected from the social injustice and exploitation. So the affirmative action is required on the part of the government to implement the spirit of directive principles contained in articles 38 and 46. 229

228. Id. at 1558.
229. Prof. M.P. Singh, has however, expressed some limitation in the implementation of all round developmental programme. According to him, under the existing social arrangements it is impossible to think of absolute parity in opportunity and that family background, environment, heredity and many other things are beyond social regulations. Secondly, the special facilities can also be attacked on the same grounds as quotas or reservations. Thirdly, due to resource constraints, the State is not in position to provide all the inputs to uplift the disadvantaged segments of society. Fourthly, at present certain groups are unrepresented in all walks of life and their induction cannot be postponed indefinitely. And lastly, if special facilities programme is based on caste lines, it causes social disintegration in the long run. See supra note 6 at 61-62. It is submitted that the views of learned author are not well founded. It is submitted that special facilities programme is suggested only to remove the existing socio-economic disparities. This is necessitated by the environmental factors and the living conditions of the individuals. Special facilities programme is not to promote the quota system of reservation but to abolish that system. Also the State should not deny the implementation of directive principles providing for special facilities programme after about four decades of the commencement of the Constitution on the ground that there are no resources for that. In fact it is the duty of the State to implement them at the earliest. This special facility programme will help the poor people to come in all walks of life and will improve the social integration as well.
Lingappa Pochanna v. State of Maharashtra, is a typical illustration of the concept of distributive justice, as the modern jurisprudence knows it. In this case Maharashtra Restoration of Lands to Scheduled Tribes Act, 1975, which provided for the transfer of agricultural land by members of the scheduled tribes to persons not belonging to such tribes was challenged. Upholding this legislation of the State, the Supreme Court observed that our Constitution permits and even directs the State to administer what may be termed as "distributive justice". The concept of distributive justice in the sphere of law-making connotes, inter-alia, the removal of inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: "From each according to his capacity to each according to his needs". It also means that those who have been deprived of their properties by unconscionable bargaining should be restored their property. All such laws may take the form of redistribution of wealth as a means of fair division of material resources among the members of society or there may be legislative control of unfair agreements.

N.B.Rao v. Principal, Osmania Medical College, Hyderabad is an illustrative example of the fact that how backward classes are exploited and prevented from taking the benefit under article 46 of the Constitution. In this case the petitioner obtained a false certificate of backward class on the recommendations of Sarpanch and Patwari of the village concerned. On the basis of that certificate he secured admission in the medical college. There was delay on the part of the authorities to verify the certificate. When this case was decided the petitioner had already completed four years of studies in M.B.B.S. Course. Considered from this perspective, K.Ramaswamy, J., observed that he has no hesitation to hold that the petitioner has committed fraud on the Constitution and is not entitled to continue his course of study as a backward class group but in view of the fact that he has already

231. Id. at 402.
232. Ibid. See also Sagarmal v. Laxmi Vastra Bhandar, A.I.R.1987 Raj.112.
completed four years of study, it is inexpedient in the circumstances as a special case to cancel his admission. The learned judge observed:

It is common knowledge that countless attempts are being made in obtaining false social certificates grabbing the seats for admission in the education field or posts reserved for the disadvantaged by persons having capacity to manoeuvre with the executive and thereby the very object of ameliorating the Dalits and Backward Classes from their social and economic backwardness is being frustrated. This is yet another pernicious form of exploitation within the meaning of Art.46.

However, the learned judge pointed out that the authorities can take the action against the persons concerned for giving false certificates or using fabricated documents.

In A.S.Sailaja v. Principal, Kurnool Medical College, it was held that where adoption of boy or girl, born in advanced section like Brahmam, in backward class at the age of 15 or so after receiving benefits of upbringing in that class and having advanced educational, cultural start off, the concerned boy or girl is not entitled to receive benefits of reservation under articles 15(4) and 16(4).

In S.Hari Ganesh v. State of T.N., Madras High Court held that the reservation of certain seats in the medical colleges for the children born of inter-caste marriages with preference for children born to spouses of whom one is a member of a Scheduled Caste or Scheduled Tribe is perfectly valid and in accordance with the law. It was observed that the State is bound legally and morally to give recognition to marriages of the so called caste Hindus with members of Scheduled Castes and Scheduled Tribes because such marriages remove the imbalances and inequalities in society to a greater degree and promote the objectives of directive principles contained in article 46.

234. Id. at 203-04.
235. Id. at 203.
236. Id. at 204. See also D.M.K. Public School v. Regnl. Jt. Dir. of School Education, A.I.R.1986 A.P.204. This is a case where judicial enthusiasm for dalit upliftment has resulted in a decision which, although just and fair, lacks in sound reasoning and adequate legal foundation. See N.S. Chandrasekharam, "Dalit Jurisprudence: Legal Basis", 28 J.L.L. 392-94 (1986).
239. Id. at 58-59.
In various other cases also the High Courts have made an endeavour to eliminate inequalities in status, facilities and opportunities which is one of the main objectives of the directive principles contained in articles 38 and 46.

It is submitted that from the perusal of the above cases it is clear that barring a few cases, the attempt of the judiciary had been to interpret the law in such a way that the objectives underlined in articles 38 and 46 are achieved. While achieving the objectives of directive principles, it is not always necessary that it should be done through reservation of seats in the professional institutions or in various parts of the government services. There are various other areas like health, housing and land distribution etc. where the government can focus its policies and also provide other developmental facilities. If this is done then the day is not far off when the right to equality will become meaningful not only for a few but for millions of Indians and there will be socio-economic justice to all.

(E) Preferential Treatment to Scheduled Classes in Legislatures

While framing the Constitution of India, the founding fathers were aware of the fact that Scheduled Castes and Scheduled Tribes might lack representation in legislative bodies because of their lack of political experience and consciousness and also dominance of other groups in these constituencies. The framers of the Constitution were aware that they had suffered social handicap and were consequently in disadvantageous position. Thus in order to ensure socio-economic justice to them and to bring them into the mainstream of national life, certain provisions were made in the Constitution which ensured the due representation of Scheduled Castes and Scheduled Tribes in Parliament and State legislatures. Articles 330 and 332 provides for reserved seats in the House of People and the State Legislative Assemblies for Scheduled Castes and Scheduled Tribes. Articles 331 and 333 make provision for the nomination of the representatives of Anglo-Indian community to the House of People and the State Legislative Assemblies, if such community is not adequately represented in these bodies. The

Constituent Assembly had rejected the political safeguards for religious and other minorities. From the face of it, these provisions look to be totally inconsistent with the secular character of the Constitution but they get their legitimacy when we look at them in the context of Indian social reality and the philosophy of socio-economic justice underlying the Constitution.

These seats are reserved in the proportion of the population of Scheduled Castes and Tribes to the total population and are to be filled in by joint election. These reservations do not involve "separate electorates" which means the representation of a particular group by legislators chosen by an electorate composed of members of that group. Therefore, an amendment moved in the Constituent Assembly which provided that a member of a Scheduled Caste should be declared elected, if he polled thirty-five per cent of total votes, irrespective of his position vis-a-vis other candidates was rejected. The seats were reserved in the sense that candidates who stand for them must belong to these privileged groups, but the entire electorate participates in choosing among candidates so qualified. Separate electorates are specifically outlawed by article 325 which provides that no person shall be excluded from any electoral roll on grounds of religion, race, caste or sex. Article 326 further provides that election to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty one years of age, and who is not otherwise disqualified by law, shall be entitled to be registered as a voter at

241. XII C.A.D.299. The Constitution contains no provision for representation for other backward classes in legislative or political bodies.
242. The provision and extent of "separate electorates" was extremely difficult and troublesome political issue in India during the pre-independence era. The Government of India Act, 1909 had given separate electorates to Muslims; the Government of India Acts 1919 and 1935 provided separate electorates for Muslims, Sikhs, Indian Christians, and other groups. Proposals to give separate electorate to the Scheduled Castes under the Government of India Act, 1935 were withdrawn after the resistance by M.K.Gandhi. They were instead given reserved seats under the Constitution. Under the scheme only they could be the candidates for these seats, but the whole general electorate chose among the candidates.

any election. In Nain Sukh Das v. State of U.P., the Supreme Court has indicated that article 15 prohibits communal electorates in local bodies.

While the preferential treatment in matters of education and employment opportunities have been left at the discretion of the State, the reservation of seats in the legislatures has been made mandatory to protect them from exploitation and subversion. This is because of the reason that scheduled classes formed an unfortunate section of the population which was backward. Their socio-economic condition was so bad, political awareness so low, and organisation capacity so meagre that they could not compete with other sections of citizens in an open election.

These legislative reservations are the only ones that are subject to a constitutional time limit. It was originally provided that such reservations should expire after ten years from the commencement of the constitution. But the time span for these reservations has been extended by various constitutional amendments and now they are to continue till the year 1990.

It is submitted that such phased continuation of the time limit of these reservations is against the intention of the framers of the Constitution. Professor Baxi has also seriously questioned the continuing of reservations for scheduled classes. He is of the view that these should be abolished on the ground that preferential treatment with respect to reservations in legislatures converts "revolutionary constitutional assumption into mere appeasement status quo". Professor Baxi is also of the view that these scheduled caste politicians have never ensured the effective implementation of the existing ameliorative policies and programmes for the benefit of their caste members. Secondly, only a few castes from among the scheduled castes have been the prime beneficiaries of these reservations. It has also been observed that with the passage of time these scheduled caste politicians acquire more affiliation with the dominant

244. A.I.R.1953 S.C.384. See also Bhopal Singh v. State, A.I.R.1958 Raj at 41. In Janardhan Paswan v. State, A.I.R.1988 Pat 75 at 93, the full bench of Patna High Court held that prohibition of discrimination on grounds of race or caste permeates the electoral rights of franchise as well.
245. See J.K.Mittal, "Special Representation in Legislative Bodies in India" 4, The Indian Advocate 23 at 25(1964).
246. See article 334.
ruling parties rather than with their own groups which has resulted in
the political grouping among these scheduled castes. Thus it is
suggested that the time limit of these reservations should not be extended
time and again rather they should be totally abolished now.

(F) Impact of Conversion and Reconversion on Preferential Treatment

The framers of the Constitution have taken a great care to ensure
that sufficient provision is made for the amelioration of weaker sections
of the society and, in particular, of the Scheduled Castes and Scheduled
Tribes. Articles 15(4), 16(4), 38, 46, 330 and 332 have been enacted for
this purpose. In the beginning of this Chapter we have identified that the
main beneficiaries of these aforesaid provisions are, scheduled castes,
scheduled tribes and backward classes who are mainly identified by apply-
ing the caste, tribe or religion criteria, though in addition to these
some other criteria have also been applied. Preamble of the Constitution
openly declares India to be a secular State. Freedom of religion has been
guaranteed as fundamental right. The religious discrimination on the
part of the State is prohibited. Nevertheless, in some instances reli-
gion has been made a qualification for preferential treatment.

The expression "Scheduled Castes" is defined in article 366 clause
(24) to mean such castes, races or tribes or parts of a group within such
castes, races or tribes as are deemed under article 341 to be Scheduled
Castes for the purpose of the Constitution. Clause(1) of article 341
enjoins upon the President to specify by public notification the castes,
races, or tribes or parts of or groups within castes, races or tribes, which
for the purpose of the Constitution are deemed to be Scheduled Castes in
relation to a state or Union territory.

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248. See U. Baxi, "Political Justice, Legislative Reservations for Scheduled
in B. Sivaramayya, supra note 28 at 32.
249. U. Baxi, "Legislative Representation-II: Towards a Purposeful policy",
The Indian Express, Chandigarh, 17 August, 1979.
250. Articles 25 to 28.
251. Articles 15, 16, 29(2), 30(2) and 325.
In discharge of the obligation imposed by clause(1) of article 341 the President issued the Constitution(Scheduled Caste)Order,1950, which provided that "no person who professes a religion different from the Hindu or Sikh religion shall be deemed to be a member of a Scheduled Caste."252

Thus it is apparent that for the purposes of the constitutional provisions relating to Scheduled Caste were intended to be applied to only those members of the castes enumerated in the Constitution(Scheduled Caste) Order, 1950, who profess the Hindu or the Sikh religion. The reason for this is that the depressed classes of the Hindu and the Sikh communities suffered from economic and social disabilities and cultural and educational backwardness so grossly in character and degree that the members of those castes in the two communities called for the protection of the constitutional provisions relating to the Scheduled Castes.

However, the main question for our determination in this part is whether a Hindu belonging to a Scheduled Caste or Scheduled Tribe retains his caste on conversion to Christianity or any other religion and what is the impact of preferential treatment to him on his conversion or reconversion to his original religion. There are various cases which have come before the courts from time to time on this aspect. The study of these cases will show the impact of conversion and reconversion on the preferential treatment.

252. In the original order paragraph 3 declared that "no person who professes a religion different from Hinduism" would be deemed to be a member of a Scheduled Caste. There was a proviso to paragraph 3 which declared that every member of the Ramdas, Kabirpanthi, Mazhabi or Sikligar, castes resident in punjab or Patiala and East Punjab States Union would in relation to that state be deemed to be a member of the Scheduled Castes whether he professed the Hindu religion or the Sikh religion. Subsequently the Parliament enacted the Scheduled Castes and Scheduled Tribes Order(Amendment) Act, 1956 which substituted for the original paragraph 3 the present paragraph which declares:"Notwithstanding anything contained in Paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste."
In Administrator General of Madras v. Anandachari, it was held that on reconversion to Hinduism a person can once again become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the original caste accept him as a member.

In Michael v. Venkataswaran, the religious requirement was upheld against a Pariyan convert to Christianity who wished to stand for reserved seat. The Court held that the general rule, is that conversion operates as an expulsion from the caste and a convert ceases to have any caste.

In Chatturbhuj Vithaldas Jasani v. Moeshwar Purashram, an Election Tribunal had rejected the nomination papers for a reserved seat submitted by a Mahar who had joined the Mahanubhava Panth, a Hindu sect which repudiated the multiplicity of gods and the caste system. The Supreme Court reversed the decision of the tribunal and held that the candidate remained a Mahar and was thus entitled to stand for the seat reserved for Scheduled Castes. The Court pointed out the following three factors to be considered to decide whether a person remained in the old caste or become a member of the new sect.

(1) the reaction of the old body,
(2) the intentions of the individual himself and
(3) the rules of the new order.

After considering these factors it was observed:

If the old order is tolerant of the new faith and sees no reason to outcaste or excommunicate the convert and the individual himself desires and intends to retain his old social and political ties, the conversion is only nominal for all practical purposes and when we have to consider the legal and political rights of the old body the views of the new faith hardly matters.
Thus the court emphasized on the second factor, i.e., the intention of the convert which must be confirmed by the acceptance of the old group or the first factor in this case.

In Jasani, the candidate was admitted to all Mahar caste functions and had been allowed to marry within the community. He twice married Mahar girls, neither of whom were Panth Members at the time of the marriage. He always identified himself as Mahar. The Panth, in spite of its doctrinal repudiation of caste, had not penalised him for his adherence to the caste. Hence the Supreme Court upheld his claim.

In V.V.Giri v. D.Suri Dora, the case arose out of an election to a seat in Parliament reserved for a member of a Scheduled Tribe. The candidate was born a Moka Dora, and his family had described itself as such in all documents till 1928. Since that time they had described themselves as Kshatriyas. There was evidence that the family had adopted Kshatriya style. The Election Tribunal applied the tests set forth in Jasani and held that the candidate was no longer a Moka Dora. It observed that the candidate had expressed unequivocal intention of drifting away from the clan and he had totally given up the feelings of being a member of Moka Dora. Thus the Election Tribunal laid emphasis on the second test laid down in Jasani. When the case reached the High Court of Andhra Pradesh, it addressed itself, not the question of whether he had remained a Moka Dora, but to the quite distinct question of whether he had become a Kshatriya. The High Court pointed out that caste is a matter of birth rather than of choice and the higher caste cannot be gained by choice. Hence he remained Moka Dora, and, therefore, eligible for the reserved seat.

The Supreme Court emphasized more on the third test of Jasani, i.e., the reaction of the new group. It was pointed out that the caste status have been determined in the light of the recognition received by him from the members of the caste into which he seeks entry. The unilateral acts cannot be easily taken to prove the claims for higher status. The Court concluded that the candidate had not become Kshatriya and had, therefore, remained a Moka Dora and hence eligible for the reserved post.

260. Supra note 256.
262. Supra note 256.
263. Id. at 735.
264. Supra note 261 at 1327.
265. Ibid.
Thus, this case is a typical example where all the three tests of Jasani were emphasised differently at the three stages of the case.

In Punjab Rao v. D.P. Mesharam, 266 the Supreme Court observed that where a person has embraced Buddhism then he ceased to be Hindu within the meaning of the Constitution(Scheduled Caste) Order, 1950. In this case one of the important points which was argued was that the word "Hindu" is comprehensive enough to include a Buddhist and in this connection the attention of the Supreme Court was drawn to Explanation II of Article 25 of the Constitution. 267 Rejecting this argument the Supreme Court pointed out that the expanded meaning of the word "Hindu" in the explanation is only for the purposes of article 25 clauses (a) and (b). If the same meaning is to be imported to the Constitution(Scheduled Castes) Order, 1950, then the use of word 'Sikh' was not required. 268

In C.M. Arumugum v. S. Rajagopal, 269 the question that had arisen before the Supreme Court was whether Rajagopal, who belonged to Adi Dravida caste before his conversion to Christianity could on reconversion to Hinduism once again become a member of the Adi Dravida caste. It was held that on re-conversion to Hinduism, a person can once again become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the caste accept him as a member. It is because orthodox Hindu society attaches social and economic disabilities to a person belonging to Scheduled Castes and favourable treatment is given to him by the Constitution. Once such person ceases to be a Hindu and becomes a Christian, the social and economic disabilities arising because of Hindu religion cease and hence it is no longer necessary to give him protection and for this reason he is deemed to be not belonging to

267. Explanation II of article 25 provides: "...the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu institutions shall be construed accordingly."
Scheduled Caste. But when he is reconverted to Hinduism the social and economic disabilities once again revive and become attached to him because there are disabilities inflicted by Hinduism.\footnote{270}

This case was followed by the Supreme Court in Gunter Medical College v. Mohan Rao.\footnote{271} In this case the question arose whether a person whose parents belonged to Scheduled Caste before their conversion to Christianity, could on reconversion to Hinduism be treated as a member of the Scheduled Caste for the purposes of preferential treatment under article 15(4). Bhagwati J., (as he then was) relying on Raj Gopal,\footnote{272} held that a son converted to Hinduism might be treated as a member of the Scheduled Caste to which his parents once belonged if the members of that caste accepted him.

Thus the court has taken a consistent view that a person can become the member of his original caste by reconversion if he is accepted by the members of that caste. In other words, the sanction of the old body is a condition precedent for this.

In Soosai v. Union of India,\footnote{273} the petitioner was belonging to Adi Dravida community and was a convert to Christianity. He was cobbler by profession and used to work on the roadside at one of the crossroads in Madras. Under the special central assistance scheme of Government of India for the welfare of the Scheduled Castes, cobblers were allotted bunks free of cost in the area where the petitioner used to work. The petitioner was not given any such benefit because the order specifically provided that the persons belonging to Scheduled Castes and converted to Christianity are not eligible for assistance under the scheme. The petitioner pointed out that this order was made in consonance with the Constitution(Scheduled Caste) Order, 1950 and challenged its validity on the grounds that it violated articles 14,15 and 25 of the Constitution.

The Supreme Court speaking through Pathak, J., (as he then was) referred to many provisions of the Constitution,\footnote{274} which deal with preferential treatment to weaker sections and in particular scheduled castes and scheduled tribes but dismissed the petition by observing that disabilities and handicaps do not continue after conversion and hence the order is not discriminatory.\footnote{275}

\footnote{270. Id. at 949. See Also Rajgopal v. Arumugam, A.I.R.1969 S.C.101.}
\footnote{271. A.I.R.1976 S.C.1904.}
\footnote{272. Supra note 269.}
\footnote{273. A.I.R.1986 S.C.733.}
\footnote{274. Id. at 734-35. See articles 15(4), 16(4), 17,46,330 and 332.}
\footnote{275. Supra note 273 at 736-37.}
It is submitted that it is difficult to understand as to how the economic condition of the petitioner had improved merely by converting to Christianity. Such denial of benefit also operates as a disincentive to the free profession of the religion since convert to another religion is at disadvantage compared with a Hindu Scheduled Caste person. Noting this kind of anomaly, the Elayaperumal Commission had recommended that the conversion should not be taken into consideration for the grant of benefits to the Scheduled Castes and Scheduled Tribes. It seems that the restriction which debar non-Hindu from the preferential treatment was originally intended to apply only to the reservation of seats in the Lok Sabha and Legislative Assemblies. Because it was thought that they would protect the interests of the Scheduled Classes in the legislatures. But to deny the benefit of preferential treatment in other fields would mean acting contrary to the objectives enshrined in articles 14, 37, 38 and 46 of the Constitution. In this case the Court has not taken into consideration sociological ramifications.

(G) An Appraisal

A society is as strong as its weakest sections. Therefore, to protect and promote the interests of such section is to stabilize and strengthen the society. Social engineering, which is law in action, must adopt new strategies to liquidate encrusted group inequalities, injustices or surrender society to traumatic tensions. Equilibrium, in human terms, emerges from release of handicapped and the primitive from persistent social disadvantage, by determined creative and canny legal manoeuvres of the State, not by hortative declaration of arid equality. Keeping in view the socio-economic disparities of the people of our country, the framers of the Constitution provided special provisions for the amelioration of the weaker sections of the society. Articles 14, 15 and 16 read with the directive principles contained in articles 37, 38 and 46 provide guidelines for the classification of society for the purposes of law. The fundamental rule is that the backward classes should be given legal push and pull to make them come to the level of equality with other sections of the community. The purpose

276. See the Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents, 170(1975).
278. See supra note 5 at 530.
is to create the socio-economic conditions so that the law may do equal justice to all. The right to equality authorises the State to take affirmative action for the benefit of Scheduled Castes, Scheduled Tribes and other weaker sections of the society. It is specifically mentioned in the directive principles that the State shall make an endeavour to promote the educational and economic interests of the weaker sections. The expression "educational and economic interest" was deliberately used to emphasize that the educational and economic interests and their advancement go hand in hand.

The traditional view that the State has nothing to do in making unequals equal and is concerned only with formal equality has undergone a sea change. However, in a caste ridden and economically imbalanced society like India, the social equality would become meaningful only if initial advantage is given as an equaliser to those who are too weak socially, educationally and economically. In order to do so the "merit criteria" has to be replaced by the "need criteria". On the basis of "need criteria" the Constitution of India envisages number of preferential treatments to socially and educationally weaker sections of the society. From the perusal of the various beneficial provisions of the Constitution it is clear that there are three categories of beneficiaries of preferential treatment. They are Scheduled Castes, Scheduled Tribes and other backward classes. The first two beneficiaries were explained in the Constitution but who are other backward classes, was not mentioned in the Constitution. The First Commission was appointed under the Chairmanship of Kaka Kalelkar in 1953 to identify the criteria for determining other backward classes. It prepared to list of 2399 caste groups as socially and educationally backward. But it could not specify particular criteria for the identification of the backward classes. Even the Second Commission under the Chairmanship of B.P. Mandal failed to identify the true backward classes. In fact both these Commissions relied more on the 'caste' as a criterion to identify the other backward classes. And according to the second Commission 75% of the population was to be considered as backward.

Judiciary also played a dominant role in laying down the criteria for the identification of other backward classes. There had been judicial
vascillation from case to case. Sometimes the Court stressed on caste as the basis for identification and in some other cases it stressed on poverty of the individuals. Even in the latest judicial pronouncement in K.C.Vasanth Kumar, where the judiciary was specifically requested to lay down the guidelines for identifying the other backward classes, all the judges who constituted the bench could not speak with one voice and laid different stress on different criteria for the identification of other backward classes.

It is submitted that due to the failure of the various Commissions and the judiciary to lay down the specific criteria to identify the other backward classes, the real needy persons have been deprived of the benefit and only a few among them shared the major part of the cake.

It is submitted that there is also social stratification among the weaker sections including the backward classes. There are some people who are more backward socially and educationally. What is happening at present is that only the upper layers among these backward classes are taking the benefit everytime, making the poor, poorer and to weak, weaker. It is suggested that these people who have improved their lot by taking the benefit of the State action should be refused further preferential treatment. Only then the chance will go to the other sections of the weaker class. Also as suggested in K.C.Vasanth Kumar, the policy of preferential treatment should be reviewed after every five year and there should be a permanent National Backward Commission to review the conditions of the backward classes.

It is also suggested that caste criteria should no longer be followed to identify the backward classes. In K.C.Vasanth Kumar, there is definitely a shift from caste to economic criteria as the basis of the identification of other backward classes.

While giving the preferential treatment, another question which came for the consideration of the judiciary was what should be the extent of reservations or preferential treatment. It is submitted that the Court in Balaji had rightly pointed out that the limit of reservation should not exceed 50%. But the later pronouncements of the Court in Thomas and A.B.S.K.Sangh diluted this rule. Also the case of Devadasan had rightly pointed out that the rule of 'carry forward' should not in any year reserve
more than 50% of the seats in a particular year. A.B.S.K. Sangh has rightly cleared the illusion in this regard. And now the carry forward rule cannot in any particular year reserves the seats more than 50%. It is submitted that while reserving the seats in the government services the efficiency should be taken into consideration. The preferential treatment should also be confined only to the initial appointments and it should not be allowed in the promotion level. Because at the promotion level the reservation or preferential treatment creates tension among the other persons who are denied the promotion and this affects the efficiency.

It is suggested that we should abolish the quota system of the reservation and instead of it we should emphasise more for the developmental facilities. There should be united action to promote the all round socio-economic development. The weaker sections may be given extra facilities and grants in the school level. This will enable them to compete with the higher classes. But while granting these facilities again the care has to be taken that the benefit of the schemes is not taken away by the top creamy layers of these weaker sections. If through this kind of united all round development we promote the socio-economic condition of the people, the reservation quota can be withdrawn in phases.

While giving preferential treatment to the students for professional colleges, it is suggested that there should not be complete relaxation of minimum qualifying marks. This dilutes the standard of education and ultimately affects the efficiency.

With regards to the reservation in the House of People and Legislative Assemblies, it is suggested that there should not be extension of the time period further. Otherwise, it will defeat the intention of the framers of the Constitution. Moreover, the history of our country bears the testimony to the fact that political representation on communal basis has been one of the major factors responsible for the creation of separatist tendencies. Political reservations have also not resulted in the appreciable benefits to the members of Scheduled Castes and Scheduled Tribes, rather it has strengthened the casteism and created an elite class among them. The political elites are least concerned with the plight of the members of their caste. Thus, the political reservations have failed to achieve their objective and their continuation is only for political reasons and it does
not serve any purpose of socio-economic justice to the weaker sections.

In regard to the conversion, it is submitted that the Court has rightly applied the tests in Jasani. If after conversion it is proved that a person has ceased to be Hindu, then he should not be allowed to contest from the reserved seat. However, it is suggested that the conversion should not debar the Scheduled Castes and Scheduled Tribes from other benefits to which they were entitled before their conversion. Otherwise, the spirit of the Constitution will be defeated. Thus, a workable synthesis between the nation's commitment to render socio-economic justice to the segments of society subjected to centuries of exploitation and the vital rights of the individuals has to be evolved.