CHAPTER - IX

ENFORCEABILITY OF EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

Many of the schemes of reservation adopted by the Central and State Governments had been subjected to judicial scrutiny ever since the commencement of the Constitution. As a result, protective discrimination attained a new jurisprudential dimension especially from the verdict of *N.M Thomas*. Similarly, the positive and wide interpretation of the Supreme Court in *Maneka's case* and its impact brought forth a new content and meaning to the fundamental rights as such and especially the right to life and personal liberty which now includes not only the procedural rights but also the substantive ones. Through the technique of judicial construction of the Constitution, many of the socio-economic rights provided in Part IV have been tailored into Part III of the Constitution and now the State is not only expected to see that a person's fundamental rights are not violated or infringed but also to effectively see that these rights are meaningfully enjoyed.

An analysis of the feasibility of enforcing the reservation principles like other rights guaranteed under Part III of the Constitution is undertaken in this Chapter from the premises of constitutional nature and judicial responses to Articles 15(4) and 16(4); Directive Principles of State Policy and the idea of justiciability; and the

earlier and recent judicial trends in this aspect. The following questions are relevant in this context:

Is reservation in public employment an exclusive discretion of the State or an enforceable constitutional right? Do the directive principles impose a mandatory duty upon the State to implement the reservation for the backward classes in jobs? Can a reserved candidate seek the remedy of a writ of mandamus to compel the State to implement a scheme of reservation related to public employment or to fill the reserved vacancies? What are the judicial responses towards these questions?

1. Nature of Articles 16 (4) and 15 (4) and Judicial Responses

In general, Part III of the Constitution is characterised as the fundamental rights and when the State violates or infringes the fundamental right, the aggrieved person can move the Supreme Court or High Court to get an appropriate remedy. Equality is guaranteed in different articles and there is a substantial connection between Articles 14 and 16. In order to satisfy the first part of Article 14 i.e., the equality before law, Article 16 (1) is guaranteed and to satisfy the latter part, the equal protection of the laws, Articles 16 (4)\(^3\) is incorporated. Similarly, there is a substantial relation between Articles 14 and 15. The reservation for backward classes in admission to educational

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3. Constitution of India, Article 16 reads: *Equality of opportunity in matters of public employment*: 1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. ... 4) Nothing in this article shall prevent the State from making any provision for the reservation 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".
institutions under Article 15(4) was construed as a special provision of exceptional character in *Balaji's case*. The reasoning of such an approach was justified by the Supreme Court in the following words:

"... it must not be ignored that the provision which is authorised to be made is a special provision, it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of society at large would be served by promoting the advancement of weaker elements in the society that Article 15 (4) authorises special provision to be made. But a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15 (4)."

This observation shows that in weighing these conflicting interests, the Court gave predominance to the general rule of non-discrimination and subordinated the reservation provision for backward classes. Though *Balaji* was a case exactly related to Article 15(4) i.e., reservation in educational institutions, the Court extended its

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4. Constitution of India, Article 15 reads: *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth* — (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them... (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste and Scheduled Tribes."


6. *Id.* at p. 467.
findings to Article 16(4). The proximity between the two sub-clauses had been explained by the Court in the following words:

"Article 15 (4) like Article 16 (4) is an enabling provision. It does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to make suitable actions, if necessary."

This mode of literal and restrictive interpretation of the provision of reservation was made without examining the proximity between the reservation principle and its importance in attaining the real equality guaranteed under the latter part of Article 14. However, the position of Balaji was later emphatically accepted by the majority in Devadasan and Article 16(4) was re-emphasised as an exception when the Court said:

"A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under clause (4) of Article 16 would in effect efface the guarantee contained in clause (1) or at best make it illusory. No provision of the Constitution or of any enactment can be so construed as to destroy another provision contemporaneously enacted therein."

The decision in Balaji and Devadasan brought out two propositions. Firstly, Article 16 (4) is only an exception and, secondly, it is only a discretion of the State

7. See for detailed analysis of this aspect. supra Ch. IV.
8. Supra n. 5 at p. 468. Emphasis supplied.
10. Id. at p. 695
to implement Article 16(4) when the State feels it necessary. If Article 16(4) is only an exception, no doubt, the citizen cannot claim it as a matter of right. But if it is an explanation to Article 16(1), Article 16(4) will become a fundamental right and part and parcel of the principle of equality of opportunity.

The exception-explanation controversy was put to a thorough analysis by the Supreme Court in *State of Kerala v. N.M. Thomas.* Justice Subba Rao's dissenting view in *Devadasan* was instrumental in taking such an appraisal. He, for the first time, searched for a jurisprudential foundation and its basis in protective discrimination policy. By construing the expression "nothing in this article" in clause (4) of Article 16 as a legislative device to express its intention in a most emphatic way, he observed that the power conferred thereunder was not limited in any way by the main provision but fell outside it. He thus viewed that clause (4) of Article 16 "has not really carved out an exception, but has prescribed a power untrammeled by the other provisions of the Article." Asserting Article 16(4) as an explanation to Article 16(1) Justice Krishna Iyer in *Thomas* said:

"To my mind, this sub-article serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to".

11. *Supra* n. 1.
12. *Supra* n. 9 at p. 700
According to him, 'it might be loosely said that Article 16 (4) is an exception, but it was an illustration of constitutionally sanctified classification'. He further clarified thus:

"Public services have been a fascination for Indians even in British days, being a symbol of State power and so a special Article has been devoted to it. Article 16 (4) need not be a saving clause but put in due to the over anxiety of the draftsman to make matters clear beyond possibility of doubt".\textsuperscript{15}

In a tone similar to Justice Krishna Iyer's, Justice Mathew too perceived clause (4) of Article 16 as an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upto the point of reservation. He said:

"If equality of opportunity guaranteed under Article 16 (1) means effective material equality, Article 16(4) is not an exception to Article 16 (1)".\textsuperscript{16}

Justice Fazl Ali also observed that clause (4) of Article 16 could not be read in isolation but had to be read as part of Article 16 (1) and (2).\textsuperscript{17}

Justice Krishna Iyer reiterated his position in \textit{Soshit Sangh}\textsuperscript{18} by holding that Articles 14 to 16 form a code by themselves and embody the distilled essence of the

\begin{itemize}
\item \textsuperscript{15} \textit{Id}. at pp. 535 - 536
\item \textsuperscript{16} \textit{Id}. at p. 519.
\item \textsuperscript{17} \textit{Id}. at p. 552.
\item \textsuperscript{18} \textit{Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India}, (1981) 1 S.C.C. 246.
\end{itemize}
Constitution’s casteless and classless egalitarianism. According to him, Articles 15(4) and 16(4) had to be read together with Articles 15(1) and 16(1). 'The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination". After observing thus, Justice Krishna Iyer immediately jumped into the following conclusion:

"Article 16(4) imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16(1) or as an exception to it".

This observation is a notable shift in emphasis. In another context he observed that clause (4) of Article 16 "is auxiliary" to "fair fulfilment" of Article 16 (1). His reading that it is no matter even if clause (4) of Article 16 is taken as exception or amplification pushes him back to an ambivalent situation. Does it mean that he is

19. *Id.* at p. 270.
21. *Id.* at p. 263. Krishna Iyer, J. said : "Article 16 which guarantees equal opportunity for all citizens in matters of State service inherently implies equalisation as a process towards equality but also hastens to harmonise the realistic need to jack up 'depressed' classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes Article 16 (4) for this specific purpose ... Article 16 (4) is not a jarring note but auxiliary to fair fulfilment of Article 16 (1)". *Ibid.* Emphasis supplied.
22. Justice Krishna Iyer was quite reasonably anxious about the possibility of misusing the provision of reservation by vested interests for political ends. This is reflected in the following observation: "The success of State action under Article 16(4) consists in

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the speed with which result oriented reservation withers away as no longer a need, not in the ever widening and everlasting operation of an exception. [Article 16 (4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison'd'etre, to politicise this provision for communal support and party ends is to subvert the solemn undertaking of Article 16 (1), to casteify 'reservation' ... is to run a grave constitutional risk". Id. at p. 264.
trying to depart from his earlier position in *Thomas*? No wonder, controversy emerged later in several cases that Justice Krishna Iyer made a retreat to the exception theory.  

It is significant to note that except Justice Krishna Iyer the other two judges including Justice Pathak, in his dissenting judgement, adopted the line of explanation theory. Justice Chinnappa Reddy unequivocally stated that preferential treatment was not a concession or privilege, but it was in recognition of their undoubted fundamental right to equality of opportunity. He emphasised thus:

"Article 16 (4) is not in the nature of an exception to Article 16 (1). It is a facet of Article 16 (1) which fosters and furthers the idea of equality of opportunity with special reference to an underprivileged and deprived class of citizens to whom egalite de droit (formal or legal equality) is not egalite de fait (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between egalite de droit and egalite de fait".  

Similarly, Justice Pathak perceived clause (4) of Article 16 as one facet of equality and a part of the process of equalisation. Thus, Justice Krishna Iyer's view

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24. *Supra* n. 18 at p. 315.  
25. *Id.* at p. 310.  
26. *Id.* at p. 303. Justice Pathak observed: "It is now well accepted that equality provisions of Part III of the Constitution constitute a single code, illustrating the multi-faceted character of the central concept of equality. Article 16 (4) also is one "
is made insignificant by the other judges' views. In other words, Justice Krishna lyer's view stands as the only one and dissenting voice among all the three judges in Soshit.

Justice Chinnappa Reddy, got yet another opportunity to tread on this aspect in Vasanth Kumar\(^{27}\) where he equated the right to equality as a matter of human right and re-emphasised it as a part of constitutional right. His observation is worth-quoting in this context:

"... the claim of the Scheduled Castes and Scheduled Tribes and other backward classes to equality as a matter of human and constitutional right is forgotten and their rights are submerged in what is described as the 'preferential principle' or 'protective or compensatory discrimination', expressions borrowed from American jurisprudence. Unless we get rid of these superior, patronising and paternalist attitudes ... it is difficult to truly appreciate the problems involved in the claim of the Scheduled Castes, Scheduled Tribes and other backward classes for their legitimate share of the benefits arising out of their belonging to humanity and to a country whose constitution preaches justice, social, economic and political and equality of status and opportunity for all".\(^{28}\)

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28. \textit{Id.} at p. 1508.
Justice Chinnappa Reddy's observation that the right to reservation as a "human and constitutional right" is a significant milestone in the evolutionary path of equality of opportunity in public employment. This approach reveals that even in the absence of a special provision in the Constitution like that of Article 16(4), the State is bound to act positively on the principles of preambular objective of attaining justice, in removing the age old disabilities and the resultant inequalities of the backward class of citizens. He vehemently argued that the backward class of people needed aid, facility, launching and propulsion. Their needs were their demands and the demands were matters of right and not a philanthropy. 'They ask for parity and not charity'.

Thus the Court was very categorical in its holding by turning down the argument of 'enabling provision' and re-asserting the Article as a concomitant of equality of opportunity:

2. **Mandal Case Crystallised the 'Explanation - Right Theory**

The Supreme Court undertook a thorough enquiry into the exception-explanation controversy in *Mandal Case*. After examining the case law in this regard, Justice Jeevan Reddy relied on the majority view in *Thomas* as the correct position and held that 'clause (4) of Article 16 is not an exception to clause (1) of Article 16, but it is an instance of classification implicit in and permitted by clause (1)'.

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29. Ibid.


31. *Id.* at pp. 395-396.
Removing the doubt, he examined the inter relationship among clauses (1), (2) and (4) and held:

"... just as Article 16 (1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect is clause (4) an exception to clause (2), if 'class' does not mean 'caste'. Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit".32

Justice Jeevan Reddy's re-emphasis, in another context, on the need for a harmonious construction between clauses (1) and (4) of Article 16 is highly remarkable. He observed that 'clause (4) is a special provision though not an exception to clause (1) and both the provisions have to be harmonised keeping in mind the fact that both are but re-statements of the principle of equality enshrined in Article 14'.33 Justice Sawant too, in his concurring judgement, viewed clause (4) of Article 16 as a specific class, carved out from various classes from whom reservation could be made,

32. Id. at p. 396.
33. Id. at pp. 438-439.
which was in tune with the objective of Articles 14 and 16 (1). Similarly Justice Pandian emphasised that clause (4) is neither an exception nor a proviso to clause (1) of Article 16 and it has an overriding effect on clauses (1) and (2) of Article 16".

The above analysis of the Mandal Case reveals that the provision of reservation is crystallised and fortified, by the judicial approach in that case, as a fundamental right similar to that of equality of opportunity under clause (1) of Article 16 and

34. *Id.* at p. 220. Justice Sawant observed: "Articles 14 and 16 (1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make the real equality guaranteed to them .... Thus, what was otherwise clear in clause (1) where the expression "equality of opportunity" is not used in a formal but in a positive sense, was made explicit in clause (4) so that there was no mistake in understanding either the real import of the "right to equality" enshrined in the Constitution or the intentions of the Constitution framers in that behalf". *Ibid.*

35. *Id.* at p. 131. Even from the analysis of the dissenting opinions of Sahai, Kuldip Singh and Thommen, JJ., it can be seen that except Justice Thommen all others did not stick hard to the old theory of exception. According to Justice Sahai, clause (1) 'is enforceable but clause (4) is only an enabling provision. The former is mandatory and operates automatically, where as the latter comes into play on identification of backward classes of citizens and their inadequate representation'. *Id.* at pp. 284-285. However he held that both the clauses are directed towards achieving equality of opportunity in services under the State. One is broader in sweep and expansive in reach. Other is limited in approach and narrow in applicability. Former applies to 'all' citizens, where as latter is available to any class of backward citizens. Use of words 'all' in Article 16 (1) and 'any' in Article (4) read together indicate that they are part of the same scheme. *Id.* at p. 284 Justice Kuldip Singh endorsed the view of Justice Sahai and added that Article 16 (4) 'is another fact of Article 16 (1)'. *Id.* at p. 195. However, Justice Thommen viewed that 'clause (4) is an exception or a proviso to the general rule of equality'. *Id.* at p. 153.
as a facet of equality principle under Article 14. Thus, it is the settled position now that Article 16 (4) is an explanation of Article 16 (1) and the State's duty in this regard is not restricted or controlled by Article 16 (1). On the other hand, clause (1) is in conformity with the mandatory requirement of providing equality of opportunity to all citizens. Thus both are directed towards achieving equality of opportunity in public employment.

Once clause (4) is accepted as a facet of Article 16 (1) i.e., a fundamental right, the logical extension is that Article 16 (4) is also a fundamental right. Thus it can logically and reasonably be concluded that if the backward class candidates are not adequately represented in public employment i.e., there are sufficient number of unfilled vacancies and the State fails to fill up those vacancies, the backward class candidate can invoke, as a matter of constitutional right, the writ remedy available either under Article 32 or 226 of the Constitution.


Apart from equality provisions, several Articles in Part IV of the Constitution i.e., Directive Principles of State Policy are intended for the State to adopt measures for removing inequalities and securing a just social order. These 'Instruments of Instructions' were incorporated in the Constitution after a long debate. The

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36. Dr. B.R. Ambedkar used this expression. He said: "The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and to the Governors of the Colonies and to those of India by the British Government under the 1935 Act.... The only difference is that they (Directive Principles) are instructions to the Legislature and the Executive. Such a thing is to my mind to be welcomed. Wherever there is a grant of power in general terms for peace, order and good government, it is necessary that it should be accompanied by instruction regulating its (f.n. contd. on next page)
Constitutional history reveals that in the early stages of drafting, there was much confusion with regard to the classification of justiciable and nonjusticiable rights. Some of the framers had the idea to bring the several socio-economic rights into the enforceable part i.e., Part III of the Constitution. But due to the social exercise .... VII C.A.D. 41. Dr. Ambedkar's oft-quoted observation is relevant in this context: "But whoever captures power ... will have to respect these instruments of Instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach is a court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles will possess will be realised better when the forces of right contrive to capture power". Ibid.


37a. B.N. Rau, the Constitutional advisor of the Government of India, advocated for positive state action with regard to certain socio-economic rights e.g., right to work should be made enforceable for its guarantee. B. Siva Rao, *Framing of Indians Constitution : Select Documents* Vol. II (1966), p. 33; K.T. Shah vehemently argued, in the Constituent Assembly, that the directive principles should be made justiciable. His reasoning is more relevant today than ever before. He said: "I would like to invite the house to agree with me that the provisions contained in the chapter must be regarded as obligations of the State towards every citizen and vice versa. Every citizen should have the right to compel the State to enforce these obligations, by whatever means may be found practicable and effective, and conversely, the State also should have the right to see that every citizen fulfills his obligations to the State". VII C.A.D. 480.
economic conditions that prevailed at the time of framing the Constitution and for the purpose of obviating the administrative and other practical difficulties that might arise if the directives were to be enforced at the behest of citizens, they incorporated the directives into the non-justiciable part with a solemn hope that within a short and reasonable time, the several benefits guaranteed in this part would be implemented. These directives are not mere "pious wishes" or "excellant window dressing without any stock behind". They are the "essence of the Constitution". They are also fundamental in the governance of the country and not a mere option of the State but a bounden duty on its part to apply these principles in making law.

Thus, the State is duty bound to extend its care to many a category of people such as working class, villagers, women, children, weaker sections and Scheduled Castes and Scheduled Tribes. Do they form part of responsibilities bestowed upon the State by this part of the Constitution? The present discussion of justiciability of reservation focusses on the following questions. What is, in general, the judicial


39. This phraseology was used by K.T. Shah, See Sudesh Kumar Sharma, *supra* n. 37 at pp. 46-47.

39a. This expression was used by Pandit Thakur Das Bhargava, VII C.A.D. 277.

40. Constitution of India, Article 37. It reads as follows: "Application of the principles contained in this part — 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".
approach towards the interpretation of directive principles? Does the State have a
duty to implement those directives? If so, has the beneficiary got a right to seek
judicial remedy to compel the State to perform such an obligation?

During the early period of the commencement of the Constitution, the directive
principles were treated as subsidiary to fundamental rights by the judiciary. For
instance, in State of Madras v. Champakam Dorairajan\(^{41}\), the Supreme Court adopted
a literal interpretation of the Constitution and held:

"The Directive Principles of State Policy have to conform to and run as
subsidiary to the Chapter on Fundamental Rights".\(^{42}\)

This view was subjected to severe criticism on the ground that fundamental rights
and directive principles are interrelated and form part of the same Constitution, both
of them are equally important and neither of them is superior or inferior to the other,
rather both supplement each other and have to be construed harmoniously.\(^{43}\) Later,

\(^{41}\) A.I.R. 1951 S.C. 226.

\(^{42}\) Id. at p. 228.

\(^{43}\) Mahendra P. Singh, V.N. Shuka's Constitution of India, Eastern Book Co., Lucknow
Approach to Them Hitherto, Parochial, Injurious and Unconstitutional", in P.K. Tripathi,
Spotlights on Constitutional Interpretation, N.M. Tripathi Pvt. Ltd., Bombay (1972)
p. 291 (1954); K.S. Hedge, "Directive Principles of State Policy in the Constitution of
India, (1971), 1 S.C.J. (Jour.) 50 at p. 69, S. Sundara Rami Reddy, "Fundamentalness
399 at p. 407; T. Devidas, Directive Principles: Sentiment or Sense?", 17 J.I.L.I. 478 at
however, the Supreme Court accepted the need for harmony between the two\textsuperscript{44} and it was held that they were complementary and supplementary to each other.\textsuperscript{45} Thus the position in \textit{Champakam} was drastically changed in the subsequent cases. The Supreme Court's decision in \textit{Kesavananda Bharati v. State of Kerala} \textsuperscript{46} added a new dimension to the directive principles. The question was with regard to the constitutional validity of the amended Article 31-C which gave predominance to some of the directive principles over fundamental rights. Upholding its validity, Justice Mathew elevated the directives principles to a higher plane in the Constitution in the following words:

"The Fundamental rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment, and even abrogation of these rights in circumstances not visualised by the Constitution-makers might become necessary: Their claim to supermacy or priority is liable to overborne at particular stages in the history of the nation by the moral claims embodied in Part IV".\textsuperscript{47}

Justice Mathew emphasised that in building a just social order, it was sometimes imperative that the fundamental right should be subordinated to directive

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\item[46.] (1973) 4 S.C.C. 225.
\item[47.] \textit{Id.} at p. 881.
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principles. He reasoned that the 'economic goals have an uncontestable claim for reality over ideological ones on the ground that excellence comes only after existence. It is only if men existed that there can be fundamental rights'. Justice Beg too construed the relationship between the two that while directive principles lay down the path of the country's progress towards the aims and objectives of the Preamble, the fundamental rights are limits of the path, like the banks of a flowing river, which could be mended according to the needs.

Thus, Kesavananda brought to light the hard Indian realities which necessitates myriads of State's action. To exist as a human being, basic amenities such as shelter, cloth and food are to be provided. Education and employment which are essential for the development of the personhood are also to be provided by the State. In short, an overall obligation is imposed upon the State by this judicial construction.

Another significant and innovative approach was undertaken by Justice P.N. Bhagwati in his dissenting judgement in Minerva Mills Ltd. v. Union of India in which he highlighted the significance of distributive justice and its relevance embodied in the directive principles thus:

"Thus, Directive Principle's, therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which

48. Ibid.
49. Ibid.
50. Id. at p. 902.
there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality not only for a few privileged persons but for the entire people of the country".52

Justice Bhagwati emphasised that the positive constitutional command to make laws for giving effect to the directive principles should have priority over the obligation not to encroach on fundamental rights.53 According to him, 'the directive principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the directive principles that the fundamental rights are intended to operate, for it is only then they can become meaningful and significant, for the millions of poor and deprived people'.54 He was categorical that the amendment of Article 31 C, far from damaging the basic structure of the Constitution, strengthened and reinforced it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and by promoting social and economic justice for all where everyone was able to exercise fundamental rights and the dignity of the individual and worth of the human person became a living reality for many.55

The very same idea is put forth by Justice Chinnappa Reddy in Soshit56 that fundamental rights should be interpreted in the light of directive principles and the

52. Id. at p. 1847.
53. Id. at p. 1852.
54. Id. at p. 1847.
55. Id. at p. 1853.
56. Supra n. 18.
latter should, whenever and wherever possible, be read into the former.\textsuperscript{57} It is significant to note that Justice Bhagwati's view in \textit{Minerva Mills} was upheld in \textit{Sanjeev Coke Mfg. Co. v. M/s. Bharat Coking Coal Ltd.}\textsuperscript{58} and \textit{National Textile Workers' Union v. P.R. Ramakrishnan.}\textsuperscript{59}

The preceding analysis of the approach of judiciary towards the interpretation of directive principles reveals that there was a slow and steady development from perceiving the directive principles firstly as subsidiary to fundamental rights\textsuperscript{60} and then equally relevant and harmonious\textsuperscript{60a} and finally superior to fundamental rights. This idea was re-echoed in \textit{Mandal case}\textsuperscript{61}.

\textsuperscript{57} \textit{Id.} at p. 309.
\textsuperscript{58} A.I.R. 1983 S.C. 239 at p. 246.
\textsuperscript{59} A.I.R. 1983 S.C. 75 at pp. 84-85, 105.
\textsuperscript{61} Supra n. 30 at p. 336. The Court said: "Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of several Articles in Part IV (Directive Principles of State Policy). "Justice — Social, Economic and Political", is the sum total of aspirations incorporated in Part IV". \textit{Per} Jeevan Reddy, J.
This transformation of judicial thinking is necessitated due to the proper realisation of the judicial role in interpreting the constitutional document in the light of the felt needs of the time. Thus, as it is rightly observed, the directives are addressed to the State and are meant to provide the courts with a scheme of values for their judicial exegesis. Therefore it becomes the duty of the court to look into the values in balancing the contending claims. The fundamental rights embody certain values inherent in the nation's life and they are themselves not all of the same force. Therefore, it is inevitable that certain values are more absolute than others and must be preferred. The judicial role in this regard of accepting the need of pre-eminence to directive principles is succinctly summarised by a jurist thus:

"For judges engaged in law making it is thus important to recognise that it is the dignity of the human person in the overall philosophy of the Constitution which constitutes the core of constitutional law. This explains why the directive principles, read with the preamble, together with fundamental rights concerned with the liberty of the person of the individual, are all important and so are superior to the remaining fundamental rights".

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62. Sudesh Kumar Sharma, supra n. 37 at p. 84.
64. Sudesh Kumar Sharma, supra n. 37 at p. 85.
65. Jagat Narain, "Judicial Law Making and the Place of the Directive Principles in Indian Constitution", 27 J.I.L.I. 198 at p. 222 (1985); Sudesh Kumar Sharma's analysis is significant in this context. He writes: "However the truth is that the directive principles have not received the satisfactory judicial note. The Supreme Court has been consistently hesitant in giving priority to the directive principles over " (f.n. contd. on next page)
4. Constitutional Scheme and Judicial Practice

Article 46 of the Constitution obligates 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 the Scheduled Tribes and to protect them from social injustice and all forms of exploitation. This Article, together with the State's duty to secure a just social order and elimination of inequalities under Article 38, embodies the concept of distributive justice. Similarly, the positive content of Article 335 also mandates the State to consider the "claims" of Scheduled fundamental rights in a situation of conflict between the parts. Such an approach is inherently inconsistent with the spirit and ethos of the Constitution which was never visualised by the founding fathers. Supra n. 37 at p. 104. The view of giving priority value of directive principles over fundamental rights becomes predominant nowadays. e.g., M.V. Pylee, India's Constitution, (1979), p. 181; V.S. Deshpande, "Rights and Duties under the Constitution", 15 J.I.L.I. 94 at p. 100 (1973); P.B. Gajendragadkar, The Indian Parliament and the Fundamental Rights: Tagore Law Lectures, Eastern Law House, Calcutta (1972), p. 67.

66. Constitution of India, Article 38 reads: "State to secure a social order for the promotion of welfare of the people. — 1. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. 2. The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."


68. Constitution of India, Article 335 reads: "Claims of Schedule Castes and Scheduled Tribes to services and posts: — The claims of the members of the Scheduled Castes (f.n. contd. on next page)
(f.n.68 contd.)

and 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".
Castes and Scheduled Tribes in making appointments to service and posts. The Court reads the articles together with Articles 15(4) and 16(4) and shows that the directive principles serve as a code of interpretation for judges in meeting out justice to a considerable section of subordinated people in our society.

The practice of reading directive principles into any of the fundamental rights, in the absence of a clear cut and enumerated rights in Part III of the Constitution, has been the greatest judicial achievement in Indian Constitutional law. This has been the impact of Maneka decision in the post-emergency period which witnessed the re-generation of human values and the judicial re-appraisal of its constitutional roles and goals. The courts, since then, do stretch its arms of protection to prisoners, indigents, environment, health and so on. The right to education is the latest addition to this string of development. It is pertinent to note that the courts have

69. E.g., Justice Krishna Iyer's observation in Soshit, supra n. 18 at p. 270.

70. E.g., Justice Chinnappa Reddy's observation in Soshit, supra, n. 18 at p. 309. The observation of Chief Justice J.S. Verma, while examining the Constitutional obligation of judiciary is highly relevant in this context when he says: "The Directive Principles are the mandate to the State as to what is expected of it in the governance of the State for the purpose of achieving the constitutional goals indicated in the preamble. Only a few words of the preamble are alone sufficient to keep us on the right track to understand the role of the courts." J.S. Verma, C.J., "The Constitutional Obligation of the Judiciary", (1997) 7 S.C.C. (Jour.) 1 at p. 5.

71. Supra n. 2.


already abdicted their traditional technicalities of *locus standi* and now any public spirited person can approach the court for seeking a remedy.

The Indian judiciary exercises enormous and vast powers unlike any other counterpart in the world. The all-pervasive character of judicial activism brings it even to the extent of performing the functions of other sister organs of the State such as the legislature and executive and thereby tilting the very balance of separation of powers. This is often justified as the only way out in a sheer exhaustion of all other means to awaken the executive and the legislature from their sclerotic coma. All the more, it is viewed as the accountability of courts to the people. In this state of affairs how can the judiciary be unheeded to the rightful claim of one class of citizens and hold the view that theirs are not fundamental right, but at the same time, the rights of other citizens as fundamental rights?

The language of Articles 15(4) and 16(4), though couched in exceptional nature, there is an inherent paradox in perceiving them as exceptions to the main provisions. This is rightly brought by M.P. Singh in the following words:


"From the very beginning the State has been performing its duties under Article 15 (4) and 16(4) through executive orders without legislation. The Courts have been consistently holding that such course is perfectly constitutional. At the same time the courts have also been holding that no fundamental right, or for that matter any right, can be taken away without authority of law. These two propositions laid down by the courts cannot stand together.... They can stand together only if these two clauses are not treated as exceptions to any fundamental right but are treated as an aspect of the fundamental rights".  

Arguing vehemently that Articles 15 (4) and 16 (4) are fundamental rights and not exceptions, M.P. Singh examines the jurisprudential basis of his thesis from the angle of Hohfeldian analysis of rights and concludes that Articles 15 (4) and 16 (4) impose positive duty on the State and to that extent they create corresponding rights in the backward classes. He seeks support from Dworkin's concept of "right to treatment as an equal", International Covenant on Economic, Social and Cultural Rights and the constitutional scheme of protection including the directive principles. His observation with regard to the intention of the framers of the Constitution is noteworthy that though they had made distinction between justiciable and nonjusticiable rights, they did not abandon their faith in the positive rights and retained

77. Mahendra P. Singh, "Are Articles 15(4) and 16(4) Fundamental Rights?", (1994) 3 S.C.C. (Jour.) 33 at pp. 36-37.
78. Id. at p. 39.
79. Id. at p. 34-39.
some of them among the fundamental rights. Moreover, he rightly argues that 'the well recognised legal maxim, *ubi jus ibi remedium* — wherever there is a right, there should also be an action for its enforcement — gives emphasis to the view that Article 15(4) and 16(4) are fundamental rights.

5. *Issues of Non-Implementation : Decided Cases*

The Supreme Court was consistently hesitant in recognising the right to reservation as a part of fundamental right during the pre-Thomas era. A notable instance of this approach was *C.A. Rajendra v. Union of India*, in which a Scheduled Caste

80. E.g., Constitution of India, Article 17 (abolition of untouchability); Article 23 (1) (Prohibition of traffic in human beings and forced labour) and Article 24 (prohibition of employment of children in factories, mines or any other hazardous jobs).

81. *Id.* at p. 40. However, Parmanand Singh holds an opposite view of M.P. Singh. In his rejoinder to M.P. Singh's article, Parmanand Singh raises the following apprehension: "The consequences of recognising reservation as a fundamental right — are also relevant. Once something which has so far been recognised as a matter of policy is acknowledged as a guaranteed fundamental right, each individual claim to secure the 'enforcement' of such right will be subject only to judicial determination. It may lose popular and political control. The right to affirmative action will thus open a floodgate for undeterminate, uncertain and vacuous claims." *Parmanand Singh, "Fundamental Right to Reservation : A Rejoinder,"* (1995) 3 S.C.C. (Jour.) 6 at p. 7. B. Erabbi is also having a similar view when he says. "Answer to the question as to whether there is a fundamental right to protective discrimination cannot, however, be given in the affirmative. If such a right and corresponding obligation were read into articles 14 and 16 (1), it would reduce articles 16 (4), 15 (4) and 46 into superfluity." *B. Erabbi, Protective Discrimination : Constitutional Prescriptions and Judicial Perception*, 11-12 *Delhi Law Review* 66 at p. 81 (1981-82).


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employee argued that the order of Central Government confining reservation in promotion to lower grade was violative of the guarantee of Article 16(4). While rejecting this contention, the Court held that Article 16(4) contained merely a power to be exercised at the discretion of the State and that the Article did not confer any right on the petitioner and there was no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes either at the initial stage of recruitment or at the state of promotion.83

This erroneous84 position was changed later in post-Thomas era where the Court specifically ordered the implementation of some beneficial measures to Scheduled Castes and Scheduled Tribe employees. For instance in Comptroller and Auditor General of India v. K.S. Jagannathan,85 the respondents were employees in the Department of Indian Audit and Accounts. They sought for relaxation in the qualify-

83. Id. at p. 513.
84. The Court did not consider the positive mandate of Article 335, but it overemphasised on the negative aspect of that Article. Id. at p. 514. Criticising this approach Marc Galanter says: "The Courts seem to infer that since there is no duty to confer any particular sort or amount of preferential treatment, there is no duty to confer any at all. In effect, they hold that a discretion sufficiently broad to allow a zero response to any individual claim is taken to imply a discretion to make a zero response to every claim. But this is somewhat paradoxical in view of the clear and explicit constitutional duty to make some special provision (Article 46) to advance the interest of the weaker sections". Marc Galanter, Competing Equalities: Law and the Backward Classes in India, Oxford University Press, Delhi (1984), p. 397.
85. (1986) 2 S.C.C. 679. The Court consisted by R.S. Pathak, A.P. Sen and D.P. Madon, JJ. The judgement was handed down by Madon, J.
ing standard of marks in their departmental test for getting promotion, in accordance with an Office Memorandum\textsuperscript{86} which was not extended to them. The Madras High Court accepted their contention and directed the appellants to give suitable relaxation in that regard. It was contented before the Supreme Court that the High Court could not issue a writ of mandamus to direct a public authority to exercise its discretion in a particular manner. While rejecting this contention the Court examined the scope of the power of High Court under Article 226 and held that the High Court had the power to issue directions or orders where the public authority had failed to exercise or had wrongly exercised the discretion or had exercised the discretion malafide or on irrelevant consideration or by ignoring relevant considerations. The Court also examined the nature of the discretion conferred by the Office Memorandum, viz., whether it was a discretionary power simplicitor or a discretionary power coupled with duty? The Court was emphatic that the discretion was to be exercised to discharge the constitutional duties imposed by Articles 335 and 346.\textsuperscript{87}

\textsuperscript{86} No. 36021/10/76. Esst. (SCT) dated January 21, 1977, issued by the Department of Personnel & Administrative Reforms to all Ministers etc. and it contained provisions for relaxation of standards in qualifying examinations for promotion to the higher grade on the basis of seniority subject to fitness to Scheduled Caste-Scheduled Tribe candidates.

\textsuperscript{87} Supra n. 85 at p. 693. The Court said: "The treatment meted out to the members of the Scheduled Castes throughout the ages was an affront to Human Rights. It was in a spirit of atonement for the wrongs done to them and to make restitution for the injury and injustice inflicted upon them that the framers of the Constitution enacted Article 16(4) placing them in a separate class in matters relating to employment or appointment to any office under the State, formulated the Directive Principles embodied in Article 46, and proclaimed the great constitutional mandate set out in Article 335." Id. at p. 700. Emphasis supplied.
This observation of the Court makes it clear that when the executive fails to implement a beneficial order, the Court could construe it as a violation of a mandatory duty and issue a writ of mandamus. Similarly another issue was brought before the Supreme Court in *P. & T. SC-ST Employees' Welfare Association v. Union of India.* In this case, the reservation of vacancies at the stage of promotion to Scheduled Castes-Scheduled Tribes employees in Post and Telegraph Department was withdrawn by the Government. This was challenged by the petitioners before the Supreme Court and sought for directing the Government to issue orders conferring such concession which was available in other departments. The three-Judge Bench speaking through Justice Venkataramiah said:

"We feel that the claim made by the petitioners is fully justified in view of the fact that similar advantage is being enjoyed by persons belonging to the Scheduled Castes and Scheduled Tribes in other departments and only they have been deprived of it. Such deprivation violates the equality clause of the Constitution." 

The Court further said:

"While it may be true that no writ can be issued ordinarily compelling the Government to make reservation under Article 16 (4) which is only an enabling clause, the circumstances in which the members belonging to

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88. (1988) 4 S.C.C. 147 The Court consisted of E.S. Venkataramiah, S. Natarajan and N.D. Ojha, JJ.

89. *Id.* at p. 151.

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Scheduled Castes and Scheduled Tribes in Post and Telegraph Department are deprived of indirectly the advantage of such reservation which they were enjoying earlier while others who are similarly situated in the other departments are allowed to enjoy it make the action of government discriminatory and invite intervention by this Court".90

The Court issued a direction to the Government of India to confer some additional advantage on the employees belonging to the Scheduled Castes and Scheduled Tribes in the Post and Telegraph Department commensurate with similar advantages which were enjoyed by the employees belonging to the Scheduled Castes, Scheduled Tribes in the other departments of the Government of India.91 The decisions in Jagannathan and P.T. S.C.S.T. Employees reveal that the inaction or the discriminatory attitude on the part of the Government could be challenged before the court of law and appropriate remedy sought for.

The preceeding assessment of the constitutional provisions and the trends of judicial approach reveal that the judiciary is adopting a pragmatic approach and it cannot take a hands-off approach on the plea that reservation is the domain of the executive discretion. The following conclusions emerge in this context.

Article 16(4) is not an exception to Article 16(1) but it is an integral part of fundamental right. Its enforciability gets support from directive principles too. Directive principles have acquired an enforceable status by the recent judicial treatment. They are substantially related to equality principles and preambular

90. Id. at pp. 151-152.

91. Id. at p. 152.
justice. The State has got a mandatory duty to implement the directive principles and the citizens have got a corresponding right to get it enforced. The judiciary too has got a duty to interpret the fundamental rights in the light of the directive principles, since directive principles are codes of judicial interpretation. The instances of issuing a writ of mandamus to the Government show that it has got a mandatory duty to comply with. Therefore, a backward class citizen can approach the court of law for getting implemented the right to reservation. The trends of judicial activism reveals that it opens the scope for interested person or groups on behalf of the backward group of people to get judicial redressal of their grievances.
CHAPTER - X

CONCLUSIONS AND SUGGESTIONS

The basis of favoured treatment or protective discrimination to backward classes is firmly rooted in jurisprudential foundations. The idea of equality of opportunity stems from the concept of justice. Its multifacets include social justice, equality, distributive justice and fair equality of opportunity. These concepts were nicely accommodated by the framers in the Indian Constitution with a view to eliminating the inequalities and achieving a casteless, classless and egalitarian society. The study reveals that the Indian judiciary could successfully locate and apply the above principles. It was Justice Subba Rao's nascent attempt in Devadasan which marked the starting point of such a jurisprudential enquiry. Later Thomas developed the thoughts by a reading new meaning and content to equality provisions of the Constitution which included the elimination of inequalities as the positive content of Articles 14 and 16(1) and elevated reservation provision to the same status of equality principles under the Constitution. Soshit, Vasanth Kumar and Mandal supplemented further to the jurisprudential contents. In this process, the courts were guided by the theories of John Rawls, David Miller, Ronald Dworkin, Max Weber and Roscoe Pound. Thus there was a slow and steady process of transformation of the reservation provision. From an anti-meritarian, unenforceable and enabling provision, it reached a stage of equally relevant and explanatory part of fundamental right to equality. Mandal viewed it as a part of sharing of State power. Though this can be seen by re-reading and re-joining thoughts of judges in this regard, the judicial approach lacks coherence and concerted efforts in evolving a jurisprudential basis for protective discrimination. The deliberations of the framers of the Constitution reveals that
there was much confusion and indeterminacy with regard to the concept of backwardness. It was, therefore, criticised that the provision of reservation would become a paradise of lawyers. This apprehension is found to be proved. However, the Constituent Assembly reposed faith in the judicial wisdom in finding out timely solutions to the recurring and vested questions of competing equalities. The study shows that the judiciary has been keeping intact the framers' expectation of having a reasonable quantum of reservation, preventing the undeserved sections from enjoying the benefit, avoiding its abuse and evolving a new criteria and rejecting the old ones.

The Indian social mileu shows the justification for protective discrimination of a section of people who happened to be de-humanised and marginalised due to the caste-ridden social system with its gradation and degradation. The caste factor and its occupational nexus, ritual and religious practices are significantly interwoven with educational and intellectual achievements and thereby the emulation of social status. However there are changes in the social mobility. The indelible stigma of lower castes disappears in certain cases but the disabilities still continue. The judiciary intervenes into those areas putting forth new criteria for the determination of backwardness. Creamy layer is the most significant one of this judicial contribution. The judiciary is meticulously overseeing the need for limiting the benefits to the most deserved and the most needy.

From the classic decision of Balaji onwards, the determination of backwardness was highly controversial. The relevance of factors such as caste and poverty in the determination were mainly in issue. Whether caste can be the sole determinant or poverty can be the sole test irrespective of caste or whether both are
relevant? The class-caste controversy existed for a quite long time. The judicial approaches towards these issues were highly confusing and vacillating. *Balaji* viewed that caste might not be irrelevant to Hindus, but its relevance should not be exaggerated and poverty was the primary index or root cause of the backwardness and considerations of caste aggravated the backwardness. However in *Chitralekha* it was viewed that caste could be eschewed altogether if backwardness could be ascertained on the basis of other criteria.

Though *Triloki Nath* re-asserted *Balaji*, *Rajendran* and *Periyakaruppan* adopted a different approach by holding that caste based list of backward classes in Tamil Nadu was valid because those included in the list were found to be socially and educationally backward. *Balram* also endorsed this view by giving due relevance to the role of caste in Indian society. However, later cases like *Janaki Prasad* and *Pradip Tandon* rejected this line of approach and went back to *Balaji-Chitralekha*. Though *Vasanth Kumar* confounded this controversy, the observations of Justices Chinnappa Reddy and Venkatramiah were found to be a turning point of ascertainment of backwardness. They emphasised the significance of caste-ridden hierarchical society of India and the nexus of social status and economic power. Justice Chinnappa Reddy was more specific in laying down that caste was the primary index of social backwardness and poverty the culprit cause. This observation is diametrically opposite to *Balaji* and instrumental in later developments towards the appraisal of caste and poverty in their right perspective.

*Mandal Case* is a significant trend setter in the area of determination of backwardness. The Court in this case re-emphasised the significance of the role of caste in the Indian context especially its homogenous and endogamous character with
occupational nexus. The decision settled the class-caste controversy by holding that caste could be a sole criterion in certain circumstances. At the same time caste might not be relevant at all in certain occupational groups or classes like agricultural labourers, rickshaw-pullers/drivers, streethawkers etc.

The identification of backward class on the basis of caste was much criticised, from the very beginning, as it would lead to the perpetuation of casteism, instead of eliminating it. The Supreme Court in *Mandal case* exposed the fallacy of this argument by citing the American practice of affirmative action and pointed out that "if race be the basis of discrimination, race equally forms the basis of redressal." The Court thus emphasised that protective discrimination was given to the disadvantaged group because they belonged to such discriminated castes and a different basis would perpetuate the status quo and therefore the caste system itself, instead of eliminating it. The Court hoped that by giving the discriminated caste-groups the benefits of reservation, the discrimination would in course of time be eliminated along with casteism. This realistic appraisal of the situation is a remarkable pointer towards the right direction.

While distinguishing between the import of Articles (16)4 and 15(4), the Court categorically stated that the backwardness contemplated by Article 16(4) was "mainly" social backwardness as it should not be both social and educational. This observation also repelled yet another 'assumption' that the backwardness contemplated by both Articles is one and the same. The Court reasoned that "social backwardness leads to educational backwardness and both of them together lead to poverty — which in turn breeds and perpetuates the social and educational backward-
ness". This means that social backwardness comprises in it the educational backwardness, the very same requirement in Article 15(4). Though this statement seems paradoxical, the Court was conversant with this inherent defect in compartmentalizing the two Articles of reservation and therefore it used the expression, "mainly social backwardness". The Court's rejection of the test of similarity of backwardness of Scheduled Castes and Scheduled Tribes with backward classes for reservation is a notable approach towards correcting the Balaji dictum. The test of exclusive economic criterion was also rejected by the Court by observing that it might be a basis along with other criteria of social backwardness. This is yet another realistic perspective of the Indian situation.

Much light was shed on the distinction between backwardness of forward class and backward class by the Court. The Court's reasoning that the backwardness of the lower castes or occupational backwardness being the consequence of both their social and educational backwardness and hence mere economic aid would not enable them to compete with others is well founded. It is significant to note that though the Court accepted the classification between backward and more backward and the preference in favour of the poorer sections it was left open to the Government to make such a classification. The Court could have issued directions in this regard rather than invoking the political will.

Though the constitutional scheme does not provide the extent or limit of reservation in employment it is specific about providing adequate representation in services for backward classes. The Balaji's less than 50 percent rule in relation to
Article 15 (4) was adopted by the Supreme Court to Article 16 (4) in *Devadasan* and a reservation up to 64.4% based on carry forward scheme was held unconstitutional. Later *Thomas* went for more than 50% rule, on the reason that such a quantum of reservation was nowhere near 50% while considering the total number of posts. However *Soshit* returned to 50 per cent limit by upholding the validating the carry forward rule subject to that limit.

In *Mandal case* the Supreme Court re-emphasised the need for 50 per cent limit to reservation in jobs. The Court however, observed that in certain extraordinary circumstances the 50 per cent rule could be relaxed. But this should be done with utmost caution and a special case should be made out. The Court specified that the situation of the inhabitants in farflung and remote areas who happened to be out of the mainstream of national life necessitated such a relaxation in the strict rule. This is a well-balanced approach. The Court significantly turned down the contention that the representation should be proportionate to the percentage of the population of the backward classes. However Justice Sawant accepted the idea of proportionate representation as a general rule, but he realised immediately the constitutional limits by observing that the provision of reservation cast a discretion on the Government to keep the reservation at a reasonable level. Justice Sawant's approach that the representation should be "effective and qualitative" including the higher rungs of administration and not quantitative in the administration as a whole, seems to be more plausible than the approach of Justice Jeevan Reddy in this aspect.

The question of quantum of reservation received a puzzling dimension in the post-*Mandal* period. The legislation of Tamil Nadu and Karnataka are suitable
instances of attempts to evade the *Mandal* verdict of 50 per cent limit. The Tamil Nadu legislation was put in the Ninth Schedule of the Constitution with a view to getting an insulation from the judicial attack. However, the Ninth Schedule can be examined on the basis of *Kesavananda*s insistence that it should pass the test of basic structure theory. So far the Supreme Court has not stated that 50 per cent quantum is a part of basic structure theory. One can reasonably hope that in future there is every chance of such an approach.

Applicability of reservation to solitary posts became an issue of highly controversial nature in post-*Mandal* period. The issue originated from the decision of a two-Judge Bench of the Supreme Court in *Chakradhar* that reservation should not be applicable to solitary posts on the reason that it would amount to 100 per cent reservation. Several High Courts followed the decision but some High Courts distinguished *Chakradhar* and followed an earlier decision of a Constitution Bench of the Court in *Arati Ray*. The question received a significant turn when a Bench of three Judges of the Court in *Madhav* did not follow *Chakradhar* and followed *Arati Ray*. This approach was followed by the Supreme Court in certain cases. However there was a reversal to *Chakradhar* by another Constitution Bench in a review petition in *Post Graduate Institute of Medical Education and Research case*, holding that even at the stage of first appointment or promotion there should not be reservation in single posts.

The study reveals that the recent review petition of the Constitution Bench did not assess the decision of *Chakradhar* and its import. In *Chakradhar* the interpretation of Government instruction for grouping of isolated posts was made in
such a way that the isolated posts could not be grouped at all. This erroneous reading of the instruction is manifestly against the spirit of the Government instructions. This fallacy was followed by courts later without noticing the factual situation of the case of Chakradhar. If reservation is not applicable to single posts, especially those of rare and specialised posts, the ramifications would be far-reaching. The policy of reservation to the rare and isolated posts was carried out by the Government by grouping of similar posts in the cadre with a rotation based roster system. Therefore there would be an equal chance of backward class members and forward class members in that posts. The whole system has become upset by the latest decision of the Court in the review petition. Thus equality of opportunity for backward classes becomes a mirage in rare, specialised and high posts of solitary character. This decision would trigger further controversies and litigations. One can reasonably hope that the judiciary should re-enter into the picture and correct its approach.

The concept of creamy layer i.e., the benefit of reservation should not be given to the advanced persons among the backward classes, has its germination in the very early period of judicial confrontation with protective discrimination. It has come to stay in Mandal case. The Supreme Court, in this case, while examining the question as to what are the criteria required in determining creamy layer, observed that social backwardness being the connecting link of backward class and if some of the members were far too advanced socially, the connecting thread between them and the remaining class would snap and they would be misfits in the class and only after excluding those sections, the class would become a compact one. According to the Court such exclusion would benefit the truly backward.

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In drawing the line of exclusion, the Court said that the emphasis should not merely be on economic factor, unless the economic advancement was so high that it necessarily meant social advancement. In other words, income or the extent of property held by a person can be taken as a measure. Justice Sawant was more specific that the elimination should be based on the person’s capacity to compete with forward classes and the adequacy of representation should be qualitative and quantitative. Till that stage reservation should be continued. Though the Central Government framed and implemented the criterion of elimination of creamy layer, State Governments like Bihar and Uttar Pradesh made legislation with multiple criteria for the exclusion of creamy layer which were invalidated by the Supreme Court.

Kerala’s position is in a peculiar tangle. The Government tried to evade the direction of the Supreme Court and enacted a legislation by saying that backward class was not adequately represented in services and there was no creamy layer. Meanwhile the Supreme Court itself had appointed a Commission to find out the creamy layer in the services of the State. The Commission's findings show that in certain services of the Government the representation of backward classes is beyond their prescribed percentage. The matter is now pending before the Supreme Court. The Kerala legislation is intended to give continuance and validity to the existing reservation as provided in the Kerala State and Subordinate Service Rules. The study reveals that the legislation will not stand against the verdict of Mandal case.

Marriage, adoption, conversion or migration promote social mobility and fraternity which are the essential attributes towards unity, integrity and secularism of a nation. In exercise of these rights, there is bound to arise a conflict between
these rights and constitutional goal of providing equality of opportunity to backward class of citizens. Much confusion and controversy existed as to the question whether a person can acquire backwardness through marriage, adoption, conversion or migration? Or what is the impact of the exercise of these rights on backwardness?

There were conflicting decisions of High Courts in the case of marriage. Delhi High Courts decision in Urmila was the beginning of the controversy. It held that a lady from higher caste who was married to a Scheduled Caste was not entitled to the benefits conferred upon the Scheduled Caste since she had not suffered any social and educational backwardness during the early period of her life. However in Kunjamma Alex, the Kerala High Court viewed otherwise while holding that a non-Latin Catholic lady after marriage to a Latin-Catholic man would become a member of Latin Catholic and was eligible to avail of the reservation benefits of her husband's community. But later the High Court went back to the earlier view. Similar was the approach of Andhra Pradesh High Court in Neelima. The matter was finally settled by the Supreme Court in Valsamma Paul that though a non-Latin Catholic lady after her marriage to a Latin Catholic man had become a member of her husband's community, she could not claim the benefit, since she had an advantageous start in life and had not undergone the disabilities, disadvantages or sufferings so as to entitle the facility of reservation. In the case of adoption also the judicial approach is the same. However, in the matter of conversion or reconversion, the Court stipulates that the convertee should have been accepted as one among them by the members of the same community to which he rejoins. The Court further stated that there must be substantial evidence to show that the person has been accepted by the community. Thus the Court fixes strict measures to become the
beneficiaries of reservation. The study reveals that there are two decisions of the Kerala High Court which are *per in curium*, i.e., the decision in those two cases were taken without noticing the earlier Supreme Court decisions and law in this regard.

The judicial approach is similar in the case of migration too. That is, reservation benefit is restricted to a person's original State and not allowed in the migrant State on the reason that the circumstances, percentage of reservation, the obligations of governmental protection are different from State to State. The reasoning in all the above issues relating to the impact of marriage, adoption, conversion and migration on backwardness is well-founded. The basic idea of such reasoning is that reservation benefits should not be misused or abused.

However, it cannot be overlooked that the principle creates difficult in some cases, for instance, involuntary migration or migration due to other compelling circumstances. In such cases, as observed by Justice Kukharji in *Marri Chandra*, legislative intervention is needed. In marriage too there are similar problems. For, in many such cases individuals of higher caste, especially women in rural India, married to backward caste would be usually subject to the same disabilities and disadvantages as their in-laws suffered. Here also, the principle needs change either through a review or by a proper legislation.

The constitutional provisions of reservation i.e., Articles 15(4) and 16(4) are of special and extraordinary nature. They are juxtaposed with the formal equality
i.e., guarantee of non-discrimination in Article 15(1) and the mandate of equal opportunity in Article 16(4). Similarly the constitutional duty to promote the interests of weaker sections is placed in the unenforceable directive principles. This constitutional framework leads to conflict between these rights. Earlier, these provisions were construed as exceptions to the main clauses. They were held as enabling provisions and there was no right on the beneficiaries or a corresponding constitutional duty imposed on the Government to take measures in this respect. This Balaji line of approach was discarded in N.M. Thomas and later cases. Thomas stood for viewing the reservation provision as an explanation or illustration or a facet of the main provision of equality. Mandal case fortified this concept when it categorically stated that "just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (4) of Article 16 is also an elaboration of a facet of clause (1)." The Court re-emphasised on the need for a harmonious construction between clauses (1) and (4) of Article 16 and both clauses "are but re-statements of the principle of equality enshrined in Article 14". This remarkable observation crystalises the view that both clauses (main as well as explanation) are one and the same aspect for achieving equality of opportunity.

The idea of justiciability of directive principles got a new dimension in Kesavananda, which upheld the constitutional validity of giving predominance to certain directive principles over fundamental rights. The earlier view of Champakam treating directive principles as subsidiary to fundamental rights lost its ground. Now
the directive principles are treated as equally relevant and harmonious or even superior to fundamental rights. It shows the trend of getting prime significance of directive principles in the constitutional scheme. The judiciary has tailored many of the rights from directive principles to fundamental right. This has added new dimensions to the enforceability of many of the individual as well as socioeconomic rights. This development would pave the way for evolving the right to reservation as an enforceable fundamental right.