

RESERVATION

As an instrument of Social change

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SR NO.	CONTENTS	PAGE NO.
1	<u>INTRODUCTION</u>	3
2	<u>THE CASTE SYSTEM</u>	5
3	<u>UPWARD JOURNEY IN CASTE SYSTEM AND SOCIETY AND SOCIAL CHANGE</u>	7
4	<u>EMPOWERMENT AS A METHOD OF SOCIAL TRANSFORMATION</u>	9
5	<u>Non-discrimination on the ground of caste as a constitutional policy</u>	11
6	<u>SPECIFIC CONSTITUTIONAL PROVISIONS</u>	11
7	<u>Acceptance of caste as a factor to undo past injustices</u>	14
8	<u>Criticisms against caste-based identification of backwardness</u>	20
9	<u>The problem of non-birth entry into caste or reservation category</u>	22
10	<u>Affirmative action and implications</u>	24
11	<u>Women and reservation policies</u>	28
12	<u>Reservations- Vertical And Horizontal</u>	36
13	<u>CONCLUSION</u>	38
14	<u>BIBLIOGRAPHY</u>	39

INTRODUCTION

Law's competence, efficacy and difficulty to interact with society for ensuring and expanding freedom, welfare and justice to people can be properly understood by looking to the social milieu and community's structure upon which it operates. The internal structure of a hierarchic society or operation of a patriarchy can hardly be ignored when the social division is responsible for emergence and prevalence of special privileges and unusual disabilities of specific groups at the social plane. One of the foremost social realities that shape inter-group and interpersonal social relations in India is caste system. The unequal opportunities and conditions of dignity offered by the social categorization through caste system in educational and economic fronts cannot be silently tolerated by a welfare state. Untouchability, which is the culmination of caste prejudice of pollution/purity, is one of the grossest violations of human rights to which legal system has been quite sensitive. While filling the values of cosmopolitan culture into a tradition bound hierarchic society faces all the challenges of modernization, leveling up the lowly and the weak by ameliorative policy attains abundant significance in the context of legal system adhering to social justice and social revolution. The social responses to issues relating to composition, inter-group tension and inter-group mobility have resulted in conflicts, sensitive struggles and evolution of compromise policies. Overall direction towards social integration of different communities and building up of a harmonious society is visible in these policies.¹

In the ancient period of India, the backward castes had been denied all kinds of social and economic endowments. Hence, they had been lagging behind in the process of development. The social and economic deprivation among Scheduled Castes had been most common during pre and post-Independence. Therefore, there was a need of number of special safeguard policies. One of that is, 'Reservation Policy' in the Government Recruitment. The objective of the reservation policy is to eradicate the social and

¹ P. Ishwara Bhat; Law & Social Transformation; 1st edition; Eastern Book Company; p 453-454

economic disparities which existed in the society.²

The policy of reservation as envisaged in the provision of the Constitution of the Union of India has always been a topic of discussion, wrought sometimes with highly emotive content that involves social, political, economic, administrative and legal ramifications.

Reserving opportunities, resources or offices for individual of group for furthering their welfare and thereby ensuring social justice, is the core of the concepts of reservation. Socio-economic disability of a person deprives him or her of the chance to compete with others on equal footing. Thus to find out the disability of the person and reserve opportunities for him or her becomes the responsibility of the State when the state is democratic and its object is welfare of the people. In the Indian political and sometimes even in judicial parlance the term 'reservation' has come to mean reserving opportunities, resources and/or offices for the groups of people who belong to the socially and educationally backward communities or castes.³

The harsh reality is that the independent India had to inherit a complex caste problem⁴. People got themselves divided into castes, which underwent a metamorphosis and multiplied. The federating point of this caste based society was the Brahmin. And through the Brahministic rituals and beliefs the hierarchy of caste system has been sustained. This has to be eliminated if India has to become democratic in the western sense of the term.⁵ The wise founding fathers of our constitution knew it well that in free India any discrimination and exploitation by any section of society against any other sections could not be justified either morally or legally. So it was realized that the Colonialism of the higher caste must be ended through the Constitution. It is in this background that it becomes indispensable for them to adopt a policy of compensatory discrimination as an equalizer to those who were too weak socially and economically in the caste ridden society. They were quite aware that these masses had suffered social

² Jagan Karade; Development of Scheduled Castes and Scheduled Tribes in India; Cambridge Scholars Publishing

³ P.P. Vijayan; Reservation Policy and Judicial Activism; Kalpaz Publications; p17

⁴ S.S. Jaswal; Reservation Policy and the Law; D&D publications; p1

⁵ Infra3; p19

injustice too long and been separated by the 'Poverty Curtain' too strong that if peaceful transformation of the nation into an egalitarian policy were not achieved, chaos, upsurge and massive disruptions would destroy the peaceful progress which is freedom's tryst with Indian destiny.⁶

THE CASTE SYSTEM

Hindu society is divided into four varna, or classes, a convention which had its origins in the Rig Veda, the first and most important set of hymns in Hindu scripture which dates back to 1500-1000 B.C. At the top of the hierarchy are the Brahmins, or priests, followed by the Kshatriyas, or warriors. The Vaisyas, the farmers and artisans, constitute the third class. At the bottom are the Shudras, the class responsible for serving the three higher groups. Finally, the Untouchables fall completely outside of this system. It is for this reason that the untouchables have also been termed avarna ("no class"). Jati, or caste, is a second factor specifying rank in the Hindu social hierarchy. Jatis are roughly determined by occupation. Often region-specific, they are more precise than the sweeping varna system which is common across India and can be divided further into sub castes and sub-subcastes. This is also the case among untouchables. Andre Beteille defines caste as "a small and named group of persons characterized by endogamy, hereditary membership, and a specific style of life which sometimes includes the pursuit by tradition of a particular occupation and is usually associated with a more or less distinct ritual status in a hierarchical system.

Jatis in the three highest varnas in the hierarchy—Brahmins, Kshatriyas, and Vaisyas—are considered "twice-born" according to Hindu scripture, meaning they are allowed to participate in Hindu ceremonies and are considered more "pure" than the Sudras and "polluting" untouchables. This concept of pollution versus purity governs the interaction between members of different castes. The touch of an untouchable is considered defiling to an upper-caste Hindu. In southern India, where caste prejudice has been historically most severe, even the sight of an untouchable was considered polluting. Untouchables

⁶ Infra 4; p2

usually handled “impure” tasks such as work involving human waste and dead animals. As a result, until reforms began in the 19th century, untouchables were barred from entering temples, drawing water from upper-caste wells, and all social interaction with upper-caste Hindus (including dining in the same room). These social rules were strictly imposed and violators were severely punished; some were even killed.

Despite constitutional prohibitions and laws, most recently the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989, violence and injustices against untouchables continue today, particularly in rural areas of India. Accounts of caste-driven abuses continually appear in Western media and surely affect foreigners’ perceptions of India. American economist Thomas Sowell drew on a 1978 case in which an untouchable girl had her ears cut off for drawing water from an upper-caste well in one of his books. More recent examples include Dalit students at a government school in Rajasthan who were punished for asking to drink water from a pitcher used by higher caste students and a Dalit in Punjab who was murdered by “affluent Rajput Hindu youths” after his dog ran into a Hindu temple

Nevertheless, there is increasing social mobility, especially in India’s urban areas. Some untouchables and sudras have tried to move up in the hierarchy by adopting customs of upper castes, a process labeled sanskritization. Others have attempted to escape the system entirely by converting to Buddhism or Christianity. The prominent Dalit politician and lawyer, Bhimrao Ramji Ambedkar (1891-1956), who saw the demolition of the caste system as necessary for the emancipation of India’s Dalits, converted to Buddhism at the end of his life. Over time, significant numbers, although only a tiny portion of India’s Dalits, have followed his example; in November 2001, thousands of untouchables participated in a mass conversion to Buddhism in Delhi.⁷

⁷ <http://www.ambedkar.org/News/reservationinindia.pdf>

UPWARD JOURNEY IN CASTE SYSTEM AND SOCIETY AND SOCIAL CHANGE

Sanskritization: or Sanskritisation is a particular form of social change found in India. It denotes the process by which castes placed lower in the caste hierarchy seek upward mobility by emulating the rituals and practices of the upper or dominant castes. It is a process similar to passing in sociological terms. This term was made popular by Indian sociologist M. N. Srinivas in the 1950s, although earlier references to this process can be found in *Castes in India: Their Mechanism, Genesis and Development* by Dr. B. R. Ambedkar.⁸

Sanskritisation is the process by which a 'low' Hindu caste or tribal or other group, changes its customs, rituals, ideology, and the way of life in the direction of a high , and frequently twice born caste. Generally such changes are followed by a claim to a higher position in caste hierarchy than that traditionally conceded to the claimant caste by the local community. The claim is usually made, over a period of time, infact, a generation or two before the arrival is conceded, occasionally a caste claims a position which its neighbors are willing to concede. This type of disagreement between claimed and conceded status may be not only realm of opinion but also in the more important realm of institutionalized practice.

“Sanskritisation is generally accompanied by, and often results in, upward mobility for the castes in question: mobility may also occur without Sanskritisation and vice versa. However, the mobility associated with Sanskritisation results only in positional changes in the system and does not lead to any structural change. That is, caste moves up, above its neighbours, and another comes down, but all this takes in an essentially stable hierarchical order. The system itself does not change. Sanskritisation is not confined to Hindu castes but also occurs amongst tribals and semi-tribals groups such as Bhils of Western India. This generally results in the tribe undergoing sanskritisation claiming to be a caste, and therefore, Hindu. In the traditional system the only way to become a

⁸ <http://en.wikipedia.org/wiki/Sanskritization>

Hindu was to belong to a caste and the unit of mobility was usually a group, not an individual or a family.⁹

Modernisation: The concepts of modernization bristle with difficulties which prevent crystallization of meaning. Modernisation is a total process of transformation of traditional society involving far reaching changes in all aspects of individual life. “it symbolises a rational attitude towards issues and their evolution from a universalistic and non peculiaristic view point,” Like science, modernity is not an exclusive possession of any ethnic or cultural group but it belongs to the humanity as a whole.”

“In contemporary India both westernization and modernization trends are observable. In large cities the external of Western life are rapidly and easily imitated by the youth in the matter of food, dress and social necessities. There is considerable interest in the Western films, music and dance. Exposure to western nation through all such varied other medium, has helped indirectly in bringing modernization and encouraging it.¹⁰

⁹ Dr. B.K. Kapoor,;Indian Society, Structure & Change; Ritu Publications, Jaipur, p. 244

¹⁰ Infra 7; p. 245

EMPOWERMENT AS A METHOD OF SOCIAL TRANSFORMATION

Overcoming the impeding handicap through empowerment is a special means chosen for social transformation in welfare democracy. Amelioration and elevation of a social segment, which is not able to compete within advanced segment because of present disabilities emanating from past discriminations, can be done by providing positive advantages and assistances to the powerless. That the victims of exploitation, whether arising from cast prejudice, gender discrimination or child abuse, are seriously marginalized because of lack of ability to withstand pressure is a factor that should be responded by energizing the, deprived through affirmative action, according to this approach. Power as an ability to alter the legal relations with others is an important factor that dispels once disabilities and carves out new opportunities hitherto denied. Empowerment is a purpose-oriented action of reinforcing the ability of the disadvantaged group to gain self generating power to be equal partners in the process of development, to remove vulnerability of the exploited and to prevent the perpetration of exploitation, violence and injustice. According to Andre Beteille, “The idea of empowerment may be invoked in virtually any context: in speaking about human rights, economic security, capacity building, skill formation or the conditions of dignified social existence.”¹¹ By strengthening the marginalized and the unorganized and by building up social and economic capabilities among individuals and communities, and by moving the society from hierarchy to equality, it radically redistributes power and contributes to social transformation. As visualized by Rabindranath Tagore, this requires infusing the language of soul and language of humanity into the mouths and hearts of weak. This involves a positive policy of adding strength where it is lacking; removing obstacles in the path of progress; and it essentially reflects the idea of social justice. Since knowledge, skill, job, property and political position have dimensions of power, providing access to them on the basis of equality of opportunity reflects the policy of empowerment. Thus the question, what is actually added, to whom, how much and how long becomes relevant in this sphere when social justice is connected to the factor of need and desert.¹²

¹¹ Andre Beteille, *Antinomies of Society* (Oxford University press, New Delhi 2000) at p.268

¹² P. Ishwara Bhat; *Law & Social Transformation*; 1st edition; Eastern Book Company; p. 454-455

Justice K. Ramaswami observed in *Air India Statutory Corpn v. United Labour Union*¹³:

“In a developing society like ours, steeped with unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst, Rubicon to poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstances. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen, etc. are languishing and to secure dignity of their person. The constitution, therefore, mandate the state to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to favour and enliven the practical content of life.”

It was observed by the Supreme Court in *M. Nagraj v. Union of India*¹⁴, “under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the state has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social.”

Since the concept of equal citizenship and equal liberties of all is a foundational value of the constitution, distribution of benefit and burden on the basis of community, caste and gender becomes odd, and needs to be justified by balanced application of ‘formal equality’ and ‘proportional equality’. Identification of the most deserving beneficiaries and use of the most appropriate means of empowerment are the stepping stones towards real amelioration. Cast has been used by the governments as one of the criteria for identifying the backward classes. Lack of proper measure for excluding the creamy layer and disinclination for internal reservation has been problematic factors in identifying the most deserving ones. While giving of fee concessions, scholarships, additional training facilities, loans and other advantages is employed as means of empowerment, the major policy is creation of quotas in jobs and educational institutions.

¹³ (1997) 9 SCC 377.

¹⁴ (2006) 8 SCC 212.

K. G. Balkrishnan, CJI has observed in *Ashoka Kumar Thakur v. Union of India*¹⁵

“Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the state to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the constitution. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India’s vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few.”

NON-DISCRIMINATION ON THE GROUND OF CASTE AS A CONSTITUTIONAL POLICY

Eradication of untouchability, prohibition of discrimination amidst citizens on grounds of caste, special measures of protective discrimination like reservation scheduled caste, scheduled tribes, socially and educationally backward classes and other backward classes and enabling of temple entry are major public policies developed by the Indian society. These policies got incorporated into the Constitution and influenced various legislative and administrative measures.

SPECIFIC CONSTITUTIONAL PROVISIONS

Prohibition of untouchability and rejection of caste based discrimination are the major policies of Constitution in this sphere. The key provision regarding abolition of untouchability can be found in Art 17 of the Constitution. It makes an epoch making declaration, “Untouchability is abolished and its practice in any form is forbidden. According to K. Ramaswami, J., “The thrust of Art. 17 and the Act is to liberate the society from blind and ritualistic adherence and traditional beliefs, which has lost all legal or moral base. It seeks to establish new ideal for society, equality to the Dalits, at par with

¹⁵ (2008) 6 SCC1, para 6

general public, absence of disabilities, restrictions or prohibitions on grounds of caste or religion, availability of opportunities and a sense of being a participant in the main stream of national life.”

Article 17 read with Article 15(2) protects an individual from discriminatory conduct not only on the part of the state but even on the part of the private persons in certain situations. Article 23(1) prohibits beggar and other similar forms of forced labour, (bonded labour). Article 23 also prohibits traffic in women (jogins and devdasi system thrives on cruel monster of custom). Since untouchability is traditionally associated with exploitative practices of slavery and temple prostitution, this prohibition has great relevance.

Article 25 guarantees freedom of religion and its exercise thereof is made available to all. Sub-clause (2) thereof envisages that nothing in that nothing in that article shall affect the operation of the existing law or prevent the State from making any law to provide for social welfare and reform or to throw open into religious institutions of a public character to all classes and sections of Hindus. Further, religious freedom is conferred subject to other provisions of part 3 of the Constitution (which includes Art.17). Hence, the policy of abolition of untouchability prevails over religious freedom. Art. 29 (2) prohibits denial of admission into an educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them. Under Art. 15 (4) state has power to make special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. By 93rd Constitution amendment, the scope of special provision is extended to admission to private educational institutions whether aided or unaided by the state [Art. 15 (5)]. Art. 16 (4) provides for state’s power to make reservation in the matter of public employment in favour of any backward classes of citizens, which in the opinion of the state, is not adequately represented in the services under the state. There is extension of this policy to provide reservation for scheduled castes and scheduled tribes in promotion with consequential seniority [Art. 16 (4 – A)]. Reservation of posts exceeding 50 percent limit in order to fill up the backlog vacancies of scheduled castes and scheduled tribes is also permitted [Art. 16 (4-B)]. Thus, the policy of substantive equality through

affirmative action and protective discrimination has been contemplated to deal with the problem of social backwardness arising from caste discrimination.

Art. 46 guides the state towards promotion of educational and economic interests of the SCs, STs and the other weaker sections “the state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the SCs and the STs, and shall protect them from social injustice and all forms of exploitations.”

Fundamental duties imposed under Art. 51-A have great bearing towards tuning of individual behaviour vis-à-vis fellow beings in the direction of abolishing untouchability. Abolition of untouchability was a part of the scheme of freedom struggle. Similarly are the duties which promote harmony, spirit of brotherhood amongst all sections of society; to develop scientific temper, humanism, spirit of enquiry, reform and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of achievement has equally played a very important role in rejecting untouchability in individual conduct.

Under Art. 330 and 332, provisions are made to reserve seats in the house of people and state legislative assemblies respectively for the SCs and STs in proportion to their population in respective states. The reservation is to expire 60 years from the commencement of the Constitution. In Panchayats and Nagar palikas reservation of seats for SCs and STs is provided through constitutional amendment. National commissions for SCs and STs are constituted under Art. 338 and 338-A to investigate about all matters relating to safeguards, inquire into complaints about deprivation of rights, to recommend for their better protection. In order to enable more effective and focused work for their amelioration, bifurcation of national commission into to separate commissions was affected by the constitution (82nd amendment) Act, 2000. This hints how instruments of social change are also reshaped with changing times. Regarding identification of SCs and STs, the president is vested with the power of public notification of lists specifying castes, races, tribes or part of groups to be deemed to be SCs and STs under Articles 341 and 342. For alteration of the lists of SCs and STs, parliament’s law-making power alone is regarded as competent [Art. 341 (2)].

Acceptance of caste as a factor to undo past injustices

"A thorn is to be removed by using another thorn", says a proverb. Employing of caste criterion for undoing past injustices is largely justified on this notion. For example, in identifying the depressed castes, the 1931 Census looked to the prevalence of the following factors: inability to be served by Brahmans, barbers, water-carriers, tailors who serve the caste Hindus; inability to serve caste Hindus, to enter temples, and *to* use public conveniences such as roads, ferries, wells or schools; and inability to be disassociated from despised occupation.⁸⁶ These criteria are based on discrimination in access *to* human rights and dignity. For ameliorating the conditions of these categories of people and to restore *to* them their human rights, the criteria chosen are both rational and connected *to* the purpose. President's notification of Scheduled Castes on this basis for protective discrimination in 1950 was non-controversial. But controversy arose when Other Backward Classes of people or Socially and Educationally Backward Classes of people were to be identified for which no definite criterion of specific past injustice was forthcoming. Further, since Census reports do not disclose caste statistics, reliance on the 1931 data has become problematic.

Various Backward Class Commissions appointed by State and Central Governments have used the criterion of caste as one of the parameters or initial reference groups. The First Backward Classes Commission, 1953 (Kaka Kalelkar Commission) reasoned, "A variety of causes-social, environmental, economic and political- have operated both openly and in subtle form for centuries to create the present colossal problem of backwardness. Economic backwardness is the result and not the cause of many social evils." Low social position in traditional caste hierarchy, lack of education, and inadequate representation in government service, trade, commerce or industry were the causes for backwardness, it said. The Second Backward Classes Commission 1978 (Mandal Commission) considered caste as a natural collectivity for defining backwardness. While it recognized the changes occurred in the caste system owing to democracy, urbanization, industrialization and mass education, it declined to accept any material alteration in the basic structure of caste. Since it is the opinion of Government about backwardness of any community as OBC or SEBC that is material for protective

discrimination programme, State policy influenced by the Commission reports gained significance. The policies were judicially scrutinized and controlled in course of litigations from time to time.

Judiciary has consistently emphasized on application of multiple factor tests in identifying the beneficiaries of protective discrimination, and has declined to rely solely on caste in identifying backwardness. It was said in *M.R. Balaji v. State of Mysore*¹⁶, "Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens."

Thus, there is an overpowering mutuality between poverty and caste in the Indian scene. Recognizing poverty as the true source of the evil of social and economic backwardness and caste as a relevant factor in determining backwardness, the Court also noticed occupation and habitation as two other important contributing factors and finally stressed the need for a penetrating investigation. It was said, "The occupations of citizens may also contribute to make classes of citizens socially backward. There are some occupations, which are treated as inferior according to conventional beliefs, and classes of citizens who follow these occupations that are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons. In a sense, the problem of social backwardness is the problem of Rural India and in that behalf, classes of citizens occupying a socially backward position in rural area fall within the purview of Article 15(4). The problem of determining who are 'socially backward classes' is undoubtedly very complex. Socio- logical, social and economic considerations come into' play in solving the problem and evolving proper criteria for determining which classes are socially backward. This is obviously a very

¹⁶ AIR 1963 SC 649

difficult task. It will need an elaborate investigation and collection of data-and examining the said data in a rational and scientific way."¹⁷

In *R. Chitrlekha v. State of Mysore*¹⁸, the Supreme Court emphasized that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class. The Court clarified that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not, vitiate the classification if it satisfied other tests. In *C.A . Rajendran v. Union of India*¹⁹, Ramaswami, J. took care to say, "...if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). 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 on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)." In the instant case the list of socially and educationally backward classes had been specified by caste. But that did not necessarily mean that caste was the sole consideration and that persons belonging to these castes were also not a class of socially and educationally backward citizens.

In *State of A.P. v. P. Sagar*²⁰, the Court held that the expression "class" in Article 15(4) meant a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste could not be excluded altogether but it could not be solely relied upon. In view of the attempt to balance the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement as against the right of equality of citizens, such an objective approach was indispensable. Inclusion of religion as a criterion for identification of backwardness is,

¹⁷ P. Ishwara Bhat; Law & Social Transformation; 1st edition; Eastern Book Company

¹⁸ AIR 1964 SC 1823

¹⁹ AIR 1968 SC 507

²⁰ AIR 1968 SC 1379.

however, not convincing as it goes against secularism, and since religions bear no indicia of backwardness. In *Indra Sawhney V. Union of India*²¹, the majority of the court considered religious communities as initial reference groups for surveying and identification of backwardness, because the identification process should begin somewhere, and ultimately entire populace should be surveyed. There is no indication of attributing the factor of backwardness to any religion.

In *A. Periakaruppan v. State of TN*²², the Court observed, "A caste has always been recognized as a class ... 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 *K. S. Jayasree v. State of Kerala*²³, in question was a government order specifying that only citizens who were members of families which had an aggregate income of less than Rs 6000 per annum and which belonged' to the caste and community mentioned in the annexures to the government order would constitute socially and educationally backward classes for the purposes of Article 15(4). The Court upheld the order and held, "Caste cannot however be made the sole or dominant test . . . Social backwardness, which results from poverty, is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness."

Justice O. Chinnappa Reddy, In *K.C. Vasanth Kumar v. State of Karnataka*²⁴, considered class poverty, not individual poverty, as the primary test. Other ancillary tests were the way of life, the standard of living, the place in the social hierarchy, the habits and customs, place of residence etc. He said, "Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty, which is the primary source of social and educational backwardness, they must be recognized for what they are along with other less primary sources." Caste-plus-means

²¹ AIR 1993 SC 477

²² (1971) 1 SCC 38: AIR 1971 SC 2303.

²³ (1976) 3 SCC 730: AIR 1976 SC 2381

²⁴ AIR 1985 SC 1495.

test was favoured by other judges in the same case where broad guidelines were laid down for identification of backward classes.

Contrary to the above mainstream view, it is viewed by **Justice D.A.Desai** in *Vasanth Kumar's case*, that in the background of transformation of the caste structure, acceptance of caste label as the basis for determining social and educational backwardness was questionable. Approvingly citing the observation of noted sociologist Shri I.P. Desai to the effect that if the State accepts caste as the basis for backwardness, it legitimizes the caste system which contradicts secular principles and secondly that the traditional caste system has broken down giving rise to emergence of contractual relationship between individuals, he discards the caste criterion. He observes, "The only criterion which can be realistically devised is the one of economic backwardness. To this may be added some relevant criteria such as the secular character of the group, its opportunity for earning livelihood, etc. but by and large economic backwardness must be the lead star." The Learned Judge regarded that this approach sought to translate into reality the twin constitutional goals of striking at the perpetuation of the caste stratification of the Indian society that had arrested its progressive movement and to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life.²⁵

There is reiteration of the Desai proposition in the dissenting views of **Justice Kuldip Singh** and **Justice R.M. Sahai** in *Indra Sawhney v. Union of India*²⁶,

Kuldip Singh, J. observed: *"Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. The Constitution has completely obliterated the caste system and has assured equality before law. Reference to caste under Articles 15(2) and 16(2) is only to obliterate it. The prohibition on the ground of caste is total; the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism - from feudalism to freedom ... Caste poses a serious threat to the secularism and as a consequence to the integrity of the country ... Caste and*

²⁵ P. Ishwara Bhat; Law & Social Transformation; 1st edition; Eastern Book Company

²⁶ 1992 Supp (3) SCC 217

class are different etymologically. When you talk of caste you never mean class or the vice-versa. Caste is an iron frame into which people keep on falling by birth ... Except the aura of caste there may not be any common thread among the caste-fellows to give them the characteristic of a class. On the other hand, a class is a homogeneous group which must have some live and visible common traits and attributes."

Justice Singh held that castes could not be adopted as collectivities for the purpose of identifying the "backward class" under Article 16(4). He agreed with the reasoning and conclusions reached by R.M. Sahai, J. to the effect that occupation (plus income or otherwise) or any other secular collectivity can be the basis for the identification of "backward classes". Caste collectivity is unconstitutional, and as such, not-permitted.

According to **Justice R.M. Sahai**, the backwardness of followers of traditional occupation has been primarily economic or educational, and identification of such class cannot be caste based. Nor it can be founded, only on economic considerations, as "mere poverty" cannot be the test of backwardness. With these two negative considerations stemming out of constitutional constraints, two positive considerations, equally important and basic in nature, flow from principle of constitutional construction: one that the effort should, primarily, be directed towards finding out a criteria which must apply uniformly to citizens of every community, second that the benefit should reach the needy. Ideal and wise method, therefore, would be to mark out various occupations, find out their social acceptability and educational standard, and weigh them in a balance of economic conditions. Advantage of occupation-based identification would be that it should apply uniformly irrespective of race, religion and caste. Since Article 16 forbids classification on the ground of caste, no backward class could, therefore, be identified on the basis of caste. Thommen, J. also expressed similar opinion.

Criticisms against caste-based identification of backwardness

The defects of caste criterion in identification of beneficiaries of protective discrimination are brought out in dissenting judgments and academic writings. While for the purpose of eradication of untouchability and amelioration of Scheduled Castes and Scheduled Tribes, caste and racial factors have been regarded as unobjectionable, for identifying OBC or SEBC their application is experienced to be problematic.

Firstly, since caste is a constitutionally prohibited ground of discrimination and has linkage with religion, use of it even for ameliorative purpose is not appropriate especially when alternative and secular criteria can be used for identification of backward classes. Since for categories other than SC/ST, caste is not a thorn-like agonizing factor, it loses relevance as a countervailing measure.

Secondly, caste in the present day world is not reflecting attributes of superiority or subordination with privileges and disabilities because of the social dynamics of urbanization and education. As viewed by A.M. Shah, "A correct understanding of the caste situation today requires recognition of the fact that 25.7 per cent of India's population is urban. Therefore, it would be incorrect to define caste only in terms of the village community, as is done frequently." Further, in villages also, the economic changes like fragmentation of land holding, reliance on non-agricultural income or occupation, and scarcity of agricultural labour have resulted in altering the economic power base or subjection of castes.

Thirdly, determination of status of caste on the basis of caste-wise statistics of 1931 census, as is presently done by various Commissions, is unscientific. A long period of 75 years' must have brought tremendous changes in the social and economic position of people in various castes. Some castes have moved upward by dedicated efforts, enterprising attitude and enlightenment, in spite of their past position.

According to Yogendra Singh, the process of social mobility through new jobs, education, enterprises, access to political offices, etc. have severely fractured the homogeneity of communities, and made it possible now to look at the Indian structure in terms of categories such as occupation, class, ideology etc. rather than as communities

such as caste, kinship, tribe or religious groups. Further, the constitutional provisions refer to the present backwardness for amelioration.

Fourthly, caste based identifications have great divisive tendency in view of the fact that in order to get the benefits, devious methods are adopted by false attribution of some characteristics or even by false certificates. The means test that is used to keep away the creamy layer is not foolproof in practice in checking undeserved claims. These distortions divide the society further. As Sen, J. said in *Vasanth Kumar's case*, "Irrational and unreasonable moves by the State will slowly but tear apart the fabric of society." To remember the words of R.H. Tawney, "because men are men, social institutions, property rights, and the organization of industry, and the system of public health and education should be planned, as far as is possible to emphasize and strengthen not the class differences which divide but the common humanity which unite them."

Justice V.R. Krishna Iyer has given a word of sociological caution:

"In the light of experience, here and elsewhere the danger of 'reservation', it seems to me, is three-fold. 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 overplayed 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 categorized as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilization of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism."

It is viewed that caste-based reservation perpetuates caste system, as reservation once introduced, faces reluctance for withdrawal. Further the dominant section of the

backward caste, in spite of *Indra Sawhney's case* mandate to exclude creamy layer, would corner the benefits at the cost of the weakest amidst their own brethren.²⁷

The problem of non-birth entry into caste or reservation category

Birth is a non-controversial basis for membership in a caste because the social atmosphere that caste builds and the one in which the child is brought up from the childhood days is likely to influence the growth and competence of the child. An outsider's entry into that social group at a subsequent stage by marriage, conversion or adoption might not be envisaging similar disadvantage, and on the other hand, might have been motivated by an idea just to grab the affirmative action benefit.

Acquisition of membership by marriage was initially conceded by the Supreme Court as enabling the claim for contesting election in constituency reserved for Scheduled Tribes, when elders of the tribe accepted such member.¹²⁹ But the Delhi High Court refused to apply the principle in a case relating to a high caste Hindu girl who married a chamar (a SC) and sought reservation benefit on the basis of new status. The Learned Judge came down heavily upon the practice of sham marriages that defeat the constitutional policy. Similar approach was adopted in several cases. In *Valsamma Paul v. Cochin University*,²⁸ a case relating to a Syrian catholic woman (forward category) who married a Latin Catholic (backward class) and sought reservation meant for Latin Catholic, the Supreme Court declined to extend such benefit, and observed: "The object of reservation is to remove the handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected to and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities ... Therefore, when a member is transplanted into Dalits, Tribe and OBCs he/she must of necessity also undergo the same handicaps, subject to the same disabilities, disadvantages, indignities or suffering so as to entitle candidate to avail the facility of reservation."

²⁷ P. Ishwara Bhat; Law & Social Transformation; 1st edition; Eastern Book Company

²⁸ AIR 1996 SC 1011

However, in the matter of reservation in election, *N.E. Horo* principle is applied ignoring the *Valasamma* ruling. Both in *Lillykutty v. Scrutiny Committee, SC& ST*,²⁹ and *Sobha Hymavathi Devi v. Setti Gangadhara Swamy*³⁰, the factor of acceptance of marriage by the husband's family was examined; on the basis of facts, the claim was found to be not established; and reservation benefit was denied. In *Meera Kanwaria v. Sunita*³¹, a case relating to claim of a Rajput women for reservation on the basis of false certificate that she was a daughter of a person belonging to Scheduled Castes and was also married to a Scheduled Caste person, the Supreme Court looked to the factor of community's non-acceptance in addition to the government circular that declined to confer status of SC merely on the basis of marriage. The Court nullified the election on grounds of false claim of reservation. The dichotomy between *Horo* and *Valasamma* approaches needs to be resolved by an objective approach and clearer principle.

The Supreme Court has dealt the question of acquiring the membership of Scheduled Caste through conversion by looking to the factor of community's acceptance.

In *C.M. Arumugam v. Rajgopal*,³² and *Principal, Guntur Medical College v. Y. Mohan Rao*,³³ i.e Apex Court held that a person born of Christian parents could become a member of SC on reconversion to Hindu fold, if the members of the caste accepted him as belonging to their fold. Regarding adoption by Scheduled Caste parents as a basis for entitlement to reservation, in *Khazan Singh v. Union of India*,³⁴ the Delhi High Court has approached from legalistic perspective of adoption. The Court reasoned that once adoption is valid, even though the motive is for taking advantage of loophole in the law and is a measure of "career planning": in view of future consequence of adoption upon subsequent generation, it is appropriate to consider the person as within the fold of the SC community. The community's acceptance theory was also not employed by the judge. The judicial approach is criticized as allowing *the* transformation of loophole into floodgate for unscrupulous people eyeing on state patronage. It can be inferred from the

²⁹ (2005) 8 SCC 283

³⁰ (2005) 2 SCC 244

³¹ AIR 2006 SC 597

³² (1976) 1 SCC 863; AIR 1976 SC 939

³³ (1976) 3 SCC 411; AIR 1976 SC 1904

³⁴ AIR 1980 Del 60

above that the judiciary is, by and large, favouring social mobility transcending the caste distinctions along with avoidance of frauds.

Affirmative action and implications

INDIA'S experiment with affirmative action is the world's oldest. Known locally as "reservation" policy it is an elaborate quota system for public jobs, places in publicly funded colleges—like the Indian Institutes of Technology (IIT)—and in most elected assemblies. These are filled by members of designated, disadvantaged groups.

There are two main intended beneficiaries. Arguably more neglected are the 100m *adivasi*, the 8% of India's population counted as "Scheduled Tribes". Many live in remote or forested corners. Probably more repressed for the centuries in which Hinduism's noxious caste practice has prevailed however are the Dalits, formerly "untouchables". Shunned by other Hindus as polluted for their labours, which included the clearing human and other waste, Dalits remain generally poor and discriminated against. To officials they are members of the "Scheduled Castes".

India's constitution of 1950 enshrined the idea of discrimination as a means to help both "scheduled" groups, which was to build on limited quotas for jobs and education that were used in parts of British-run India from the 1920s. It proposed that the policy exist for a decade to see what progress would be made, but without spelling out how to measure it. The provision has been renewed without fuss every decade since.

Rather than debate whether the practices help, politicians focus on extending them to new blocks of voters. By the late 1980s, after a commission of inquiry, lowly but non-"scheduled" Hindu castes, known collectively as the OBCs for "Other Backward Classes", some 27% of the population, also got quotas. The result: in individual states such as Tamil Nadu or within the north-east, where backward populations predominate, over 80% of government jobs are set aside in quotas, despite a Supreme Court ruling that 50% ought to be the maximum.

Muslims want quotas too, but lack political clout to force them. Women have had a hand up in the political realm: a third of all seats in local elected bodies are reserved for them, after a 1993 constitutional amendment. A bill, supported by Sonia Gandhi, India's most powerful politician, would see it applied in the national parliament too.

The various quotas have partly achieved their most basic tasks. In public jobs members of backward groups claim more posts than of old. Dalits had just 1.6% of the most senior ("Group A") civil servant positions in 1965, for example. That rose to 11.5% by 2011, not far off the 16% or so of the general population that Dalits represent. The share is higher for more junior posts.

Judging a broader impact is harder. Very few Indians have formal jobs, let alone government ones. "The [jobs] policy only matters for perhaps 2% of the Indian work force", points out Harsh Shrivastava of the World Development Forum, a think-tank in Delhi. Other than in tweaking quotas (to reflect the local size of a "scheduled" population) states have never experimented, nor competed, to find out whether their jobs policies have any wider, beneficial impact.

Worse, the policy has probably helped to make India's bureaucracy increasingly rotten—and it was already one of the country's greater burdens. An obsession with making the ranks of public servants representative, not capable, makes it too hard to sack dysfunctional or corrupt bureaucrats. Nor will this improve. In December 2012 parliament's upper house passed a bill ordering that bureaucrats be promoted not on merit alone, but to lift the backward castes faster.

Private firms are not directly affected, but a few take voluntary measures. The biggest of all, the Tata conglomerate, which employs over 350,000, does in-house surveys to assess its Dalit and tribal work force. Tata gives incentives, setting lower requirements for exam marks, for Dalit and tribal job applicants. Most generally, however, formal jobs in tech and outsourcing firms, for example, are valued in part because they are caste-blind.

Wider consequences may be within education. Quotas and special scholarships for backward groups were first established in the 1920s. For secondary schooling state funds help to encourage more Dalit and tribal children into classrooms; the effect of setting

aside special places in colleges and university is to lower the marks needed by Dalit and other backward applicants. That causes resentment among general applicants, who vie for extremely competitive spots in medical, business and other colleges. But the policy probably does help to propel more Dalits and others to study, as shown in steadily improving rates of literacy and higher qualifications achieved by the groups. A 2009 study found roughly one-in-15 graduates were Dalits, and one-in-ten secondary students, well up on previous decades. Yet that is still too few, as they continue to lag other groups.

Nor is it possible to know just why the numbers have risen. A general programme to build schools and provide a free, midday meal for all pupils, irrespective of caste, probably does even more to help the backward groups. And broad economic changes, such as urbanisation or the use of English, almost certainly do more to boost chances for Dalits and others.

The overall effects therefore are probably limited, and certainly hard to judge. Pratap Bhanu Mehta, an academic at the Centre for Policy Research in Delhi, favours affirmative action but concludes that a policy focused on distribution of limited state resources is bound to fail. “The current system is not about equal opportunity, it is about distributing the spoils of state power strictly according to caste, thus perpetuating it”, he says.

Nor is any thought given to missed opportunity. Beyond an obsession with quotas, and making untouchability illegal, India’s rulers have done nothing to address ongoing social repression by caste. Village councils, for example in Haryana, in effect outlaw marriages between different castes, or within certain sub-caste groups. The practice of “honour” killings of youngsters who marry against caste rules remains dismally prevalent. Police and politicians show little interest in prosecuting those responsible.

Nor does it help that social mobility of all sorts has been slow in India, mostly because it has remained poor and predominantly rural for so long due to decades of wrongheaded economic policies. For a Dalits peasant or labourer the reservation policy is unlikely to make much difference; getting a job in a factory or a call centre would transform his life.

A tiny minority has prospered, with an estimated 1% of the two “scheduled” groups falling into the highest wealth bracket (calculated as four times above the poverty line), according to a recent study of income data by caste, from 2005. Yet this in turn creates anxiety. If a tiny set flourishes within a broadly disadvantaged group, should it continue to enjoy privileges and quotas from the state?

The Supreme Court, addressing the OBCs in particular, says no. It defined the concept of a “creamy layer” of the wealthiest and most privileged among the OBCs, saying they must now be excluded from quotas. The result: debates flare not only over which backward groups deserve privileges, but over whom within the groups should then be excluded. The result, increasingly, will be a mess.

The creamiest layer of the lot are in politics. Dalits, for example, now serve as parliament’s speaker and as home minister. Most powerful of all—even a potential prime minister—is Mayawati, the former chief minister of Uttar Pradesh state, who heads the Bahujan Samaj Party. She has done much to promote symbols of Dalit strength, often in the form of towering statues of elephants, her party symbol, or of herself wielding a handbag. Yet her success is on the back of electoral clout, not quotas and reservations.

Is there any proof that political reservations bring benefits? Finding any is desperately difficult, since few have ever bothered to assess the impact of India’s affirmative-action policies over the decades.

One 2010 study of 16 of India’s biggest states did look at the effect on poverty in backward groups of their getting quotas of representatives, from 1960 to 2000. The report’s authors, Aimee Chin and Nishith Prakash, say theirs is the only study ever to ask how an affirmative -action policy, of any sort, has affected poverty in India. Their conclusion: for “scheduled tribes”, who are conveniently crowded near one another on electoral maps, greater political clout has indeed led to a small drop in poverty. But for the “scheduled castes”, by contrast, it has made absolutely no difference at all.³⁵

³⁵ <http://www.economist.com/blogs/banyan/2013/06/affirmative-action>

WOMEN AND RESERVATION POLICIES

Status of women is a benchmark of social process and is a very important part of the human development index in the human rights jurisprudence. India has achieved a certain degree of legislative protection for women but in terms of required international standards a lot is yet to be achieved. History is indeed witness to the fact that women all across the world had to struggle for equality being a part of an eschewed system.

In a purely Indian context, Indian women have come a long way from Vedic ages. There have been changes in every aspect of her life, yet she has miles to go before she rests.

Glimpses of the ancient social system

Every time a reference comes up to the status of women in the ancient social system, a stereotypic reference to Gargi , Maitreyi, Ghosha, Khana is made in an attempt to illustrate that gender justice prevailed in that social system. Manu's edict that where women are worshipped God dwells , the worship of Goddesses as Kali, Durga , the vanquisher of the evil etc. are supposed to be symbols of so called gender justice. The other side of the coin is women were supposed to be under their father from birth, under their brothers in absence of the father, under her husband in her youth and under the son in her old age. She is to be deprived of her property. This, however, castes her into a socially acceptable image. Any deviation from this image calls for beating with sticks and/ or rope as thick as ones thumb till she moulds herself to that image socially prescribed for her. Therefore, the women mentioned in the foregoing paragraphs can only be an exception to the common rule- perhaps a reflection to the brahminical society, and even there, they are too few in number.

According to Altekar birth of a girl child in the ancient society, was heralded as the arrival of Goddess Lakshmi. Birth of a son, however, called for a greater celebration because he would deliver the forefathers from held and pay the Pitri Rina. Evidence also exists that the age of marriage was quite high during that period. There is no express prohibition to widow remarriage or encouragement of sati in the Shastric texts. Many texts also speak of chattel being the property of women although are silent upon the

property rights or/ and inheritance issues. All in all, there are contradictory pictures available regarding the status of women during this period.

It must be remembered that this period is almost five thousand years of civilisation and development . Therefore the aforementioned details are reflective of development over various periods of time.

The Constitution of India and Women

The Indian Constitution adopted by the Constituent Assembly on 26th November, 1949 is a comprehensive document enshrining various principles of justice, liberty, equality and fraternity. These objectives specified in the preamble and elsewhere form part of basic structure of The Indian Constitution. The fundamental law of the land assures the dignity of the individuals irrespective of their sex community or place of birth.

With regard to the women, the constitution contains many negative and positive provisions which go a way in securing gender justice. While incorporating these provisions, the framers of the Constitution were well conscious of the unequal treatment meted out to the fairer sex, from the time immemorial. The history of suppression of women in India is very long and the same has been responsible for including certain general as well as specific provisions for upliftment of the status of women. The rights guaranteed to the women are on par with the rights of men and in some cases the women have been allowed to enjoy the benefit of certain special provisions.

The general provisions relating to the equal rights available to the women are the right to vote and the other political rights, the fundamental rights contained in Part III of the Constitution and directive principles etc.,

(i) Fundamental rights

Even though, all the fundamental rights contained in Part III, Articles 12 to 35 are applicable to all the citizens irrespective of sex, certain fundamental rights contain specific and positive provisions to protect the rights of women.

Article 15(3) of the Constitution specifically provides that the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth as contained in Article 15, shall not prevent the State from making any special provisions for women and children. In other words, the state is empowered to make any such provisions and it shall not be violative of Art.15. Article 15(1) prohibits gender discrimination. Article 15(3) lifts that rigour and permits the State to positively discriminate in favour of women to make special provision, to ameliorate their social economic and political justice and accords them parity.

Clause (3) of Article 15, which permits special provisions for women and children, has been widely resorted to, by the State and the courts have always upheld the validity of the special measures in legislative or executive orders favouring women. These provisions could be seen in the sphere of Criminal Law, Labour and Industrial Laws Service Law and Criminal Procedure etc.

Article 15(3) embodies one of the two exceptions to the prohibition contained in clause (1) and (2) of Article 15. It empowers the state to make special provisions for women and children. This particular advantage has been conferred on the women because the framers of the Constitution were well aware of the unequal treatment meted out to women in India from the time immemorial. The other reason for making special provisions for them is their physical structure and the performance of maternal functions which place them at a disadvantage in struggle for subsistence.

Recently the Supreme Court has upheld the constitutional validity of Proviso to Section 31(1)(a) of Andhra Pradesh Cooperative Societies Act, 1964 and of the Rules 22(c) and 22-A(3)(a) framed there under relying upon the mandate of Article 15 Clause 3. The Proviso read with the said rules provided for nomination of two women members by the Registrar to managing committee of the co-operative societies with a right to vote

and to take part in the meetings of the committee. The court upheld the validity of these provisions on the ground that Article 15(3) of the Constitution permitted the making of special provisions for women.

Thus it would be no violation of Article 15 if institutions are set up the State exclusively for women or places reserved for them at public entertainments or in public conveyances. The reservations made for women in educational institutional and public employment are protected by Article 15(3). The following few cases may be helpful in understanding the concept of protective discrimination in favour of women.³⁶

ii) Gender justice and constitution of India

The constitution accepted the principle of gender equality. But in the absence of well-formulated action plan and time frame certain equality clauses are still only a black letter of Law. For example it took about twenty-six to achieve legislation for equal work for men and women in the organised sector. In the unorganised sector retention of personal laws as laws in force itself is a perpetuation of gender injustice. Articles 25 to 28, which embody the right to freedom of religion as interpreted and legislated in the form of personal laws deny equality to women in personal, economic, sexual, social, educational and cultural level. The economic justice discourse in the Constitutional does not take into account the economic value of use- value non productive (in market sense) labour.

Article 15(3) of the constitutional empowers the State to make special provisions with regard to women and children. The approach is reformist and welfarist. The attitude has been rather casual. The policies for affirmative actions to be taken by the government directly conflicts with gender issues in the family. It also puts the disability suffered by women at par with the disability suffered by the dalits. By not treating gender inequality as a problem needing special and focused attention care, by not creating a change by law ideologies where social equality gets translated as a way of life, the Constitution perpetuates gender inequality while paying lip service to the principles of equality. This ambivalence is evident even in the reformist movement. Moreover, most of the women's

³⁶ Dr. G.B, Reddy; Women and Law; Edition 2007;Gogia Law Agency

issues having been relegated to the directive principles of state policy, which does not have a time frame, and not being justifiable really does not help the cause of women.

iii)The empowerment power

The Constitution has been the primary empowering document. A supreme statement of equality and power balance, the Constitution of India provides for equality before law and equal protection of laws. The preamble speaks of equality of status and opportunity reiterated in Article 14, complemented and supplemented by Articles 15(1)(4) and 16(1)(4) wherein the state is empowered to make special provisions for women and children. Article 21 has given the women the right to health, right to profession, livelihood, employment, dignity.....the list is endless. All these are aimed at assisting the woman to break free of her image. Several laws have been enacted with this end in view.

It is often heard that all the rights guaranteed under the Constitution should not be accessed at home as it allegedly amounts to introducing a bull into a china shop. This is again a part of the image game played by the society. The above statement reflects the urge of patriarchy to continue to treat women in the traditional format of daughter, wife and mother and moulded according to societal desire. Even a casual glance through the personal laws will show that the society tends to frown upon the practise of divorce while divorce is not to be encouraged as a matter of casual practise; nevertheless it is an important right. The ancient Hindu and the Christian texts discourage rather prohibit divorce. In fact the concept was unknown among the Hindus. The codified Hindu law did confer the right of divorce to men and women equally but the codified Christian law in India give unequal right to divorce to men and women till the year 2001. The Indian Divorce Act as amended in 2001 is said to have eliminated the inequality and of having given equal rights to men and women. The Parsi law too gives equal rights of divorce to men and women. Islamic law was perhaps the only law in the world to grant the right of divorce to men and women and also recognised the act of divorce for the first time. The provisions for divorce in Koran are just, fair and reasonable and not like the teen talaq in practise today. The current method of pronouncing talaq, talaq ,talaq thrice at a stretch and consecutively is a recent development. It is often admitted and recognised by Islamic Community that the latter is not socially just.

Article 44 of the constitution promises its citizens that the state shall endeavour to secure a Uniform civil code throughout the territory of India. There has been a long and protected debate on the possibility of adopting a uniform civil code in India. The matter has been highly politicised. It is significant to note that the women's movement in each religious group jointly and severally have risen above politics, which led to the formulation of a uniformity of sorts. What has been achieved is a personal codified law of divorce for the Hindus, Christians and Parsis in parity and conformity with a Constitutional mandate. Of late the Islamic women also have organised movements and discussions in order to reform their personal laws and bring it in parity with the Constitution. If that is achieved we shall have a type Uniform Civil code, which will be uniform in diversity and yet will be governed by rule of law, mandate of equality and shall have equal protection of law. These achievements again reflect women's empowerment while she is confined within her image. The achievement is slow, the struggle is hard and long but the emergence of women, triumphant and above politics is unmistakable.

It is not argued that right of divorce is to be encouraged and practised with frivolity, but it is a very serious status determining right having a reaching socio-legal consequence, especially for women. Yet it is a necessary evil, which helps the women to escape from legal, moral, social and economical bondage. It has also made the women conscious of their rights and the rights consciousness has empowered her to take bold decisions. It must be remembered after divorce she suffers a social stigma and she stands accused of failures. This is because she is in cage of the image- empowered or disempowered.

Development however is required in the field of property rights, which is commonly treated as an issue of the elite. Although the Islamic women have a clear law relating to property and Section 14 of Hindu Succession Act, 1956 confers a right of property to Hindu women, the Hindu and Christian women require a better framework to assert their property rights. There is a chasm between the *de-jure* and *de facto* positions. Right to property alone will help the women to break out of the prison of image. Unless she is liberated from this prison she will fail to give clear expression to her status and her strategies of survival. Such empowerment while assisted and encouraged by the

Constitution will need the support of legal literacy and legal aid and gender sensitivity. Through it is not suggested that the right to property alone can empower woman, it cannot be denied that it is the most powerful weapon of empowerment . Often this right does not find focus in women's movement because property is considered an elitist issue. It would be better to address the issue of woman's economic empowerment. Economic empowerment and legal empowerment both supplement and compliment each other. One is the *sine qua non* of the other.³⁷

Women Reservations

Provisions providing for reservations of seats for women in local bodies or in educational institutions are valid. The supreme Court has recently held in case of **Govt. of A.P. v. P. B. Vijay Kumar**³⁸, that the reservation to an extent of 30% made in the State services by Andhra Pradesh Government to women candidates is valid. The Division bench of the Supreme Court emphatically declared that the power conferred upon the State by Article 15(3) is wide enough to cover the entire range of State activity including employment under the state. Thus making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16.

In **Union of India v. K.P. Prabhakaran**³⁹, the Supreme Court upheld the decision of the Railway Administration to reserve the posts of Enquiry cum Reservation Clerks in Reservation offices in metropolitan cities of Madras, Bombay, Calcutta and Delhi exclusively for women and the further decision that the Reservation Offices in said metropolitan cities should constitute a seniority unit separate from the rest of the cadre of Enquiry-cum-Reservation clerks. The court while coming to the above conclusion relied upon the decision of **Govt. of A.P vs P.B. Vijay Kumar** wherein it was stated that since Articles 15(1) and 15(3) go together, the protection of Articles 15(3) would be applicable to employment under the State falling under Articles 16(1) and (2) of the Constitution.

³⁷ Dr. N. K. Chakrabarty; Gender justice; volume 2; Cambridge

³⁸ AIR 1995 SC 1648

³⁹ (1997) 11 SCC 638

Women Reservation in Election to Local bodies

The 73rd and 74th Amendments to the Indian Constitution effected in 1992 provide for reservation of seats to the women in Elections to the Panchayat and the Municipalities. Perhaps, this is the first attempt by the Parliament to provide reservation for woman in legislatures. According to Article 243D of the Constitution of India, not less than one third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women. Such seats may be allotted by rotation to different constituencies in a Panchayat. Not less than on third of total number of offices the Chairpersons in the Panchayat at each level shall be reserved for women.

According to Article 243-T of the Constitution of India which was added by the Constitution (74th Amendment) Act, 1992 makes similar provisions for reservation of seats to women in the direct elections to every Municipality. Therefore there is a successful reservation of 33% seats for women in local bodies which acquires poignant importance. It is well documented that the woman of India made a distinguished contribution to the country in all spheres of life therefore there is nothing unreasonable or unconstitutional in making reservation for woman in legislatures. It is important to remember that the Article 15(3) of the Constitution of India empowers the States to make special provisions for woman and children.

The Parliament introduced the Constitutional 81st Amendment Bill seeking to reserve on third of seats in Lok Sabha and State Assembly for woman in the month of September, 1996. The Bill has been referred to a joint committee of Parliament and is yet to be passed. In a way, the move is only an extension of the 73rd and 74th Constitution Amendments, under which a similar quota has been provided for woman in the elected bodies at various levels in the Panchayat Raj and Nagar Palika systems and as such represents a big step forward empowering the women to play their rightful part in democratic government and in the political process at the decision making level. This measure is towards correcting the gender injustice⁴⁰.

⁴⁰ Dr. G.B, Reddy; Women and Law; Edition 2007; Gogia Law Agency

Our constitution under Art 15(3), provides that nothing shall prevent the state from making any special provision for women. Thus, Art 15(3) enables the state to confer special rights upon women. The object of this special provision is to strengthen and improve the status of women. Under Art 15(3) of the constitution it actually enables the state to discriminate in favour of women, the constitutional experts also call it a protective discrimination. In cases of discrimination faced by women in matters such as denial of employment in certain occupations considered unsuitable for women, it has always been understood by the court that such laws while being in violation of Art 15(1) are saved by the special provision of Art 15(3) of the constitution.

The device of protective discrimination under this article has served a great purpose of bringing women at par with men in all respects. To put it in other way, the concept of protective discrimination in its very nature is an exception to the general rule of equality⁴¹.

Reservations- Vertical And Horizontal

The state in terms of Art 16 of the constitution of India may make two types of reservations, vertical and horizontal. Social reservations in favour of scheduled caste, Scheduled tribe and OBC under Art 16 (4) of the constitution of India are vertical reservations. Special reservations in favour of physically handicapped, women, etc, under Art 16(1) or 15(3) are horizontal reservations.

The remarks made by the Supreme Court in *Indira Sawhney v. Union of India*⁴² regarding reservation are indeed worth mentioning: it cannot also be ignored that the very idea of reservation implies selection of less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. Where a vertical reservation is made in favour of backward class under Art 16(4), the candidates belonging to such class may compete for non reserved post and if they are appointed to the non reserved post on their own merit, their number will not be

⁴¹ Surinder Mediretta; Handbook of Law, women, and employment; Oxford University Press p. 61

⁴² AIR 1993 SC 477

counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates who by their own merit get selected to open competition vacancies equal or even exceeds the percentage of posts reserved for SC candidates it cannot be said that the reservation quota for SC's stood filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. But the said principle applicable to vertical reservations will not apply to horizontal reservations.

The Supreme Court in *Rajesh Kumar Daria v. RPSC*,⁴³ stated that where a special reservation for women is proved within the social reservation for SCs, the proper procedure is first to fill up the quota for SCs in order of merit and then find out the number of candidates among them who belong to the special reservation group of scheduled caste women. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the reservation quota. Only if there is any shortfall, the requisite number of SC women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to SC.

One of the questions involved in *Mira Kanwaria v. Sunita*,⁴⁴ was whether the purpose of reservation under Articles 15(4) and 16(4) of the constitution on the one hand and Articles 330 and 332 on the other, is different. In this case, the court held that it is not different and that reservation of seat for a SC or a ST under Articles 330 and 332 is also constitutional reservation intending to benefit the really under privileged and not those who came to the class by way of marriage.

⁴³ (2007) 8 SC 785

⁴⁴ (2006) 1 SCC 344

CONCLUSION

Thus affirmative action in essence and spirit involves classification of people as backward class of citizens and those who are not as such backward or have by passage of time ceased to be backward would come within the purview of creamy layer doctrine evolved by the Supreme Court. By evolving this doctrine it intended to lay a law that in terms of our constitutional scheme, no group of persons should be held to be more equal than the other group. Articles 15(4) and 16(4) of the constitution are only enabling provisions and no individual can claim enforcement of the same. The reservation policies were important in the perfect set up of Indian context, considering the severe atrocities faced by the lower caste members of the caste hierarchy. It has been seen that over the years there was a constant struggle of these lower caste members to take an upward leap in caste hierarchy and gradually and cumulatively attain Brahminical status. This has been observed by two very well renowned dogmatic principles of sociology viz a viz Sanskritization and modernization/westernization. But this alone would not serve the purpose because it all meant about the upward transgression of a lower most member to a higher most position whereas, this would not do anything with regard to dissolution of this atrocious system. Thus, the constitutional framers introduced affirmative action in the labyrinthous framework of the constitution in order to uplift the socially and economically backward people, which could be ultimately linked to the caste system and cumulatively eradicate the atrocious effects of the age old system. This experiment of the affirmative action, till date, has shown certain signs of success. But the confusion created with the legislative means used to determine economic backwardness or the social backwardness in terms of caste. This stands through considering that the purpose which ought to have been achieved has been achieved to certain extent. Thus, it might have a reverse result if the legislature and the judiciary does not create certain proper checks and balances with respect to affirmative action and protective discrimination.

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