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# KLE LAW JOURNAL

## *Special Issue*

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This *Special Issue* of KLE Law Journal is a collection of few articles of the resource persons deliberated during the two day of the National Conference on “Post Liberalization of an Organic Constitution” held on 1st and 2nd October 2016.

**National Conference on  
“Post Liberalization Nuances of an Organic Constitution”  
1<sup>st</sup> and 2<sup>nd</sup> October, 2016.**

On Eve of Centenary Celebrations of KLE Society, Belagavi, a two day Conference on “Post Liberalization Nuances of Organic Constitution” was hosted on 1<sup>st</sup> and 2<sup>nd</sup> October, 2016 by K.L.E Law Society's Law College, Bengaluru.

The Event was inaugurated by Hon'ble Mr. Justice B.S.Patil, Judge High Court of Karnataka, Dr.Aman Hingorani, Advocate on Record and Mediator, Supreme Court of India, Shri. Shankaranna I. Munavalli, Member, Board of Management, KLE Society, Belagavi. The conference was attended by academicians and law experts across the country and globe. The Conference was concluded with the Valedictory function. Prof (Dr.) R. Venkat Rao, Vice-Chancellor, National Law School of India University was the Chief Guest, Dr.R.S. Deshpande, Professor, Rajiv Gandhi National Fellow (ICSSR) Institute for Social and Economic Change, Bengaluru was the guest of honour and Shri Prabhuling K. Navadgi, Additional Solicitor General, Govt. of India presided over.

### **Concept Note**

The Constitution of India is embodiment of aspirations of the people, hence it is described as a value document, it's not just a contrivance for administration of state but it serves as a bridge between past and future of the nation to bring transformation in all walks of life, it keeps evolving with the growth of the nation, hence it is described as an organic law as well. Though the Constitution of India was framed 65 years ago, at a turbulent time of life of the nation, it has been drafted and enacted to endure for centuries to come. There are two features of our Constitution that makes it an ever evolving organic law. The first one being amendment process. The framers of the Constitution, were men of vision, foresight and scholastic ability, but they did not claim monopoly over the knowledge and experience, rather very consciously and cautiously provided for peaceful method of amending the provisions of the constitution, because, they were mindful of the fact that the social, political and economic life of the nation undergoes a change and

such change necessitates inevitable adjustments in its basic law. Second one is a strong and independent judiciary as a watchdog of executive and legislature which is established under the constitution with onerous responsibility of protecting and defending the Constitution. Such a strong and active judiciary with the judges of eminence and forensic abilities has made the constitution ever growing by developing their interpretative skills and has protected it whenever attempts were made to defeat it and upheld the aspirations of the people. These two features of Constitution of India have immensely contributed to make the constitution an organic document.

Constitution is a document that keeps evolving and responding to changing situations. One major development India witnessed is liberalization and globalization of its market economy. Over a period of 25 years since the introduction of New Economic Policy there has been a major shift in the economic policy of India. Private participation in public utility services hitherto monopoly of State has increased. Public sector industries are privatized. Affirmative actions took different contour and are politicized. Agrarian reforms took back seat. Trade and commerce, international trade, corporatization and urbanization became priorities of successive governments. IPR regime underwent drastic change to comply with obligations under TRIPS. Corporate law undergone a sea change to facilitate and manage domestic and foreign corporate entities. There is unprecedented growth of media and its freedom as well. All these developments in the post liberalization scenario are a mixed bag of advantages and disadvantages. Undoubtedly, these changes have contributed to the growth of the nation but certain developments have gone against the constitutional principles, impeded the rights of the individuals and marred the aspirations of the framers of the constitution.

Thus it is desired to take a holistic view of the developments in the country during post LPG era, verify and understand if the developments are serving the constitutional goals, identify the mismatch, if any, arrive at some intellectual thought leading to contribution to the policy framing in India.

#### **Sub-themes:**

##### **1. Privatization and public welfare**

Constitution of India establishes a welfare state seeking to assure the maximum

welfare of the maximum people and for that unique socialist model of economy was supplanted, where major public utility services and major industries were to remain in the domain of the State, where service is the motive not the profit. But in post 1990 economic policy of India the successive governments are giving more stress on privatization and disinvestment from the public sector industries and throwing open all PUS sectors to private players who's motive will be profit but not the service. These developments have posed challenge to the basic tenets of the constitution, hence a research and deliberation in this area is felt.

## **2. Protective Discrimination: Maintaining the balance under the Constitution**

One of the efforts of the State to bring transformation in the lives of the historically suppressed, downtrodden and vulnerable class of the Indian society is protective discrimination. It is one contentious issue that is in vogue from 1951 itself, with Champakam Dorairajan case and successive amendments to Art.15 and 16. It became more contentious when GOI implemented Mandal Commission recommendations. Further it became a matter of vote bank politics and even IX schedule was used to shield the reservation laws. Many reservation laws though meant for betterment of the suppressed, downtrodden and vulnerable class, serious doubts have often raised about the purpose they served. Latest addition to this controversy is the demand for reservation in private sector in view of vanishing role of state in economic activities. In this backdrop a de-politicized, non- partisan and objective assessment of measures of protective discrimination and to find out ways and means to balance the conflicting interests under the Constitution is needed.

## **3. Adherence to and deviations from basic structure and role of judiciary in Preserving Constitution in Post – Liberalization era**

Despite the controversy over competing ideas of content of basic structure, the core of the basic structure remains unchallenged. The constitutional mandates born out from the Preamble, Part III and Part IV of the Constitution are arguably under attack during LPG era. Neither the amendment procedure nor the interpretational exercise could ever permit the deviation from the basic structure. Doubts are often raised about the adherence to and deviation from the Basic structure of our Constitution during LPG days. In view of such doubts the sanctity of the system

in place is seemingly in danger. So it is desired to investigate to mirror the present developments with the Constitutional goals and find out the way forward.

#### **4. Media and Privacy issue**

After 1990 print media as well as digital media underwent a sea change and due to liberalized foreign policy of Govt. of India foreign participation also increased. This development has no doubt contributed for spreading awareness among the people about affairs of the State and has to some extent contributed for bringing transparency in administration. It has almost acquired the status of fourth estate of the State. IT enabled environment and social media also has brought drastic change in communication. Flipside of these developments is that of issue concerning the privacy rights of the people. While there is necessity of providing free access to internet with a view to make the accelerating e-governance by the Govt. at all levels meaningful, privacy of individuals is under attack by the state and non-state actors. In this scenario the conflict between right to privacy of individuals and freedom of speech and expression of the press and media vis-à-vis power of the state to collect and use the data of individuals for various purposes needs to be addressed.

#### **5. Coherence and incoherence of Corporate Laws and IPR regime with the Constitution**

In the post liberalized scenario India went for many changes in its corporate laws and IPR regime. It was inevitable but to comply with WTO norms and to have economic and industrial growth. Changes in corporate laws have huge impact on the Indian Market and it has been criticized as pro-capitalist development against the unique socialist principle enshrined in the constitution. Similarly the changes brought to IPR laws have also encouraged innovation and technological developments but at the same time such changes are criticized on the ground that they are against societal interest and monopoly in any form results in exploitation. Since the changes in these two legal regimes have raised the issues about their coherence with the constitutional principles, these issues needs to be deliberated.

## POST LIBERALISATION NUANCES OF AN ORGANIC CONSTITUTION

*Keynote Address*  
*Dr. Aman Hingorani\**

May I begin by congratulating, the Karnataka Lingayat Education Society on the occasion of its centenary celebrations. The KLE society, which was set up in 1916 to provide education for the children of the farming community deprived of basic literacy, has now grown to 252 institutions imparting education in a variety of subjects in different parts of the country. KLE society has done justice to its ideology of 'Truth, Love, Service and Self-Sacrifice'.

It is, indeed, gratifying to note that KLE Law College has made its mark in providing quality legal education in a state-of-art environment. Of particular interest is the emphasis on clinical legal education and co-curricular activities that transform law students to legal professionals. It goes to the credit of KLE Law College that it attracts students from all over the country. I am told that there are students from twenty eight states and three Union Territories and five different nations. Given such drive, it is but natural for KLE Law College to be recognised amongst the top law schools in India.

The dedication and enthusiasm of the KLE Society and the KLE law College is truly inspiring. May the success that has come your way today lead you to bigger achievements in the years to come!

The theme of this Conference is an interesting one. The Constitution of a free nation is necessarily organic as it embodies the moral sentiment of the people. These sentiments vary from time to time. The Constitution must, therefore, evolve and adapt itself to the needs of society. It has, in fact, been said that a Constitution should be like clothes. It should be made to fit the people, it is meant to serve.

Our Constitution was not drawn on a clean State. We had before us the experience of the successive Government of India Acts and in particular the 1935 Act. Those Acts were meant to serve the British colonial power. Then there were

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examples of various Constitutions like the American and Irish. The Constituent Assembly laboured hard to draw up the Constitution that it felt was suitable to the aspirations of a fractured society reeling from the effects of colonisation and inhuman poverty, the horrors of partition and communal violence. And they did a pretty good job. Our Constitution not only sets out the machinery of government and establishes a quasi-federal structure; it provides a road map to the government to move in a particular direction of building an egalitarian society. This road map is spelt out in Part IV of the Constitution, the Directive Principles of State Policy. These Principles, though unenforceable, colour the provisions of the Constitution, since Article 37 mandates that they are fundamental to the governance of the country and it shall be the duty of the State to apply these principles in making laws. Several commentators take the view that in view of the Directive Principles, we were a socialist state even prior to the Constitution (Forty-second amendment) Act of 1976 inserting the term socialism in the Preamble. The Constitution Bench of the Supreme Court has in fact taken this view in *M.Nagaraj and Others v. Union of India and Others* [AIR 2007 SC 71] that “principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole.”

But then, there is also Part III of the Constitution which lists the civil and political rights that the State must respect. The State is bound to observe not only the mandate of Article 21, the religious freedoms, the minority rights, and the equality clause prohibiting arbitrariness but also the freedoms contained in Article 19, including the freedom to practise any profession or to carry on any occupation, trade or business. Part III and IV together have been described to be the conscience of the Constitution, and their harmony constitutes the basic structure of the Constitution as held in *Keshavananda Bharti v. State of Kerala* [(1973) 4 SCC 225].

While one of the Constitution Bench of the Supreme Court has viewed socialism, as part of basic structure of the Constitution, another such Bench in *Excel Wear Etc v. Union Of India* [1979 SCR (1)1009] held, though in the context of nationalisation, that so long as the private ownership of industry is recognised

and governs an overwhelmingly large proportion of our economic structure, it is not possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely, or to a very large extent, the interests of another section of the public, namely, the private owners of the undertakings.

The seeming conflict can perhaps be resolved by taking a broader view of the term socialism as merely connoting social welfare. Part IV of the Constitution contains the ends of an egalitarian society. The State could, if it felt it expedient in the interest of efficiency and development, follow a liberalisation policy so as to bring about the egalitarian society contemplated by the Directive Principles. We have no option but to take a pragmatic approach towards socialism since we inherited, along with the common law, the colonial structures, the bureaucracy and the redtapism that ensure that constitutional guarantees are reduced to mere speeches. Moreover, new technology and the rapid pace of science have made MNCs more pervasive than States. The world has become more and more interdependent, with an event in one part of the globe impacting the other. In such a shrunk world, the question of any country following a policy of socialism in its narrow sense of communism is simply not feasible. There is one caveat to this though. India is bound by the constitutional boundaries of what it can or cannot do. The fact that it chooses to reach its constitutional goals through private enterprise does not absolve it or its chosen private enterprise from observing these constitutional boundaries. Subject to this caveat, the new economic policy can co-exist with the constitutional mandate of India being a social welfare state. Of course there will be issues that are bound to arise, when new technology and new engagements seek to conform to the old law.

Thus, there will be concerns when the private sector is allowed not only for power or infrastructure projects but also for the critical defence and nuclear departments. Again, should we fight for net neutrality which requires that all Internet data pack should be treated equally, that there should be no fast or slow lanes for Internet, so that there is level playing field for start-ups dependent on a neutral internet or could zero-ratings be a possible solution by declaring only certain services or an app as free.

Then there is Aadhar law, as an example of affirmative action to give the poor access to the Public Distribution System. However, the extensive and invasive

Aadhar card database containing personal information lacks privacy safeguards, and its misuse could irreparably violate the constitutional right to privacy.

Similarly, would the amendment of the Patents Act, 1970 in order to harmonize it with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, adversely impact India's generic pharmaceutical industry, making medicines so expensive that it could result in loss of millions of lives. Prior to the amendment, only process patents were granted for a new process of manufacturing an already known product or for manufacturing a new product. So the Indian pharmaceutical industry could develop generic versions of the new medical drugs at affordable prices. The West called it theft. We called it an innovation to help the poor in India as also in the developing countries to which India exported the medical drugs at low cost. With the introduction of product patent now, this entire market is endangered and will result in prohibitive cost of medicines that the poor cannot afford.

To what extent can the Indian patent law be consistent with its international obligations, take recourse to the provision of compulsory licensing in TRIPS Agreement to undo the adverse impact of product patents – by this provision, member countries would retain the right to issue compulsory license to domestic firms for a patented medicine if the patent holder did not provide the medicine at an affordable price. On the other hand, would the introduction of product patents be a major incentive for developing new medicines, especially for tropical diseases, not focused upon by the developed nations.

In each case, it is the judiciary that is the final arbiter as to where to draw the line so as to maintain the social welfare philosophy of the Constitution. A good example of this is the September 16, 2016 judgement of the Delhi High Court (*The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*), which held that the making of photocopies of books for academic purposes did not constitute an infringement of copyright, and publishers could not legally stop universities and photocopying places from doing so. The suit filed by Oxford University Press, Cambridge University Press and Taylor and Francis Group for an injunction against the photocopier as well as Delhi University for preparing "course packets" consisting of portions of reference books required for studies in various disciplines. As anyone who has studied in any institution of higher education in this country would know, academic titles of multinational

publishers are prohibitively expensive. It is common practice, across universities in India, for faculty to prepare reading materials and course packs made up of extracts from academic works for classroom discussion purposes. This is essential to the teaching process as the prices of most of the titles are well outside the reach of almost all students and even otherwise, it would be difficult to expect students to purchase 10-15 books every semester just to read the relevant passages necessary for the course.

The High Court construed Section 52(1)(i) of the Copyright Act, 1957 to hold the "University" was the same as the "teacher" defined under the Act, and the grant of permission by the university to a particular photocopier to create "course packets" from the "master copy" of the relevant extracts of various expensive books made the photocopier "a contractor to whom the University, has outsourced its work of providing photocopying service for its students". The act of preparing photocopies was similar to the practice of allowing students to issue books from the library and get the relevant pages photocopied for them. The Court observed that students "can never be expected to buy all the books". The Court has ruled in favour of academic freedom and learning in India.

These instances illustrate the importance of the sub themes of the Conference: on privatisation and public welfare, media and privacy issues, protective discrimination, corporate law and IPR Regime, and the role of the judiciary in maintaining the balance. I am sure the eminent resource persons will address these and other issues during the sessions today and tomorrow. These issues, however, as I pointed out, do not arise because of any inherent conflict between the liberalisation policy and the social welfare character of the Constitution. The Constitution is broad enough and flexible enough to take within its ambit the new economic regime. It is not the Constitution that is a matter of concern, but the character of the Indian state in meeting the challenges of liberalisation. Take for instance, the allocation of natural resources marked by the 2G scam, the allocation of coal blocks and so on so forth, where liberalisation is seen as an opportunity and an avenue for corruption.

The Parliament has done its bit to deter foreign investment, as is exemplified by the tax dispute between Vodafone and the tax department. Section 19(1)(i) of the Income-Tax Act, 1961 provides for imposition of capital gains tax when

the capital assets are transferred directly from one company to another, and not indirectly. Indirect transfer means when the shares of a company are transferred, the underlying asset is also transferred to the buyer. In this case, the revenue authorities claimed that Vodafone had to pay a capital gains tax of nearly Rs. 11000 crores for its purchase of Hutchison Essar Telecom Company from Hutch. The question was whether an indirect transfer of property located in India can be taxed under section 9(1)(i) of the Income-Tax Act, 1961. The Supreme Court said no [*Vodafone International Holdings B V v. Union of India*, (2012) 6 SCC 613]. Parliament then stepped in to amend Section 9(1)(i) in 2012 to tax such a transaction retrospectively from 1962. Surely Parliament realises that such patently unfair action resulting in an uncertain tax regime will deter foreign investment.

The judiciary is no better, with its well-known delays in disposing off cases. The arbitration regime of 1996 has not really been effective, with section 34 applications being filed routinely to challenge virtually every arbitral award. Sadly, press reports of September 26, 2016 cite a World Bank survey on doing business as having listed India at rank 188 out of 189 countries in terms of enforcing contracts to resolve commercial dues [Sasi, Anil, 2016, *To cut litigation among own, Cabinet Secretary says keep disputes within*, The Indian Express, New Delhi Edition, 26 September].

A greater cause of concern, to my mind, is how the Indian state views its citizens. A good example of that is the Civil Liability for Nuclear Damage Act, 2010. In order to appreciate the import of this Act, let us consider briefly how the Indian State treated the victims of the world's worst industrial disaster – the Bhopal Gas tragedy.

At the time of the tragedy, various Indian investors, including Life Insurance Corporation of India (LIC), the Industrial Development Bank of India Limited (IDBI) and other public sector institutions, owned 49.1 percent of Union Carbide India Limited (UCIL), the subsidiary of the Union Carbide Corporation (UCC). Further, by granting a licence to manufacture pesticides, the government made the collaboration agreement between UCC and UCIL subject to Indian laws, which include the Insecticide Act of 1968 that regulates the import, manufacture and use of insecticides with a view to safeguard human life. Many central and state

agencies, empowered under various acts like the Factories Act 1948, regulated at all times Union Carbide's operations, which were approved by the government.

Despite the Canadian government asking UCC in 1972 to shut down its operations for fear of damage to life and environment, the Indian government let the plant be set up in the heart of the city. Further, authorities had permitted the area around the plant to be used for dumping of hazardous chemicals for years. Successive tests on soil, water and vegetables from the residential areas around the plant confirm their contamination by toxic heavy metals and chemical compounds.

It is difficult to understand how the executive in India was allowed to escape its liability towards the victims both as a joint tortfeasor (wrong-doer) with UCC and UCIL and for failing to discharge its constitutional obligations of providing pollution-free air and water to people. The novel way out was to enact the stand-alone Bhopal Gas Disaster (Processing of Claims) Act, 1985. Through this Act, the government (a guilty party) became the representative of the Bhopal victims, and denied the victims their right to take the UCC and UCIL to court for compensation. As a result, one guilty party negotiated with another for the compensation due to victims who were precluded by law from even asserting their claim against the State or Union Carbide.

This law was challenged before the Supreme Court, which regrettably upheld it in 1989 in *Charan Lal Sahu v. Union of India* [AIR 1990 SC 1480] inter alia on the ground that it was passed in exercise of *parens patriae*, the sovereign power of the State and in recognition of the right of the sovereign to act as (parent of the nation). However, both the premises of the Supreme Court in such reasoning are fallacious. The Full Bench of the Apex Court, in *Madhav Rao Scindia v. Union of India* [1971 SCR (3) 9], had held way back in 1971 that there is no such thing as 'sovereign power of the State' under the Constitution. The Court held that in India, the Executive cannot exercise sovereignty over citizens, as legal sovereignty vests in the Constitution and political sovereignty lies with the people of the country.

And so, the statement 'India is a sovereign State' implies that people (political sovereign) or the Constitution (legal sovereign) are sovereign — not that the State enjoys sovereign powers. The Indian State, as a representative of sovereign people, may be sovereign in relation to other countries. But it cannot be sovereign qua its own people from whom it derives its 'sovereignty'. Also, the doctrine of

*parens patriae* has its roots in the common law concept of the 'royal prerogative' of the British Crown. It includes the right of the British Crown to take care of its subjects under disability, which the Indian State surely cannot claim.

The Civil Liability for Nuclear Liability Act, 2010 goes a step further than the Bhopal Gas Disaster (Processing of Claims) Act, 1985. The 2010 Act, effectively caps the maximum liability in case of a nuclear accident of both the operator of the nuclear plant as also the central government. The operator, the Nuclear Power Corporation of India Ltd. (NPCIL), is itself a government-owned facility. Section 17 allows only the operator (NPCIL) to sue the manufacturers and suppliers. The country is to be divided into zones with each zone having a Claims Commissioner who will entertain claims from the victims. Section 18 of the 2010 Act limits the time to make a claim to ten years for damage to property and twenty years for personal injury from the date of occurrence of the nuclear accident. Section 31 provides that subject to Section 18, every application for compensation before the Commissioner for nuclear damage shall be made within a period of three years from the date of knowledge of the nuclear damage by the person suffering such damage.

It must be appreciated that Article 32 of the Constitution guarantees as a fundamental right the right of every person to approach the Supreme Court for protection of his or her fundamental (human) rights. Could such statutory provisions of the 2010 Act confining the remedy of the victims to merely making a claim for compensation and capping the liability of the government regardless of the extent of nuclear damage or the degree of negligence, be justified on the touchstone of Part III of the Constitution?

The greatest challenge of our system of governance perhaps is that it divides political power between the Executive, Parliament and Courts, and thereby conceals political responsibility. In the process, it is the poor, marginalised and vulnerable who are taken for a ride. The kind of issues that crop up post-liberalisation will have more to do with the character of the men and women who run the Indian State than with the social welfare philosophy of an organic constitution.

Thank you.

## PROTECTIVE DISCRIMINATION: MAINTAINING THE BALANCE UNDER THE CONSTITUTION\*

*Dr. G. R. Jagadeesh\**

### 1. Introduction

The founding fathers of our Constitution felt that the inequitable forces in the socio-economic system and political organisations had created imbalance in the society and placed certain people particularly the SCs / STs in the disadvantageous position. The members of particular group of people experience multiple socio-economic disadvantages that limit their access to the basic needs of life.<sup>1</sup> Issues of sustainable livelihood, social and political participation of the vulnerable groups exists as the major problem in developing India. In spite of legislative measures and enforcement mechanism, there exist a wide gap between administration of justice and equity. This gap shows that they are susceptible for all kinds of exploitation. In such case justice is capable of reaching only those who can afford and deprives those who cannot afford economically.

Equality as an ideal has been a strong force in the evolution of human civilization. Essentially the idea seems to have arisen from consideration on how to deal with differences in people within the same group or outside it. The early response was one of subjugation, exclusion, elimination, and segregation, which led to wars, slavery and institutional discrimination of one class by the other class. With rationality and small utilitarianism, the approach towards equality changed for better. The emphasis was on rationalization of inequalities in a manner that promoted division of labour, mutual co-existence and socio-cultural legitimisations, which suited the dominant class.

It is out of this historical process that one sees today several conceptions of equality competing for dominance in the legal systems of the world. The most popular model is the "equality of status and of opportunity and of non-discrimination on the basis of religion, sex, race, caste and so on. The essence of this model of equality, which the Indian constitution has adopted, has been to demolish age-old

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<sup>1</sup> Health, education, shelter, food, employment, justice and equity etc.,

barriers, which denied equality of status and of opportunity to group of citizens on the basis of caste and sex. Empowerment<sup>2</sup> of the vulnerable section of the society is a method of benevolent social transformation.

Since the concept of equal citizenship and equal liberties of all is 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 a balanced application of “formal equality” and “Proportional equality”.

## 2. Advancement of socially and educationally backward classes

While Article 15(1) Prohibits discrimination by the State; clause (2) prohibits both the state and private individuals from making any discrimination. The object of Article 15(2) is to eradicate the abuse of the Hindu social system and to herald a united nation. Article 15(4) was added by Constitution (First Amendment) Act 1951 to nullify the decision in *State of Madras v. Champakam Dorairajan*<sup>3</sup> Article 15(4) is an exception to clause (1) and (2) of Article 15. This empowers the state to make special provision for the advancement of any socially and educationally backward classes of citizens or for SCs and STs.<sup>4</sup>

The principle behind Article 15(4) is that a preferential treatment can be given validly where socially and educationally backward classes need it and is not an exception but only makes a special application of the principle of reasonable classification.<sup>5</sup>

In *Mandal commission case*<sup>6</sup> the Supreme Court had held that there can be no reservation to other backward classes in higher educational institutions. e.g., IITs, IIMs and post graduate level in the Universities. Followed by the *T.M.A Pai v. State of Karnataka*,<sup>7</sup> *Islamic Academy v. State of Karnataka*<sup>8</sup> and

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<sup>2</sup> Empowerment infuses ability for self-organisation, overcomes subordination, fills confidence for all-round growth by using special facility given by the state and enables better participation in control and use of resources

<sup>3</sup> AIR 1951 SC 226.

<sup>4</sup> Article 46 under the directive principles of state policy provides that “the state shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of scheduled castes and scheduled tribes and shall protect them from social injustice and all forms of exploitation.

<sup>5</sup> *Gulson Prakash v. State of Haryana*, AIR 2010 SC 288.

<sup>6</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

<sup>7</sup> AIR 2003 SC 355.

<sup>8</sup> AIR 2003 SC 3724.

*P.A Inamdar v. State of Maharastra*<sup>9</sup> cases wherein it was held that the State cannot make reservation of seats in admission in privately run educational institutions. This ruling has been given burial, by Constitution (93<sup>rd</sup> Amendment) Act, 2005<sup>10</sup> and the scope of special provision is extended to admission to private educational Institutions whether aided or unaided by the State.

The Amendment, however, keeps the minority educational institutions out of its purview. This is a retrogressive step seems to appease minority. It would damage the social fabric of Indian Society which is more cohesive and unified.

In *Ashok Kumar Thakur v. UOI*<sup>11</sup> Supreme Court held that the Constitution (93<sup>rd</sup> Amendment) Act 2006 providing 27 percent reservation in admission to OBC candidates in higher educational institutions like IITs and IIMs is Constitutional.

### 3. Protective discrimination for minimization of inequality

The Constitution of India provides to all the citizens, social, economic and political justice and equality of status and of opportunity. The code of equality under the Constitution of India is to be found in Articles 14, 15, 16, 17, 18 and 29 (2).<sup>12</sup> Special measures of reservation for scheduled castes, scheduled tribes, socially and educationally backward classes and other backward classes are major public policy developed by the Indian society. One of the efforts of the State to bring transformation in the lives of the suppressed, downtrodden and vulnerable class of the Indian society is Protective discrimination<sup>13</sup>.

In the historic *Mandal Commission case*,<sup>14</sup> the Supreme Court held that the sub-classification of backward classes into more backward and backward classes for the purpose of Article 16(4) can be done. But, as a result of sub –classification,

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<sup>9</sup> AIR 2005 SC 3226.

<sup>10</sup> Art 15(5) "Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to clause (1) Article 30.

<sup>11</sup> *Ashok Kumar Thakur v. UOI* AIR 2008 SCW 2899

<sup>12</sup> The idea of equality expressed in the preamble is stipulated here. This provision has enabled the state to reserve seats for SCs and STs in educational institutions including engineering and Medical colleges.

<sup>13</sup> Protective discrimination is a contentious issue that is in vogue from 1951, with *Champakam Dorairajan* case and successive amendments to Articles 15 and 16.

<sup>14</sup> AIR 1993 SC 477

the reservation cannot exceed more than 50 per cent. The distinction should be on the basis of degree of social backwardness. In fact such a classification would be necessary to help more backward classes otherwise those of the backward classes who are little more advanced than the more backward classes might take away all the seats. This interpretation is equally applicable to Article 15(4), as the words 'Backward Classes of citizens' in Article 16(4) are wider and includes the SCs and STs and other socially and educationally backward classes also. On this point the decision in *Balaji v. State of Mysore*,<sup>15</sup> has been disapproved and *State of Andhra Pradesh v. Balram*<sup>16</sup> and *K.C. Vasanth Kumar v. State of Karnataka*<sup>17</sup> have been followed by the court.

As regards the limit of reservation the court held that the total reservation shall not exceed 50 percent. This general rule can be relaxed in extraordinary situations for population living in far flung areas of the country as it may be desirable to treat them differently. On this point, the court affirmed the ruling *Balaji*<sup>18</sup> and *Devadasan*<sup>19</sup> cases and overruled the *State of Kerala v. N.M Thomas*<sup>20</sup> and *K.C Vasanth Kumar v. State of Karnataka* case.<sup>21</sup>

Article 16(1) guarantees equality of opportunity for all citizens in matters of 'employment' or 'appointment' to any post under the State. Clause (2) says that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of, any employment or office under the State. Clause (3) and onwards provides four exceptions to these general rules of equality of opportunity.

Article 16(4) provides for the 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.

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<sup>15</sup> AIR 1963 SC 649.

<sup>16</sup> AIR 1972 SC 1875.

<sup>17</sup> AIR 1985 SC 1495.

<sup>18</sup> *Supra* Note 9.

<sup>19</sup> *Devadasan v. UOI* AIR 1964 SC 179.

<sup>20</sup> AIR 1976 SC 490.

<sup>21</sup> *Supra* Note 11.

#### 4. Implementation of Mandal Commission Report

In *Mandal Commission case*,<sup>22</sup> the Supreme Court held that the existing policy of reservation in promotion is not sustainable under Article 16(4)<sup>23</sup> of the constitution. Though the court had accepted caste as determinant of backwardness yet it has struck a balance with the principle of Secularism which is the basic feature of the Constitution by bringing the principle of creamy layer. However, it allowed the existing policy to continue for a period of five years. The Government of India, however, considered it necessary to continue with reservation in promotion, in the case of SCs / STs as their representation in services had not reached the required level. Accordingly, Article 16 was amended *vide* Constitution (77<sup>th</sup> Amendment) Act, 1995, empowering the government to provide for reservation in promotion for SCs / STs by inserting clause 4A<sup>24</sup> in Art 16.

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. Reservation can be provided only in favour of backward class and whether a class is a backward or not is to be determined objectively according to the acceptable criteria.

While Article 16(4) empowers state to make reservations, the constitution makers laced a limiting provision within the constitution<sup>25</sup> under Article 335 which reads as under;

**Article 335: Claims of scheduled caste and scheduled tribes to services and posts:** The claims of the scheduled castes 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.

<sup>22</sup> *Supra* Note 6- AIR 1993 SC 477.

<sup>23</sup> Art 16(4) speaks of class protection and not individual protection.

<sup>24</sup> Art 16(4A): Nothing in this Article shall prevent the state from making any provision for reservation in matter of promotion to any class or classes of posts in the services under the state in favour of the scheduled castes and scheduled tribes which in the opinion of the state are not adequately represented in the services under the state.

<sup>25</sup> Chidananda Reddy S. Patil, "Affirmative action: check and balances", Paper presented at a National seminar, Margao, 23<sup>rd</sup> and 24<sup>th</sup> 2007. p.3.

Article 335 assumes that the scheduled castes and scheduled tribes have some claims to reservation and these claims have to be taken into consideration in the making of appointments to services and posts.

Reservation of posts exceeding 50 percent limit in order to fill up the backlog vacancies of Scheduled Castes and Scheduled Tribes is also permitted.<sup>26</sup> The Constitution (81<sup>st</sup> Amendment) Act, 2000, inserted new clause 4B in Article 16 which seeks to end the 50% ceiling on reservation for SCs/STs in the backlog vacancies which could not be filled up in the previous years due to the non-availability of eligible candidates. Under the newly added clause 4-B of Article 16, the vacancies which could not be filled up in the previous year or years shall be treated as a separate class of vacancies of the years, even if they go beyond the 50% limit.

#### 5. Proviso<sup>27</sup> to Article 335 of the Constitution of India

“Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the scheduled castes and scheduled tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”

The Constitution (85<sup>th</sup> Amendment) Act, 2001 has inserted, in clause 4A: “in matters of promotion to any class” the words “*in matters of promotion, with consequential seniority, to any class.*” This Amendment aims at extending the *benefit of reservation in favour of the SCs/STs in matters of promotion with consequential seniority.* This is from April 1995 when the constitution (77<sup>th</sup> Amendment) Act 1995 was enacted.

All the above mentioned Constitutional Amendments came to be challenged in the case of *M. Nagaraj v. Union of India*<sup>28</sup>. The constitutional validity of all these amendments was upheld by the Supreme Court subject to some conditions. Imposing of these conditions in the judgment is a caution to the legislature and the executive that, in appropriate cases, the court will not hesitate to interfere and strike

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<sup>26</sup> Art 16(4-B), Constitution of India.

<sup>27</sup> The Constitution (82<sup>nd</sup> Amendment) Act, 2000.

<sup>28</sup> AIR 2007 SC 71.

down the provisions providing for excessive reservations and undue concessions. The following observations of the court make this manifest.

“The object in enacting the enabling provisions like Article 16(4) (4A) and (4B) is that the state is empowered to identify and recognise the compelling interests. If the state has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind the maintenance of efficiency which is held to be a constitutional limitation on the discretion of the state in making reservation as indicated in Article 335...”

As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Article 16(4A) and 16(4B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this court has to examine individual cases and decide the matter in accordance with law. This is the theory of ‘guided power.’

Answering the question of relaxation of qualifying marks or standards for reservation in matters of promotion the court observed: “In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated...” Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs / STs. These compelling interests however, have to be identified by weighty and comparable data.

Introduction of new paradigm of “compelling reasons” in *M. Nagaraj v. Union of India*<sup>29</sup> has persuaded for more objective scrutiny of the presence of backwardness, inadequacy of representation and overall administrative efficiency so as to comply with all the constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.<sup>30</sup>

The State is not bound to make reservation for SC / ST in matter of promotions. However, if they wish to exercise their discretion and make such provision, the

<sup>29</sup> AIR 2007 SC 71.

<sup>30</sup> An Illustration given about “compelling reasons” in *M. Nagaraj* can be looked into, in order to know its method of practical application.

State has to collect quantifiable data showing backwardness of the class and inadequacy of representation in that class in public employment in addition to compliance with Article 335.

Thus, Objective determination of the factual position was insisted. Looking to the relation between creamy layer rule and secularism, the court in *Nair Service Society case*<sup>31</sup> observed that the creamy layer rule is a necessary bargain between the compelling ends of caste-based reservations and the principle of secularism, and is "a part of the constitutional 'scheme. Court's prescription of means test to exclude the creamy layer has made laudable contribution to ensure that the benefits of protective discrimination would go to really deserving section."<sup>32</sup>

The 'difference principle' of justice enunciated by Rawls contemplates equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality.<sup>33</sup>

In *B K Pavitra and Others v. State of Karnataka*,<sup>34</sup> the apex court held that the exercise for determining 'inadequacy of representation'; Backwardness' and 'overall efficiency' must be carried out before granting promotion to Scheduled Castes and Scheduled Tribes employees under the Constitution.

The mere fact that there is no proportionate representation in promotional posts for the population of SCs' and STs is not by itself enough to grant consequential seniority to promotes, who are otherwise juniors and thereby denying seniority to those who are given promotion later on account of reservation policy. In this case, the assistant engineers of SC/ST category recruited in 1987 were promoted to the cadre of assistant executive engineers while assistant engineers, recruited in 1976 under general merit were considered for promotion to the said cadre. The government granted benefits to the 1987 cadre engineers under the Karnataka Determination of seniority of the Government Servants Promoted on the basis of Reservation

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<sup>31</sup> *Nair Service Society v. State of Kerala* (2007) 4 SCC 1.

<sup>32</sup> Ishwar Bhat, P. Law and Social transformation, Eastern Book Co. p.494

<sup>33</sup> Quoted by Ishwar Bhat P. Law and Social transformation, Eastern Book Co. p.492

<sup>34</sup> Civil Appeal No. 2368 of 2011 decided on 9<sup>th</sup> February 2017.

(To the posts in the Civil Services of the State) Act 2002.<sup>35</sup> The petitioners challenged a high court ruling that they must prove that overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation granted under Article 16(4A) of the Constitution relying upon *M Nagaraj and others case*,<sup>36</sup> the Supreme Court held that 'it is for the state to place material on record that, there was compelling necessity for exercise of such power and that the decision of the state was based on material including the study that overall efficiency is not compromised.'<sup>37</sup>

The Constitution (93<sup>rd</sup> Amendment) Act, 2006, added clause (5) into Article 15. By this Amendment, the scope of special provision is extended to admission to private educational institutions whether aided or unaided by the state.<sup>38</sup> Its addition became imminent because in *P.A Inamdhar v. State of Maharashtra*<sup>39</sup> the Supreme Court held that "neither the policy of reservation can be enforced by the state nor can any quota or percentage of admission can be carved out to be appropriated by the state in an unaided educational institution. Reiterating its stand in *T.M.A. Pai Foundation v. State of Karnataka*<sup>40</sup>, the right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g)," it went further and held that "imposition of quota of state seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions..., which cannot be held to be reasonable restriction within the meaning of Article 19(6)." The Constitution (93<sup>rd</sup> Amendment) Act, 2006 neutralises the decision on these points and restores the prior position subject to the condition that the special provision can now be made only by law while before the amendment it could be made even by the executive action.<sup>41</sup>

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<sup>35</sup> Entire legislation has been quashed.

<sup>36</sup> 'Catch up rule'- If a senior general candidate was promoted after SC / ST candidates, he would regain his seniority on promotion in relation to the juniors who had been promoted against reserved vacancies.

<sup>37</sup> Deccan Herald Feb 10, 2017.

<sup>38</sup> Article 15(5), Constitution of India.

<sup>39</sup> (2005) 6.SCC 537.

<sup>40</sup> (2002) 8 SCC 481.

<sup>41</sup> Mahendra P singh (ed.), V.N. Shukla Constitution of India. p. 100.

In pursuance of this provision parliament enacted the central educational institution (Reservation in Admission) Act, 2006 providing for reservation in central institutions of Higher education and research for members of scheduled caste (15%), scheduled tribe (7.5%) and educationally backward class (27%). However, Linguistic or religious Minority run educational institutions are excluded from the purview of Article 15(5).

In *Ashok Kumar Thakur v. UOI*,<sup>42</sup> the Constitutional Bench of the Supreme Court continued the policy of upholding caste criterion as one of the criteria for identification of OBC and SEBC subject to the application of creamy layer test in the context of Article 15(4) and 16(4) given in *Indra Sawhney case* as equally relevant and applicable in cases of Article 15(5) also.

## 6. Reservation Laws in IX Schedule

The IX schedule was incorporated into the constitution with the purpose of providing protection to agrarian and economic reform legislations. The object of the IX schedule was to save land reforms laws enacted by various states from being challenged in the court. Originally, it had 13 legislations for which Jawaharlal Nehru remarked as long list.<sup>43</sup>

There was strange addition to the IX schedule i.e., Tamilnadu Reservation Statute of 1994, which clearly purport to surpass the well- thought judgment rendered by the apex court in *Mandal Commission's* case. Karnataka state government also attempted to include its reservation law with 73% reservation in the IX schedule. The Tamilnadu law in IX schedule was added because of the Supreme Court's ruling in the *Mandal* case that overall reservation cannot exceed 50%. In *I. R. Coelho (Dead) by L.Rs v. State of Tamilnadu and others*<sup>44</sup> the petitioner had challenged the validity of the various Central and State laws put in the IX schedule including Tamilnadu reservation law. A nine judge constitution Bench headed by chief justice Y.K.Sabharwal held that any law placed in the IX schedule after April 24, 1973 will be open to challenge. The court said that even though an Act is put in the IX schedule by a Constitutional Amendment its

<sup>42</sup> (2008) 6 SCC 1.

<sup>43</sup> As of now there are 284 legislations in the IX schedule.

<sup>44</sup> 2007(1) SC 137.

provisions would be open to challenge on the ground that they destroy or damage the basic features, if the fundamental rights are taken away or abrogated pertaining to the basic features or the basic structure.

#### 7. Article 342(1) the Constitution of India: discourse

Regarding the identification of SCs and STs, the president is vested with power of public notification of lists specifying castes, races, tribes or parts of groups to be deemed to be SCs and STs under Article 341 and 342. Article 341(1) provides that the President may, with respect to any state or union territory after consultation with the Governor thereof, by public notification, specify the castes or races or tribes which shall for the purposes of this constitution be deemed to be scheduled castes in relation to that state or union territory. According to Article 341(2) the Parliament may by law include or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. For alteration of the list of SCs and STs, the Parliament's law-making power alone is regarded as competent.

#### 8. Reservation within reservation by micro classification

The fact that there has not been uniform level of development amidst various castes grouped under the category of Scheduled castes has given rise to the problem of uneven competition because of which more advanced sections among them are able to get the benefits and the weaker of the weakest are lagging in the race.<sup>45</sup> Since, there is no application of creamy layer test to exclude the forward section from the competition within the category of Scheduled castes because of confinement of *Mandal Commission's* case judgment only to OBC and SEBC, this unfair situation has arisen.

Since, states have both power and responsibility to protect the interests of weaker sections of society under Article 15(4), 16(4) and 46, it is justifiable act on their part to sub group the castes on the basis of their respective population in order to allocate their respective entitlement. The list of SCs as specified by president

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<sup>45</sup> *Supra* Note 32. p. 496.

in consultation with the State Governors under Article 341(1)<sup>46</sup> is kept intact, and only the allocation is monitored on the basis of pragmatic appreciation of facts. A distinction needs to be made between disturbance of the list and allocation of the quantum of share.<sup>47</sup>

There is also an opinion that once a reservation benefit has been already claimed and got by a candidate even belonging to SC / ST; such candidate shall be disqualified from claiming reservation benefit in his carrier.<sup>48</sup> As the nomenclature scheduled castes suggests, it is a list of castes and not the single caste. Because of different types of employments undertaken by them or socio-economic position enjoyed by them or because of different cultural background even going to the extent of denying co-dining or marital relations amidst the castes listed as scheduled castes, it is travesty of truth to treat them as a homogenous class.<sup>49</sup>

As per Article 38(2), "The State shall, in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas engaged in different vocations." This obligates the states to subgroup the castes having different characteristics for the purpose of avoiding hostile competition amidst them.<sup>50</sup>

Other Backward Classes are in fact, conglomerations of castes or religious groups having the characteristics of inadequate representation in services. In

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<sup>46</sup> Regarding the identification of SCs and STs, the president is vested with power of public notification of lists specifying castes, races, tribes or parts of groups to be deemed to be SCs and STs under Article 341 and 342. Article 341(1) provides that the President may, with respect to any state or union territory after consultation with the Governor thereof, by public notification, specify the castes or races or tribes which shall for the purposes of this constitution be deemed to be scheduled castes in relation to that state or union territory. According to Article 341(2) Parliament may by law include or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. For alteration of the list of SCs and STs, Parliament's law-making power alone is regarded as competent.

<sup>47</sup> *Supra* Note 32 at 499.

<sup>48</sup> It was a terrible mistake in the past in believing that merit was an attribute not of Individual but of groups, that being born a Brahmin was itself a mark of merit. This generation of reservationists will make the same kind of mistake if they act on the belief that need too is always, and not just in special cases, an attribute of groups rather than of individuals. There is a tough competition on the sub soil of India for being continued to be always backward to claim benefits of state affirmative action.

<sup>49</sup> *Supra* Note 32 at 499.

<sup>50</sup> *Ibid*

*Indra Sawhney* case<sup>51</sup> the Supreme Court allowed sub grouping of OBCs into less backward and more backward, allowed categorization with different quotas based on population and applied creamy layer test to filter out the advanced individual members.

Since, the social dimensions of castes in general remain common in India at various sectors, it is difficult to say that there remains homogeneity<sup>52</sup> amidst SCs/ STs and heterogeneity amidst OBCs. Since the entire group cannot be elevated simultaneously, differences do arise between the beneficiaries of reservation and others in the group, or to put it more particularly, between the forward and backward within the community.<sup>53</sup> In Karnataka, the Government has appointed Justice A.J Sadashiva Commission to look into discrimination arising within the Scheduled Castes because of cornering the advantages by the advanced sections among them and the committee has submitted its report after due consultation with the stake holders among SCs in Karnataka.

#### 9. 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.<sup>54</sup> 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. However, apex court declined to extend such benefit in many cases<sup>55</sup> pertaining to marriage and election and conversion and election. Regarding adoption by scheduled caste parents as a basis for entitlement to reservation, in *Khazan Singh*<sup>56</sup> the Delhi High court has approached from legalistic perspective of adoption. The

<sup>51</sup> *Supra* Note 6; AIR 1993 SC 477.

<sup>52</sup> The Issue of homogeneity needs to be looked from sociological viewpoint. After Sixty five years of protective discrimination policy at various levels and sectors of public life continuously and seriously practiced, a vague point focus on its social impact and dynamics of change demands attention.

<sup>53</sup> *Supra* Note 31 at 500.

<sup>54</sup> *Supra* Note 31 at 503.

<sup>55</sup> *N.E Horo v. Jahanara* (1972)1 SCC 771; AIR 1972 SC 1840; *Urmila v. UOI* AIR 1975 del 115; *Valsamma v. Cochin University*, AIR 1996 SC 1011

<sup>56</sup> AIR 1980 Del 60.

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 consequences of adoption upon subsequent generation, it is appropriate to consider the person as within the fold of the SC community. Prof B.N. Sampath criticized this verdict as it allows the transformation of loophole into floodgate for unscrupulous people eyeing on State patronage.<sup>57</sup>

#### 10. Women and children as vulnerable class

Article 15(3)<sup>58</sup> empowers the State to make special provision for 'Women and Children.' Women and Children require special treatment on account of their very nature. The women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical well being becomes an object of public interest and care in order to preserve the strength and vigour of the race.<sup>59</sup>

#### 11. Free and compulsory education to all children

The Constitution (86<sup>th</sup> Amendment) Act 2002, has added a new Article 21A and has made education for all children of the age of 6 to 14 years a fundamental right. It provides that "The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine."<sup>60</sup>

#### 12. Cultural and educational rights

Any section of the citizens residing in the territory of India or any part thereof having distinct language, script, or culture of its own shall have the Right to conserve the same.<sup>61</sup> Article 29(1) has special significance for all the scheduled tribes. However, this provision need not be understood to educate the tribal only in their language and thereby making them isolated. They should be educated in

<sup>57</sup> B. N. Sampath, "Pseudo-scheduled castes: A Gift of Adoption law"; (1981)23 JILI p. 599

<sup>58</sup> 15(3): Nothing in Article 15 shall prevent the State from making any special provision for women and Children.

<sup>59</sup> *Muller v. Oregon*, 52 L.Ed 551

<sup>60</sup> Article 45: provision for early childhood care and education to children below the age of six years - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

<sup>61</sup> Article 29(1), Constitution of India.

the language of the state as well as national language to expose them to outside knowledge.

No citizen shall be denied 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.<sup>62</sup> Clause (2) of Article 29 relates to admission into educational institutions which are maintained or aided by state funds. It may be recalled that Article 15 also prohibits discrimination against citizens on grounds of religion, caste etc. But the scope of two Articles is different. Article 15(1) protects citizens only against the state while Article 29(2) protects citizens against the State or anybody who denies the right conferred by it. Secondly, Article 15 protects citizens against discrimination generally but 29(2) protects only against a particular species of wrong, namely, denial of admission into educational institutions maintained or aided by state. Article 29(2) is a special Article and is a controlling provision when the question relates to admission to colleges. The right to admission into an educational institution is a right which an individual citizen has and not as a member of any community or class of citizens. Hence a school run by a minority, if it is aided by state funds, cannot refuse admission to children belonging to other communities.

It shall be the endeavour of every local authority within the state to provide adequate facilities for instructions in the mother tongue at the primary stage of education to children who belongs to linguistic minority groups and the president may issue directions to any state as he considers necessary or proper for securing the provision of such facilities.<sup>63</sup> Most of the tribal communities have their own language or dialects, which usually belongs to a different family of language than the one to which the state's official language belongs. However, facilities should be provided to teach in the national language and in English, besides in the mother tongue and local dialect.

### 13. Political safeguards

Article 164(1) provides<sup>64</sup>, that there shall be a minister in charge of tribal

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<sup>62</sup> Article 29(2), Constitution of India.

<sup>63</sup> Article 350(A), Constitution of India.

<sup>64</sup> In the State of Bihar, Madhya Pradesh and Orissa.

welfare who may in addition be in charge of the welfare of the scheduled castes and backward classes or any other work.

Article 330 provides, for reservation of seats<sup>65</sup> of SCs / STs in the Lok Sabha. In pursuance of this 106 seats out of 545 total seats are reserved for members of SC / ST communities. In the post 11<sup>th</sup> Lok Sabha, SC / ST number of MPs outnumbered the fixed quota which indicates that besides the reserved constituencies SC / ST candidates are elected against unreserved Lok Sabha seats also. It is a healthy sign of social transformation.

#### **14. Constitutional 73<sup>rd</sup> and 74<sup>th</sup> Amendment Acts: Empowerment of SCs, STs and OBCs and Women**

In accordance with the Constitution (73<sup>rd</sup> Amendment) Act 1992, seats in Panchayat from Gram panchayat to Zilla panchayat will be reserved for SC / STs in proportion to their population at respective level, in direct election.<sup>66</sup> Out of the seats reserved for SCs and STs one third will be reserved for women of these communities. These reserved seats for SCs and STs shall be allotted by rotation to different constituencies in a panchayat at each level.

In accordance with the Constitution (74<sup>th</sup> Amendment) Act, 1992 out of total seats to be filled by direct election, seats shall be reserved for SCs / STs in proportion to their population in the municipal bodies at each level.<sup>67</sup> Out of these seats for SCs / STs at least one-third shall be reserved for SC / ST women.

Reservation for SCs and STs in the Panchayats and Municipalities is an important step towards their political empowerment. As a result of these provision more than seven lakhs elected representatives including women from these groups are playing important roles in decentralised governance, planning and development.

With the enactment of the Panchayat (extension to the Scheduled Areas) Act, 1996, the provision of part IX of the constitution relating to Panchayats have been

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<sup>65</sup> Article 332 provides for reservation of seats for SC/ST state Vidhana Sabhas (Legislative assemblies).

Article 334 lays down the provision relating to the reservation of seats for SCs and STs in the Lok Sabha and state Vidhana Sabha (reservation of the Anglo-Indian community in the Lok Sabha and the state Vidhana Sabhas by nomination). This provision has been extended by amending the constitution every ten years.

<sup>66</sup> Article 243-D, Constitution of India.

<sup>67</sup> Article 243-T, Constitution of India.

extended to the scheduled areas subject to exceptions and modifications that a legislature of a state shall not make any law inconsistent with any of the following features- customary law, Social and religious practices and traditional management practices of community services.

Every village shall have Gram sabha which shall be competent to safeguard and preserve the traditions and customs of the people and shall be vested with the powers to approve the programmes and projects for social and economic development, also identification of beneficiaries under such programmes the Panchayats at their levels shall be endowed with ownership of minor forest produce. The Gram sabha or the Panchayats at the appropriate level shall be consulted for granting prospective licensees or mining lease or minor minerals and their prior recommendation obtained for acquisition of land in the scheduled areas for development projects or for settlement of project affected members of the scheduled tribe. Thus, the extension of the 73<sup>rd</sup> Amendment Act to the scheduled areas would enable the tribal people to prepare and execute economic development and social justice plans in their respective areas.

### 15. National Commission for SCs and STs

Under Article 338 and 338-A<sup>68</sup> National Commissions for SCs and STs are constituted to investigate about all matters relating to safeguards, inquire into

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<sup>68</sup> Article 338 and 338-A prescribes the following duties of the respective commissions;

- i. To investigate and monitor all matters relating to the safeguards provided for the scheduled castes (scheduled Tribes) under this constitution or under any other law for the time being in force or under any order of the government and to evaluate the working of such safeguards;
- ii. To inquire into specific complaints with respect to the deprivation of rights and safeguards of the scheduled castes (scheduled Tribes);
- iii. To participate and advise on the planning process of the socio-economic development of the scheduled castes (scheduled Tribes) and to evaluate the progress of their development under the union and any state;
- iv. To report to the president, annually and at such other times as the commission may deem fit, reports on working of those safeguards;
- v. To make in such reports recommendations as to the measures that should be taken by the union or any state for the effective implementation of those safeguards and other measures for the protection, welfare, and socio-economic development of the scheduled castes (scheduled Tribes);
- vi. To discharge such other functions in relation to the protection, welfare and development and advancement of the scheduled castes (scheduled Tribes) as the president may, subject to the provisions of any law made by parliament, by the rule satisfy.

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 two separate commissions was affected by the Constitution (89<sup>th</sup> Amendment) Act, 2003. This hints how instrumentalities for social change are also reshaped with changing times.

#### **16. Reservation in private sector**

With the growth of Information technology (IT) and Biotechnology (BT) sectors and flourish of Multinationals and Indian listed companies, reservationists are aiming their sight at high-end jobs in these spheres. State's power of making infrastructural facilities available is sometimes relied upon for seeking governmental intervention to pressurise the private sector to follow reservation policy. Protagonists of reservation in private sector claim that for reducing economic discrimination, for promoting equitable growth, for securing the tenure of dalit workers and for minimizing the potential conflict, reservation is essential. With the growth of Privatisation, the arena of public sector is reduced and the scope for special provision for the backward classes is also narrowed down.

According to a study commissioned by the National Human Rights Commission in 2002, 'autonomy of operation is the key in the private sector since the responsibility for profit and loss is borne by the enterprise. Therefore, those who invest their capital would not countenance restrictions on their autonomy. There is no accountability of private sector enterprise to government or to public. They are accountable to their own share holders. In the era of Privatisation, Liberalisation and Globalisation (LPG) high level of performance cannot be maintained in the private sector without a flexible system of job contracts.

The study report expressed doubts over the "Constitutional Sustainability" of the proposal for job reservation in private sector for those belonging to scheduled castes and scheduled tribes for a number of reasons. That is why even in the peak period of commitment to reservation as a strategy of empowerment of SCs/STs, the government did not consider introducing reservation of jobs in the private sector. According to the report, with the intervention of the Supreme Court in restricting the scope and ambit of reservation from time to time, it "seems highly

improbable" that the idea of reservation of jobs in the private sector would muster legal sanction.<sup>69</sup>

The report goes on to suggest that the government could engage the private sector in meaningful discussion on how to facilitate the entry of marginalized communities such as SCs / STs in private sector employment, trade and commerce. This may not assure jobs in the manner of reservation but would bring the vast private sector employment in the ambit of social obligation.<sup>70</sup> It says adding appropriate mechanisms can be created to monitor the progress and such success of these efforts.

The report is dismissive of the scale of possible absorption of SCs/STs in private sector jobs through reservation, saying even if 15% reservation were to be enforced; this would take care of only around 13 lakhs persons from the SCs and another 6.5 lakhs from among the STs. While the benefits from reservation are shrinking SCs / STs are not equipped to tap employment opportunities in the open market. This is likely to increase their frustration.

## 17. Conclusion

Affirmative action as a means of empowerment and an instrument of social justice has taken multiple forms and has been employed by various levels of Government with region- specific political policy decisions. With the growth of society, the features and characteristics of the beneficiaries and of the categories of reservation also undergo change. However, objectivity has suffered when prejudice, favoritism and mere political consideration are mixed with policy. The confrontational approach between the Legislature and judiciary has made both law men and lay men not in a position to perceive the reservation policy. Exclusion of persons or families who got reservation benefit or of persons who merged with forward sections by becoming creamy layer from the advantages of affirmative action's, would help in channelising the benefits to weaker of the weakest. Extension of Mandal Commission's case principle on this matter to scheduled

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<sup>69</sup> Retired bureaucrat K.B.Saxena wrote the Report in 2002.

<sup>70</sup> Govt. of Karnataka has announced the policy of awarding Govt. contracts worth up to Rs 50, 00,000 for SC/ST.

castes and scheduled tribes is required. The need for actual empowerment of the weaker section by infusing the strength for competition should be realized and the direction of development should be towards minimizing the dependence on caste factor for identifying the beneficiaries of state affirmative action.

The ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely; backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of status and of opportunity would collapse.

## THE BASIC STRUCTURE DOCTRINE POST-GLOBALIZATION: A CRITIQUE

*Dr. Sandeep S. Desai\**

### 1. Introduction

The “Basic Structure Doctrine” is a judge-made doctrine where certain features of the Constitution of India are beyond the limit of the amending powers of the Parliament of India. On Feb 27, 1967, a Special Bench of 11 Judges had held in the case of *Golaknath v. State of Punjab*<sup>1</sup>, that “Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights”. On April 24, 1973, a Special Bench comprising 13 Judges of the Supreme Court of India held that Article 368 of the Constitution “does not enable Parliament to alter the basic structure or framework of the Constitution”. Though the court overruled the decision in *Golaknath* and held that even fundamental rights may be amended, it also held that certain elements of the constitution cannot be amended. It then propounded what has come to be known as “the basic structure doctrine”. The doctrine was introduced in India for the first time by Justice Mudholkar in the case of *Sajjan Singh*,<sup>2</sup> when he used the phrase, “*basic feature of the Constitution*” to argue that there are certain features of the Constitution that cannot be amended by the Parliament through its amending powers under Art. 368 of the Constitution. Justice Mudholkar drew upon the Pakistan Supreme Court’s decision in *Fazlul Quader Chowdhry v. Mohd Abdul Haque*,<sup>3</sup> which had used the basic structure doctrine previously. The political context for the rise of the basic structure was an attempt by the government to shield certain land laws from judicial scrutiny. After the death of Pt. Jawaharlal Nehru, the Congress party, under the guidance of Mrs. Indira Nehru Gandhi, was committed to bring about land reforms in the country which caused widespread social inequities in the country. The government through

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<sup>1</sup> 1967 SCR (2) 762.

<sup>2</sup> AIR 1965 SC 845.

<sup>3</sup> *Fazlul Quader Chowdhry v. Mohd Abdul Haque*, 1963 PLC 486.

Art. 31, placed these laws in the Ninth Schedule which could not be challenged in a court of law on the ground that they violated the fundamental rights of citizens.<sup>4</sup> The most aggrieved among various classes were the propertied class who felt that the Parliament is acting *ultra virus* Indian constitution and subsequently, property owners challenged the constitutional amendments which placed land reform laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13(2) of the Constitution

## 2. Golaknath and Keshawananda Bharati verdict

In 1967, an eleven-judge bench of the Supreme Court headed by Chief Justice Koka Subba Rao, put forth the curious position that, Art.368 did not confer upon the Parliament the power to amend the Constitution. Thus, the apex court held that the amending power and legislative powers of the Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2). In 1973, the largest Constitutional Bench of 13 Judges, heard arguments in *Kesavananda Bharati v. State of Kerala*.<sup>5</sup> The Supreme Court reviewed the decision in *Golaknath v. State of Punjab*<sup>6</sup>, and considered the validity of the 24th, 25th, 26th and 29th Amendments. The Court held that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament, the “basic structure of the Constitution could not be abrogated even by a constitutional amendment”.<sup>7</sup>

Nine judges signed a statement of summary for the judgment that reads:

- 1) Golaknath's case is over-ruled.
- 2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.
- 3) The Constitution (Twenty-fourth Amendment Act, Twenty-fifth Amendment) Act, 1971 is valid.

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<sup>4</sup> *Ibid*

<sup>5</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>6</sup> *Supra* Note 1.

<sup>7</sup> *Ibid*, Bhandari, M.K., *Basic Structure of the Indian Constitution: A critical reconsideration* (Deep and Deep Publications 1993); Bhagwati, P.N., “Judicial activism and public interest litigation,” 23 *Colum. J. Transnat'l L.* 561 (1984).

- 4) The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The court held that Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. Basic Features of the Constitution according to the Keshavanada verdict were laid out separately by each judge based on what he thought were the basic or essential features of the Constitution.

**Sikri, C.J. explained that the concept of basic structure included:**

1. Supremacy of the Constitution.
2. Republican and democratic form of government.
3. Secular character of the Constitution.
4. Separation of powers between the legislature, executive and the judiciary.
5. Federal character of the Constitution.

**Shelat, J. and Grover, J. added three more basic features to this list:**

1. The mandate to build a welfare state contained in the Directive Principles of State Policy.
2. Unity and integrity of the nation.
3. Sovereignty of the country.

**Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:**

1. Sovereignty of India.
2. Democratic character of the polity.
3. Unity of the country.
4. Essential features of the individual freedoms secured to the citizens.
5. Mandate to build a welfare state.

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

1. Sovereign democratic republic.
2. Justice - social, economic and political.
3. Liberty of thought, expression, belief, faith and worship.
4. Equality of status and the opportunity.
5. Basic Features of the Constitution according to the *Keshavanada*, case verdict of each judge laid out separately, what he thought were the basic or essential features of the Constitution.

Khanna J. whose decision was the deciding factor as far as the existence of the basic structure and amendability of the constitution was concerned, saw the following as parts of the basic structure.

1. Implied restrictions on amending power.
2. Supremacy of fundamental rights above all.
3. Justice Khanna, held that the word "amendment" meant to change or alter.
4. Amendment could not mean completely defacing or abrogating a particular document.
5. This rationale in turn became the backbone on which the basic structure doctrine was formulated.

Nani Palkhivala, the counsel for the mutt (Keshavananda Bharti) argued that, the Parliament having unfettered power to amend the constitution would render the document null and void.<sup>8</sup> There must be some restraint on the amending power of the parliament. Certain principles of the constitution like rule of law and fundamental rights were sacrosanct and could not be touched. Ray, C.J. convened a 13-judge bench to review the Kesavanada verdict on the pretext of hearing a number of

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<sup>8</sup>Shukla, V.N. and Singh, D.K., *V.N. Shukla's Constitution of India* (Eastern Book Company 1982); Krishnaswamy, S., *Democracy and constitutionalism in India: a study of the basic structure doctrine* (Oxford University Press 2011); Bhandari, M.K., *Basic Structure of the Indian Constitution: A critical reconsideration* (Deep and Deep Publications 1993); Neuborne, B., "The Supreme Court of India", 1 *Int'l J. Const. L.*, 476 (2003).

petitions relating to land ceiling laws. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. Meanwhile, Prime Minister Indira Gandhi refused to accept the dogma of basic structure, N.N. Palkhivala, appearing on behalf of a coal mining company, argued against the move to review the Kesavananda decision.<sup>9</sup> Ultimately, Ray, C.J. dissolved the bench after 2 days of hearing. The declaration of a National Emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventive detention, diverted the attention of the country from this issue. One certainty that emerged out of this tussle between the parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress, the basic structure are to be struck down by the Supreme Court.

### **3. Economic liberalization and effect of the New Economic Policy of 1991**

The process of economic liberalization in India includes the ongoing economic reforms in the country that began in the year 1991. This process can be traced back to the late 1970s, continued in the 1980s through fresh ideological influences, and partly through the observation of faster growth in many East Asian economies. Such observations prompted India's economic policy makers began to seriously attempt, some changes in the overall approach to the role of government in the country's economic development, introducing some liberalization in the trade regime, loosening of domestic industrial controls, and promotion of investment in modern technologies for areas such as telecommunications and information technology, automobiles etc., In 1991, India faced a severe balance of payments crisis, and this circumstance became the occasion for a substantial advance in the pace and nature of economic reforms that were being attempted. In particular, the major steps taken was further trade liberalization, in the form of reductions in tariffs and conversion of quantitative restrictions to tariffs, and sweeping away a large segment of restrictions on domestic industrial investment. These two changes in the early 1990s have come to symbolize or coin the term 'economic reform' in India. It was only in 1991, the Government signalled a systemic shift

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<sup>9</sup>Mehta, P.B., "India's judiciary: The promise of uncertainty," *The Supreme Court Versus the Constitution: A Challenge to Federalism*, 155-177(2006); Bhagwati, P.N., "Judicial activism and public interest litigation" 23 *Colum. J. Transnat'l L.*, 561(1984).

to a more open economy by changing its economic policies due to financial crisis and pressure from international organizations, like the World Bank and IMF. There was greater reliance upon market forces, a larger role for the private sector including foreign investment, and a restructuring of the role of Government.<sup>10</sup> During this period, while growth accelerated past five per cent (5%) it came at the cost of macroeconomic imbalances which worsened at the beginning of the 1990s. The policy changes can be reviewed in five major areas covered by the reform programme: fiscal deficit reduction, industrial and trade policy, agricultural policy, infrastructure development and social sector development. It is however, pertinent to note that since the economic reforms of 1991, the liberalisation of the Indian economy has continued in the same manner, barring a few questions that have been constantly raised regarding the control over exercise of power by the government. These questions however become extremely relevant when considering the balance that must be maintained between government control and rights of the citizens. Thus, the economic reforms initiated in 1991 introduced far-reaching measures, which changed the working and machinery of the economy. These changes were pertinent to the following:

- Dominance of the public sector in the industrial activity.
- Discretionary controls on industrial investment and capacity expansion.
- Trade and exchange controls.
- Limited access to foreign investment.
- Public ownership and regulation of the financial sector.

One could say that these reforms have unlocked India's enormous growth potential and unleashed powerful entrepreneurial forces. Since 1991, successive governments, across political parties, have successfully carried forward the country's economic reform agenda.

The most visible and important component of the reforms so far has been the relaxation of various internal and external controls on private economic activity, the "license-permit-quota raj". A significant objective of this liberalization has been

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<sup>10</sup> Aghion, P., Burgess, R., Redding, S.J. and Zilibotti, F., "The unequal effects of liberalization: Evidence from dismantling the License Raj in India", 98(4) *The American Economic Review*, 1397-1412(2008).

achieving greater efficiency in resource allocation, and re-integration of India's economy with that of the rest of the world. The economic reforms introduced in India in the year 1991 focused on trade policy/external sector; industrial policy; infrastructural sector policies; divestment/privatization policies; the financial sector; and on policies for attracting foreign direct investment. However, due to the political economic dimensions of the reforms, there was less percolation of reforms to the state level. After the adoption of the new economic policy in 1991, there were problems faced by the importers in the country mainly due to the Liberalization of trade and foreign investment. It is interesting to note the approach of the Supreme Court of India while interpreting the economic policy of the Government of India. The most celebrated case in this context is *Balco Employees Union v. Union of India and others*<sup>11</sup> the relevant extract is quoted hereafter:

*"Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed."* This in turn indicates that the judiciary's adherence to elements like socialist economy and welfare state both elements of the basic structure.

#### **4. Collective Interest – Power and right relationship**

The courts observed, that in order for the policy to be adopted and enacted successfully, it should be designed in a way such that, it results in the collective good of the citizens rather than focusing on the individual interests of a particular section of people in the country, for example, decreasing the custom duty such

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<sup>11</sup> *Balco Employees Union v. Union of India and others* 2002 (2) SCC 333, Cassels, J., "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?", 37(3) *The American Journal of Comparative Law*, 495-519 (1989) ; Baxi, U., "Taking suffering seriously: Social action litigation in the Supreme Court of India". *Third World Legal Stud* 107 (1985).

that it benefits the companies who largely import their products. The result of such legislation would be such that people would prefer to buy the imported products and the local companies would start incurring losses. This would eventually result in the local companies accusing the government of restricting their right to carry on trade. Therefore, it is necessary that the legislations are passed keeping the rights and collective good of the people in mind. The courts also criticised the purported change in the economic policy which provided short term advantages to the indigenous industry/business, as well as globalised the Indian economy. It was against the policy of the Government especially in the context of the then economic reforms. It was a contradiction that Government was succumbing to the pressure of vested interests. In the case of *Shri Hari Exports v. Director General of Foreign Trade*,<sup>12</sup> the petitioner challenged the validity of the two notifications dated 25-1-1994 and 29-1-1994, effect of which was to transform Polypropylene Moulding powder/granules as goods in the sensitive test for the purpose of its importation, though, when the value based license issued to the petitioner, no such restriction was imposed. Petitioner was issued with the value based license on 6-7-1993. As per this license, if the petitioner exports the particular goods (cassettes), he was entitled to import the goods described in the license without any restriction as to their quantity. It was contended that the change in import policy had affected the public interest. Prior to change in the policy, the exporter was issued with value based license to import the goods, mentioned in the license, with no restriction in respect of the quantity to be exported but due to change in policy, the goods in question were shifted to sensitive list. It was held that the two notifications are invalid to the extent they operate as an unreasonable restriction on the rights of a citizen and that the courts cannot at all exercise judicial control over it. It was further observed that the source for the exercise of power requires that it has to be exercised in the public interest by itself does not confer any immunity to the said exercise; the power shall have to be exercised in a reasonable way. The reasonableness has to be tested in the light of the Constitutional provisions. Further, reasonableness of any particular action could be gathered only by considering the circumstances under which it is exercised, the evil sought to be eradicated by the action in question or the public purpose sought to be projected by it. Thus, the

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<sup>12</sup> *Shri Hari Exports v. Director General of Foreign Trade*, (1994 (73) ELT 794).

exercise of power is considered to be reasonable when it does not infringe upon the legal rights of any citizen. Legal rights are essentially interests recognized and administered by law and belong to science of law rather than to law and are a complete idea. It may mean the legally recognized and defined human wants, demands, or some conceptions by which the recognized interests are given form in order to be secured by a legal order. If the power is exercised in such a way that the legal rights of citizens are being violated, then the government is held to be acting out of the collective interest. Therefore, it can be said that the economic policies of the government are valid till the time they do not infringe upon the rights of the citizens. Rights correspond to attaining four goals of legislation; subsistence, abundance, equality and security for the citizen. By security, it is meant that a man's person, his honour, his property and his status must be protected, and his expectations in so far the law has produced them, be maintained. With reference to the economic policies of the country, they should be adopted in such a manner that the basic rights of the citizens such as the right to freedom to carry on trade should not be restricted upon. The restriction on the right should be reasonable in all aspects even when the policy seems to infringe upon the right. For example, putting restrictions on trade through waterways can be considered a reasonable one since smuggling is most common through the sea ports. This cannot be considered an infringement of right as the government had taken such an action by keeping in consideration the collective good of the people. This judgement is therefore a clear indication of adherence to the basic structure in terms of prioritization of fundamental rights over economic policy.

In *Shri Sitaram Sugar Company Ltd v. Union of India*<sup>13</sup>, the petitioners were owners of sugar mills operating in the State of Uttar Pradesh in areas classified for the purpose of determining the price of levy sugar as West and East Zones. They challenged the validity of notifications dated 28th November, 1974 and 11<sup>th</sup> July, 1975 issued by the Central Government in exercise of its power under Sub-section (3-C) of Section 3 of the Essential Commodities Act, 1955. The Apex Court considered the nature, extent and scope of judicial review of administrative actions formulating the economic policies regarding fixing the price of sugar. It observed that the Court in exercise of judicial review is not concerned with the

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<sup>13</sup> *Shri Sitaram Sugar Company Ltd v. Union of India*, 1991 SCR (1) 909.

correctness of the finding of fact on the basis of which the orders are made and held: "*Judicial review is not concerned with the matters of economic policy. The Court does not substitute its judgment format of the Legislature or its agent as the matters within the province of either.*"

This judgment shows the judiciary balancing two elements of the basic structure against each other i.e. judicial review and separation of powers. The case of *Commissioner of Income Tax, Udaipur v. Hindustan Zinc Limited*<sup>14</sup> discussed the jurisdiction of Court to interfere in economic matters under Articles 226 and 14 of the Constitution of India. In the present case, the petitioners are exporters, registered with respondents No. 2, M/s. Apparel Export Promotion Council, (in short "AEPC") and are engaged in the manufacture and export of garments and claim to have turnover of Rs. 300 crores. Petitioners had impugned the above notice, as not being in public interest. The notice is also assailed as imposing unreasonable restriction on the right to carry on business of exports which is an infringement of Article 19(1)(g) of the Constitution of India. Here, while the court reiterated that arbitrariness was a ground to invalidate economic policy decision it upheld fundamental rights and in essence adhered to the basic structure and prioritised the above anything else.<sup>15</sup>

## 5. Constitutional developments post 1991

*Kihoto Hollohan v. U.O.I.*<sup>16</sup>

*Kihoto Hollohan v. Zachillhu And Others* is commonly referred as the case where the constitution bench of the Supreme Court analyzed in detail the various provisions of the 52<sup>nd</sup> amendment of the constitution. The 52<sup>nd</sup> Amendment inserted a new schedule (Tenth schedule) elaborating various provisions to protect the parties from defection. The amendment happened in the year 1985 and followed by much uproar which ultimately led to filing a PIL and resulting into the decision in the year 1993 declaring the amendment completely legal with certain interpretation regarding judicial review. In the process the court declared that democracy was a

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<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*

<sup>16</sup> AIR 1993 SC 412.

core element of the basic structure and held that the 52<sup>nd</sup> Amendment furthered that objective and was hence deemed legal.

*S.R. Bommai v. U.O.I.*<sup>17</sup>

On April 21, 1989, Karnataka Chief Minister S.R. Bommai presented Governor P. Venkatasubbaiah, a copy of the resolution passed by the Janata Dal Legislature Party requesting the Governor to give Bommai an opportunity to test his majority in the Assembly. Although floor tests continue to be the sole practical means of establishing majorities, incumbency is clearly a key factor in the outcome of such tests. The majority decision of the Supreme Court in *S.R. Bommai v. U.O.I.*, in essence has overturned a long held belief that the use of Article 356 was not really subject to review by courts, a doctrine articulated in a landmark case, *State of Rajasthan v. U.O.I.*<sup>18</sup> *S.R. Bommai*, laid down the conditions under which State governments may be dismissed, and mechanisms for that process. These were expressed through six opinions, with the judgments of Justices A.M. Ahmadi, K. Ramaswamy, and J.S. Verma for himself and Yogeshwar Dayal dissenting from the majority opinion of Justices P.B. Sawant for himself and Kuldeep Singh, B.P. Jeevan Reddy for himself and S.C. Agarwal, and, finally, S. Ratnavel Pandian. Although this seeming maze of judgments created some confusion among lay people about precisely what portions in the Supreme Court decision were the law, the debate has now been largely resolved. Jurist Soli Sorabjee wrote in a critique of the case:

*"The judgments of Sawant and Kuldeep Singh, JJ, to the extent they are not directly or by necessary implication inconsistent with judgments of Justices Jeevan Reddy and Agarwal, are part of the majority judgment and constitute the law of the land"* The language of S.R. Bommai is plain. *"In all cases where the support of the Ministry is claimed to have been withdrawn by some legislators," Justices Sawant and Kuldeep Singh held, "the proper course for testing the strength of the Ministry is holding the test on the floor of the House."* *"The assessment of the strength of the Ministry is not a matter of private opinion of any individual be he the Governor or the President"* (emphasis added). Justices Jeevan Reddy and

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<sup>17</sup> AIR 1994 SC 1918.

<sup>18</sup> (1977)3 SC 592.

*Agarwal underlined the floor test procedure: "Whenever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House" (emphasis as in the original). The sole exception to this will be a situation of "all-pervasive violence where the Governor comes to the conclusion - and records the same in his report - that for the reasons mentioned by him, a free vote is not possible."*

These simple legal mandates were before President Narayanan when he first ordered a brief on S.R. Bommai as BJP-BSP relations deteriorated in the State. Prime Minister I.K. Gujral proved receptive to the need for a floor test, but Defence Minister Mulayam Singh Yadav, backed by the Congress (I), insisted that the BJP Government be dismissed. Although legally in was wrong, Mulayam Singh was in a political sense entitled to suggest the course of action he did. In June 1995, his Ministry in Uttar Pradesh, deserted by the slippery BSP, became the first to be dismissed after S.R. Bommai was delivered. The Chief Minister was summoned to the Raj Bhavan at 4 p.m., on June 3rd and told to resign. Despite his explicit protest against the unconstitutionality of the action since S.R. Bommai made a floor test to his right, Governor Motilal Vora asserted that legal opinion stressed his discretionary powers in such situations (Frontline, June 30, 1995). The Supreme Court's verdict in the *S.R. Bommai case* sharply limited the constitutional power vested in the Central Government to dismiss a State government, but upheld the dismissal of four BJP Governments for going against the constitutional philosophy and provisions that were secular. Further, the Supreme Court, through its verdict in the *S.R. Bommai case* added federalism, democracy and secularism as components of the basic structure whilst upholding the pre-existing elements of democracy and sovereignty.

*L. Chandra Kumar v. U.O.I.*<sup>19</sup>

A 3-Judge Bench of the Supreme Court referred the matter to a larger Bench on the issues relating to:

1. It is pertinent to mention validity of Section 5(6) of the Administrative Tribunals Act, 1985, whereby a Single Member Bench of an Administrative Tribunal (such as CAT) was empowered to exercise powers of the Tribunal.

<sup>19</sup> *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

2. The second issue being whether the power of judicial review need not always be exercised by regular courts and the same can be exercised by an equally efficacious alternative mechanism (such as an Administrative Tribunal), as held by a 5-Judge Constitution Bench in the case of *P. Sampath Kumar v. Union of India*.<sup>20</sup>
3. Lastly, whether the Administrative Tribunals (such as CAT) established under the Administrative Tribunals Act, 1985, were equal in status to the High Courts, as held in the aforesaid case of *P. Sampath Kumar v. Union of India*.<sup>21</sup>

That in the said *S.P. Sampath Kumar* case, the Supreme Court had upheld the validity of Section 28 of the Administrative Tribunals Act, 1985, under which the jurisdiction of all courts except that of the Supreme Court under Article 136 with respect to matters falling within the jurisdiction of the tribunals concerned, was excluded. The power of judicial review over legislative action vested in the High Court under Article 226 and in Supreme Court under Article 32 is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded. The power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. Thus, through this decision not only did the Supreme Court adhere to the basic structure of the constitution by prioritizing judicial review whilst expanding its scope at the same time.

*I.R.Coelho v. State of T.N.*<sup>22</sup>

In this case the court was required to determine whether on and after 24th April, 1973 when Basic Structures Doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them in the Ninth Schedule and, if so, what is its effect on the power of judicial review of the court. A law that abrogates or abridges rights

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<sup>20</sup> *P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

<sup>21</sup> *Ibid*

<sup>22</sup> AIR 2007 SC 861.

guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The majority judgment in *Kesavananda Bharti's* case read with *Indira Gandhi's* case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge. All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently, even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure, if the fundamental right are taken away or abrogated, pertains to the basic structure. Justification for conferring protection is not the blanket protection on the laws included in the Ninth Schedule. The Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and the extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the 'rights test' and the 'essence of the right' test. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule. Hence through this decision the Supreme Court expanded the scope of judicial review and in essence expanded the scope of the basic structure.

*M. Nagaraj v. U.O.I.*<sup>23</sup>

In *M. Nagaraj v. Union of India*, the Supreme Court held that the State must demonstrate backwardness, inadequacy of representation and maintenance of efficiency before providing reservation in promotions. While upholding the constitutional validity of the amendments, the Supreme Court in *Nagaraj case*, made

<sup>23</sup> AIR 2007 SC 71

it very clear that Article 16 (4A), which was inserted through these amendments, was only an enabling provision. In essence, every time a government or the legislature sought to provide reservation in promotions under Article 16(4A), it would have to pass constitutional muster. While justifying each attempt to provide reservation in promotions, the state would have to demonstrate backwardness, inadequacy of representation and maintenance of efficiency. The court also noted in this instance that the amendment did not affect the basic structure of the Constitution.

## 6. Digression from Basic Structure

*Supreme Court Advocates on- Record association v. Union of India*<sup>24</sup>

This case dealt with the constitutionality of the National Judicial Appointments Commission Act. The court had to deal with the question of Judicial Independence under Article 124. The issue that arose was whether the Act infringed on the basic structure of the constitution. The court decided the case based on the decisions in:

1. *S. P. Gupta v. Union of India* - 1981 (also known as the Judges' Transfer case).
2. *Supreme Court Advocates-on Record Association v. Union of India* - 1993.
3. *In re Special Reference 1 of 1998*.

The Court held that the Act was unconstitutional as it affected judicial independence which was a component of the basic structure of the constitution. The case was widely criticised by the government as not conforming to the basic structure. The issue is twofold Firstly, whether judicial autonomy is a part of basic structure despite no such indication being given in the constituent assembly debates or in the text of Article 124. More importantly did the judiciary create a component of the basic structure by itself. The second issue is whether the court in giving its decision disregarded other elements of the basic structure like parliamentary sovereignty and representative democracy.

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<sup>24</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, WP (Civil) No.13 of 2015.

*Jagdambika Pal v. U.O.I.*<sup>25</sup>

The Supreme Court ordered that a floor test be carried out in case of *Jagdambika Pal v. State of U.P.* This decision was criticised as a violative of the *doctrine of separation of powers*. While the Constitution prohibits judiciary to look into matters of violation of Constitution when it is concerned with legislative act instead it is vice versa as in *Keshav Singh v. Speaker, Legislative Assembly*. The court in this case while conducting floor test in the legislative assembly had interpreted the Constitution as: "*Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law, the validity of any proceeding inside the legislative chamber, if his case is that the said proceeding suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinized in a court of law.*"

This was seen as an express violation of the *doctrine of separation of powers* which was already seen as a component of the basic structure. *P.U.C.L. v. U.O.I.*<sup>26</sup>

The Supreme Court in June asked the Centre to create a disaster mitigation fund to tackle drought- like situation and directed the Agriculture Ministry to hold a meeting within a week with affected states like Bihar, Gujarat and Haryana to assess the conditions. A bench headed by Justice M B Lokur, directed the Centre to also implement the provisions of Disaster Management Act and fix a time limit for declaration of drought on scientific grounds. It also asked the Centre to revise the drought management manual to provide effective relief to calamity-hit farmers and prepare a national plan to tackle the crisis. Angry about the judiciary's repeated lunges into executive and legislative terrain, Arun Jaitley said it all in one sentence: "*Step by step, brick by brick, the edifice of India's legislature is being destroyed*". He stated further that "*We have the National Disaster Response Fund and the State Disaster Response Fund and now we are being asked to create a third fund. The appropriation bill is being passed. Now outside this appropriation bill, we are being told to create this fund. How will I do that? India's budget-making is being subject to judicial review?*" This is a clear instance of the court violating the basic structure in terms of separation of powers.

<sup>25</sup> AIR 1998 SC 998.

<sup>26</sup> <http://www.firstpost.com/politics/supreme-court-arun-jaitley-article-356-bcci-ipl-rbi-dance-bars-2779546.html>

## 7. Judicial interference in recent times - *Vaunted or Un-vaunted*

In *Subramanian Swamy v. A Raja*<sup>27</sup> (2012) 9 SCC 255, a PIL was filed in the Supreme court with respect to the issue of corruption surrounding the matter of 2G spectrum allocations in 2002 by the government. The court went beyond mere judicial restraint and classified 2G spectrum as a natural resource. The court in its decision went on to hold public officials must be liable for the mismanagement of resources despite there being no clear law on the matter owing to the "public trust" doctrine. This again is an instance of the Supreme Court formulating its own rules and expanding its power not only to decided matters but also re-defining what constitutes natural resources. While the decision may be well reasoned, and perhaps was required considering the issues of corruption surrounding the case the digression from separation of powers in making purely policy based determinations is still a digression from the basic structure. In *Common Cause v. Union of India*<sup>28</sup>, a petition was filed in the Supreme Court with respect to the issue of corruption surrounding the matter of coal block allocations worth several lakhs of crores. The court in this instance found impropriety in the coal block allocations and cancelled the allocation. This again is an instance of the Supreme Court prioritising social welfare a key component of the basic structure over economic outcomes.<sup>29</sup> Despite the court being told that cancellation of coal block allocations would result in damage to the companies involved, the court held that allowing the current allocation to perpetuate would have harmful effects on the economy in the long run. Thus the court prioritised general welfare of the nation and its people over and above the private profits and losses of individuals. This can be seen as a form of strict adherence to the basic structure.

## 8. Conclusion

Thus the following issues become extremely important when considering the importance of the basic structure and its evolution as well as possible digression from the same.

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<sup>27</sup> *Ibid* Mate, M., "Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective" 12 *San Diego Int'l LJ* 175 (2010); Baxi, U., "Justice of Human Rights in Indian Constitutionalism: Preliminary Notes", *Modern Indian Political Thought* 263-284 (Delhi, Sage Publications 2006); Jayasurya, G., *Indian Judiciary: From Activism to Restraint* (Burlington Gower Publishers 2010).

<sup>28</sup> *Common Cause v. Union of India*, WP (C) NO.463/2012.

<sup>29</sup> *Ibid*

- Is the will of people undermined by Basic Structure Theory?
- Why the doctrine of "Political Questions" is not applied in India?
- Can the judiciary regulate the amending power and process?
- Is the Basic Structure doctrine a myth?

## INDIAN CONSTITUTION AND THE RESERVATION POLICIES IN INDIA: A REVIEW OF THE POSITION WITH SPECIAL REFERENCE TO THE OBC CREAMY LAYER CRITERIA

*Dr. Jyothi Vishwanath\**

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### 1. Introduction

*“It is against the fundamental principles of humanity, it is against the dictates of reason that a man should, by reason of birth, be denied or given extra privileges.” – Mahatma Gandhi*

Burdened with the nightmares of the centuries of social discrimination rooted in the Indian social structure, evolving and ensuring reservation policies as part of affirmative action post-independence was rendered a constitutional and social necessity. For ameliorating and alleviating the grave sufferings of the underprivileged and the exploited sections of the Indian society, unique reservation policies are presently in force. Protective discrimination principles were woven into the Indian Constitutional fabric with an excogitated objective of reconstructing and transforming the hierarchical Indian society and building a society, egalitarian in nature, cherished with the values of individual achievements, individual development, individual involvement in the nation building, equal opportunity for all and justice. Presently, affirmative action and reservation appears to be the sole tool, to eradicate the present and the continuing effects of the past discrimination against particular social segments in the country.

Affirmative action deciphers in India in the form of quota based reservations in the three major and prominent areas viz., education, jobs and legislative bodies.

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In the absence of proper and tested alternatives and bearing in mind the nature of India's social pulse, this triangular reservation policy appears to stay for the times to come. The reservation logic has been further refined with the introduction of the OBC [Other Backward Classes] Creamy Layer Criteria for preventing the stronger OBCs from cornering the quota benefits and for ensuring that the benefits of reservation reach the neediest in the backward classes. At times the reservation policies ensured under Indian Constitution have come in conflict with the issues of merit and competency.

Amidst this scenario, this paper embarks on an academic journey of analysing the affirmative action prevalent in India. It conceptualizes affirmative action and reservation; examines the need, evolution and the nature of the beneficiary groups, triangular protection principles in the areas of job, education and legislative bodies. It also analyses the origin, logic, relevance and scope of the OBC Creamy Layer Criteria. Finally it attempts to draw jurisprudential deductions for balancing the conflicting interests emerging due to the reservation policies in the country.

## 2. Conceptualization: Reservation and Affirmative Action

While addressing the graduating class at Howard University, President Johnson highlighted that civil rights alone cannot remedy discrimination thus: *"You do not wipe away the scars of centuries by saying: 'now, you are free to go where you want, do as you desire and choose the leaders you please.' You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race saying, 'you are free to compete with all the others' and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory but equality as a fact and as a result."*<sup>1</sup>

President John F. Kennedy was the first to utilize the term, 'affirmative action' in Executive Order 10925<sup>2</sup> in the year 1961 for ensuring affirmative action by

<sup>1</sup> <http://www.infoplease.com/spot/affirmativetimeline1.html> accessed 29 December 2015 at 10.47 p.m.

<sup>2</sup> *Ibid* signed on 6 March 1961, the Order created the Committee on Equal Employment Opportunity and mandated that projects financed with federal funds take affirmative action in hiring and employment, free of racial bias.

the government contractors in the employment of applicants and for treating employees without regard to their race, creed, colour or national origin.<sup>3</sup>

Affirmative action means enforcing equal opportunity.<sup>4</sup> It refers to a policy or programme seeking to redress past discrimination through active measures to ensure equal opportunity in education and employment, training for disadvantaged groups such as women, ethnic minorities etc.<sup>5</sup> Affirmative action or positive discrimination, known as employment equity in Canada, reservation in India and Nepal and positive action in United Kingdom is the policy of favouring members of a disadvantaged group who have suffered discrimination within a culture/system.<sup>6</sup> Affirmative action tends to protect people from the present effects stemming from past discrimination. According to the *New Webster Dictionary* reservation means, “keeping aside something for some specific purpose.”<sup>7</sup> Reservation refers to the act of reserving; keeping back or withholding.<sup>8</sup>

Mostly controversial in nature, affirmative action policies pervade most of the countries in one or the other form including India.<sup>9</sup> Racial quotas, gender quotas, religious and caste quotas rein affirmative action all over the globe.<sup>10</sup> Rampant slavery

<sup>3</sup> This executive order realized the government's intent to create equal opportunities for all qualified people. It was eventually amended and superseded by Lyndon B. Johnson's Executive Order 11246 which prevented discrimination based on race, colour, religion and national origin by organizations which received federal contracts and subcontracts. In 1967, Order was amended to include sex as well. -[https://en.wikipedia.org/wiki/Affirmative\\_action\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Affirmative_action_in_the_United_States).

<sup>4</sup> *Ibid*

<sup>5</sup> [www.thefreedictionary.com/affirmative+action](http://www.thefreedictionary.com/affirmative+action) accessed 12 December 2015 at 6.03 p.m.

<sup>6</sup> [https://en.wikipedia.org/wiki/Affirmative\\_action](https://en.wikipedia.org/wiki/Affirmative_action) accessed 20 October 2015 at 4.35 a.m.

<sup>7</sup> <https://latasinha.wordpress.com/2011/08/11/policy-of-reservations-in-government-jobs/>.

<sup>8</sup> *Supra Note 5*

<sup>9</sup> In *Barbara Grutter v. Lee Bollinger, et al.* [539 U.S. 306], the US Supreme Court held that University of Michigan Law School admissions program that gave special consideration for being a certain racial minority did not violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964; Brazil, Malaysia, South Africa are few other countries battling the arguments for and against affirmative action in their countries. Refer for details [http://www.alternet.org/story/16391/affirmative\\_action\\_in\\_other\\_countries](http://www.alternet.org/story/16391/affirmative_action_in_other_countries) (Last visited on 01 September 2017 at 6.29 p.m.).

<sup>10</sup> Brazil has Vestibular i.e., a competitive examination conducted for selection of the students. Canada has Employment equity (Canada) which affects aboriginals and minorities. China reserves positions for ethnic minorities and women. Finland has quotas for Swedish speakers. Germany has quotas in their Gymnasium system. Israel has affirmative action. Japan has policies to help the Burakumin who are considered the outcaste group. Macedonia has quotas for Albanians. Malaysia has the Malaysian New Economic Policy. New Zealand has affirmative action for Maoris and Polynesians. Norway requires 40% of the Public Limited Companies boards to be women. Romania has quotas for Romas. South Africa has Employment Equity. South Korea boards to be women. Romania has quotas for Romas. Sri Lanka has rules for Christians and Tamils. Sweden has affirmative action for Chinese and North Koreans. United Kingdom has the Equality Act 2010 and US has affirmative action. -<https://www.quora.com/Which-countries-other-than-India-have-caste-based-reservation-systems> (Lat visited on 01 September 2017 at 5.45 p.m.).

and segregation has led to affirmative action in the European world while economic backwardness, social exclusion, segregation, discrimination and exploitation of certain communities due to caste system have necessitated affirmative action in India. Reservation policies in India aim at uplifting the submerged sections of the society and bringing them back into the national mainstream by reserving jobs and other facilities in various institutions/organisations. Reservation in India is a form of unique caste based affirmative action designed to improve the well-being of backward and under-represented communities.

### 3. Need, evolution and beneficiaries

For understanding the rationale of reservation in India, it is inevitable to trace the evolution of the caste system since the roots of reservation lie in the latter. The basis of social stratification can be either slavery, estates, caste, social class and status.<sup>11</sup> The Hindu society in India was stratified on the basis of two fundamental elements. One being the natural endowment of man and the other pertains to his nurture and upbringing together known as *Varna Ashrama Vyavastha* grounded on differences in caste and differences in stages of life. Dharma was supposed to be prescribed for each class and each stage of an individual's life. According to *Ashrama dharma*, for achieving *moksha*, one has to cross four stages of life viz., *Brahmacharya Ashrama* or student stage; *Grihastha Ashrama* or householder stage; *Vanaprastha Ashrama* and *Sanyasa Ashrama*. *Varnadharma* decides an individual's position in the society.<sup>12</sup>

The initial distinction of people into two varnas viz., the fair *Aryans* and the dark *Dasas* later developed into three groups as referred in the *Rig-Veda* viz., *Brahma i.e.*, Priests, *Ksatra i.e.*, king or rulers and *Vis i.e.*, common people. Later developed the *chaturvarnas i.e.*, the four classes as specified in *Purusasukta* hymn.<sup>13</sup>

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<sup>11</sup> L.Devi., (Ed.) (1998), *Social Stratification Setup and New Approaches to Sociology*. Lucknow: Institute for Sustainable Development and New Delhi: Anmol Publications, p.1

<sup>12</sup> B.Kuppuswamy., (1989). *Social Change in India*. Delhi: Konark Publications, p.183-84; Sharma, A. (2004). *Hinduism and Human Rights: A Conceptual Approach*. New Delhi: Oxford University Press, p.14.

<sup>13</sup> M.N.Srinivas., (1991). *India: Social Structure*. Delhi: Hindustan Publishing Corporation, p.3; Devi, *Supra* Note 11, p.43.

Literally meaning colour in Sanskrit, Varna originally referred to the Brahmanical schematic layer wise social division as outlined in the Brahmanical texts as *Brahmana*, *Kshatriya*, *Vaisya* and *Sudra*.<sup>14</sup> Manusmriti.X.4 provides that the first three castes are the twice-born but the fourth *i.e.*, the *Sudra* has one birth only; there being no fifth caste.<sup>15</sup> Later a fifth varna, comprising the 'untouchables' was added to the varna divisions of the Hindu society which was outside the scope of the caste society.<sup>16</sup>

According to the *Purushasukta*, the *purusha* or *Brahma i.e.*, creator<sup>17</sup> produced the *Brahmana* from his mouth, *Kshatriya* from his arms, *Vaisya* from his thighs and the *Sudra* from his feet<sup>18</sup> and allotted separate duties to them for preserving the universe. These four Varnas were created for the upkeep and betterment of society corresponding to the four limbs of the Lord.<sup>19</sup> Birth of all the four varnas from different parts of one and the same *purusha* indicates their mutual interdependence and hierarchical order. In later times, the whole *Ashrama* system declined but the Varna system started weakening, crystallized itself and gradually degraded into a rigid caste system.<sup>20</sup>

The deed based Varna system was much flexible since it allowed change of Varna while little mobility was allowed amongst castes. With narrowing down of the social attitude, changing Varna was rendered difficult. *Sudras* were placed at the lower station in social system but were not looked down upon. Untouchability was not in existence. Rather the responsibility of looking after the welfare of the *Sudras* was shared by the three Dwija communities. With the changing times, willingness to change ones varna started weakening. Children of brahmins began to be identified with the specific tasks of brahminhood and those of kshatriya

<sup>14</sup> U.Chakravarti., (2003). *Gendering Caste: Through a Feminist Lens*. Calcutta: Stree, p.9; Gupta, D. (Ed.) (1991), *Social Stratification*. New Delhi: Oxford University Press, p.28-29.

<sup>15</sup> G.Buhler. (1990), *The Laws of Manu*, New Delhi: Ahuja Book Company, p.402.

<sup>16</sup> *Supra* Note 14

<sup>17</sup> Amarpal Singh., *Affirmative Action Programme: A Comparative Study of India and U.S*. Masters Paper, European Academy of Legal Theory Brussels.

<sup>18</sup> Apastamba, 1.1.4-6; Baudhayana, 1.16.1; Vasistha, 2.1-2- Olivelle, Patrick. (Ed. and Tr.) (2005). *Dharmasutra Parallels*. Delhi: Motilal Banarsidass Publishers., p.41.

<sup>19</sup> Brahmanasya mukhamaseet Bahu Rajanyah Kritah uru tadasya yadvaisyah padabhyam shudro ajayat. Lokanam tu vivardhyartham mukhbahurupadtah Brahmanasya Kshatriyam vaishyam shudram cha nikhartayat

<sup>20</sup> Kireet Joshi., (1991). *The Veda and the Indian Culture*, New Delhi: Rashtriya Veda Vidya Pratishthan and Delhi: Motilal Banarsidass Publishers, p.53-54.

with the tasks for kshatriyahood. In the hitherto deed based varna system, birth assumed importance for determining the status of an individual. Rigidity in marital relations, prohibition of inter-caste marriages transformation of varna system into caste system was followed by formation of clusters of jatis (castes) and upajatis (sub-castes). Duties of different castes and sub-castes were fixed and at this stage of social development appeared untouchability. The social status of *Sudras* recorded a steep downfall.<sup>21</sup>

Birth being the basis of the Indian caste system,<sup>22</sup> membership of a particular *caste* is decided by one's birth and not by the aptitudes/skills. Castes are classified as highest, upper, middle and the lowest castes. Brahmans, rajputs, banias, kayasthas and Kshatriyas constitute the highest caste. Jats, yadavs, kurmis constitute the middle castes. *Harijans* or the untouchables constitute the lowest caste.<sup>23</sup> Presently the Indian society is a conglomeration of Hindus, Muslims, Scheduled Castes (hereinafter referred as SCs), Scheduled Tribes (hereinafter referred as STs) and Other Backward Classes (hereinafter referred as OBCs), members of other religious groups.<sup>24</sup>

Despite genuine reformative efforts to eradicate the caste based discriminations initiated by many social reformers including Mahatma Gandhiji, Swami Dayanand Saraswati, Jyotiba Phule, Dr. B. R. Ambedkar, Acharya Vinoba Bhave,<sup>25</sup> it has been impossible to wipe out the signs and effects of centuries old exploitation of the lower castes in India. Ritual status, control/lack of control of productive resources/power, peculiar notions of purity of blood and nature of work contribute to the internal differences within the caste system and its hierarchical nature.<sup>26</sup> With concentration of privileges at the top and disabilities at the bottom, caste system nurtures institutionalized inequality, guaranteeing differential access to the valued

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<sup>21</sup> *Supra* Note 17.

<sup>22</sup> After their advent into India in the 16<sup>th</sup> century, Portuguese referred to the separate groups of the Hindu community as *castas*, thereby meaning tribes, clan or families and this term was later modified as castes for the Hindu social group. –Sharma (2004).

<sup>23</sup> *Supra* Note 12 at 184-85.

<sup>24</sup> Sumedha Upadhyay., *Reservation: Understanding The Past, Present And Solutions* - <http://www.youthkiawaaz.com/2011/02/educational-reservations-india-solutions/>.

<sup>25</sup> <http://www.culturalindia.net/reformers/>.

<sup>26</sup> Chakravarti., *Supra* Note 14.

things of life.<sup>27</sup> With the passing times post-independence, disparity and inequality grew largely among the different castes. Being illiterate and economically deprived, *Sudras* were discriminated in every sphere of life, rendering their condition pathetic. Eventually, the horrendous caste system and untouchability have grown such deep roots in the Indian social system that education, economic development, political awareness, legal institutions, constitutionalism and even modernisation have utterly failed to have any impact on it. Caste system is presently the hard fact of Indian society, greatly responsible for introduction of reservation policies in pre and post independent India.

With transformation in the governmental orientation from the laissez-faire approach prevalent in post-II World War period to a welfare state in the post-independence era, need was felt to create an atmosphere for ensuring social, political and economic justice and improvement of the exploited sections of the Indian society. Government assumed responsibility of ensuring welfare of the citizens from their birth to death. Reservation policy stands out as one of the important initiative in this regard.<sup>28</sup> The present set of reservation policies has more than hundred year's history.<sup>29</sup> Reservations in jobs, educational institutions and legislatures and in the local self-governing institutions, better known as Panchayati Raj institutions, for SCs, STs, OBCs and women can definitely be considered as a grand experiment by any standard.

#### 4. Constitutional Legal Framework

Founding fathers' of the Indian Constitution were well aware about the miserable and appalling conditions of the backward groups who lagged far behind, segregated from national and social mainstream due to social oppression and economic exploitation for centuries. These communities were forced to lead a life of penury and were coerced to learn and adopt the family/caste trade or

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<sup>27</sup> Chakravarti., *Supra* Note 14 at 10 and 12.

<sup>28</sup> *Supra* Note 7.

<sup>29</sup> Initially the policy was introduced by the colonial administration to divide and rule the local people and perpetuate their authority. Initially it was a mechanism to maintain the balance of power amongst different sections of society and redress the inequality in public services. In the post-independence period protective discrimination policies were adopted as a measure of social engineering and for the upliftment of weaker and deprived sections.

occupation.<sup>30</sup> For furnishing a fair start to the under privileged classes in respect of education, employment and legislative bodies, Constitution framers allowed the Central and State Governments to make provisions for reservations with a sacrosanct aim to uplift and put them on par with the rest of the society.<sup>31</sup>

The Indian Constitution creates the legal base for according protective discrimination to the weaker sections through various provisions. The preamble to the Indian Constitution runs thus: *"We the People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic"*<sup>32</sup> and to secure to all its citizens: justice, social, economic and political... " Social and economic justice is sought to be achieved by providing reservations in the educational institutions and jobs and through Directive Principles of State Policy contained in Part IV of the Constitution. Political justice is ensured by reserving seats and ensuring a minimum representation to the deprived and exploited sections of the Indian society in the legislatures and other political bodies. Article 15(4) primarily relates to educational opportunities and Article 16(4) to job opportunities. Directive principles as laid down in Articles 38, 39, 41, 43, 45, 46 guide the government in protecting the ignored classes.

Article 15(4) states that *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 Castes and the Scheduled Tribes.*<sup>33</sup> Article 15(5) states that *Nothing in this Article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.*<sup>34</sup>

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<sup>30</sup> *Ibid*

<sup>31</sup> *Supra* Note 7.

<sup>32</sup> The Constitution (Forty-Second Amendment) Act, 1976 has inserted the words secular and socialist and it came into effect from 3 January 1977.

<sup>33</sup> This sub clause was inserted by the Constitution (First Amendment) Act, 1951.

<sup>34</sup> This provision was inserted by the Constitution (Ninety-third Amendment) Act, 2005.

Article 16(4) provides that *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.* Article 16(4A)<sup>35</sup> provides that *nothing in this article shall prevent the State from making any provision for reservation, in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.* Article 16(4B)<sup>36</sup> provides that *Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.*

In the aforementioned provisions, the expression “*making any special provision*” is an open ended provision, enabling the government to provide infinite number of facilities for promoting the interests of socially and educationally backward classes like waiver of fees, waiver of age requirements, special coaching, scholarships, grants, loans, concession in eligibility criteria etc.

The backwardness envisaged under Article 15 and 16 is social and educational and not either social or educational. For a class to be identified as backward, it should be both socially and educationally backward. Many factors like education, poverty, caste, occupation, place of habitation all decide backwardness but none of them can be the sole criteria to stamp backwardness on any community. Further Article 15(4) does not speak of castes but only speaks of classes and that caste and class are not synonymous.<sup>37</sup>

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<sup>35</sup> Article 16(4)(A) was inserted by the Constitution (Seventy-seventh Amendment) Act, 1995.

<sup>36</sup> This provision was inserted by the Constitution (Eighty-first Amendment) Act, 2000.

<sup>37</sup> Poverty alone cannot be the test of backwardness in India else large sections of the population would fall under the backward category since poverty is rampant in India. Though caste may be a relevant factor in defining backwardness, it cannot be the sole criterion.

Article 46 provides that *State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation.*

The Indian Constitution provides specific representation to certain communities through reservation of seats in the Parliament *vide* Article 330 and in the State Legislative Assemblies *vide* Article 332. Article 330(1) provides that seats shall be reserved in the House of the People for the SCs, STs except the STs in the autonomous districts of Assam. Article 330(2) provides that the number of seats reserved in any State/Union territory for the SCs STs under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State/Union territory in the House of the People as the population of the SCs in the State/Union territory or of the STs in the State/Union territory or part of the State/Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State/Union territory.<sup>38</sup> Article 331 provides for reservation of two seats for the Anglo-Indian community by nomination to the House of the People by the President.

Article 332 provides, that seats shall be reserved for the SCs and the STs, (except the STs in the autonomous districts of Assam), in the Legislative Assembly of every State. Seats are also reserved for the autonomous districts in the Legislative Assembly of the State of Assam. The number of seats reserved for the SCs/ STs in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the SCs or STs in the State or part of the State in respect of which seats are so reserved, bears to the total population of the State.

Article 334 provides, that the reservation of seats for the SCs and STs in the House of the People and State Legislative Assemblies and the representation of the Anglo-Indian community in the House of the People and State Legislative Assemblies by nomination, shall cease to have effect on the expiration of a period of [sixty years]<sup>39</sup> from the commencement of this Constitution:

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<sup>38</sup> This provision was inserted by the Constitution (Seventh Amendment) Act, 1956.

<sup>39</sup> This period has been enhanced every ten years.

The framers of the Indian Constitution were well aware about the need of maintaining and retaining efficiency of administration in the public institutions. For this, Article 335 was inserted in the Constitution which provides the claims of the members of the SCs and the STs 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/State. Despite this, the government can make any provision in favour of the members of the SCs and STs for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

The reservation policies gained ground with the various reports submitted by different Commissions appointed from time to time. The First Backward Classes Commission was set up by a presidential order on 29<sup>th</sup> January 1953 under the chairmanship of Kaka Kalelkar. The Commission submitted its Report on 30<sup>th</sup> March 1955. It had prepared a list of 2,399 backward castes/communities for the entire country, of which 837 had been classified as the “most backward”. The Commission recommended the undertaking of caste-wise enumeration of population in the census of 1961; relating social backwardness of a class to its low position in the traditional caste hierarchy of Indian society; treating all women as a class as “backward”; reservation of 70% seats in all technical and professional institutions for qualified students of backward classes and reservation of vacancies in all government services and local bodies for other backward classes.<sup>40</sup>

In *Ashoka Kumar Thakur v. Union of India*,<sup>41</sup> Supreme Court stamped its assent to the Government order for implementation of the recommendations of the Mandal commission report but limited overall reservation to 50% and also inserted an economic exclusion clause under the name of “creamy layer”. It later reiterated its decision of fixing the upper limit while disallowing the pleas of the Governments of Tamil Nadu and Karnataka for increasing the quota beyond 50%.<sup>42</sup>

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<sup>40</sup> <http://www.chakranews.com/first-backward-classes-commission-census-separation/2857> accessed 30 on December 2015 at 12.10 p.m.

<sup>41</sup> (2014) 1 SCC 384

<sup>42</sup> *Supra* Note 45

Reservations in educational institutions and job placements are based on a variety of criteria. The quota system sets aside a proportion of all possible seats/positions for members of a specific group. Those not belonging to the designated communities can compete only for the remaining positions while members of the designated communities can compete for either reserved or open positions.<sup>43</sup>

The Central Educational Institutions (Reservation in Admission) Act, 2006 governs reservation in admission of the students belonging to SCs, STs and the Other Backward Classes of citizens in certain educational institutions like central universities, institution of national importance, deemed universities etc. Section 3 lays down the seat matrix for admission purposes. It provides that out of the annual permitted strength, in each branch of study or faculty, 15% of the seats shall be reserved for the SCs; seven and a half (7.5%) shall be reserved for STs and 27% shall be reserved for the Other Backward Classes. It excludes minority educational institutions and course requiring high levels of specialisation from the purview of reservation.<sup>44</sup>

Presently, in political institutions consisting of the elected representatives of the people, admission in educational institutions and reservations in jobs, Central Government reserves 22.5% of available seats for SC and ST, (7.5% for STs, 15% for SCs). This reservation percentage has been raised to 49.5% by including an additional 27% reservation for OBCs. This ratio is maintained even in Parliament and all elections where a few constituencies are earmarked for those from certain communities (which will next rotate in 2026 per the Delimitation Commission). Thus, presently reservation stands at 50% (OBC: 27.5%, SCs: 15%, ST: 7.5%) but this varies from state to state. In the absence of a well-defined policy, every State is applying its own criteria in providing reservation in jobs and education.<sup>45</sup>

Despite Supreme Court cap of 50% on reservations, there are states exceeding this limit and cases concerned to it pending in Supreme Court. For example, the caste-based reservation stands at 69% and the same is applicable to about 87% of

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<sup>43</sup> [https://en.wikipedia.org/wiki/Reservation\\_in\\_India](https://en.wikipedia.org/wiki/Reservation_in_India) accessed 20 October 2015 at 4.45 a.m.

<sup>44</sup> Section 4

<sup>45</sup> For expanding their vote banks, the different state governments have overplayed the just principle of protective discrimination. - R.D.Sharma., *Urgent Need for consensus*. Deccan Herald, Bangalore. 17 November 2015, p.10

the population in the State of Tamil Nadu. The exact percentages vary from state to state and are briefly enumerated below:

**State wise reservation quota in jobs and educational institutions as per the Sachar Committee Report<sup>46</sup>**

| Sl.No | State            | % of Reservation |     |     |       |
|-------|------------------|------------------|-----|-----|-------|
|       |                  | SC               | ST  | OBC | Total |
| 1.    | India            | 15               | 7.5 | 27  | 49.5  |
| 2.    | West Bengal      | 22               | 6   | 7   | 35    |
| 3.    | Kerala           | 10               |     | 40  | 50    |
| 4.    | Uttar Pradesh    | 21               | 2   | 27  | 50    |
| 5.    | Bihar            | 15               | 1   | 34  | 50    |
| 6.    | Assam            | 7                | 15  | 15  | 37    |
| 7.    | Jharkhand        | 11               | 27  | 22  | 60    |
| 8.    | Karnataka        | 15               | 3   | 32  | 50    |
| 9.    | Uttaranchal      | 19               | 4   | 14  | 37    |
| 10.   | Delhi            | 15               | 7.5 | 27  | 49.5  |
| 11.   | Maharashtra      | 13               | 7   | 32  | 52    |
| 12.   | Andhra Pradesh   | 15               | 6   | 25  | 46    |
| 13.   | Gujarat          | 7                | 15  | 27  | 49    |
| 14.   | Rajasthan        | 15               | 7.5 | 27  | 49.5  |
| 15.   | Madhya Pradesh   | 16               | 20  | 14  | 50    |
| 16.   | Haryana          | 15               | 7.5 | 27  | 49.5  |
| 17.   | Tamil Nadu       | 18               | 1   | 50  | 69    |
| 18.   | Orissa           | 15               | 7.5 | 27  | 49.5  |
| 19.   | Himachal Pradesh | 15               | 7.5 | 5   | 27.5  |
| 20.   | Chattisgarh      | 15               | 18  | 14  | 47    |
| 21.   | Punjab           | 20               | 5   | 22  | 47    |

The Sachar Committee lays down in the aforementioned chart the reservation matrix in India in jobs and educational institutions.<sup>47</sup> Reservation is also provided to the religious minorities, on the basis of domicile, to terrorist victims from Kashmir, *e.g.* in Punjab, single girl child, migrants from the state of Jammu and Kashmir, sons/daughters/grandsons/granddaughters of freedom fighters, physically

<sup>46</sup> [http://minorityaffairs.gov.in/sites/upload\\_files/moma/files/pdfs/sachar\\_comm.pdf](http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf) accessed on 24 November 2015 at 2.13 a.m.

<sup>47</sup> The Rajinder Sachar Committee, appointed in 2005 by the then Indian Prime Minister Manmohan Singh, was commissioned to prepare a report on the latest social, economic and educational conditions of the Muslim community of India. It was headed by former Chief Justice of the Delhi High Court Rajinder Sachar with six other members and it submitted report on 30 November 2006. -<http://www.minorityaffairs.gov.in/sachar> accessed on 1 January 2016 at 7.11 p.m.

handicapped, sports personalities, ex-serviceman, dependents of armed force personnel killed-in-action, repatriates and woman. Further Non-Resident Indians (NRIs) have a small percentage of reserved seats in educational institutions.

Article 330 provided for reservation in Legislature for ten years unless at the end of this period the reservation is continued by an amendment of the Constitution. However, the Constitution was amended again and again in 1961, 1971, 1981, 1991 and 2001 to extend this period for another ten years at each instance. It is felt that the handicaps and disabilities under which these people live have not yet been removed. This necessitates reservation for some time more for ameliorating their condition and they may catch up with the rest of the nation.

Presently out of 543 seats in Indian parliament, 84 (15.47%) are reserved for SCs/Dalits and 47 (8.66%) for STs/Tribes. Allocation of seats for SCs and STs in the Lok Sabha is made on the basis of proportion of SCs and STs in the State concerned to that of the total population *vide* Article 330 read with Section 3 of the Representation of People Act, 1950. The fact that reservation of seats for SCs and STs in the legislatures is a temporary measure substantiates that these communities improve and assimilate themselves fully in the political and national life of the country as early as possible.<sup>48</sup> These reservations ensure presence of minimum number of representatives of these communities. The claim of eligibility for reserved seats does not exclude the claim for the general seat. It is an additional claim obtainable by way of merit and work. Candidates of general category are not eligible to contest from reserved constituencies. Elections to the reserved seats are held on the basis of single electoral roll and each voter in the reserved constituency is entitled to vote. There is no separate electorate. Thus to elect a person belonging to reserved castes and tribes to a reserved seat, all the voters in the constituency have a right to vote.

In case of municipal elections and other local bodies elections, constituencies are known as Wards. Thus, there may be as many Wards/Constituencies as the number of elected seats in the elected body. A large number of seats in the Parliament, State Assemblies, Municipalities and village level institutions are reserved for Dalits or SCs and Adivasis or STs.

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<sup>48</sup> *Supra* Note 17

The Women's Reservation Bill or the Constitution (108<sup>th</sup> Amendment) Bill, 2008 proposing to reserve 33% of all seats in the Lok Sabha and in all state legislative assemblies for women is pending since long.<sup>49</sup> The seats to be reserved in rotation will be determined by draw of lots in such a way that a seat shall be reserved only once in three consecutive general elections. It has been passed by Rajya Sabha on 9<sup>th</sup> March 2010 amid stiff opposition by Samajwadi Party, Rashtriya Janata Dal and Janata Dal (U). The bill seeks to reserve 181 of the 543 Lok Sabha seats and 1,370 out of a total of 4,109 seats in 28 state assemblies for women. The Parliamentary Standing Committee on Law and Justice and Personnel recommended passage of the Bill in December 2009 and the Bill has been cleared by the Union Cabinet on 25 February 2010<sup>50</sup> but till date Lok Sabha has not voted on the Bill.<sup>51</sup> Two other bills - the Constitution (110<sup>th</sup> Amendment) Bill, 2009 and the Constitution (112<sup>th</sup> Amendment) Bill, 2009, respectively seeking to increase the reserved seats for women in rural panchayats and urban local bodies from one-third to half of the total number of seats too has lapsed. Currently, women constitute 9% of the Lok Sabha, 10% of the Rajya Sabha and 7% of the state legislative assemblies.

## 5. OBC Creamy Layer Criteria

The Central Government has published Central List of OBCs for all the 31 states.<sup>52</sup> As on 17<sup>th</sup> February 2014, around 199 castes find place in the Karnataka list *vide* different Central Government resolutions. Presumably, the number of castes totally included under the OBCs in all the states is bound to be definitely huge, unimaginable and complex.<sup>53</sup> Huge number of castes and vast population covered

<sup>49</sup> Similar Bills have been introduced thrice before in the late 90's but lapsed with the dissolution of the respective Lok Sabhas. -<http://www.prsindia.org/billtrack/womens-reservation-bill-the-constitution-108th-amendment-bill-2008-45/> accessed on 1 January 2016 at 5.27 p.m.

<sup>50</sup> [www.thehindu.com/news/national/amendments-to-empower-women/article876065.ece](http://www.thehindu.com/news/national/amendments-to-empower-women/article876065.ece) accessed on 01 September 2017 at 4.25 a.m.

<sup>51</sup> <http://www.thehindu.com/news/national/womens-reservation-bill-the-story-so-far/article6969294.ece> (Last visited on 1 January 2016 at 5.22 p.m.).

<sup>52</sup> For details refer [http://www.ncbc.nic.in/User\\_Panel/CentralListStateView.aspx#](http://www.ncbc.nic.in/User_Panel/CentralListStateView.aspx#) (Last visited on 18 September 2016 at 7.08 p.m.).

<sup>53</sup> The matter is rendered complex since the lists of OBCs is maintained by both National Commission for Backward Classes [NCBC] and individual states. Further the central list does not always reflect the state lists and both can differ significantly. A community identified as a nationally recognized OBC in the NCBC central list may be so recognized only in specific states or only in limited areas within specific states.

under these castes pose the risk of same persons enjoying the benefit of reservation at the cost of the weaker persons therein. This necessitates excluding the richer section from these castes from claiming reservation so that the financially weaker persons among them enjoy the benefit of reservation. This principle of excluding the richer sections is referred to as the OBC Creamy Layer Criteria.

Creamy layer refers to the relatively wealthier and better educated members of the OBCs who are purposely kept out of the reservation benefits in educational institutions and jobs.<sup>54</sup> The term creamy layer was for the first time used by the Sattanathan Commission in 1971,<sup>55</sup> which directed that the creamy layer should be excluded from the reservation quotas of civil posts and services granted to the OBCs.<sup>56</sup> Implemented by the UPA government in 1993, the Creamy Layer is the income ceiling separating the well-off OBC candidates from the poor who are eligible for quota benefits.<sup>57</sup>

Noticeably the Creamy Layer concept currently applies only to the OBCs and does not apply to the Scheduled Castes and Scheduled Tribes.<sup>58</sup> Further, it also does not apply to Muslims, Christians and Sikhs since, castes does not exist among these communities and hence caste cannot be the basis either for providing reservation or for excluding from reservation amongst them.<sup>59</sup> 27% seats in government jobs and educational institutions are reserved for OBCs provided the annual income of the family is up to rupees six lakh. Those who earn above that are referred to as the

<sup>54</sup> <https://www.quora.com/What-is-the-creamy-layer-and-the-non-creamy-layer-in-the-OBC-category> (Last visited on 18 September 2016 at 8.49 p.m.).

<sup>55</sup> The Tamil Nadu Backward Class Commission was constituted by the Government of Tamil Nadu under the Chairmanship of A.N.Sattanathan.

<sup>56</sup> <https://www.quora.com/What-is-the-creamy-layer-and-the-non-creamy-layer-in-the-OBC-category>. (Last visited on 18 September 2016 at 8.49 p.m.).

<sup>57</sup> Cithara Paul, *Storm on horizon? OBC creamy layer cap set to go up to Rs 8.50 lakh* -<http://www.newindianexpress.com/nation/Storm-on-horizon-OBC-creamy-layer-cap-set-to-go-up-to-Rs-8.50-lakh/2016/06/03/article3463998.ece> (Last visited on 18 September 2016 at 7.29 p.m.).

<sup>58</sup> Reservations for SC/ST are not for their economical benefits but for their social upliftment. Therefore the state cannot impose creamy layer concept amongst them. Imposing the creamy layer criteria on them will defeat the sole purpose of social upliftment and the spirit of the Constitution. As held by Supreme Court in *Ashoka Kumar Thakur v. Union of India* [(2008) 4 S.C.R.], Creamy layer principle is one of the parameters to identify backward classes and it cannot be applied to STs and SCs as they are separate classes by themselves.

<sup>59</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477, 1992 Supp 2 SCR 454; the judgement was delivered on 16<sup>th</sup> November 1992.

creamy layer.<sup>60</sup> Even certain categories of persons holding prominent positions are covered under the Creamy Layer irrespective of their income.

In *State of Kerala v. N.M.Thomas*,<sup>61</sup> Justice Krishna Iyer observed that *"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 among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation 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."* In the *Indra Sawhney v. Union of India*,<sup>62</sup> it was emphasised that *"the economic criterion is an important one and must be applied in determining backward classes and also for excluding those sections or identified groups who may for the sake of convenience be referred to as the 'creamy layer'."*

Income criterion for creamy layer was first notified at Rs.1.00 lakh per annum in September 1993. This was enhanced to Rs.2.5 lakh in March 2004 and thereafter to Rs.4.5 lakh in October 2008 and Rs.6 lakh in May 2013. The National Commission for Backward Classes has proposed to raise the income ceiling from the present 6 lakhs to 15 lakhs in its Supplementary Report on the Review Criterion for determining the creamy layer, 2015.<sup>63</sup> It is also proposed to include the children of chairpersons and members of the Central and State Administrative Tribunals, sitting MPs under the creamy layer. The matter has been examined in the Ministry of Social Justice and Empowerment in consultation with

<sup>60</sup> <http://economictimes.indiatimes.com/news/politics-and-nation/government-may-relax-creamy-layer-norms-for-obc-reservation/articleshow/53896254.cms> (Last visited on 18 September 2016 at 8.53 p.m.).

<sup>61</sup> AIR 1976 SC 490; 1976 SCR (1) 906.

<sup>62</sup> *Infra* Note 65.

<sup>63</sup> The Report is submitted to the Central Government and is under consideration.

other Ministries/Departments concerned for taking a view on the enhancement of income ceiling. The level of enhancement and the revised income ceiling will be notified by the Government in due course after approval of the Cabinet.<sup>64</sup> With a large number of vacancies in government jobs meant for OBCs remaining unfilled for want of candidates necessitates relaxing the creamy layer criterion by raising the income ceiling.<sup>65</sup>

The Office Memorandum issued by the Department of Personnel and Training<sup>66</sup> for the first time, officially dealt with the criteria for exclusion of the socially advanced persons/sections from the benefits of reservations for OBCs in civil posts and services under the Government of India. The memorandum excluded certain persons and sections from the quota of 27% reservation earmarked for the OBCs. The Schedule appended to this Memorandum clearly chalks out the criteria for excluding different categories of persons. They are enumerated below:

1. *Constitutional Posts*: Sons and daughters of President/Vice President of India, judges of the Supreme Court and High Courts, Chairman/Members of UPSC, State Public Service Commission, Chief Election Commissioner, Comptroller and Auditor General of India.

2. *Service Category (Direct Recruit)*: Sons and daughters of parents both/ either of whom is a Class I officer. If both the parents are such officers and have died or suffer permanent incapacitation; if a lady belonging to OBC category has married a Class I Officer, then they are not excluded. Further sons and daughters of parents both of whom are Class II Officers; parents of whom only the husband is a Class I Officer and he gets into Class I at the age of 40 or earlier are also covered.

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<sup>64</sup> <http://www.govttempdiary.com/2016/07/increase-in-income-limit-for-obc-non-creamy-layer/20177> (Last visited on 18th September 2016 at 8.43 p.m). Cithara Paul., *Supra* Note 63.

<sup>65</sup> <http://economictimes.indiatimes.com/news/politics-and-nation/government-may-relax-creamy-layer-norms-for-obc-reservation/articleshow/53896254.cms> . (Last visited on 18<sup>th</sup> September 2016 at 8.53 p.m.).

<sup>66</sup> Department of Personnel and Training O.M.No.36012/22/93- Estt. (SCT) dated the 8<sup>th</sup> September 1993 was issued to all the Ministries and Departments. This memorandum was issued in consequence of the recommendations of the Expert Committee which was constituted following the Supreme Court Judgement in *Indira Sawhney and others v. Union of India and others* (Writ Petition (Civil) No.930 of 1990).

*Employees in Public Sector Undertakings:* Children of officers in PSUs, Banks, Insurance, Organisations, Universities subject to the income ceiling specified by the Government from time to time.

- I. *Armed Forces/Para Military Forces:* Sons and daughters of parents either/ both of whom is in the rank of Colonel and above in the Armed Forces/ Para Military Forces.
- II. *Professional Class:* Sons and daughters of doctors, lawyers, chartered accountant, financial/management consultant, dental surgeon, engineer, architect, computer specialist, film artist, author, playwright, sports person, media professional subject to the income ceiling specified by the Government from time to time.
- III. *Property Owners:* Sons and daughters of persons to a family which owns only irrigated land which is equal to or more than 85% of the statutory area; owners of coffee, tea, rubber, mango, citrus, apple plantations subject to the income ceiling specified by the Government from time to time
- IV. *Income Test:* Sons and daughter of persons having gross income above the ceiling,<sup>67</sup> for a period of three consecutive years, as specified by the Government from time to time.

## 6. Analysis and Ways forward

Allotment of social goods is governed by many principles and ideologies. Meritorian Principle emphasises allotment of social goods on the basis of one's merit/ability, whether natural or acquired. Individual merit reflecting in the qualifying tests along with knowledge test can be criteria for admitting/selecting students/employees to higher institutions/ employments. Personal characteristic of an individual pertaining to his birth, race, colour, sex, caste is not considered under this ideology. Rights argument alleges that, affirmative action in favour of one group is discriminatory against others denied of the same benefits and that is itself denial of equality, which is the right of every individual as an individual and not as a member of any group. Denying or conferring benefits simply because one belongs to an advanced group or to a backward group negates right to equality.

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<sup>67</sup> This ceiling was initially fixed at Rs.1.00 Lakh and has been revised from time to time.

Efficiency argument raises the conflict between efficiency and social justice and provides that entry of a less meritorious affects the efficiency of the institutional system. Institutions like courts, hospitals, banks, universities, laboratories, posts and telegraph *etc* are mandatory for a healthy social life. Reservation Policy aims at improving the lot of backward sections of society and empowering them for a better future. For a successful administration the keynote is efficiency which means right people on right positions at right time. An efficient administration can provide convenience to the public at large and attain the developmental and welfare goals of the nation within time and cost parameters. It could secure maximum results with minimum labour and resources.

Due to the vast social inequalities, level playing field with affirmative action with respect to the opportunities was necessitated in the post independent India with the rationality that, the reservations can be done away with once the inequalities diminish. With this motive, a time bound affirmative action was envisaged in the Indian Constitution. But due to reasons plenty, despite vast reservation benefits, the social and economic inequalities have not extinguished. Mostly the benefits of reservation have been captured repeatedly<sup>68</sup> by the well-off groups from depressed classes and the most poorer among the depressed have failed to avail them.<sup>69</sup> To tackle this, the Creamy Layer Criteria was evolved.

Unfortunately, the reservation policies come with many negative effects. Since the major yard scale of extending reservation benefits in India is caste, rather than wealth or income, it ultimately leads to deepening of caste based divisions in the society.<sup>70</sup> Further though initiated for uplifting the submerged sections of Indian society, for protecting their rights, overcoming the cumulative disparities of power, wealth and culture existing among various sections of society, reservation policies are by their very nature discriminatory and exclusive. Reservations lead to reverse discrimination wherein members of the non-reserved classes' are discriminated against in favour of a historically disadvantaged group/minority. It empowers state authorities to prefer one/more groups to the exclusion of others and encroach on

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<sup>68</sup> Makarand Sahasrabuddhe., *Is reservation the best method of affirmative action in India?* - <https://www.quora.com/Is-reservation-the-best-method-of-affirmative-action-in-India> (Last visited on 20th October 2015 at 5.43 a.m.).

<sup>69</sup> Chamars from the SCs have captured most of the benefits as compared to bhangis from the SCs. *Supra* Note 46.

<sup>70</sup> *Supra* Note 24.

domain of right to equality to all. Of late, it has become a source of considerable controversy. The aggressive agitation in Gujarat for including State's relatively prosperous Patel community in the category of OBCs for the benefit of caste quota based reservations in educational institutions and government jobs has opened up nationwide discussion as to where the line has to be drawn in matters of reservation. Right percentage of reservation has been always difficult to decide.

Further reservation policy, as understood by Indian authorities, results in appointing less-qualified persons to the crucial positions in public institutions by relaxing, the standards and thereby may undermine the efficiency of these public institutions. But what has to be understood is that millions of persons would not have had access to education, livelihood and power donning seats in legislative houses but for the triangular reservation policies in India. Reservation has played a crucial role in induction of SCs, STs and OBCs into public sector employment and educational institutions. The various quotas have partly achieved their most basic tasks. In public jobs members of backward groups are claiming more posts than earlier days. Dalits had just 1.6% of the most senior ("Group A") Civil servant positions in 1965 which rose to 11.5% by 2011. The share is higher for more junior posts,<sup>71</sup> though the figures are good but that is still too low. The overall effects therefore are probably limited and certainly hard to judge. Their accessible share in employment and educational institutions still falls short of the target in certain categories of jobs and higher education. The target in the case of Groups D and C are close to the population mark of 15% for scheduled castes and 7.5% for scheduled tribes but fall short in Groups A and B.<sup>72</sup>

Despite shortcomings, reservation policies undeniably tend to benefit the concerned groups in the course of time. Reservation in jobs, education and legislative bodies are quite essential as long as the society discriminates against certain castes, religious minorities and womenfolk. As the (society), it tries to keep them away from the galleries of progress and economic empowerment. Participation in education, jobs and legislative bodies are ways to achieve power and

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<sup>71</sup> <http://www.economist.com/blogs/banyan/2013/06/affirmative-action#> accessed on 12 December 2015 at 4.18 pm.

<sup>72</sup> *Ibid*

become empowered, be it, mental or financial or political. For combating historic inequalities, triangular reservation policies are a suitable answer. What needs to be kept in mind is that in the whole process, the youth of the unreserved categories are not left in lurch, transforming their apathy due to reverse discrimination and diverting them to crimes, terrorism *etc.* It is needful to remember that in the process of correcting legacies of injustice and discrimination, we are not creating new ways of causing injustice and discrimination to other groups.

The then President of America, Bill Clinton, however, expressed his stance on affirmative action in a speech delivered on 19 July 1995 thus: *"Let me be clear about what affirmative action must not mean and what I won't allow it to be. It does not mean – and I don't favor – the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean – and I don't favor – numerical quotas. It doesn't mean – and I don't favor – rejection or selection of any employee or student solely on the basis of race or gender without regard to merit..."*. He further emphasised, *"even though affirmative action should be a temporary policy, the time had not come for it to be ended."* He felt it was still a relevant practice and overall, the goal of the nation should be to *"mend it but don't end it."*<sup>73</sup> These opinions presently suit Indian conditions.

We can seriously talk of getting rid of affirmative action only when society changes to an extent, where it becomes unnecessary. Admittedly, gross discrimination against women and people of reserved communities exist. The present laws against discrimination are difficult and cumbersome and fail to deliver justice. The SC and The ST (Prevention of Atrocities) Act, 1989 has failed to achieve its goals. Cases of atrocities against SCs and STs has increased from 33,594 and 5,425 (year 2009) to 47,064 and 11,451 (year 2014) respectively. This sharp shoot up deciphers the critical condition of these communities in the Indian society.<sup>74</sup> As it always happens, laws and policies need to step in when self-governance is not happening. If we as a society fail to prevent discrimination, resorting to affirmative action will be rendered mandatory. Some of the important suggestions are made hereunder:

<sup>73</sup> [https://en.wikipedia.org/wiki/Affirmative\\_action\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Affirmative_action_in_the_United_States) (Last visited on 20th October 2015 at 4.32 p.m.).

<sup>74</sup> *Changes in SC/ST bill timely.* -Deccan Herald., Bangalore 10 (28 December 2015).

Reservation system cannot be the final answer or solution for the years of atrocities. To end the inequalities, such sections of the society should be clearly identified that need development and financial aids. Then to uplift them free education, incentives and financial assistance should be provided. Upon achieving this, they must be allowed to face the competition. After infusing capability in them, they must be allowed to face the healthy competition.<sup>75</sup> But since the sufferings of the downtrodden have not ended, removing reservations will be irrational in the present scenario. This calls for rationalizing reservation policies.

## 7. Conclusions

- Reservation can be provided from the school level to the undergraduate level and not beyond this. Beyond this, only financial help like concession or exemption of fees ought to be provided and no reservations in higher education or recruitment. Admission in PG courses or government services should be solely based on merit. Reserved category candidates can be preferred when there are two equally qualified candidates for a single seat/post and one of them is from the reserved communities. This process can be continued for few decades to be dropped later.
- All facilities like free and extra tuition, subsidised and extra nourishment, residential accommodation to overcome their disabilities and to acquire requisite abilities should be provided.
- If reservation is retained, it is preferable that there is a constitutional ban on reservations of all kinds exceeding 50%. Benefit of reservation should be available to only one generation in a family. Economic criteria ought to be used instead of caste for defining eligible groups for preferential treatment. Official machinery has to be set up for reviewing the progress of each beneficiary group and depending upon their progress, fix a deadline for expiration of reservation for each group.<sup>76</sup>

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<sup>75</sup> Ramandeep Kaur., *Do we still need a reservation or quota system in India?* -<http://www.mapsofindia.com/my-india/education/do-we-still-need-a-reservation-or-quota-system-in-india> (Last visited on 21<sup>st</sup> October 2015 at 6.25 a.m.).

<sup>76</sup> *Supra* Note 51.

- The policy of creamy layer needs to be seriously looked into and refined for avoiding repeated benefits to the same set of persons. Creamy layer criterion is not applicable to SCs and STs. Need is to rationalize it and introduce it among them. Among OBCs it should be implemented strictly.
- Vote bank politics ought not to govern the reservation policies. All political parties ought to have same reservation agenda. This will help the society in the long run without affecting the party prospects in the elections.<sup>77</sup>
- Need is there to revisit the castes that are entitled for reservations and remove all those which were included solely for political considerations and those which have benefitted from reservations. Truly deserving individuals who needs special attention must be identified by assessing their economic condition without any bias.
- If India wants to emerge as a strong nation in the world, it should give preference to efficiency, motivation, discipline, tenacity of purpose and will to achieve the desired goals. Abilities to shoulder responsibilities at entry point and performance throughout the career should always be given importance. Standards set for postings and promotions ought to apply equally to all. The method of assessment should be continually honed, so that more meritorious persons can be selected for any posts/positions.

Definitely the existing reservations policies aren't perfect and need checks and balances. But it is needful to be careful before meddling with the present reservation policies.

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<sup>77</sup> *Supra* Note 46.

## CONSTITUTIONAL BASIS FOR BASIC STRUCTURE DOCTRINE IN INDIA: EFFECTS AND APPLICABILITY

*Dr. N. Sathish Gowda\**

### 1. Introduction

The Constitution of India is a supreme, special, legal document which gives clear road map to all three organs of the government in Centre and State to perform their duties and functions within its sphere. No organ of the government is supreme. All three organs of the government should work within the boundary of the Constitution. There must be an express provision under the Constitution to consider, the validity of the actions of the individual organ as well as to justify their orders. But, when there is a gap in Constitutional law to check the unjustified actions of the government, then judiciary can evolve or invent some doctrine to uphold the constitutional supremacy. The Apex Court laid down the doctrine or principle should be only at exceptional circumstances to resolve the constitutional crisis. If Judiciary continues in preparing guidelines and evolving doctrines for all cases as general rule, it will be a great threat to the democratic principles and also contradictory to the theory of separation of power.

The framers of the Constitution, with due diligent have taken lot of care and concern to provide a best Constitution to the citizen. But, they did not add express clause under Article 368 to impose limitations upon the amendment power exercised by the Parliament. Consequently, Parliament by exercising its constituent power added tricky Ninth Schedule<sup>1</sup> to accommodate agrarian reforms by excluding judicial review. Gradually, Ninth Schedule made controlled Constitution into uncontrolled one. As a result, in *Keshavanada Bharathi's*<sup>2</sup> case in 1973, the Supreme Court made uncontrolled Constitution into controlled one through inventing the new doctrine called "Basic Structure" which imposes implied limitations upon the amendment power of the Parliament. But, Supreme

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<sup>1</sup> Ninth Schedule was inserted in the 1<sup>st</sup> Amendment of Indian Constitution.

<sup>2</sup> AIR 1973 SC1473.

Court has failed to lay down the yardstick for what constitutes basic structure. Power to make an implied amendment to Indian Constitution was given even to individual judge, which is really unfair under the scheme of theory of separation of power which is also one of the basic structure of the Indian Constitution. The Judiciary even did not say the subject matters of basic structure should be decided by the Constitutional Bench.

The doctrine of "basic structure of the Constitution"<sup>3</sup> has become very controversial principle and ambiguous one. This doctrine does not have a textual basis. There is no provision stipulating that the Constitution has a basic structure and this structure is beyond the competence of amending power. Therefore, the limitation of the amending power through the basic structure of the Constitution is deprived of positive legal validity. Moreover, not having its origin in the text of the Constitution, the concept of the "basic structure of the Constitution" cannot be defined.

In this context, an attempt has been made in this paper to examine the reasons for evolving this doctrine by the Apex Court and to know what constitutes the basic structure of the Constitution. Further, paper addresses, whether this doctrine violates the theory of separation of power which is also one of the basic features of Indian Constitution? Do we need to add this doctrine expressly by bringing an amendment to Article 368? If single judge says some subject matters are basic structure, would it not curtail the power of Parliament?

## 2. Evolution of Basic Structure Theory in India

Generally academicians always argue that the basic structure theory is the product of long struggle and conflict between the Parliament and Judiciary. But, the author opines that this doctrine came into existence not because of confront between Judiciary and Parliament, but, because of framers passive approach, where they did not give any scope and place for agrarian reforms under the provisions of the original Constitution. Further, incorporating the right to property under the list

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<sup>3</sup>The doctrine of "basic structure" is introduced into India by a German scholar, Dietrich Conrad. See Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 Indian Year book of International Affaris 375 (1970). For the D. Conrad's influence on the Indian Supreme Court, see A. G. Noorani, "Behind the Basic Structure Doctrine: On India's Debt to a German Jurist, Professor Dietrich Conrad", 18 FRONTLINE (April 28 - May 11, 2001), available at <http://www.hinduonnet.com/fline/fl1809/18090950.htm>.

of fundamental rights was also one of the factors responsible for giving birth to this doctrine by the Apex Court in 1973.

If framers had not brought right to property under Part-III of Indian Constitution, we would have not seen the case of *Kameshwar Singh v. State of Bihar*<sup>4</sup>. Because of this case, the then Prime Minister Jawaharlal Nehru brought Ninth Schedule<sup>5</sup> read with Article 31-B<sup>6</sup> of the Indian Constitution in the first amendment in order to give much importance to agrarian reforms which was one of the manifest of Indian Congress before independence. If we would have not had this 1<sup>st</sup> amendment, *Shankari Prasad's*<sup>7</sup> case would have not come into the picture. After *Shankari Prasad's* case, basic structure doctrine was conceived first time in *Sajjan Singh*<sup>8</sup> case. In these two cases, Supreme Court in fact respected and upheld the decision of Parliament for giving scope for agrarian reforms through Ninth Schedule.

Thereafter, Supreme Court in *Golak Nath's*<sup>9</sup> case said that amendment will also come under the definition of 'Law'. When 'law' has limitations under Article 245 of the Constitution (subject to the Provisions of the Constitution), 'amendment' will also have limitations. Till date, there is no single express provision under the Indian Constitution to limit the amendment power of the Parliament. But, for the first time, Supreme Court in this case, imposed implied limitation upon the amending power of the Parliament by adding the word 'amendment' under the definition of 'law' according to Article 13(3)(a). The petitioner Golak Nath spent money in this case for no relief but for evolving the 'doctrine of prospective over ruling.'

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<sup>4</sup> AIR 1951 Pat.91, SB.

<sup>5</sup> Ninth Schedule was introduced in the Constitution by the Constitution First Amendment Act 1951.

<sup>6</sup> Article 31-B: Validation of certain Acts and Regulations- Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

<sup>7</sup> *Sankari Prasad Singh v. Union of India*, AIR 1951SC 458.

<sup>8</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>9</sup> *Golak Nath v. State of Punjab*, (1967) 2 SCR 762; AIR 1967 SC.

As a result, to nullify the verdict, Parliament brought 24<sup>th</sup> amendment<sup>10</sup> and added clearly clause 3 under Article 368 and clause 4 under Article 13 stating that Parliament is having power to amend the Constitution is not a law making power but it is a constituent power. Thereafter, constitutional validity of 24<sup>th</sup> Amendment was challenged in the case of *Keshavananda Bahrathi*.<sup>11</sup> Supreme Court constitutional bench consisting of 13 judges<sup>12</sup> (6:1:6) upheld the 24<sup>th</sup> Amendment and said that Parliament under Article - 368 can bring an amendment to any provisions of the Indian Constitution including fundamental rights but not for the basic structure. This is how; the Supreme Court gave real birth to this basic structure doctrine to check the uncontrolled power of the Parliament.

Therefore, the author strongly observes that because of the framers of the Constitution attempt to include right to property in the list of fundamental rights in the original Constitution. The doctrine of basic structure came into existence in the *Keshavananda Bahrathi's* case. Hence, right to property is the main cause and responsible right for evolving this doctrine.

### 3. What constitutes Basic Structure?

People in India seem to have accepted, the basic structure doctrine in the same manner as the Americans accepted judicial review of legislation claimed by the Supreme Courts of the United States in *Marbury v. Madison*.<sup>13</sup> In determining what basic structure is, the Court will have to keep national consensus about such basic structure in mind. It is impossible to articulate exhaustively the elements which would constitute the basic structure of the Constitution. It will have to be articulated from case to case. During last few years the Supreme Court has

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<sup>10</sup> Article 13(4) and 368(3) were inserted through 24<sup>th</sup> Amendment. [13 (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

<sup>11</sup> *Supra* Note 2.

<sup>12</sup> These Seven Judges were, Chief Justice Sikri, Justices Shelat, Hegde, Grover, Mukherjea, Jaganmohan Reddy, and Khanna. The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment. See S.P.Sathe, "Judicial Review in India: Limits and Policy". H.M. Seervai, in his analysis of the case in his magnum opus, "Constitution of India" states that six out of the seven majority judges held that there were implied and inherent limitations on the amending power of the Parliament, which precluded Parliament from amending the Basic Structure of the Constitution. However Khanna J. rejected this theory of implied limitations but held that the Basic Structure could not be amended away. All Seven judges gave illustrations of what they considered Basic Structure comprised of.

<sup>13</sup> 1 Cranch 137 : 2 L.Ed. 60.

intervened with constitutional amendments on the ground of basic structure initially only in five cases.<sup>14</sup>

In *Kesavananda Bharati's* case, the majority of judges who admitted the existence of "basic structure of the Constitution" did not agree with the list of the principles included in this concept. Each judge drew a different list. Each judge is able to define the basic structure concept according to his own subjective satisfaction. This leads to the fact that the validity or invalidity of the Constitution Amendment lies on the personal preference of each judge. In the event of this, the judges will acquire the power to amend the Constitution, not specifically conferred to them under the Constitution but given to the Parliament under Art.368 of the Constitution. For that reason, as noted by Anuranjan Sethi, the basic structure doctrine can be shown as a "*vulgar display of usurpation of constitutional power by the Supreme Court of India.*"<sup>15</sup> As illustrated in the case-law of the Indian Supreme Court, when there is no explicit substantive limitation on the amending power, the attempt by a constitutional court to review the substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.

#### 4. Subject matter of Basic Structure Theory

Supreme Court in series of cases considered following are the subject matters of basic structure and same cannot be altered or amended by the Parliament under Article 368 of the Indian Constitution. They are:

- Supremacy of the Constitution- republican and democratic form of government- Secular character of the Constitution- Separation of powers between the legislature, executive and the judiciary-Federal character of the Constitution<sup>16</sup>.

<sup>14</sup>*Kesavananda Bharti v. Kerala*, AIR 1973, SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *S.P. Sampat Kumar v. India*, AIR 1987 SC 386; *Sambamurthy v. A.P.*, AIR 1987 SC 663.

<sup>15</sup>Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, <http://ssrn.com/abstract=835165>, p. 6-8, 26-27 Similarly, S. P. Sathe concluded that "the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to... the legislature" (S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. AND POL'Y 29-108, at 88 (2001))

Available at [http://law.wustl.edu/journal/6/p\\_29\\_Sathe.pdf](http://law.wustl.edu/journal/6/p_29_Sathe.pdf). Likewise, T. R. Andhyarujina said that the "exercise of such power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy" (T. R. Andhyarujina, *Judicial Activism and Constitutional Democracy in India* '10 (1992), quoted in Sathe, at 70.

<sup>16</sup>*Keshavananda Bahrathi Case Sikri, C.J.* explained the concept of basic structure.

- The mandate to build a welfare state contained in the Directive Principles of State Policy- Unity and Integrity of the nation-Sovereignty of the country<sup>17</sup>.
- Democratic character of the polity-Unity of the country- Essential features of the individual freedoms secured to the citizens- Mandate to build a welfare state.
- Unity and integrity of the nation<sup>18</sup> -Equality of status and the opportunity -Sovereign democratic republic-Justice - social, economic and political- Liberty of thought, expression, belief, faith and worship. Democratic character of the polity-Unity of the country- Essential features of the individual freedoms secured to the citizens-Mandate to build a welfare state.
- Democracy and the Preamble to the Indian Constitution guarantees equality of status and of opportunity and that the Rule of law is the basic structure of the Constitution<sup>19</sup>.
- The doctrine of equality enshrined in Art.14 of the Constitution, which is the basis of the Rule of Law, is the basic feature of the Constitution.<sup>20</sup>
- Independence of judiciary is a basic feature of the Constitution as it is the sine qua non of democracy.<sup>21</sup>
- Secularism and Democracy and Federalism are essential features of our Constitution and are part of its basic structure.<sup>22</sup>
- Judicial review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional Policy. Several

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<sup>17</sup> *Shelat, J. and Grover, J.* added three more basic features to the list

<sup>18</sup> *Hegde, J. and Mukherjea, J.* identified a separate and shorter list of basic features

<sup>19</sup> *Indira Gandhi v. Rajnarain* AIR 1975 SC, 2299 (1975) 3 SCC 34; *Kihoto Hollohon* AIR, 1993, SC 412

<sup>20</sup> *Nachane, Ashwini Shivram v. State of Maharashtra*, AIR 1998 Bom 1; *Raghunath Rao v. Union of India*, AIR 1993 SC 1267

<sup>21</sup> *Bhagwati, J. Union of India v. Sankal Chand, Himmatlal Sheth*, AIR 1977 SC 2328 : (1977) 4 SCC 193. and *The Gupta Case*, AIR 1982 SC 149 at 197, 198, *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213 : (2000) 4 SC 640, *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296, *Supreme Court Advocates-records-Association v. Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268.

<sup>22</sup> *S.R. Bommai v. Union of India*, AIR 1994 SC 1918, at 1976; *Poudyal v. Union of India*, (1994) Supp.1 SCC 324.

Articles in the Constitution, such as Arts.32, 136, 226 and 227, guarantee judicial review of legislation and administrative action<sup>23</sup>

➤ The unity and integrity of the nation<sup>24</sup> and Parliamentary system.<sup>25</sup>

Adding many subject matters to the Basic structure box, Judiciary has completely tightened the hands of Parliament. As a general rule, Judiciary has been adding many aspects as basic structure and directed the parliamentarian not to change or alter above mentioned subject matters.

### 5. Effects of Basic Structure Theory on Amendment Power of the Parliament

The “Basic Structure” doctrine is the judge-made doctrine whereby certain features of the Constitution of India are beyond the limits of the amending powers of the Parliament. Though the Court held that the power of Parliament to amend the Constitution was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what constitutes the basic structure.<sup>26</sup>

According to Prof. Upendra Baxi,<sup>27</sup> the effect of the decision in *Keshavananda Bharathi's* case on amendment power of the Parliament rendered so far indicate the following limitations alone, viz.,

- Total repeal of the Constitution would be violative of the basic structure,
- Any expansion of Art.368 to achieve consequence of total repeal would similarly be violative of the basic structure,
- Any attempt to deprive the Court of its power of judicial review of Constitutional amendment would also be transgressive of basic structure,
- Freedoms guaranteed by Arts.14, 19 and 21 constitutes to limit the power of amendment,
- Any attempt to abrogate Part IV of the Constitution may violate basic structure and

<sup>23</sup> *L.Chandrakumar v. Union of India*, AIR 1997 SC 1125; *Waman Rao v. Union of India*, AIR 1981 SC 271

<sup>24</sup> *Raghunath Rao v. Union of India*, AIR 1993 SC 1267

<sup>25</sup> In *Raghunath Rao v. Union of India* case, AIR 1973 SC at 1535, 1603, 1628 and 1860.

<sup>26</sup> Article on “Basic Structure Doctrine and its Widening Horizons” by V.R. Jayadevan, published in CULR, Vol. 27, March 2003 p.333

<sup>27</sup> See article on ‘Amendment of the Constitution in Constitutional Law of India,’ VOL.II, (Bar Council of India Trust).

- The democratic nature of the Constitution may not be validly transformed by the use of Art.368.

## 6. Insertion of Clause 4 and 5 of Article 368 (42<sup>nd</sup> Amendment)

After the decisions of the Supreme Court in *Keshavnand Bharati and Indira Gandhi*<sup>28</sup> cases, the Constitution (42<sup>nd</sup> Amendment) Act, 1976, was passed which added two new clauses of 4 and 5 to Article 368<sup>29</sup> of the Constitution expressly prohibiting the review of the Constitutional amendments. The 42<sup>nd</sup> Amendment tried to overreach the implication of *Kesavananda Bharathi*'s case.

But in *Minerva Mills Ltd. v. Union of India*,<sup>30</sup> question arose that, whether the amendments introduced by Sections 4 and 55 of the Constitution (42<sup>nd</sup> Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements? The Supreme Court in its answer considered clause (4) and (5) of Art. 368 that were inserted by the 42<sup>nd</sup> Amendment and held them to be unconstitutional since they damage and destroy the basic structure of the Constitution. On the whole, *Minerva Mills*<sup>31</sup> is a comprehensive decision bringing clarity to the doctrine of basic structure. The holding enables the Indian Constitution and the Indian legal system to retain their identity even when attempts have been made to alter them for bringing about social revolution through legislation.<sup>32</sup>

After this case, Supreme Court in *Waman Rao v. Union of India*<sup>33</sup> once again reiterated and applied the doctrine of basic features of the Constitution. In *I.R.Coelho case*,<sup>34</sup> the Constitution Bench observed that, according to *Waman Rao*

<sup>28</sup> AIR 1975 SC 2299.

<sup>29</sup> Clause (4) Art. 368 stipulated that "No constitutional amendment (including the provision of Part III) or purporting to have been made under Art.368 whether before or after the commencement of the Constitution (42<sup>nd</sup> Amendment) Act, 1976 shall be called in any court on any ground." Therefore in India, as of 1976, the Supreme Court was precluded from reviewing constitutionality of Constitutional amendments. There is no doubt on this issue because clause (4) of Art.368 explicitly prohibits the judicial review of constitutional amendments. Moreover, clause 5 of the same Article states that "there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article." This clause also provides that constitutional amendments cannot be judicially reviewed because Indian Constitution does not impose any limitations on the power of Indian Parliament to amend the Constitution.

<sup>30</sup> (1981) 1 SCR 206, (AIR 1980 SC 1789)

<sup>31</sup> *Ibid*

<sup>32</sup> V.R. Jayadevan's 'Basic Structure Doctrine and its Widening Horizons, published in CULR (2003) p.349.

<sup>33</sup> AIR 1981 SC 271.

<sup>34</sup> AIR 2007 SC 137.

*and Ors. v. Union of India and Ors*<sup>35</sup> amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure.

## 7. The Constitution Forty-Fifth Amendment Bill, 1978.

It is really not possible to exhaustively enumerate the aspects of the basic structure of the Constitution. Such an attempt was made by the Constitution (Forty-Fifth) Amendment Bill, 1978 (CB 45),<sup>36</sup> which was undertaken during the short period of rule of the Janatha Government. In this, the following features were mentioned as features requiring special process of referendum for their amendment. They are: (i) The secular or democratic character of the Constitution; (ii) Rights of citizens under Part III; (iii) Free and fair elections to the House of the People or the Legislative Assemblies of states on the basis of adult suffrage; (iv) The independence of the Judiciary and (v) Amendment of the provision for the entrenchment of the above basic features and the requirement for the referendum. If an amendment of the Constitution was to be made for the amendment of any of the above matters, such an amendment had to be approved by the people at a referendum. The referendum for the purpose of seeking the approval of the people of India for any amendment of the nature referred to in the above provision was to be through a poll and all persons eligible for voting in the elections to the Lok Sabha were to vote in such a poll. Not less than fifty one percent of the total number of eligible voters must actually vote in the poll and the amendment was deemed to be approved at the poll, if it was supported by a majority of the votes actually polled. The opposition to the amendment was a tacit admission of the basic structure doctrine. The opposition to the amendment was not because it had entrenched the basic structure but because it provided for even the destruction of such basic structure through a referendum. Whether such matters could be left to popular will was also doubted. Seervai observed.<sup>37</sup>

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<sup>35</sup> *Supra* Note 33.

<sup>36</sup> CB 45 is the abbreviation used in the text for the Constitution (Forty-Fifth Amendment) Bill, which later became the Constitution (Forty-Fourth Amendment) Act.

<sup>37</sup> H.M. Seervai, 2 Constitutional Law, p. 2702.

The adoption of a referendum under the conditions prevailing in India was ill-advised and ill-conceived. Amendments to the Constitution are not capable of being formulated in such a manner as to ask for a simple 'yes' or 'no.' As against this, Professor Baxi had strongly recommended such legislative enumeration of the basic structure limitations much before it was mooted by the amendment Bill. He had recommended referendum for the amendment of any such basic features.<sup>38</sup>

The basic structure doctrine has been legitimated due to gross abuse of constituent power by the ruling elite and subsequent acceptance of it by all major political participants.<sup>39</sup> Unfortunately, the Rajya Sabha where the Congress Party had a majority did not approve these proposals although the Lok Sabha had passed the same by the requisite majority.<sup>40</sup>

## 8. Basic Structure Doctrine and Theory of Separation of Power

Lord Montesquieu in 1748, propounded the theory of separation of power. According to him, one organ of the government should not interfere with another organ of the government. Keeping this in mind, Hon'ble Apex Court said that separation of power is also one of the basic structure of the Indian Constitution. The Constitution of India also provided clear cut separation of powers among three organs of the government.

The Supreme Court for the first time has imposed implied limitations on amendment power (which was considered as law making power) in *Golaknath's* case. Later, Supreme Court by inventing the doctrine of basic structure, they completely curtail the amendment power of the Parliament. Many academicians argue that *Golaknath's* case decision was overruled by the Court in *Keshavananda Bahrathi's* case. But, the author strongly opines that the decisions in both the cases are similar when it comes to the matter of imposing limitations upon the amending power of the Parliament. But, the Supreme Court in *Keshavananda's* case has overruled the part of the decision of *Golaknath* with respect to the non acceptance

<sup>38</sup> Upendra Baxi "Some Reflections on the Nature of Constituent Power" in *Trends and Issues*, p. 142 (Indian Law Institute, 1978).

<sup>39</sup> S.P. Sathe, "Limitation on Constitutional Amendment: Basic Structure Principle Reexamined" in *Trends and Issues*, p. 179 (Indian Law Institute, 1978).

<sup>40</sup> M.P.Jain 'Indian Constitution Law' Fifth Edition, 2003 p.1926.

of the constitutional amendment as law and upholding the constitutional validity of 24<sup>th</sup> Amendment. Otherwise, it makes no difference between both the decisions.

R Dhavan and A Shourie have observed that the Court is accused of widening the scope of judicial review beyond the constitutional boundaries,<sup>41</sup> usurping the powers of the executive and legislature.<sup>42</sup> One of the important critique is that, if the basic structure theory was upheld, "every amendment made by the Parliament would be subject to judicial approval on the question whether it damages the core of an essential feature or not... and it is up to the Supreme Court and High Courts either to validate or invalidate the amendment. It is a step towards the 'Government of Judges' as the final say rests with the judges of the Supreme Court not with the Parliament."<sup>43</sup>

The criticism of *P.K.Tripathi* was also in the same view when he wrote "the people and the Parliament will never have to worry about what the Constitution ought to be. The Court will do it for them... The Court will not only play the role of the opposition in criticizing all proposed legislations concerning socio-economic policies, but it will be above to wipe out legislation which does not favour. In fact it will govern the country in regard to routine matters which might be left to the Parliament and the Cabinet."<sup>44</sup>

## 9. Application of Basic Structure theory in Appointment of Judges of Higher Courts

When it comes to the matter pertaining to the appointment of Supreme Court judges under NJAC, it is really an interesting part to discuss how all three organs of the Government have taken decisions without any rationality. When the basic structure doctrine was evolved by majority of the judges in *Keshavanada Bahrathi's* case, Judges who were in the Majority group had to face situations

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<sup>41</sup> R. Dhavan, *Supreme Court and Parliamentary Sovereignty* New Delhi Sterling Publisher, 1976 cited in Sudhir Krishnaswamy 'Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, Oxford University Press, p. xvi.

<sup>42</sup> A. Shourie, *Courts and their judgments; Promises, Prerequisites, Consequences*, New Delhi: Rupa & Co., 2011, pp 399-421 cited in Sudhir Krishnaswamy 'Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, Oxford University Press, p.xvi .

<sup>43</sup> *Idid* at 440.

<sup>44</sup> Cited by Prasad Anirudh, "Dynamic of the Basic Structure Theory", *Law* 1978, Vol.10, No.10. 199 (October, 1978).

of humiliation and while appointing as chief justice of India after Justice S.M. Sikri's retirement (Former CJ of Supreme Court). Justices J.M. Shelat, K.S. Hegde, A.N. Grover, though they possess seniority, government was not appointing any one among the three as chief justice of India, because these three judges were also responsible for upholding the doctrine of basic structure. The three superseded judges were a party to the majority opinion of the historic *Keshavananda Bharti* case which held that the Parliament's right to amend the Constitution did not include the right to amend, abrogate or destroy the basic structure of the Constitution. This judgement was delivered on the eve of superseding of judges. Needless to say, Justice A.N. Ray agreed with the minority view which upheld Parliament's supremacy to amend the Constitution. Finally, Executive appointed A.N. Ray as Chief Justice of India in 1973, violating the Constitutional conventions i.e., seniority in case of appointing CJI was considered as darkest day in the history of the Constitution.

In another incident, proclamation of Emergency on June 26, 1975 was an attempt to destroy Indian democracy. While a large section of the Indian judiciary decided to resist the onslaught on democratic institutions like the press and judiciary, a section of the Supreme Court surrendered. The unanimous verdict of nine High Courts relating to Habeas Corpus—that Article 21 is not the sole repository of life and liberty and that a detainee has a right of *Habeas Corpus* during the emergency—was reversed by a 4:1 verdict of the Supreme Court. The High Courts displayed courage whether it was on the matter of a detainee's right of medical treatment or his interviews with his relatives, or the right of a lawyers' association to organise a meeting, or to stay a High Court Judge's arbitrary transfer. The Supreme Court, however, showed subservience in the *Habeas Corpus* case<sup>45</sup>. Justice Khanna and

<sup>45</sup> Chief Justice A.N. Ray said, "There is no record of any life of an individual being taken away either in our country during Emergency or in England or America during the emergency in their countries. It can never be reasonably assumed that such a thing will happen. Some instances from different countries were referred to by some counsel for the respondents as to what happened there when people were murdered in gas chambers or people were otherwise murdered. Such instances are intended to produce a kind of terror and horror and are abortive in character. People who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country."

Justice Y.V. Chandrachud expressed his optimism by writing that "counsel after counsel expressed the fear that during the Emergency, the executive may whip and strip and starve the detainee and if this be one's judgement even shoot him down. Such misdeeds have not tarnished the record of free India and I have a diamond bright, diamond hard hope that such things will never come to pass."

Justice M.H. Beg said in his judgement, "I do not think that it is either responsible advocacy or the performance of any patriotic or public duty to suggest that powers of detention are being misused in the current emergency".

other judges of various high courts who displayed courage were punished for their independent views. Fourteen judges of high courts who were party to various judgements, who were against the government, were transferred from one high court to another without their consent. Executive prepared a list of 52 inconvenient judges. Proposals were mooted for the establishment of a superior council over the judges. Upon the retirement of Justice A.N. Ray, the next senior most judge, Justice H.R. Khanna, was denied his right to become the Chief Justice of India. Justice R.N. Aggarwal and Justice U.R. Lalit, who were additional judges of the Delhi and Bombay High Courts respectively, were not confirmed.<sup>46</sup>

Thereafter, issue pertaining to primacy with respect to appointment of judges of Supreme Court was discussed in *S.P. Gupta v. Union of India*<sup>47</sup>, *S.C. Advocates on Record Association v. Union of India*<sup>48</sup> and *In re: Presidential Reference*.<sup>49</sup> Finally, in *S.C. Advocates on Record Association v. Union of India*<sup>50</sup>, the Supreme Court declared that the Constitution (Ninety-ninth Amendment) Act, 2014 is unconstitutional. On the basis of the conclusions given by Hon'ble judges in

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Justice Chandrachud expressed his optimism by writing that "counsel after counsel expressed the fear that during the Emergency, the executive may whip and strip and starve the detainee and if this be one's judgement even shoot him down. Such misdeeds have not tarnished the record of free India and I have a diamond bright, diamond hard hope that such things will never come to pass."

Justice P.N. Bhagwati agreed with the majority and said, "The apprehensions and fears voiced on behalf of the detainees may not altogether be ruled out. It is possible that when vast powers are vested in the executive, the exercise of which is immune from judicial scrutiny, they may sometimes be abused and innocent persons may be consigned to temporary detentions. But merely because a power may sometimes be abused is no ground for denying the existence of the power. All power is likely to be abused I have always leaned in favour of upholding personal liberty, for I believe it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have laid down their lives at its altar in order to secure it, protect it and preserve it. But I do not think that it would be right for me to allow my love for personal liberty to cloud my vision or to persuade me to place on relevant provision of the Constitution a construction which its language cannot reasonably bear."

<sup>46</sup> <http://www.pucl.org/from-archives/81july/judiciary.htm>.

<sup>47</sup> AIR 1982 SC 149, the first judge's case (*S.P. Gupta v. Union of India* AIR 1982 SC 149) gave the primacy to the executive in appointments to the higher judiciary, declaring that the advice of the CJI's recommendation on judicial appointments and transfers can be refused for "cogent reasons."

<sup>48</sup> AIR 1994 SC 268, the majority verdict gave back CJI's power over judicial appointments and transfers. It says the CJI only need to consult two senior-most judges. Court held that the role of the CJI is primal in nature because this being a topic within the judicial family, the Executive cannot have an equal say in the matter, the verdict reasoned. However, confusion prevails as the CJIs start taking unilateral decisions without consulting two colleagues. The President is reduced to only an approver.

<sup>49</sup> Special Reference No.1 of 1998 AIR 1999 SC1, To clarify the position the then President K.R. Narayanan sought a reference from the SC in the third judge's case (Special Reference No.1 of 1998 AIR 1999 SC 1), the Supreme Court laid down that the CJI should consult with a plurality of four senior-most Supreme Court judges to form his opinion on judicial appointments and transfers. The crux of the second and third judges' case, is that the Judiciary should have primacy.

<sup>50</sup> *Supreme Court Advocates-on-Record Association v. Union of India* (Writ Petition (C) No.83 of 2015).

their respective judgments it can be said that the 2014 amendment is being struck down as it is against the principles of 'separation of powers' and 'independence of judiciary' and thus violative of the basic structure of the Constitution.

Let us examine the role of legislature, executive and judiciary with respect to appointment of judges of the Supreme Court. Because, Constitution gave the primacy to the executive in appointments to the higher judiciary, they violated constitutional conventions in appointing chief justice of India twice in 1973 and 1977. As a result, after 1993, Judiciary adopted the method of Collegium system which does not have any constitutional basis or mandate from 1993 to 2014; even the Parliament did not make any attempt to constitutionalise the Collegium system. Finally, in 2014, the NDA government introduced the Constitutional (121st Amendment) Bill, which was subsequently passed by both houses of the Parliament, ratified by 16 state legislatures and assented by the President; NJAC, Act 2014 and the Constitutional Amendment Act came into force from 13 April 2015. By this NJAC case The Constitution (Ninety-ninth Amendment) Act, 2014 and The National Judicial Appointments Commission Act, 2014 have been declared null and void by the court which is the issue in hand.<sup>51</sup>

Judiciary nullified the Act of NJAC which is against the principles of 'separation of powers' and violative of the basic structure of the constitution. But, Judiciary instead of declaring the serious attempt of the Parliament as unconstitutional, they could have amended in the composition of NJAC itself while pronouncing judgement. Further, If NDA government had incorporated the recommendations of Venkatachaliah Commission,<sup>52</sup> judiciary might not have declared NJAC Act, is unconstitutional. At present, the Executive is not showing their interest in filling vacancies of post in higher judiciary which is really a great threat to the democracy. Conflict between judiciary and executive with respect to appointment of judges

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<sup>51</sup><http://www.legallyindia.com/views/entry/njac-or-collegium-the-need-of-an-ideal-system-for-appointments-to-the-higher-judiciary>.

<sup>52</sup> In 2000, the Venkatachaliah Commission was set up by NDA government to review the working of the constitution. In its report the commission recommended the formulation of a judicial commission comprising of:

- (1) The Chief Justice of India: Chairman
- (2) Two senior most judges of the Supreme Court: Member
- (3) The Union Minister for Law and Justice: Member
- (4) One eminent person nominated by the President after consulting the Chief Justice of India: Member.

has made democracy in danger. In action of the Executive with respect to Non-appointment of judges in lower and higher judiciary within stipulated time leads, not only to violation of basic rights of an individual but it also affects to ensure Centre- State relations.

## 10. Conclusion

Finally, the author opines that if framers had inserted express clause under Constitution of India regarding limitation of amending power of the Parliament under Art.368 itself and provisions for agrarian reforms and had not incorporated right to property in the list of fundamental right in the original constitution itself, there would not have been a situation of introducing this basic structure doctrine and very importantly, if the Parliament had exercised its amending power without disturbing the Supremacy of the Constitution in the case of Ninth Schedule, judiciary would not have made any attempt to propound the doctrine of basic structure. Violating constitutional conventions regarding appointment of the chief justice of India by the Executive and applying application of basic structure doctrine for all cases as a general rule including appointment of judges by judges are against the theory of separation of power. Therefore, author suggests that:

- All three organs of the government should work within the frameworks of the Constitution to uphold constitutional supremacy.
- There is a need to incorporate some important features expressly by amending Article 368 of the Constitution.
- Recognition of subject matters as basic structure should be decided by constitutional bench consisting more than 10 judges in an exceptional cases.

## PRIVATIZATION AND PUBLIC WELFARE: CONSTITUTIONAL IMPERATIVES

*DR. P. Puneeth\**

### 1. Introduction

A nuanced understanding of the working of the Indian Constitution in the post liberalization era reveals the challenges, the country has been facing in implementing some of the constitutional guarantees. Yet the issue has not yet fully caught the national attention. The National Commission to Review the Working of the Constitution (NCRWC) appointed under the Chairmanship of M. N. Venkatachalaiah, Former Chief Justice of India, during the earlier NDA regime had, no doubt, gone into some of these nuances and made suitable recommendations but did not enquire into all aspects. Ensuring public welfare, as ordained under the Constitution, in the age of privatization is one such issue that did not get adequate attention. This is an important issue that needs to be considered. The relevant question to begin with is this: Does 'privatization' and 'public welfare' go together? Or to put it more appropriately, can the governments, which are relentlessly pursuing policies of liberalization, privatization and globalization (LPG) through the methods, *inter alia*, of disinvestment, deregulation and denationalization (which Upendra Baxi calls 'three Ds'), continue to perform their public welfare functions?

Some say, 'privatization' and 'public welfare' is an oxymoron and they do not go together. Is it so? If it is so, then what are the constitutional imperatives? Should the government desist from pursuing this policy of LPG, which is the central idea of the New Economic Policy (NEP) adopted in India in 1991, in view of constitutionally ordained welfare functions? Or is it permissible for the government to pursue such policies without minding the welfare functions? The paper seeks to briefly address these questions.

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## 2. Constitutional conception of Welfare State

It is indisputable that the architects of the Indian Constitution did not intend to establish India as a *laissez fair* state. They, in fact, wanted India to be a welfare state. If the preamble and directive principles of state policy envisaged under the Indian Constitution are to be considered as its integral parts forming parts of its basic structure, there cannot be an alternative view. Unlike the Constitution of United States of America, which, according to Oliver Wendell Homes Jr. J., does not embody a particular economic theory, Indian Constitution does clearly embody, at least in broad terms, an economic theory.

At the outset, it is stated in the preamble itself that securing justice, not just 'political' but also 'social' and 'economical' is one of the principal objectives of the Constitution. In addition, if one looks at various directive principles of state policies, it is abundantly clear that the Constitution does contain an explicit commitment to 'socialism'<sup>1</sup> and imposed an obligation on the state to promote 'welfare of the people'.

The Constitutional conception of welfare state is not limited only to provide certain basic facilities, amenities or services like health, education, housing, sustenance etc. The concept of welfare state envisaged under the Indian Constitution is a holistic one. It is evident from Article 38(1), one of the cardinal directive principles of state policy, which mandates that:

[T]he 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.

Thus, constitutionally speaking, promoting welfare of the people would require securing them socio, economic and political justice.

Whereas this is a very broad and a grand principle envisaged under the Constitution, various other welfare functions the State is expected to discharge are specified in clause (2) of Article 38, Articles 39, 39A, 41, 42, 43, 45, 46 and 47 of the Constitution of India. All these are directive principles of state policies.

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<sup>1</sup> V. Krishna Ananth, *The Indian Constitution and Social Revolution: Right to Property Since Independence* (2015).

These provisions require the state, in particular, to take measures to minimize in inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities amongst individuals as well as groups of people residing in different areas or engaged in different vocations.<sup>2</sup> The State is also ordained to direct its policies towards securing adequate means of livelihood; distribution of material resources of the community so as best to subserve the common good; prevention of concentration of wealth and means of production to the common detriment; equal pay for equal work. It is also under an obligation to prevent abuse of health and strength of workers and tender age of children. It shall strive to provide opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity and protect them and to youth against exploitation and moral and material abandonment.<sup>3</sup> Public welfare functions envisaged under the Constitution also include securing right to work, to education and to public assistance in cases of underserved want;<sup>4</sup> to make provision for just and human conditions of work and for maternity relief;<sup>5</sup> secure living wage and conditions of work that ensure decent standard of life;<sup>6</sup> to make provisions for early childhood care and education to children below the age of six years;<sup>7</sup> to raise the level of nutrition and the standard of living and to improve public health;<sup>8</sup> to promote with special care educational and economic interests of the weaker sections of the people.<sup>9</sup> In addition, the Constitution (Forty-second Amendment) Act, 1976 has also imposed an obligation on the state to promote equal justice and to provide free legal aid.<sup>10</sup>

These principles, though judicially unenforceable, are nevertheless fundamental in the governance of the country. They lay down roadmap for the progress of the country. They serve twin purposes:

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<sup>2</sup> Art. 38(2).

<sup>3</sup> Art. 39(a) to (f).

<sup>4</sup> Art. 41.

<sup>5</sup> Art. 42.

<sup>6</sup> Art. 43.

<sup>7</sup> Art. 45.

<sup>8</sup> Art. 47.

<sup>9</sup> Art. 46.

<sup>10</sup> Art. 39A.

- (i) They provide an assurance to the people as to what they can expect from the government, and
- (ii) They command the state and its agencies and instrumentalities<sup>11</sup> to follow them while making laws or formulating policies for the governance.

These principles require the State, its agencies and instrumentalities to adopt such laws and policies that aim at securing and promoting the welfare of the people as envisaged. It is their constitutional duty to implement them. They may not be answerable in a court of law for the failure to implement them but before the electorate, as per the wishful thinking of the chief architect of the Constitution of India, they are answerable.<sup>12</sup>

### 3. Promotion of public welfare in a free market economy

It is axiomatic that unless the state has an effective control over the market/economy, it cannot promote public welfare as ordained under the Constitution. State control and regulation of economic activities is a *sine-qua-non* for implementation of welfare programmes mandated under the Constitution. That is the reason why framers of the Indian Constitution not only contemplated mixed economy, where both public and private sectors can co-exist, but also allowed the State to create monopolies in favour of public sector undertakings and also to effectively control and regulate all economic activities.

But in the post 1991 era, which marked the beginning of New Economic Policy (NEP), the State is gradually losing effective control over the economy. The NEP was adopted by the government in order, *inter alia*, to comply with the 'conditionalities' of the global regulatory institutions viz., World Bank and the International Monetary Fund. Ever since the adoption of NEP, the successive governments in India are relentlessly in pursuit of Liberalisation, privatization and

<sup>11</sup> It may be pertinent to note that even in Part IV, unless the context otherwise requires, the term 'state' has the same meaning as in Part III. Thus, the directive principles of state policy are required to be followed not only by the "Government and Parliament of India and the Government and Legislatures of each of the States" but also by "all local or other authorities within the territory of India or under the control of the Government of India." Since all agencies or instrumentalities of the State fall within the ambit of 'other authorities' in Art. 12 of the Constitution, they are also required to follow those directives addressed to the 'state'. See *Central Inland Water Transport Corporation v. BrojoNath Ganguly* (1986) 3 SCC 156; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600.

<sup>12</sup> B. R. Ambedkar, VII CAD 41.

Globalisation (LPG). Disinvestment, Denationalization and Deregulation have also become the characteristic features of NEP. LPG has become a new *mantra* that every government is chanting ever since then.

Privatization takes place in many forms, from disinvestment, through public private partnership and private financial initiatives to outsourcing and contracting of services and activities in governmental organizations or institutions etc.,

All these forms of privatization are in vogue in India. Recently, as per the reports in *[T]he Hindu*,<sup>13</sup> the Prime Minister's Office had given a green signal to the NITI Aayog's two set of proposals:

- (i) For shutting down seventeen sick or loss-making government companies, and
- (ii) For strategic sales aimed at reducing government ownership to below fifty-one percent (1%) in about 22 public sector companies.

The first list includes Indian Oil-CREDA Biofuels Ltd., CREDA HPCL Biofuel Ltd, both Jatropha oil-focussed subsidiaries of state-owned petroleum giants, National Jute Manufactures Corporation Limited and its subsidiary, Birds Jute and Export. Bharat Wagonand Engineering etc., The second list includes the Miniratna helicopter services operator Pawan Hans Limited, Scooters India Limited, Cement Corporation of India Limited and three plants of the Maharatna Steel Authority of India (SAIL) located at Salem, Durgapur and Bhadravati. etc., The NITI Aayog is in pursuit of identifying more and more public sector undertakings for disinvestment.

Indian economy is increasingly liberalized to suit privatization and to promote foreign investments. A policy of liberalization involves, in the opinion of Permananda Singh:<sup>14</sup>

[d]ismantling of the regime of discretionary control over private investors in industry and trade and also liberalizing the regime of foreign trade and investment. Such policies are also accompanied by

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<sup>13</sup> *The Hindu*, September 21, 2016.

<sup>14</sup> Parmananda Singh, *Supra* Note 14 at 105.

a regime of incentives to the foreign and domestic investors and mark a transition to the 'retreat of the State'<sup>15</sup> from a socially responsible government.

Particularly after the adoption of NEP in 1991, India is marching towards creating free market economic conditions. Free market requires that the state should recede from the market and restrict its economic functions. It requires that the state should free the market from its regulations.

When the States are increasingly adopting the measures of deregulation, disinvestment and denationalisation, they are not only losing their regulatory powers but, more importantly, their *redistributionist capacity* as well. David Schzeiderman highlighted this aspect very succinctly, while discussing about global investment rules, in the following words:<sup>16</sup>

The emergence of a transnational regime for the protection and promotion of foreign investment challenges directly the proposition that global capital has not tangible, institutional fabric. This rules regime cumulatively attempts to fashion a global tapestry of economic policy, property rights, and constitutionalism that institutionalises the political project of neo-liberalism. *This project advances the idea that the state should recede from the market, restrict its economic functions, and limit its redistributionist capacity.* The paradox is that at a time when institutions of democracy are being reproduced globally, democracy is not to be trusted in economic matters.

Similar views were expressed by Upendra Baxi too, who stated that "deregulation signifies not an end of the nation-state but an end to the *redistributionist state*."<sup>17</sup> If the redistributionist capacity of the state is limited, welfare functions contemplated under the Constitution cannot be carried on by the State. As J.S.H. Gildenhuys has

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<sup>15</sup> The concept of 'retreat of the State' "signifies a process in which the state contracts out its social welfare commitments by transferring ownership, control and/or managerial responsibility of the government enterprises to private corporations through the measures of deregulation, disinvestment and denationalisation."

<sup>16</sup> David Schzeiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise 2* (Cambridge University Press, 2008). Emphasis supplied.

<sup>17</sup> Upendra Baxi, *The Future of Human Rights* 140 (2002).

stated "the general socialization of particular services...is unacceptable within a free market system."<sup>18</sup>

It may, however, be noted that the NEP that is intended to promote LPG is not *per se* unconstitutional.<sup>19</sup> But, seemingly there exists a conflict between the directive principles, in particular the socialist agenda contained therein, and the NEP.<sup>20</sup> Concerns expressed by V. R. Krishna Iyer J., may be noted here:<sup>21</sup>

We have a new democracy run from afar by strong capitalist proprietors influencing the political process and humouring the glitterati and winning parties Right, Left and Centre through a monoculture of *globalization, liberalization, marketisation and privatization plus anti-socialism*.... Herein lies the contradiction between the Constitution and the elections held under the Constitution.

It may also be pertinent to refer to the observations made by Surya Deva on this aspect:<sup>22</sup>

Given that the policies promoting liberalization *per se*, including privatisation and disinvestment, have been declared to be constitutional and are here to stay, it needs to be considered how they impact on the constitutional obligation of the Indian state to promote human rights – whether embodied as directive principles, or in the form of ‘converted fundamental rights’. For example, can the Indian government still establish a just social order by minimizing/eliminating inequalities, ensure that there is no concentration of wealth or means of production, secure maternity benefits in private sector, or protect environment and wild life? The same could be said regarding the plethora of

<sup>18</sup> J.S.H. Gildenhuis, *The Philosophy of Public Administration: A Holistic Approach* 363 (2004).

<sup>19</sup> Mahendra P. Singh, "Constitutionality of Market Economy" XVIII DLR 272 (1996). Also see Parmananda Singh, *Supra* Note 116 at 105. See, *Delhi Science Forum v. Union of India* (1996) 2 SCC 405; *BALCO Employees' Union (Regd.) v. Union of India* (2002) 2 SCC 333.

<sup>20</sup> Upendra Baxi, *Supra* Note 5; Parmananda Singh, *Supra* Note 14; S. S. Singh and Suresh Mishra, "State and Market: A Constitutional Analysis" XVIII DLR 46 (1996).

<sup>21</sup> V. R. Krishna Iyer, *Rhetoric Versus Reality: Essays on Human Rights, Justice, Democratic Values* 51 (2004). Emphasis added.

<sup>22</sup> Surya Deva, "Globalization and its Impact on the Realization of Human Rights: Indian Perspective on a Global Canvas" in C. Rajkumar, K. Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment* 236 at 257 (2003).

rights created by the judiciary by importing directive principles into fundamental rights. For example, it is not clear how the government plan to ensure that various traits of globalization do not unreasonably affect, for example, the right to livelihood or the right to shelter.

Similarly, though the policy of privatisation, in particular, is not *per se* unconstitutional, it may not confirm to the goal values of the cardinal directive principles envisaged under articles 38 (1) and (2), and 30 (a), (b) and (c) of the Constitution.<sup>23</sup> Upendra Baxi expressed this view, while commenting in the context of privatisation of Uttar Pradesh State Cement Corporation. It is important to note one of his observations made in the context:<sup>24</sup>

Without any amendment of the Preamble, it is not fully open to the proponents of 'privatisation' to practice unbridled forms of it. Similarly, it is not open to advocate or practice 'privatisation' without changing the text of Articles 38, 39 or 43-A. Pending such changes... 'privatization'... is fraught with grave constitutional improprieties and even invalidity.

It may not be completely justifiable to argue that such policies are fraught with constitutional invalidity as they are apparently inconsistent with the directive principles only. Having regard to their judicially non-enforceable character, directive principles have not been made the sole basis for invalidating any law or policy. But such policies are certainly fraught with constitutional improprieties for the very reason that they are inconsistent with directive principles.

#### 4. In lieu of conclusion: a way forward

The socialist agenda and the welfare programmes envisaged in the Constitution are fast losing their significance as they are getting diluted and side-lined in the process of relentless pursuit of the successive governments to carry forward NEP and to achieve LPG to the fullest possible extent at the earliest possible time. There is a need to pause at least for a while and re-think is it justifiable to side-line the socialist agenda and the public welfare mandate of the Indian Constitution?

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<sup>23</sup> Upendra Baxi, *Supra* Note 5 at 32.

<sup>24</sup> *Ibid* at 33.

If the pursuit of LPG continues endlessly, without sufficient attention paid to the mandates of the Constitution in the form of directive principles, even the very preambular objectives would be defeated.

If the current processes of LPG are irreversible, as some say, the only effective way out is to provide horizontal effect to constitutional guarantees envisaged as fundamental rights and directive principles of state policy. That requires, in the very first place, revisiting of the definition of 'state' under Article 12 of the Constitution. As it is well known, the said definition had been expanded to certain extent by the Supreme Court in the pre – globalization era.<sup>25</sup> Such judicial expansion came about primarily with a view to prevent the government from by passing its constitutional obligations by creating companies, corporation, etc., to perform its duties.<sup>26</sup> But, in the post – globalization era, the judiciary is unwilling to further expand the scope of the definition. This approach is evident from the observation made by N. Santosh Hegde J. in *Zee Telefilms Ltd.*:<sup>27</sup>

[b]ecause of the need of the day this Court in *Rajasthan SEB* and *Sukhdev Singh* noticing the socio-economic policy of the country thought it fit to expand the definition of the term "other authorities" to include bodies other than statutory bodies.... It is to be noted that in the meantime the socio-economic policy of the Government of India has changed... and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of *Sukhdev Singh* is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being.

It is pertinent to note that in the age of globalization, the government is no longer trying to bypass its constitutional obligations by creating companies, corporation, etc., to perform its duties. It failed in that endeavour in the pre – globalization era itself. It does not, however, mean that the government is

<sup>25</sup> See, *Rajasthan State Electricity Board v. Mohallal* (1967) 3 SCR 377; *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* (1975) 1 SCC 421; *R. D. Shetty v. International Airport Authority of India* (1979) 3 SCC 489; *Ajay Hasia v. Khalid Mujib Sehravardi* (1981) 1 SCC 722.

<sup>26</sup> *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649.

<sup>27</sup> *Ibid* para 35.

not trying to bypass it at all in the post – globalization era. It is, in fact, more successfully outmanoeuvring the constitutional obligations by pursuing the policy of disinvestment and privatization. If, for example, the government's stakes in a public sector undertaking is reduced to less than fifty – one per cent, most probably such public sector undertaking cease to be 'state' within the meaning of article 12. Perhaps, there is a greater need now, more than ever before, to further expand the definition to include every organization or institution in relation to such of its functions which are of a public nature. This was, in fact, the recommendation of the NCRWC as well.

In *Zee Telefilm Ltd.*, itself N. Santosh Hegde J., while refusing to expand the definition, had observed that "...in a democracy there is a dividing line between a State enterprise and a non – State enterprise, which is distinct and the judiciary should not be an instrument to erase the said line *unless, of course, the circumstances of the day require it do so.*"<sup>28</sup> But, after having contemplated the necessity of erasing the dividing line, when the circumstances require, he had not, it seems, fully appreciated the prevailing circumstances in the age of globalization, where the scope for enforcement of fundamental rights and directive principles of state policy are increasing getting reduced. Thus, there is a necessity to further expand the scope of the definition and it is appropriate to do so in exercise of the constituent power by the Parliament. This, of course, is a very first but significant step. Lot more needs to be done to enliven the socialist agenda and the public welfare mandate of the Indian Constitution in the age of globalization.

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<sup>28</sup> *Ibid* Emphasis supplied.

## WORKERS WITHOUT BORDERS IN INDIA – SYNERGIZING THE WELFARE STATE IDEOLOGY AND THE POST LIBERALIZED IDEOLOGY

*Dr. Anuja, S\**

### 1. Introduction

Migration is the key global challenge of this decade relating to the discourses on decent work and the inevitable need for social cohesion and governance. Globalization can perhaps best be defined as the ‘widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social life.’<sup>1</sup> The Global Landscape relating to the migrant workers reflects a unique trend of its own marked by decreasing significance of the State in recruiting migrant labour and the increasing importance of private agents and intermediaries; feminization of migrant labour with women migrant workers predominant in the sex sector and domestic work- areas characterized by a strong bond of subordination between the employer and employee, and usually beyond the protection of labour law; increasing short-term nature of labour migration; considerable growth in irregular migration and the need for states to balance control measures with measures that facilitate labour migration and protect migrant workers and last but not the least States’ reluctance to agree to legally binding, multilateral instruments.

The domestic/national level implications of globalization can best be deciphered from the trends and incidences of migration having its source in the push and pull factors. The Decent Work Agenda of the ILO (International Labour Organisation) assumes importance in this context, since the jobs of the migrants are categorized as coming under 3 d’s- dirty, dangerous and degrading. Thus there is the organic link between globalization, migration and the Constitutional ideologies. The forces driving migration in the Indian setting are many and complex. Poverty, wars, famine and repression are certainly among the major causal factors of migration but there are other factors as well. Migration from one state to another in India occurs mainly out of subsistence or survival concerns. The pressure behind this phenomenon

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<sup>1</sup><http://www.imi.ox.ac.uk/pdfs/wp/wp-68-13.pdf>. (last visited on 29/5/2016).

could very well be scarcity in natural resources, growing urbanization, uneven development, inter regional disparities, displacement added with socio - economic hardship, bonded labour debts etc., Workers migrate seasonally, temporarily, or for a longer period, either within a State or across States.<sup>2</sup>

## 2. The profile of a migrant worker

The common link that can be attributed to the domestic workers, rickshaw drivers, migrant families encompassing child labourers, workers of tile factory, workers in crop cutting, workers in sugarcane industry, fish processing industry, workers involved in export zones, the construction workers, the agricultural labourers, workers in the brick kilns is that they are migrants. India is a country with billion population. The statistics reveal that around 93 % of the Indian work force comes under the unorganized sector. Nearly one-third of India's population is migrant population, half of this population having migrated from rural areas to cities in search of work. The popular Labour catchment areas identified by the administrative statistics are Bihar, Uttar Pradesh, Orissa, Andhra Pradesh, Tamil Nadu and parts of Kerala and Karnataka.

The majority of the migrant population comprises of tribal people, socially deprived groups and people from resource-poor areas. Hence profile of a migrant worker in India can be deemed to be geographically scattered, socio-culturally fragmented and economically disenfranchised. The ought proposition is that the system when positively viewed leads to improve income, skill development, and provide greater access to services like healthcare and education, providing work opportunities for migrants, the acquisition of new skills, and remittances which helped to support families. The is proposition contradicts with the ought and results in negative aspects of migration in the form of exploitation of labour, and the issues smuggling or trafficking of human beings in the background cannot be overlooked. The whole process can be summed up as a scenario where there is the lack of gainful employment, decent work, human security and individual freedoms. More often than not, they are vulnerable, exploited and work in conditions where their rights are not protected.

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<sup>2</sup> <http://www.un.org.in/page/decent-work-for-migrant-workers-in-india>.

### 3. The anxieties and concerns

The articulation of rights culture and language among the migrant workers has evolved as a potent weapon, through the International mandates ruling the field to empower the migrant workers. The lack of education poses a huge obstacle to the realization of rights based culture. Preference by employers for migrant than local workers in similar lines with the issue of child labour justified by the theory of disciplining leads to a favourable market for the migrant workers in India. Little bargaining power and less unionisation attributes to such preferential tendencies. The unscrupulous behavior of employers manipulating the status of such migrant workers resulting in deprivation of wages and due status as a human beings conflicts with the idea of empowerment of migrant workers in India.

The influx of women migrant workers into the realm reveals the gender dimensions of the problem and acquires huge proportions resulting in trafficking. The issue of double discrimination becomes crucial reinforcing the concept of sweat shops. They are virtually kept in captivity, generally at workplace itself, forced to work for long hours in unhygienic conditions, are denied minimum wages and also subjected to various forms of sexual exploitations and coercion.<sup>3</sup> Migration and its associated abuses perpetrated against women workers leads to a situation on par with bonded labour i.e., the Modern forms of slavery. The paradox being that the industry with whom they may be working will be in the organized sector but since they fall under the informal labour due to their migrant status makes them invisible and voiceless population. The enslavement through debt bondage system in India adds on the plight of the migrant workers.<sup>4</sup> Poor / non enforcement of laws and protection of rights of workers during migration and at worksites aggravates the situation leading to non- prosecutions of genuine cases.

The chronic insecurity of informal workers allows employers to impose extremely hazardous working conditions on them. Lack of occupational health and safety which contradicts with the constitutional aspirations under the Constitution of India<sup>5</sup> and the prevalence of violence and sexual harassment at workplace leads

<sup>3</sup> Rohini Hensman, "The Impact of Globalisation on Employment in India and Responses from the formal and Informal Sectors" IIAS/IISG CLARA Working Paper, No.15, Amsterdam (2001).

<sup>4</sup> See for more details, Dr. Anuja.S, "Justice Promised but Undelivered-A Critique on Enslavement through Debt Bondage in India" *Journal of Law and Public Policy*, Vol-II (2015).

<sup>5</sup> The principles of Art.14 relating to non-discrimination, Right to work, Article 23(1), Article 39, Article 42, and Article 43.

to a chaotic situation in the migration culture as such. The fact that the migrant workers are highly mobile communities with no deep roots anywhere they go adds on to the conditions of greater threat of nutritional diseases, occupational illnesses, communicable diseases, alcoholism, HIV and AIDS amongst migrant populations. Migration and slums are inextricably linked, as labour demand in cities and the resulting rural-to-urban migration creates greater pressures to accommodate more people. The extreme poverty and the high insecurities attached to the employment arrangements leads to clandestine manipulative practices by the employer enforcing forms of bondage. The Exclusive policy ideology results in lack of access to public services and social protection for migrants in destination areas. Lack of participation in the political process at the local level and poor integration into social structures such as self-help groups differentiates them with the mainstream developmental processes.<sup>6</sup> The problems above mentioned are in a piece meal fashion addressed by the social sector ministries connected with health and family welfare, human resource development, food and consumer affairs, urban affairs, social justice etc.,

Identity documentation that is authenticated by the State is indispensable for ensuring that a person has a secure citizenship status and can benefit from the rights and protections that the state provides.<sup>7</sup> The issue of identity crisis haunts them throughout their stay at the destination points. The migrants usually form a class of voiceless population. They work in poor conditions, with no access to government services and schemes, which are usually available to other workers. How to address and reconcile the need based framework of the problem is the crucial challenge. i.e., the workplace concerns of the migrant worker relating to safety and the human rights concerns of the migrant worker coupled with the needs of family members, including infants, children, adolescents and elderly who accompany migrant workers or are left behind in source areas. The concerns of migrant workmen from indigenous tribes and communities and women fall into the category of doubly disadvantageous class of vulnerability. The proponents of globalization are mainly the unscrupulous employer whether be private or

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<sup>6</sup> *Supra* Note 1. These are the challenges identified in the Indian context as a part of the Decent Work Agenda of ILO.

<sup>7</sup> See for more details <http://www.migrationpolicy.org/article/internal-labor-migration-india-raises-integration-challenges-migrants>. (last visited on 17/3/2016).

government owned supports debates of need of increasing flexibility allowing the enterprises for restructuring or to close down the enterprises or to shift their investments to more profitable lines. These capitalistic arguments pose a serious challenge to the survival and living of these vulnerable categories.

#### 4. The Promises

The three main instruments dealing with addressing the discriminatory and abusive treatment of migrant workers that has long been on the international agenda are C097-Migration for Employment Convention (Revised), 1949 (No.97),<sup>8</sup> R086-Migration for Employment Recommendation (Revised), 1949 (No.86), C143-Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143),<sup>9</sup> the accompanying R151-Migrant Workers Recommendation, 1975 (No.151) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (ICMW). As its title implies, the ICMW addresses the working situation of migrants, entitling them to the same pay, hours, safety considerations, and other workplace conditions that nationals enjoy. However, the convention goes beyond rights in the workplace by enumerating a comprehensive list of protections for migrants' family members, with the goal of acknowledging migrant workers as more than simply economic factors of production. Indicative of this concern are provisions barring the arbitrary expulsion of legal migrant workers. The ICMW does not attempt to create new rights. Rather, it explicitly extends to migrants those rights set forth in other UN documents. In enumerating these rights, the convention often invokes a principle of equal treatment between migrant workers and nationals.<sup>10</sup> The ILO Multilateral Framework on Labour Migration (2006) is yet another milestone development relating to the issue.

<sup>8</sup>The ILO establishes the Migration for Employment Convention, mandating that member-states guarantee certain rights to migrant workers: free and adequate employment assistance; facilitation of departure, journey and arrival of migrants; access to medical services; equal treatment of migrant workers in terms of labor rights; right to remain in the destination country in cases of injury or illness and freedom to transfer and savings abroad.

<sup>9</sup>Article 11-A migrant worker is defined as "a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker."

<sup>10</sup><http://www.migrationpolicy.org/article/promise-and-prospects-uns-convention-migrant-workers>. (last visited on 17/3/2016).

The 2030 agenda for sustainable development, adopted by the United Nations General Assembly in September 2015, provides for a strong link between decent work and migration in Sustainable Development Goal (SDG) 8 on promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, which contains target SDG 8:8 *Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.*<sup>11</sup> Suggestions for the role of the ILO in protecting migrant workers included: providing technical assistance to support countries in implementing the existing international labour standards in law and practice; assisting in capacity building among member States to better manage migration nationally and regionally; promoting policies that enhance contributions of migration to development; promoting social dialogue nationally and regionally; promoting bilateral and regional discussions and cooperation; disseminating information on best practices; – creating a database to provide reliable statistics, particularly from sending countries, including data disaggregated by sex, and to provide labour market data; involving regional and sub-regional offices in the dissemination of information; ensuring consistency between ILO standard-setting and technical activities and other UN agencies and international bodies; supporting institutional structures to facilitate the exchange and monitoring of migrant flows.<sup>12</sup>

The Indian Constitution contains basic provisions relating to the conditions of employment, non-discrimination, right to work etc., (Articles, 23(1), 39, 42 and 43). India is the founder member and has ratified many of the ILO Conventions. These provisions and commitments along with pressure from worker's associations have found expression in labour laws and policies. The Indian constitution provides basic freedom to move to any part of the country, right to reside and earn livelihood of their choice. Thus, migrants are not required to register either at the place of origin or at the place of destination.<sup>13</sup> An Indian citizen can well take the advantages of the Article but when the Indian citizen who belongs to

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<sup>11</sup> <http://www.ilo.org/global/topics/labour-migration/policy-areas/migration-and-development/lang--en/index.htm>. (last visited on 17/3/2016).

<sup>12</sup> <http://www.ilo.org/public/english/standards/reln/ilc/ilc92/pdf/pr-22.pdf>. (last visited on 17/7/2015).

<sup>13</sup> Ansari P A., "Internal Migration: An analysis of Problems faced by the migrants in India- A step to the solution" *Indian Journal Of Applied Research*, Vol.6, Issue: 6 (June 2016).

a socially backward and vulnerable class of migrant workers the situations gets problematic. An interstate migrant worker in India has a protective umbrella of various legislative frameworks like the Inter- state Migrant Workmen (Regulation and Conditions of Service) Act, 1979; the Minimum Wages Act, 1948; the Contract Labour (Regulation and Abolition) Act, 1970; the Equal Remuneration Act, 1976; and the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; the Employees Compensation Act 1923; the Payment of Wages Act 1936, the child labour (Prohibition and Regulation) Act, 1986, the Bonded Labour Act, 1976 and the Unorganised Workers Social Security Act, 2008 in general. All these legislations owe their origin to the welfare state aspirations enshrined under the Directive Principles of State Policy enshrined under the Constitution of India. These piece meal legislations are meant to serve the versatile purposes of the migrant worker during his employment period.

“Inter-state migrant workman” under the Inter State Migrant Workmen (Regulation and Conditions of Service) Act, 1979 means any person who is recruited by or through a contractor in one state under an agreement or other arrangement for employment in an establishment in another state, whether with or without the knowledge of the principal employer in relation to such establishment; the system envisaging a transaction through a contractor and recruitment in one state for working in another state<sup>14</sup>. The salient features of the Act includes the following :

1. Applicability of the Act to interstate migrants recruited through contractors or middlemen and those establishments and Contractors that employ five or more such workers on any given day.
2. Establishment proposing to employ Inter-State migrant workmen will be required to be registered with registering officers appointed under the Central Government or the State Governments, as the case may be, depending on whether the establishment falls under the Central sphere or State sphere.<sup>15</sup>
3. Prohibition against employment of Inter-State migrant workmen without registration.<sup>16</sup>

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<sup>14</sup> Sec.2 (1) (e) of the Inter State Migrant Workmen (Regulation and Conditions of Service) Act, 1979.

<sup>15</sup> *Ibid* Sec.4.

<sup>16</sup> *Ibid* Sec 6.

4. Licensing of Contractors -Every contractor who proposes to recruit or employ Inter-State migrant workmen will be required to obtain a licence from the specified authority both of the State (home State) and the State in which he is proposed to be employed (host State). Contractor will be required to furnish particulars regarding the workmen in the form to be prescribed by rules to the specified authority of both the home State and the host State<sup>17</sup>. The contractor will also be required to issue to every workman employed by him, a pass book containing the details of the employment. Specific guidelines have been indicated regarding the wages payable to inter-State migrant workman and he is required to be paid wages from the date of his recruitment.<sup>18</sup>
5. Displacement allowance- at the time of recruitment, a displacement allowance equal to fifty percentage (50%) of the monthly wages payable to him or seventy-five rupees, whichever is higher.<sup>19</sup> (not refundable, in addition to wages)
6. Journey allowance- for to and fro journeys from place of residence and place of work and-entitled to payment of wages during the period of such journeys as if he were on duty.<sup>20</sup>
7. Prescribed the Duties and Obligations of Contractors-To furnish to home State and host State particulars of Migrant Workers; to issue pass books with photograph affixed; name and place of the establishment wherein the workman is employed; the period of employment; the proposed rates and modes of payment of wages; the displacement allowance payable; the return fare payable to the workman on the expiry of the period of his employment and in such contingencies as may be prescribed and in such other contingencies as may be specified in the contract of employment; and the deductions made with other details.<sup>21</sup>
8. Past liabilities- It shall be the duty of every contractor and every principal employer to ensure that any loan given by such contractor or principal

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<sup>17</sup> Contents of License, terms and conditions of the agreement or other arrangement under which the workmen will be recruited, the remuneration payable, hours of work, fixation of wages and other essential amenities in respect of the inter-State migrant workmen.

<sup>18</sup> Sec.8, the Inter State Migrant Workmen (Regulation and Conditions of Service) Act, 1979.

<sup>19</sup> *Ibid* Sec.14.

<sup>20</sup> *Ibid* Sec.15.

<sup>21</sup> *Ibid* Sec.12.

employer to any inter-State migrant workman does not remain outstanding after the completion of the period of employment of such workman under the said contractor or, as the case may be, in the establishment of such principal employer and accordingly the remaining unsatisfied before the completion of such period shall, on such completion, be deemed to have been extinguished and no suit or other proceeding shall lie in any Court or before, any authority for the recovery of such debt or any part thereof.<sup>22</sup>

9. Deeming Provision- Inter-State migrant workmen to be deemed to be in employment from date of recruitment for the purposes of certain enactments specified in the schedule.<sup>23</sup>
10. Procedural compliance during occurrence of Fatal Accidents<sup>24</sup>- Information to the specified authorities of both the States and also the next of the kins of the migrant workman.
11. Legal Aid<sup>25</sup>- On receipt of a written application from migrant workmen or in the event of his death, from next of his kin for providing legal aid in relation to any proceedings before the Authority under Section 15 of the Payment of Wages Act, 1936 or Authority under Section 20 of the Minimum Wages Act, 1948 or appropriate Labour Court under Section 33C (2) of the Industrial Disputes Act, 1947 or Commissioner for Workmen's Compensation under the Workmen's Compensation Act, 1923, in which the migrant workman or his legal heir is a party, the specified authority concerned, if he is satisfied, may with the prior approval of the Deputy Chief Labour Commissioner (Central) engage an advocate to conduct the relevant proceedings on behalf of the migrant workman or his legal heir as the case may be and meet all legal expenses in this regard.
12. Applicability of S.33C(2) Industrial Disputes Act; Where any workman is entitled to receive from the employer any money or any benefit which is

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<sup>22</sup> *Ibid* Sec.19.

<sup>23</sup> *Ibid* Sec.21.

<sup>24</sup> *Ibid* Sec.16 (g), Details to be included in the report includes name of the migrant workman Date, place and nature of accident; Condition of the migrant workman (if alive); Action taken by the contractor/principal employer; Remarks.

<sup>25</sup> Rule 58.

capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government; within a period not exceeding three months.

13. Monitoring aspect-Power has been given to the State Government of the home State to appoint, after consultation with the Government of the host State, inspectors for visiting the establishments wherein workmen from the former State are employed to see whether the provisions of the legislation are being complied with in the case of such workmen.

The Unorganized Workers Social Security Act, 2008, (UWSSA) marks a departure from the past on the much neglected issue of social protection for the unorganized workers. UWSSA, 2008, highlights the major unorganized worker categories and includes migrant workers under the ambit of wage workers. The Act provides for formulation of schemes by the Central Government for different sections of unorganized workers on matters relating to: a) life and disability cover, b) health and maternity benefits, c) old age protection, d) any other benefit as may be determined by the Central Government. It provides for formulation of schemes relating to provident fund, employment injury benefits, housing, educational schemes for children, skill upgradation, funeral assistance and old age homes by the state governments. It envisages National Social Security Board at the central level under the chairmanship of the Union Minister for Labour and Employment which also gets replicated at the state level comprising of representatives of unorganized workers and employers of unorganized workers as well as persons belonging to the Scheduled Castes (SCs), Scheduled Tribes (STs), other minorities and women. The ten schemes enlisted which were already made available to the BPL card holders gets extended to the unorganized workers registered under the Act. The law is good as long as its implementation goes and the applicability of law in the context created incongruities.

### 5. The problems

Despite the various advantages conferred upon the inter-state migrant workers by the legislation, there exists certain hurdles in the path of its effective

implementation. Any law is good as long as its implementation goes. The workplaces or establishments where flexibility in labour is required in lines with the ideology of the post liberalised era become the attractive destination of these types of workers. The problem starts with the identification of the migrant worker. Given the low level of literacy and non-proximity with the destination state added with the language crisis perpetuates the invisibility of the person and he/she is deemed voiceless. Unaware of the pitfalls they are into, they are kept as bonded labourers. The contractors through whom these workers get migrated hardly register themselves and take licenses for employing them. Very few enterprises employing interstate Migrant Workmen have registered under the Act. The record of prosecutions and dispute settlement has been very weak. Migrant Workmen do not possess pass books, prescribed by law, and forming the basic record of their identity and their transactions with the contractor and employers. The difficulty in identifying the migrant workmen adds on to the plight.

The co-ordination between the states that ought to happen i.e. between the host state and the state from where the migrant is recruited rarely happens. There exists hardly no or rare coordination between Labour Commissioners of different states in sharing information relating to the migrant workmen. Verification of documents submitted by the migrant workmen by the labour Department and the difficulty in getting processed various identity cards for these group augments the time consuming processes of getting the reliefs on time. Rampant violation of labour laws in the hands of unscrupulous employers and contractors adds on to the system. Governmental costs involved to migrant workers and their families included a high level of stress due to poor working conditions, separation and vulnerability to physical and psychological abuse, with the most vulnerable workers bearing the greatest burden. The concerns of the transit shelter for the migrant workers had never been the core point of discussion. Upgrading the skills of the migrant workers has never been the agenda that has been taken cognizance of.

One of the personal level discomforts attached to migration as an issue is that migrants may not speak the local language sufficiently fluently and may lack links with the local community, which can prevent them from finding out about suitable job vacancies. Regrettably, discrimination also adds on to the plight. Migrant workers as a class in itself is often viewed, targeted and stigmatized as beyond

the applicability of labour laws, which reinforces the problem of identification and well being of this population. The Unorganized Workers Social Security Act, 2008, remains as another toothless tiger given the context that it has its own inbuilt deficiencies as reflected when the law gets applied in the context. The Act (UWSS) is silent about the definition on social security and thereby there is No entitlement of rights to labourers. The Act is silent about regulating the conditions of employment which is very crucial about the migrant workers. There is no penalty is attached to cases of non - implementation of schemes envisaged and no authority has been identified as implementation mechanism. The Act does not possess any corpus fund unlike that of the Construction Workers Welfare Act of 1996. Neither any grievance redressal mechanism is put in place under the Act nor any appellate body is envisaged. Non- payment of contribution disentitles the worker from getting any benefits which adds on to the plight of migrant workers when he is into systems of forced or bonded labour. There is no concept of social assistance rendered in cases of unemployment/loss of job, payment or fixation of wages, working hours etc. regarding the unorganised workers. The Act remains silent on a national minimum wage, improving working conditions, the problems of women workers like unequal pay and sexual harassment at the workplace. Agricultural labourers who are the major population among the unorganised workers in India are not addressed through the legislation. In toto, the legislative promises remain as paper tigers.

## 6. The Prospects

*Undoubtedly, internal migrants have both fueled and fed off the country's development.* India's economic growth, in fact, is a success story because of unbridled distress migration by the country's poor. In the case of workers in the informal economy, where the relationship between employer and worker is not very clearly established, the State should be seen as the principal employer. It is the state's responsibility that workers in the informal economy are protected and given services and social security benefits. Suggestions to promote decent work for Migrant Workers in India include: developing a policy framework that gives priority to migrants, creates linkages between state and central policies on healthcare, education and social security, and facilitating convergence of state and central resources.

society. The multipronged strategy at different stages of life relating to, right to work decently, right to earn decently, right to maintain the remittances, right to quality education of children of migrant workers, ought to be set in motion in the Indian setting to espouse the cause of the migrant workers. Setting up micro credit advancements and arrangements through recognised banks and institutions can be another way of elevating the status of migrants. Given the context that encouraging them into work can reduce the prospects of them and their families being sucked into poverty traps and help them build social and community links, upgrading working skills and mentoring schemes for the migrant workers suitable to their age can be a positive step to be taken up by the concerned state governments. The improvement in the skill potential of the workers included can be better facilitated by public private partnership programmes, which can go a long way forward in improving labour market performance, leading to inclusive policies and integrating them into the mainstream of society. Kindergartens and schools that combine education with care may also bring major benefits to very young children from poorer families of migrant workers at a crucial stage of their development which requires a similar positive mandate in the national laws like Rights to Education Act, 2009. Social protection and social assistance to be made a reality for this chunk of population through the pro-active role played by State is yet another strategy required. Labour unions vociferously advocating the demands of the migrant workers ought to be a conducive atmosphere while evolving strategies for the migrant workmen. At a broader level, there should be an effort to create dialogue mechanisms between host States and the home States of migrant workers.

Rehabilitation of migrant workmen with easy access to subsidised food, housing, health and education for their children, institution of scholarships for the children for pursuing higher studies all take a long leap forward in the cause. Involving effectively the migrant workmen with Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) programmes can also be a feasible suggestion in this regard. Empowering the migrant workmen of their rights through periodical training by Para Legal staff and updating the existing legal developments to the vulnerable also brings in value added enriching of knowledge database of these sections. The potential of NGO's who cater to the *innovative solutions for migrants, including registration and photo ID services, vocational training,*

*employment counseling, legal aid, financial services, and destination support and influencing policy around rural migration can be harnessed in conducive atmosphere to create a rights based culture within the migrant community. A strong national strategy based on the foundations of protective discrimination as envisaged under the Constitution of India that ensures better access to entitlements and basic working conditions of migrant workers will be essential in building a sustainable and equitable path way to the development of the nation and progress of migrant workers.*

*"Labour is prior to, and independent of, capital. Capital is only the fruit of labour, and could never have existed if labour had not first existed. Labour is the superior of capital, and deserves much the higher consideration". Abraham Lincoln's First annual message to Congress, December 3, 1861.*

## TITIVATING PROTECTIVE DISCRIMINATION IN THE ERA OF PRIVATISATION

*Dr. Vishnuprasad R\**

In every society, there is clash of different forms and conflict between the power and freedoms of the individuals. It is the rule of law, democracy and judicial review that act as the balancing bar in cases of such conflict. The rule of law provides, a key basis for the protection of individuals and their rights while defining the relationship between the governing and the governed. As one speaks of rights, it is important to remember that concepts such as 'rights,' 'justice,' 'freedom,' and 'equality' are very elusive as they permit many conflicting opinions and understandings. Such opinions and understandings may emerge from the convictions of the thinkers, which in turn is dependent on their abilities to think. Further, thinking is a process moored in the environment, and associated to socio-economic, political, and moral standards of the society from which thinkers evolve or have an occasion to think. In fact, thinkers and social reformers have all along played an important role in attempting to spread the significance of equality and human development amongst all the individuals without any discrimination or deprivation of opportunities. Taking the clue from the past 'reformation and rights movements', the independent India embarked on intense reordering of its social structure. To begin with, its legal foundation, the constitution, provided for abolition of untouchability, prohibition of discrimination on grounds, among others, such as race, religion, and caste. *Incontro*, this zenith of the pyramid of normative structure in India fortified equality of treatment and of opportunities to all the people.

However, it is important to note that human beings, amongst themselves, are comprehensively diverse because of their external (social structure) as well as personal characteristics.<sup>1</sup> Such diversity between the individuals espouses inequalities in their competence, aptitude, skills and wants. Unarguably, it is the

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<sup>1</sup> External characteristics could include inherited fortunes in the natural and social environment in which we live. Whereas, personal characteristics could refer to age, sex, proneness to illness, physical and mental abilities. See Amartya Sen, *Inequality Reexamined 1* (Cambridge: Harvard University Press, 1995).

very same set of factors, which qualify individuals in the enjoyment of their lives as well as the lives of their dependents, freedoms, right to self-determination, development, and actualisation of wants. Further, reference to both the external and personal characteristics enables the State to have a realistic grasp of equality and inequalities in a society. Similarly, it is equally important to note that there is an inseparable nexus with justice and the social structure. In this setting, there is colossal scope for the powerful rhetoric of 'equality for all'.

Jean-Jacques Rousseau's Discourses on the Origin and Foundations of Inequality among Men is to the point and requires to be summoned up here. While introducing inequality, Rousseau declared that "*O man, of whatever country you are, and whatever your opinions may be, behold your history, such as I have thought to read it, not in the books written by your fellow-creatures, who are liars, but in nature, which never lies. All that comes from her will be true...*" This would mean that one has to consider what has been the man's state in the original state, (nature nurtures man as it does nurture animals) what has brought on inequality among men? (State, social structure and savage or inflict of pain or suffering by the powerful few) What has civilisation and progress made of man? (Made men weak and dependent on social stratification based on certain parameters).

Both, the natural and juristic persons, though differ from one another with regard to their constitution, form of creation, rights-obligations, abilities, purposes and characteristics and either benefitted or aggrieved by the policies of the State. The 'Economic Liberalisation Policy of 1991' (ELP) brought many changes in our society. In brief, this policy was introduced with a view to make the economy further market-oriented besides escalating the role of private and foreign investments. For this purpose, the government under the said policy (ELP) encouraged reduction in import tariffs, introduced deregulation of markets, and lessened taxes. However, this policy (ELP) is double-edged. On the one hand, the Policy is observed to be the reason for improvement of economic growth, and on the other hand, it is blamed for perpetuating and enlarging the scale of poverty, inequality and economic degradation that is a consequence of increased industrialisation.<sup>2</sup>

<sup>2</sup> See [https://en.wikipedia.org/wiki/Economic\\_liberalisation\\_in\\_India](https://en.wikipedia.org/wiki/Economic_liberalisation_in_India). (last visited on 30/9/2016).

Besides this, the policy also encourages a de-socialist pattern of governance, which in turn led to privatisation of majority of the functions of the State such as, construction and updation of roadways and railways, construction-development and maintenance of terminals, handling of thermal and steam coal (such as in Vishakhapatnam port), developments of city clusters, development and handling of mega containers, financing, supply of drinking water, electricity, and education.<sup>3</sup> Consequently, many public service undertakings are managed by private players either independently for the period of contract or jointly in association with the State. It may not be an exaggeration to submit that we are living in a PPP-Private Public Partnership era. This is a direct challenge to the implementation of government's protective discrimination policy.

The right to equality and non-discrimination is recognised in Article 2 of Universal Declaration of Human Rights (UDHR) and is a cross-cutting issue of concern in different UN human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) (Articles 2.1, 14, 24, 25 and 26), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 2.2), the Convention on the Elimination of All Forms of Racial Discrimination (CEARD) (Articles 1, 2, 4 and 5), the Convention on the Rights of the Child (CRC) (Article 2), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Articles 2, 3, 4 and 15), the Convention on the Rights of Persons with Disabilities (CRPD) (Articles 3, 4, 5 and 12), implicitly in the Convention Against Torture (since treatment being discriminatory can also contribute to it being found to be "degrading").

Not all different treatment amounts to discrimination under the human rights treaties.

- Under the ICCPR, the UN Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.
- In determining the 'reasonable and objective' test, the Committee has proceeded on a case-by-case basis "Special measures" are expressly recognised

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<sup>3</sup> See <https://www.pppinindia.gov.in/projects-list>. (last visited on 29/9/2016).

- in CERD Article 1.4 (to secure the advancement of certain racial or ethnic groups or individuals where necessary to ensure equal enjoyment of fundamental rights and freedoms)
- in CEDAW Article 4 (to accelerate equality between men and women)
- in CRPD Article 5 (which also recognises that promoting equality and eliminating discrimination requires parties to take appropriate steps to ensure provision of "reasonable accommodation") and in the list of positive measures which parties are required to take under CRPD Article 4.

The principle of equality requires, the State to take affirmative action in order to lessen or eradicate conditions that cause or help to perpetuate discrimination. The Human Rights Committee has clearly stated this obligation in General Comment 18 and the Committee on Economic, Social and Cultural Rights referred to it, as the duty of the State in its concluding observations. Thus, it is submitted as an obligation of all nation-States including India, to observe the right to equal treatment without discrimination by taking suitable legislative, executive and judicial measures. On the other hand, in every pluralistic society any egalitarian policy would necessarily be internally contradictory.<sup>4</sup>

The Constitution of India provided for a departure from the formal forms of equality to empower and promote advancements of the Scheduled Castes, Scheduled Tribes, and Women, given the fact that these sections of population have different levels of social and educational advancements concomitant to historical practices. In view of that, protective discrimination method was chosen to secure and realise social and economic justice to all Women, Scheduled Castes and Scheduled Tribes. The same is now also extended to the other backward classes.

Amartya Sen has pointed out that generally "Equality is judged by comparing some particular aspect of a person (such as income, or wealth, or happiness, or liberty, or opportunities, or rights or need-fulfilments) with the same aspect of another person..."<sup>5</sup> This would mean that any determination or measurement of

<sup>4</sup> Letwin William (ed.), *Against Equality, Readings on Economic and Social Policy* 15, (London: Macmillan Press 1983).

<sup>5</sup> Amartya Sen, *Inequality Reexamined* 2, (Cambridge: Harvard University Press 1995).

inequality would entirely depend on the choice of the variable in terms of which certain sections of population is described as unequals.<sup>6</sup> In addition, the variable to be selected depends upon the ideology or approach of the investigator or the State and additionally, some variables are interdependent as well as intersecting.<sup>7</sup>

Generally, equality is a complex concept and in its formal guise becomes not only more complex but also disadvantageous to subaltern sections in a pluralistic society like India especially given the past social structure and juxtaposed developments of the individuals. Continuing the old social structure of classifying people on castes and consequently depriving the people of their opportunities in education, employment and development would constitute for a non-egalitarian setup. Thus, if a formal equality before law principle is adopted, it evades the subaltern sections of people from their development plus enjoyment of rights. The same would also be offensive to human dignity, fraternity, and human rights<sup>8</sup> because, it is not only the general principle of equality and non-discrimination but also a fundamental element of International Human Rights Law, which is a higher norm.

In general, under International Human Rights Law, a violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; or c) if there is no proportionality between the aim sought and the means employed. International human rights supervisory bodies, including the Human Rights Committee, have expressly set out these requirements.<sup>9</sup>

Few thinkers like Prof. Sachidananda, (the Former Director of Sulabh Institute of Development of Studies, Patna) regard the reservation policy as pernicious principle.<sup>10</sup> This is because it revolves around an idea of remedying sins of the past of a social order by subjecting the present non-subaltern sections of the society

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<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> Dr. Varun Malik, "Protective Discrimination - A Challenging Issue in the Contemporary Society", 3 No.8 *IJMSSR* 20 (August 2014).

<sup>9</sup> See, General Comment 18, para.13, available at: <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>. (last visited on 30/9/2016).

<sup>10</sup> Sachidananda, *Rethinking at Scheduled Caste Reservation*, in A.K. Lal (ed.), *Protective Discrimination: Ideology and Praxis* 33, (Delhi: Concept Publishing Company 2002).

to certain disadvantages emanating from the pro-subaltern section policies of the State to uplift the subalterns. This may also be seen as punishing the present for the sin of the past social order. Could this cycle end? Perhaps, this cycle would proceed without an end, something comparable to the cycle of birth and death, which only has one exception that is salvation. Interestingly, the compensatory backwardness cycle in India is yet to explore a case of exception or have an end.

Affirmative action or protective discrimination might be adopted by a programme of preferential treatment extending certain special advantages to them or by reservation of quotas in their favour to the total exclusion of everybody outside the favoured groups. The validity of both of these measures depends on classification founded on intelligible differentia having rational and substantial nexus with the object sought to be achieved, that is, the redressal of backwardness. Further, such differentiation or classification for special preference must not be unduly unfair to the persons left out of the favoured groups.<sup>11</sup> In *K.C. Vasanth Kumar v. State of Karnataka*,<sup>12</sup> the Court held that the expression, 'any backward class of citizens' is of very wide import and as such members of every religion such as Hindu, Muslim, Sikh, Budha, Jain, etc, who are citizens of India and are backward and are not adequately represented in services are to be brought into the national stream by protective measures. Also backward may be relative such as professional or occupational backwardness or it may be economic, social, and educational. Therefore, appropriate context must be taken into consideration.

The reservation policies of the Government are challenged by the aggrieved. The earlier ideology of the Court exhibited in *State of Madras v. Champakam Dorairajan*,<sup>13</sup> shows that the court did not agree to the justification given by the State that Article 46 mandated the State to make provisions for the promotion of the educational and economic interests of the Scheduled Castes and the Scheduled Tribes. The Court opined that the said provision being a directive principle it could not override the Fundamental Rights under Articles 15 and 29 and therefore, the Government Order was quashed.

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<sup>11</sup> *Ibid* Para 2.

<sup>12</sup> 1985 Supp. SCC 714.

<sup>13</sup> AIR 1951 SC 226.

The Court in *M.R. Balaji v. State of Mysore*<sup>14</sup>, viewed that backwardness by itself is not sufficient to warrant reservation. What qualifies for reservation is backwardness which is the result of *identified past discrimination* and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. Reservation is a remedial action specially addressed to the ill effects stemming from historical discrimination. Further, the Court held that affirmative action is to redress the conditions of backward classes of citizens.

Most importantly, the court declared that maximum reservation allowed in the case of Article 15 (4) and 16 (4) is fifty percent.<sup>15</sup> The question that remained in controversy, however, was concerning the rule of "carry-forward". The Court held that the number of vacancies to be filled up based on reservation in a year including the "carry-forward" reservations should in no case exceed the ceiling limit of 50%.<sup>16</sup> Nonetheless, the Government found that total reservation in a year for Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) combined together easily reaches fifty percent and it becomes difficult to fill "backlog vacancies". According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling limit of 50%. Therefore, the Government inserted clause (4-B) after clause (4-A) in Article 16 *vide* the Constitution (Eighty-First Amendment) Act, 2000.<sup>17</sup> By clause (4-B) the "carry-forward"/"unfilled vacancies" of a year are kept out and excluded from the overall ceiling limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-First

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<sup>14</sup> AIR 1963 SC 649.

<sup>15</sup> *Indra Sawhney and Ors. v. Union of India and Ors.*, 1992 Supl. (3) SCC 217.

<sup>16</sup> *Ibid* Para 93.

<sup>17</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212. The Court held, "The ceiling limit of 50% on current vacancies continues to remain. In working out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained. On one hand of the spectrum, we have unfilled vacancies; on the other hand, we have a time spread over a number of years over which unfilled vacancies are sought to be carried over. These two are alternating factors and, therefore, if the ceiling limit on the carryover of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact situation. What is stated hereinabove is borne out by the service rules in some of the States where the carry-over rule does not extend beyond three years."

Amendment) Act, 2000.<sup>18</sup> Article 16 (4-B) lifts the 50% cap on carry-over vacancies (backlog vacancies). It is said, the said clauses "...retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand..."<sup>19</sup>

Other important observations of the court relating to reservation are as follows. Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1). The backward class of citizens contemplated in Article 16 (4) is not the same as the socially and educationally backward classes referred to in Article 15 (4). It is much wider. 'Creamy layer' is to be excluded. A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be.<sup>20</sup>

These decisions of the Court dealing with various issues relating to 'reservation policy' indicate that the Court has attempted over a period to resolve only certain ambiguities and concerns that existed concerning its implementation. However, it is submitted that the current practice of reservation including its implementation method is inappropriate and that they are contrary to human rights standards. This is because, the reservation policy was developed with an intention to promote people, who were subjected to suppression and oppression based on an ancient 'Caste' or 'Varna' system. Post-independence, the Constitution required the State to provide equal treatment to all citizens in matters of application of the law, determination by court, access to public places, and in matters of public employment which needed

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<sup>18</sup> *Ibid* at Para 95.

<sup>19</sup> *Ibid* at 278.

<sup>20</sup> *Supra* Note 12 at 766.

special treatment to be accorded by the State to such people to ensure that the unequals are not treated equally with equals. It is said, "The transformation of caste discrimination from "domestic grievance" into an internationally recognised human rights issue was largely due to the persistence of Dalit activists in calling on, the UN to take up this form of discrimination as a violation of international human rights law".<sup>21</sup>

International Convention on the Elimination of all forms of Racial Discrimination (ICERD) defines 'racial discrimination' in Article 1(1).<sup>22</sup> CERD viewed caste discrimination, as a form of racial discrimination based on descent.<sup>23</sup> In its General Recommendation No. 29, the CERD condemned descent-based discrimination that included discrimination founded on forms of social stratification such as caste as a violation of ICERD.<sup>24</sup> This was countered by India by stating that SCs, STs, the special measures for their upliftment, or that the caste could not be equated with race or covered under descent under Article 1(1) of the ICERD.<sup>25</sup> India has regularly rejected CERD's interpretation of descent by arguing that descent in Article 1(1) refers only to race whereas caste is based on social distinctions, not race. Therefore, it cannot be paralleled with race or descent.<sup>26</sup> The Committee for the Elimination of Discrimination Against Women has identified caste as obstacle to the implementation of the CEDAW and in India it is prominent with Dalit women and girls suffering extreme gender-based and sexual violence and gender-related discrimination on grounds of caste.<sup>27</sup> The CERD in its concluding observations on India's fifteenth to nineteenth reports has highlighted the gap between the formal

<sup>21</sup> Annapurna Waughray, "Caste Discrimination and Minority Rights: The Case of India's Dalits", 17 *Int'l J. on Minority and Group Rts* 331( 2010).

<sup>22</sup> It is defined as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

<sup>23</sup> CERD/C, concluding observations on India's ninth to fourteenth reports, 22 August 1996, UN Doc. CERD A/51/18 (1996), 352.

<sup>24</sup> See CERD/C General Recommendation No. 29, 22 August 2002, UN Doc. A/57/18 (2002).

<sup>25</sup> UN Doc. CERD/C/SR.797, 61. See also UN Doc. CERD/C/SR.796, 26.

<sup>26</sup> CERD, fourteenth periodic report of India, UN Doc. CERD/C/299/Add.3, 29 April 1996, 6-7; CERD, nineteenth report of India, UN Doc. CERD/C/IND/19, 29 March 2006, 16.

<sup>27</sup> See UN Doc. CEDAW A/55/38 (2000), 52, 68, 74; UN Doc. CEDAW/C/IND/Co.3, 2 February 2007, 8, 28, 29, 32, 33.

abolition of untouchability and caste discrimination in India and it has identified the continuance of discrimination and practice of caste as an obstacle in promoting equality concerning the enjoyment and exercise of human rights under the UN Convention on the Rights of the Child, the ICCPR and the ICESCR.<sup>28</sup>

In addition, it is submitted that the present reservation policy excludes 'minorities' from the list of its beneficiaries,<sup>29</sup> and that the category of SCs is restricted by religion only to Hindus, Sikhs and Buddhists which would indicate that backward class people from other religions are neglected. This is a serious breach of equality in a pluralistic society like India.<sup>30</sup> Further, it is observed that the reservation for the OBCs is defined without reference to religion and as such, they are tighter in scope than reservations to SCs and STs. Since, the results from the current reservation policy is discernibly benefitting to only certain sections of the community, while ignoring the other disadvantaged and needy, the reservation policy is not in accordance with international human rights standards, rather it is contrary to Articles 1,<sup>31</sup> 7,<sup>32</sup> 10,<sup>33</sup> and 21(2)<sup>34</sup> of the UDHR. Further, in the light of privatisation and liberalisation policy of the Government more and more governmental activities are taken up by the private sectors which originally were managed by the public servants in concerned governmental departments. This would suggest that application of the reservation policy to the private sectors would be the need of the day. Reservation policy may be regarded as required but

<sup>28</sup> See UN Doc. CRC/C/15/Add.228, 26 February 2004, 22, 25, 28, 59, 65; UN Doc. CCPR A/52/40 (1997), 430; UN Doc. E/C.12/IND/CO/5, 8 August 2008, 13, 14, 19, 25, 53.

<sup>29</sup> Indian legal framework distinguishes between the Dalits, or SCs, and minorities. The SCs benefit from special measures in employment, education and political representation which is not conferred upon the minorities. Although some minority communities qualify for reservations as OBCs on grounds of their social and educational backwardness they are not formally recognised for the benefit.

<sup>30</sup> "No person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste"; see Constitution (Scheduled Castes) Order 1950 (CO 19) para. 3, available at <http://lawmin.nic.in/ld/subord/rule3a.htm>, last visited on 3 December 2010; see Constituent Assembly Debates of India Vol. VIII, 25 May 1949, p. 272, 311 as to the discussions on inclusion of Sikhs to the list of beneficiaries of reservation policy.

<sup>31</sup> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

<sup>32</sup> "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

<sup>33</sup> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

<sup>34</sup> "Everyone has the right of equal access to public service in his country."

the manner in which it is structured and implemented needs to be revised keeping in mind the above shortcomings. The Court has much to achieve in this regard.

The principle of equality of opportunity ensures, that every person has an equal chance to do what he or she wishes and has the capacity for. There is a fundamental presumption here that inequalities must be tolerated if they result from differences of personal effort and merit and not as the result of different opportunities.<sup>35</sup>

The social and cultural changes of the last sixty five years have been associated with the emergence and growth of administrative, educational, scientific, medical, financial and other institutions of a public or semi- public character, that are either completely new or so different from their traditional counterparts as to count effectively as new.<sup>36</sup> State should be aware of this and it has made some special provisions concerning unequals for their upliftment. Another concern that stem is that, whether all such needy persons get the protection and benefit of special provisions. Indeed, such a concern can be analysed from the perspective of the scope of the actual policy or law, and in particular, its manner of application. This being the case, not all may get the benefit. Hence, the practical outcome is wants and desires are aplenty but the ability in the individual to realise them is limited or not sufficient. This is coupled with another factor, that is, modern living values and standards have redefined the necessities and the luxuries. Interestingly, be it a necessity or luxury, human bent is not just to have mutually, but to have both as much as possible. The State ought to have addressed these issues by this time and unfortunately it has neither addressed it effectively nor thought of them as the basic set of facts to be considered at the time for formulation of policies oriented towards promotion of equality to all. Poverty and large population add to the misery of the people and Government continues to fail in securing de facto equality among all. Issues of inequalities in income, inequalities in capacities of the individuals, the problem of concentration of wealth among few persons, unending wants/desires, large population, unemployment, and poverty guides one to consider 'illegal means

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<sup>35</sup> Pulin B. Nayak, "On Equality and Distributive Justice", 26 *Economic and Political Weekly* 584 (Annual Number 11/12, March 1991).

<sup>36</sup> Andre Beteille, "Distributive Justice and Institutional Well-Being", 26 *Economic and Political Weekly* 592 (Annual Number 11/12, March 1991).

of attaining economic capacity', besides fragmenting society making it a paradise for political game plays.

Aristotle wrote that 'justice is equality,'<sup>37</sup> but demand for equality must be specific, that is specification of demand, 'equality of what.'<sup>38</sup> The social structure, since its formulation, had continuously been going through vicissitudes with changing times and changing thoughts.

Discrimination affects the way people are treated in all spheres of society such as politics, education, employment, social and medical services, housing, the penitentiary system, law enforcement and the administration of justice in general.<sup>39</sup> Demand for equality is justified, protective discrimination is justified, the manner/nature, duration and quantum of demand and affirmative action is to be periodically reviewed and aligned with the tenets of constitution and human rights laws.

It must be remembered that protective discrimination is not merely a legal or a political step as it was embedded to reorder the social structure itself. Therefore, the governments in succession ought to have established the refurbished social structure by this time as envisioned starting from 1947. However, a glance in retrospect projects the failure of all former and the present governments in this direction.

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<sup>37</sup> Pulin B. Nayak, "On Equality and Distributive Justice," 26 *Economic and Political Weekly* 583, Vol. 26 (Annual Number 11/12 March 1991).

<sup>38</sup> Amrtya Sen, *Supra* Note 24.

<sup>39</sup> <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>.

# IS CORPORATE LAW ACHIEVING SOCIAL JUSTICE IN INDIA?

*Dr. Kamlesh Kumar\**

## 1. Introduction

India is only country in the corporate world which has made Corporate Social Responsibility (CSR) a legal mandate for both public and private companies fall under stipulated criteria. The section 135 of the Indian Companies Act, 2013 formalized the contribution of the company to social development. This should of two percent profits gained from last three years average net profits (as specified in the Schedule VIII of the Companies Act, 2013). The present paper assesses the wide range of the activities undertaken under the umbrella of CSR. Broadly, are the outcomes of such initiatives contributing substantially to the progress of the Nation building? Further, the findings revealed the impact of the CSR activities in terms of access to education, sanitation, drinking water for the marginalized sections of society in urban and rural settings. Apart, the youth training and skill development initiatives program enhanced an opportunity for generating livelihood among youths as well as community and rural development, especially in the developmental deficit pockets or clusters of different States in the country. Eventually, it is evident that amendment to law has transformed corporate responsibility and partnering towards achieving Constitutional vision of social justice in India.

## 2. Corporate Social Responsibility

Jagdish Gulati<sup>1</sup> made an attempt to capture CSR in Indian context from historical to contemporary perspective when, he looks at CSR debate from philanthropy to public-private-people partnerships. As he mentions that, the term CSR might be new but the concept is not so. The concept has a long history; it has been incorporated in various religious laws where a part of one's earnings

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<sup>1</sup> Gulati, J., "CSR debate in India from Philanthropy to public-private-people partnerships in Corporate Social Responsibility concepts and cases"- The Indian Experience(ed.) by Baxi. C.V and Prashad. A 2013, Excel Books, New Delhi: 2013.

are donated for the poor and community welfare. Thus, the individuals joined hands to form organizations or industry and the same concept became embedded in organisational culture. The companies used to see this area of corporate social philanthropy as the last thing on their agenda ten years ago, now they agree that social and economic issues are intertwined. As earlier mentioned, recently, CSR involves a legal commitment by a company to manage its roles in society at large in stipulated criteria. CSR involves a wide range of practices in the area of human rights, employee relations, diversity, consumer protection, environment protection, fiscal responsibility and accountability, marketplace and philanthropy. Indian companies like Tata and Birla groups, ITC, Ranbaxy, Infosys and Dupont India, have endeavored to create a better social order.

### Theories of CSR

According to Baxi and Chadha,<sup>2</sup> different models or theories have emerged in the field of CSR:

1. Ethical Theory
2. Altruistic Theory
3. Political Theory
4. Social Contract Theory
5. Stakeholder Theory
6. Globalization Theory
7. Economic Theory

The present paper is based on social contract theory which advocates social aspects of CSR includes human rights, labour, consumer protection and respect for national sovereignty and local communities.

### 3. Methodology

The methodology adopted for preparation of this research paper is observation and descriptive analysis based, on the research survey undertaken by Federation

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<sup>2</sup> Baxi, C.V and Prashad, A., 2013, "Corporate Social Responsibility-concepts and cases - The Indian Experience" (ed.) Excel Books, New Delhi; 2013.

of India Chambers of Commerce and Industry (FICCI) and Tata Institute of Social Sciences (TISS). The Federation of Indian Chambers of Commerce and Industry (FICCI) has conducted a survey to assess implementation of the CSR mandated after amended companies Act in 2013. The FICCI survey a kind of quantitative data interpretation surveyed. Other way round, the Tata Institute of Social Sciences (TISS) has undertaken various activities under the National Center of CSR Hub. The NCSR Hub has been engaged in research and impact assessment of corporate initiated, CSR activities in various parts of the country (qualitative). Thus, the paper is based on review, the research survey and impact assessment work/task conducted by both FICCI and TISS in recent years and available in public domain.

**Table -1 Method and materials**

| Methods    | Nature of Data/Informations |                       |
|------------|-----------------------------|-----------------------|
| Survey     | Quantitative                | Opinion/views         |
| Case Study | Qualitative                 | Interaction/interview |
| Case -1    | Need Assessment             | Base Line Survey      |
| Case-2     | Impact Assessment           | Evaluation Report     |
| Case-3     | Impact Assessment           | Evaluation Report     |
| Case-4     | Impact Assessment           | Evaluation Report     |
| Case-5     | Impact Assessment           | Evaluation Report     |

**Sector covered:** Engineering, Electronics, Food and Beverages, Banks and finance, Cements, Chemicals, Germs and Jewelry, Pharmaceuticals, Mining, Information Technology, Real Estate, FMCG, Infrastructure and paper and paper products etc.

#### 4. CSR entries under Schedule VII of the S.135 of the Companies Act, 2013.

- (i) Eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and providing safe drinking water.
- (ii) Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects.

- (iii) Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.
- (iv) Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water.
- (v) Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts.
- (vi) Measures for the benefit of armed forces veterans, war widows and their dependents.
- (vii) Training to promote rural sports, nationally recognized sports, paralympic sports and Olympic Sports.
- (viii) Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the scheduled caste, the scheduled tribes, other backward classes, minorities and women.
- (ix) Contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government.
- (x) Rural development projects.<sup>3</sup>

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<sup>3</sup> "G.S.R.130(E) notification dated 27<sup>th</sup> February, 2014, Ministry of Corporate Affairs, Government of India."

Table -2

## Towards constitutional vision of social justice through CSR

| CSR Activities                 | Schedule-VII of the section-135 of Companies Act, 2013                 | Constitutional vision of Social Justice                                                                                                                                                                                                                                                                      |
|--------------------------------|------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Access to Education            | Schedule- VII Entry (ii) under section 135 of the Companies Act 2013.  | 86 <sup>th</sup> Amendment to Constitution of India, 2002 and later became an Act of parliament - Right of Children to Free and Compulsory Education Act, 2009                                                                                                                                               |
| Vocational Training and Skills | Schedule -VII Entry (ii) under section 135 of the Companies Act, 2013. | Art. 39(a) - The State shall, in particular, direct its policy towards securing.<br><br>(a) that the citizens, men and women equally, have the right to an adequate means of livelihood.                                                                                                                     |
| Poverty Eradication            | Schedule -VII Entry (i) under section 135 of the Companies Act, 2013.  | Art. 38(2)(2) - The State shall, in particular, strive to minimise the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. |

|                          |                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|--------------------------|-----------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Malnutrition Alleviation | Schedule -VII Entry (i) under section 135 of the Companies Act, 2013. | Art. 47 - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health.                                                                                                                                                                                                                                                                                                                              |
| Access to Health Care    | Schedule -VII Entry (i) under section 135 of the Companies Act, 2013. | <p>(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;</p> <p>(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.</p> |
| Access to Sanitation     | Schedule -VII Entry (i) under section 135 of the Companies Act, 2013. | <p>Art. 21 - Right to life and personal liberty.</p> <p>Article 47 - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health.</p>                                                                                                                                                                                                                                                               |

|                              |                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|------------------------------|------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Access to Water              | Schedule -VII Entry (i) under section 135 of the Companies Act, 2013.  | Art. 21 - Right to life and personal liberty.<br><br>The concept of right to "healthy environment" has been developed as part of the right to life under Article 21 of our Constitution. This concept was first articulated in the case of <i>Bandhua Mukti Morcha v. Union of India</i> <sup>4</sup> and then continued and expanded. The Supreme Court protected the right to clean water as part of the right to a healthy environment. |
| Environmental Sustainability | Schedule -VII Entry (iv) under section 135 of the Companies Act, 2013. | Art. 48A - The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.                                                                                                                                                                                                                                                                                                     |
| Rural Development            | Schedule -VII Entry (x) under section 135 of the Companies Act, 2013.  | Art. 40 - The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.                                                                                                                                                                                                                                              |
| Disabled                     | Schedule -VII Entry (ii) under section 135 of the Companies Act, 2013. | Art. 46 - The State has also the responsibility of <i>promoting</i> ... education, employment, basic infrastructure and social <i>welfare</i> measures.<br><br>The Right of persons with disabilities Bill, 2014                                                                                                                                                                                                                           |

<sup>4</sup> (1997) 10 SCC 549.

|                |                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|----------------|-------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Senior Citizen | Schedule -VII Entry (iii) under section 135 of the Companies Act, 2013. | Art. 41 - The State shall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.                                                                                                                                                                        |
| Sportsmen      | Schedule -VI Entry (vii) under section 135 of the Companies Act, 2013.  | Art. 43 - The State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. |
| War Veterans   | Schedule -VII Entry (vi) under section 135 of the Companies Act, 2013.  | Art. 38(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.                                                                                                                                                                                                        |

|                                                               |                                                                                   |                                                                                                                                                                                                                                                                                                                |
|---------------------------------------------------------------|-----------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Gender(women)/<br>Trans-gender                                | Schedule -VII Entry<br>(viii) under section 135<br>of the Companies Act,<br>2013. | Art. 39(a) - that the citizens,<br>men and women equally,<br>have the right to an adequate<br>means of livelihood.                                                                                                                                                                                             |
| Welfare of Schedule<br>Caste and Schedule<br>Tribes Community | Schedule -VII Entry<br>(viii) under section 135<br>of the Companies Act,<br>2013. | Art. 46 - The State shall<br>promote with special care,<br>the educational and economic<br>interests of the weaker<br>sections of the people, and, in<br>particular, of the Scheduled<br>Castes and the Scheduled<br>Tribes, and shall protect them<br>from social injustice and all<br>forms of exploitation. |

In table 2, a modest attempt is made to link CSR activities in the consonance with the legal framework of company law (S.135) and also broader framework of Constitution of India. It is found that one or other ways, the activities under the CSR are contributing to the goal and preamble of the Constitution which is reflection of the law of the land. Further, the CSR activities that have proved impact upon individual capacity and capabilities of the community and society at large. Ultimately, the value created through these activities is reflected in the realization of the Directive Principles of State Policy as fundamental duties of corporate citizen towards fostering rights of the citizens. Thus, we can say that, even in post liberalization and globalization process, the corporate law in very much has coherence with the Constitution of India in letter and spirit.

**Table- 3 FICCI Survey (n=150)**  
**(Quantitative)**

| <b>Company</b>               | <b>Frequency</b> | <b>Percentage</b> |
|------------------------------|------------------|-------------------|
| Private                      | 108              | 72%               |
| Public                       | 09               | 06%               |
| Foreign (MNCs)               | 33               | 22%               |
| <b>Motivational Factors</b>  |                  |                   |
| Ethics                       | 129              | 86%               |
| Economics                    | 21               | 14%               |
| <b>Implementing Strategy</b> |                  |                   |
| Directly by company          | 52               | 35%               |
| Company Foundation           | 60               | 40%               |
| NGOs                         | 38               | 25%               |
| <b>Trend in Budgeting</b>    |                  |                   |
| Increased                    | 114              | 77%               |
| Decreased                    | 30               | 22%               |
| Intact                       | 16               | 11%               |
| <b>Beneficiaries</b>         |                  |                   |
| Children                     | 46               | 31%               |
| Women                        | 33               | 22%               |
| Environment                  | 25               | 17%               |
| Disabled                     | 15               | 10%               |
| Senior Citizens              | 09               | 6%                |
| War Veterans                 | 06               | 4%                |
| Trans-gender                 | 04               | 3%                |

(FICCI, 2016 Survey-available at [www.ficci.in/Sedocument/20361/csr\\_survey\\_ficci.pdf](http://www.ficci.in/Sedocument/20361/csr_survey_ficci.pdf))

Majority of the companies are covered by the FICCI survey are private owned, public and foreign companies. These companies are having area of operation in

India in different sectors such as engineering, manufacturing, food and beverages, bank, insurance and finance, cement, oil and gas, textiles, tourism and hospitality, electronics, pharmaceuticals, mining, information and technology, real estate, fast moving consumer goods (FMCG), infrastructure, paper and paper products, chemicals, gems and jewellery and metal. It is interesting to note that in the Table-1, the motivational factors behind the CSR activities by companies are ethical (86%) and economical (14%). Despite legal mandate to carry out CSR activities under Schedule vii of the Section-135 of the Companies Act, 2013, the mindset of these companies is not to comply with the norms rather display shared value, employees satisfaction, brand image and risk mitigation. This process will take time in realization towards normative framework of the law of the land and value creation. 40% of the companies indicate that they implemented projects are through their company's foundation and another about 36% said that, they did it directly and 65% reported that they had patterning with the Government or another corporate for execution of projects. Trend of budgeting is manifestly increasing in many of the projects undertaken.

A majority of the beneficiaries are vulnerable group (Children, women, disabled, senior citizens and war veterans). Also, youths were supported and prepared for leadership in various sports activities in the country.

Apart from quantitative data and information gathered and presented by the federation of Indian Commerce and Industry (FICCI), The Tata Institute of Social Sciences (TISS) has recognized by the Department of Public Enterprises, Ministry of Heavy Industries, Government of India has designated TISS as the Hub for facilitating Central Public Sector Enterprises to define/ deliver welfare and development to Indian people for Inclusive Growth. As a government funded research oriented teaching university, the TISS CSR Hub will provide high quality independent service to PSE's. TISS is not an interested party, but has agreed to take up this work to enable inclusive grow. In the field of CSR, TISS has been undertaking need assessment, evaluation and impact assessment research studies (qualitative) on behalf of corporate public sector and its impact on community development and society at large.

## 5. Case studies (Qualitative)

The case studies are based on the research work conducted by TISS for public sector companies as part of their CSR activities.<sup>5</sup>

### Case study -1

This is a base line survey aimed to identify needs of local community in the Mumbai city. The study has adopted both qualitative and quantitative methods. It covers 500 households, in-depth interviews with key informants and focus group interview discussions with selected groups of people to elicit their views. Among the respondents 313 men and 187 female responded to the questionnaire administered. The study revealed that majority of them, was migrated from different states and had stayed there from many years. They had problems of basic amenities such as water, sanitation, housing and health and hygiene resulted in many diseases and causalities. Most of them were engaged in unorganised sector for livelihood. The study was sponsored by Mazgoan Dock Limited (MDL) as part of its corporate social responsibility (CSR). The study suggested a better plan of action for community empowerment.

### Case study-2

The public sector GAIL Company and TISS entered into a MOU and conducted need assessment survey in the Patna (UP), Vijaypur (MP) and Jhabua (Bihar). The survey was aimed to gain understanding into village life and concern of the people of that region. The research team used questionnaire to collect quantitative data and information from individual households. Further detailed discussion was also conducted to assess the needs of the people and their priorities. After surveying the villages, the problems were almost same in nature like the basic amenities were lacking to live a quality of life. Illiteracy, lack of employment opportunities, lack of water and sanitation facilities, lack of health care facilities which made them more poorer to live in a vulnerability prone situation. The study has recommended that the existing infrastructure of GAIL Plants can be utilised to make them more accessible at reasonable costs. Self employments is an option left, due to lack

<sup>5</sup> Available on [www.http://www.csr.tiss.edu/research](http://www.csr.tiss.edu/research)

of much land for agricultural work for poor segments. Community participation, especially youths involvements can make things in better manner.

### **Case study-3**

National Corporate Social Responsibility Hub (NCSR HUB) located at Tata Institute of Social Sciences in Mumbai city has undertaken a project based on need assessment survey for Rail Vikas Nigam Limited (RVNL). The project was initiated in three different locations, Kolkata in West Bengal, Narainpur in Chhattisgarh and Rishikesh in Uttarakhand. In-depth interview was used as tool to gauge the views of respondents as primary source of data as well household survey and village profiling became part of secondary data. The survey reported illiteracy among the youths from a significant section of society, unskilled labour and vulnerability due to health related diseases like TB prevailed. Agrarian crisis and taking loan from money lenders was common phenomena. Contaminated water and issues of scholarship were hindrance for access to education. The study has recommended for providing skill based programmes for women and vocational training for young minds and also generation of support system and space for girls in getting education could make a better place to live with it.

### **Case study-4**

This is an evaluation study done by NCSR hub located at TISS for IRCON International Ltd for seven of its projects spread across three states (Bihar, Rajasthan and Uttar Pradesh). The scope of the study is limited to understand the efficacy of the projects and its main purpose to know the functioning of the projects undergone in the field and the changes that have come due to its presence in the field. It is expected that the findings of the evaluation would help IRCON to work in doing improvements in these areas, while consolidating the existing good practices.

### **Case study-5**

This is an impact assessment of GAIL - Sulabh project on total sanitation campaign launched in seven villages of the Guna district of Madhya Pradesh State. The project aimed to achieve total open defecation free society by 2017. Thus, the

research methodology used was qualitative in nature and tried to explore responses from individuals who are connected with the project in their area directly or indirectly. The triangulation approach is adopted in term of data triangulation (data or information gathered from different stakeholders) and investigator triangulation (to collect parallel data or information by two different researchers in the field). For the purpose of the impact assessment, villages are considered as primary source of data and Gram Panchayat as a secondary source of data. At the end of the day, the main beneficiaries of this project are male, female, adolescent girls and boys. In total 386 individual toilets and six community toilets were constructed under this project which was used by villagers and households. Therefore, this study assesses impact of this infrastructure on the individual and community life.

The case studies provide insights of positive aspects of CSR intervention in both rural and urban areas. In rural areas projects/schemes are implemented because, they lack amenities like water, food, housing, electricity, education. After CSR intervention in the segments of society or cluster of the areas have improved services or made better accessibility. Also, the infrastructures are created through CSR example: school, hospitals, health and hygiene, better education and literacy and rural development are taken care. Eventually, it can be said that the contribution made by corporate world led to not only legal mandate under the Companies, Act but also broader vision of social justice under the Constitution of India.

### Challenges

- Lack of skilled human resource that willing to work at grassroots level.
- Lack of CSR professionals for project Implementation.
- Limitation of funds for project Implementation.
- Lack of effective and transparent monitoring mechanism.
- Delay in project Implementation due to problems in getting NOC from a competent authority.
- Problems in getting clearance for land for rural infrastructure projects in hand.

- Rural people were unable to understand the development perspective of the project.
- Lack of suitable and reliable NGOs in field.
- Unwillingness of doctors and medical staff to go in the remote areas for health care projects.
- Lack of clarity in understanding CSR team among stakeholders resulted something conflicts arose and resolved through regular interaction.

### Way forward

Towards achieving effectiveness in the better implementing corporate social responsibility, few suggestions will make a difference in the socio-economic and political life of the country.

- Integrated approach for Monitoring CSR activities;
- Collaborative efforts partnering with professionals and civil society groups;
- Encourage NGOs/CBOs at grass roots level;
- Expand the scope of CSR as inclusive society;
- Field Training for youths and volunteers on CSR aspect.

## MARCH OF THE NATION THROUGH AN ERA OF LIBERAL ECONOMY-AN ACADEMIC EXPEDITION\*

*G. Dakshina Moorthy\*\**

The KLE Society, Belagavi, a veteran Institution serving the cause of Education since 1916, celebrated its Centenary '*of Transforming Lives*'. This happily accorded with the Society's Law College at Bengaluru entering its new, *state-of-the-art* Campus. The KLE Society's Law College, Bengaluru established in 1975, partook the glory of its parent Institution in imparting value education in law, and has brought out ranks of lawyers, academicians, judges and law officers that have brought glory to the College and the parent Society, from all over India. There number is legion!

Its accomplishments that have kept pace with the three generations (3Gs) of Legal Education Reform in India, were fittingly showcased on the eve of the Centenary Celebrations held in the new Campus of the Society's Law College, located in Visweswaraya Layout, Bengaluru, on the 1<sup>st</sup> and 2<sup>nd</sup> of October 2016. The occasion brought together 32 colleges from 14 States from all over India, with students participating in several contests like Moot Court, Advocacy Talent Test *et seq.*, besides other co-curricular and extra-curricular activities. There can be no better accolade for this attainment than the reassuring words coming in the Key Note address delivered by Dr. Aman Hingorani, Asst. Solicitor General at the Supreme Court in his words:

*"It is, indeed, gratifying to note that KLE Law College has made its mark in providing quality legal education in a state-of-art environment. Of particular interest is the emphasis on clinical legal education and co-curricular activities that transform law students to legal professionals. It goes to the credit of KLE Law College that it attracts students from all over the country. I am told that there are students from twenty eight states and three Union Territories and five different nations. Given such drive, it is but natural for KLE Law College to be recognized amongst the top law schools in India".*

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\* An overview of paper presented during two day National Conference on "Post Liberalization of an Organic Constitution" held on 1st and 2nd October 2016.

\*\* Guest Faculty, KLE Law College, Bengaluru, First Director, KILPAR, Former Judge and Secretary to Govt. of Karnataka

The core event of the Celebration was the *National Conference on the subject of Post Liberalisation Nuances of Organic Constitution* spread over five evocative themes that were discussed in five plenary sessions involving some 25 resource persons coming from New Delhi, Bombay, Chennai and several parts of the State, representing various Universities and National Public Institutions, besides a sizeable team of student participants - from first to final year- of the host college. The Inaugural and Valedictory parts of the Conference were embellished by dignitaries including several sitting and former Judges of the High Court, Constitutionalists, Academicians, Educationists and Experts from related fields undertaking an Academic Inspection of the March of the Nation through the era of Liberalisation. Here is a modest account of the Expedition.

The Conference aimed at taking a realistic account of the New Economic Policy adopted by the Indian Government in 1991, featuring Liberalization, Privatization and Globalization (LPG) of national economy and its impact on the Constitutional Goals of the Nation as a welfare State. There are Papers dealing individually with its impact on the Basic Structure and the ideology of the Indian Constitution, impact on Judicial Regimes, General Welfare, Fundamental Rights, Women Empowerment, Right to Equality vis-a-vis Protective Discrimination, Rights of the Real Downtrodden, Right to Privacy v/s Media Laws, economic growth and development, etc., not overlooking the most critical issues of global dimension including Industrial Licensing, Migration Laws, Market-driven economy, NEP's impact on matters of Rural Development, Urban Infrastructure, Industry, Education, Health, Foreign Investment, Patents Regime, IPRs, social networking etc., under captivating titles. Keeping in view the spacial constraints of this journal, it is here intend to limit the review to the general theme of the Conference, namely, Post-Liberalisation Nuances of Organic Constitution, and other issues as bearing on it.

A noteworthy *Compendium of Abstracts* is brought out on the occasion to stand memorial to the thoughts resounding to the concerns of the Conference, including the young voices. This article aims at lending photo-shot of the forceful features of the debate, picking the contours by random sampling of the papers that are categorized as far as they allied with the themes of the five individual Sessions, from the expansive mass of the Compendium.

It could be rewarding to begin with a prefatory account of what is *Liberalisation* and what is an *Organic Constitution*, before entering analysis of the topic.

The history goes on; owing to lack of domestic capital, India had to depend on financial aid and grants from external sources like the world bank, IMF etc., which affected the stability of the Indian economy. To overcome the crisis India needed to tag along foreign capital and attain financial stability. This can be achieved by allowing Foreign Direct Investment which is a debt-free capital flow from home-states to host-states by signing bilateral treaties drawn on international principles to protect the interests of foreign investors and the same incorporated in municipal investment laws....

FDI when enters into host-state will have impacts, both positive and negative. Positive impacts generate employment opportunities, good standard of life, transfer of technology and skilled human resources, production of goods at reasonable prices, and the like. Negative impacts involve violation of human rights, deterioration of environment, corruption etc., India has committed for FDI policy and regime, which is investor-friendly. And that is required for development of economy (of the host-state).

While this backdrop accounts for the vigor of the stimulus, this Conference oriented itself to assess its impact on the Indian Constitution, which we have described as *Organic*. So what is it for a written Constitution to be organic? The appropriate key to opening this study is found in the presentation of Dr. S. Nataraj, Associate Professor JSS Law College, Mysore and his Student Ms. Aparna. The Organic nature of our Constitution is explained in this paper as here extracted:

*'Law without a doubt is dynamic in nature and it has to adopt with the changing times. Constitution being the Sovereign Law, if it is static, ultimately becomes a hurdle in the path of the progress of the nation. Article - 368 (that enables amendment of the Constitution) does not prescribe any limitation on the Parliament's power to amend.'*

We thus understand that our Constitution is *organic* in as much as it keeps open to changes as times demand. Yet the verdict of the Supreme Court, in *Keshavananda Bharathi's case* finds that the concept of *Basic Structure* has emerged as the outer stretch of Article - 368, and to that extent Parliament's power

to amend the Constitution is circumscribed. *Basic Structure* embraces the goal of an egalitarian welfare state. This should give us a basic understanding of what it is for the constitution of a country to be *organic*. This pithy statement flowing from Dr. Hingorani's key note makes our understanding perfect:

*"The theme of this Conference is an interesting one. The Constitution of a free nation is necessarily organic as it embodies the moral sentiment of the people. These sentiments vary from time to time. The Constitution must, therefore, evolve and adapt itself to the needs of society. It has, in fact, been said that a Constitution should be like clothes. It should be made to fit the people, it is meant to serve."*

After getting familiarized thus with the *two* parameters of the debate, we may try to grasp in a flash, the post-liberation *nuances* befalling the Indian Constitution, from the content of scholarly presentations witnessed on the stage.

### **1. Protective Discrimination: Maintaining the Balance under the Constitution.**

There was indeed, a springtide of thought proposed at the Conference on this very penetrating content of Constitutional maneuver. The Paper on the point by Ms. Dhanya S, Student and her mentor Prof. Shivananda Bharathi, Assistant Professor at JSS Law College (autonomous), Mysore have briefed on India's current Reservation Policy in comparison with two other Legal Systems. They observe that in order that social equilibrium is maintained especially on the issue of reservation in broader perspectives; empowerment must happen from within and not by providing reservations desiring that our Constitution should not feature like reservation friendly.

Be it as it may, thoughts on the topic presented by Prof. G.R. Jagadeesh, Principal, C.B.R. National College of Law, Shivamogga, took the lead of deliberation, elaborating on the history and development of the issue of reservation as a tool of ensuring, not only social and economic justice but also political justice to the people. Noting well that, while issues of sustainable livelihood, social and political participation of the vulnerable groups exists as the major problem in developing India, the author maintained that *Equality* as an ideal, has been a strong force in the evolution of human civilization. Protective discrimination is explained as the effort of the State towards bringing transformation in the lives of the suppressed, downtrodden and vulnerable class of the Indian society ensuring

equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, *subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality.* (Drawing from Rawl's 'difference principle' of justice).

The paper held out in detail the handling of the issue by the Government and the Judiciary and in the context of Reservation Laws in IX Schedule and of carving out of 'reservation within reservation' with 'micro classifications' both in the arena of executive regulation through the course of judicial interpretations in the plethora of cases brought before it by citizens complaining of administrative malfunctioning visiting injustice. That there has not been uniform level of development amidst various castes grouped under the category of Scheduled castes has given rise to the problem of uneven competition because of which more advanced sections among them are able to get the benefits and the weaker of the weakest are lagging in the race. This constituted the major complaint in one form or the other, before the courts.

Executive actions in extending the validity of reservation beyond the constitutional limitation, bringing in newer caste classifications for reservation through the IX Schedule and creating reservations within reservations and eliminating the creamy layer of classes within the OBCs, according reservations in promotions especially preserving consequential seniority to these classes, the author points, account for the major areas of conflict.

However, social welfare being essentially a domain of State administration, one should appreciate, there was little scope for judicial intervention and thus, the courts accepted caste as determinant of backwardness; in determining the constitutionality of classification, the Judiciary stuck a balance with the principle of secularism operating as the basic feature of the Constitution. The Supreme Court endorsed that, consistent with the maintenance of efficiency of administration, inequalities could be permitted, *if they could produce the greatest possible benefit for those least well off in a given scheme of inequality.*

Since, States have both power and responsibility to protect the interests of weaker sections of society under Article - 15(4), 16(4) and 46, it was held justifiable on their part to sub-group the castes on the basis of their respective population

in order to allocate their respective entitlement. The list of SCs as specified by president in consultation with the State Governors under Article - 341 (1) the Court chose to keep intact retaining jurisdiction only to monitor the allocation on the basis of pragmatic appreciation of facts. The Court ruled that according to Article - 341(2) the Parliament may by law include or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. For alteration of the list of SCs and STs, the Court regarded the Parliament's law-making power alone as competent.

This development however stands to be tested against the fundamental principle of social justice enunciated by *Mahatma Gandhi*, that *'Equality is against the fundamental principles of humanity; it is against the dictates of reason that a man should, by reason of birth, be denied or given extra privilege'*. It is in this context that the deliberations at the conference in the light of the other papers, needs to be inspected. They indeed seem to present the sentimentalities of victims of the policy in operation.

Two young brains, *Lija Merin John and Lipsa Rout*, Students of Bangalore Institute of Legal Studies, Bengaluru, who, unpretentiously find the doctrine of Protective Discrimination in India, *capsized*, make a piercing analysis of the nuance. In their estimate: *'Protective Discrimination is, on the one hand, justified as it paves way to the weaker sections of the society, like the Scheduled Castes and Tribes and also women, to come to the same level of the other developed sections; but, on the other hand, mocks the common unreserved section of the society which questions the equality and justice assured to all the people of the Nation in the preamble'*. This, they assert to have arrived after critical evaluation of case law on the issue - both for and against - and make their point clear, that the confusion created by protective discrimination in terms of social justice and equality has, somehow to be put an end to.

Ms. Roopa S, Assistant Professor, Sheshadripuram Law College, looks at the problem from a different angle of reservations in employment. She points: *Although it (reservations in private employment) was debated for centuries, it assumed strategic importance at the wake of structural reforms in the economy*

owing to liberalisation and feels the way that *fair competition in a mixed economy* meant that the public sector and private sector should have a level playing field. She visualizes the 'what, if?' of the situation: when the public sector is being asked to discharge its social commitment through reservations in jobs, why the private sector should be exempted from the purview while it is receiving lot of concessions from the government?, . . . and underpins her apprehension that, if introduced, it w(c)ould be seen as government's interference in the day-to-day affairs of the company'.

The two latter papers together signal to that the concept of reservation is not faithfully pursued in India - either in policy or execution. As it seems, the capitalist goals have got mixed up with social goal of protective discrimination, owing to political transgressions. This reminds us of President Johnson's words while addressing the graduating class at Howard University: *We seek not just freedom but opportunity; not just legal equity but human ability . . . not just equality as a right and a theory, but equality as a fact and as a result*, fittingly quoted by Dr. Jyothi Vishwanath and Srinivas C. Palakonda in their paper '*Indian Constitution and the Reservation Policies in India*'. Expounding on the issue they give their estimate asunder:

*'Unfortunately, the reservation policies come with many negative effects. Since the major yard scale of extending reservation benefits in India is caste, rather than wealth or income, it ultimately leads to deepening of caste based divisions in the society. Further though initiated for uplifting the submerged sections of Indian society, for protecting their rights, overcoming the cumulative disparities of power, wealth and culture existing among various sections of society, reservation policies are by their very nature discriminatory and exclusive. Reservations lead to reverse discrimination wherein members of the non-reserved classes' are discriminated against in favour of a historically disadvantaged group or minority'*

Elaborating on the issue they present that, in India, reservation has empowered the State authorities to prefer one or more groups to the exclusion of others, encroaching upon the domain of right to equality to all. President Johnson *did* believe that civil rights alone could not remedy discrimination. He said: '*Reservation system cannot be the final answer or solution for the years of atrocities*'. The dynamism of Johnson's stance, we find envisioned in his further

statements that these words: *To end the inequalities, such sections of the society should be clearly identified with need development and financial aids. Then to uplift them, free education, incentives and financial assistance should be provided. Upon achieving this, they must be allowed to face the competition. After infusing capability in them, they must be allowed to face the healthy competition*'.

The authors also quote from Bill Clinton, past President of America, to drive home his view of what affirmative action did not mean. He has said, *"Let me be clear about what affirmative action must not mean and what I won't allow it to be. It does not mean . . . the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean . . . numerical quotas. It doesn't mean . . . rejection or selection of any employee or student solely on the basis of race or gender without regard to merit...."*

The authors rightly emphasize the importance of affirmative action based on Johnson's view that *since the sufferings of the downtrodden have not ended, removing reservations will be irrational in the present scenario.*' They firmly hold that the existing reservation policies aren't perfect and they need checks and balances, though however they sense a need to be careful before meddling with the present reservation policies and thus conclude:

*'If India wants to emerge as a strong nation in the world, it should give preference to efficiency, motivation, discipline, tenacity of purpose and will to achieve the desired goals. Abilities to shoulder responsibilities at entry point and performance throughout the career should always be given importance. Standards set for postings and promotions ought to apply equally to all. The method of assessment should be continually honed, so that more meritorious persons can be selected for any posts or positions and add in a firm voice that the existing reservation policies aren't perfect and need checks and balances; however cautioning the need to be careful before meddling with the present reservation policies.*

The discussion would be incomplete without assimilating some points from Dr. Vishnu Prasad's paper on, *"Titivating Protective Discrimination in the era of Privatization"* who quotes from authorities that *the reservation policy is a pernicious principle.* His explanation for this is that the policy revolves around an idea of remedying sins of the past of a social order by subjecting the present non-subaltern sections of the society to certain disadvantages emanating from the

*pro-subaltern section policies of the State to uplift the subalterns and speculates if this could not be seen as punishing the present for the sin of the past social order. He candidly asks: Could this cycle end? Pithily remarking that protective discrimination is not merely a legal or a political step, as it was embedded to reorder the social structure itself, he bids that the governments in succession ought to have established the refurbished social structure by this time as envisioned starting from 1947. But ends in a feeling that to a glance in retrospect, the image projects the failure of all former and the present governments in this direction.*

## 2. Privatization and Public Welfare

On the theme of this session, again, I begin with a fledgling estimation of a paper sharing the title of this Session mirroring more of an expectation, rather than an evaluation. The younger brains, *Bhuvaneswari S and Rishab Rao*, Students, from KLE Society's Law College, Bangalore, envisage the New Economic Policy (NEP), as *supplanting the socialist model of economy for India*. NEP is here understood as a policy to retain '*major Public Utility Services and Industries in the domain of the State, where service was the motive, not the profit*' whereas, by 1991 the NEP clearly indicated that *PSU's had shown a very negative rate of return on capital employed*. The authors genuinely felt, a need was identified in order to '*get rid of these units and to concentrate on core activities*'. Their thinking is direct and clear in their understanding of Privatisation as a '*process by which the government transferred the productive activities from the public sector to the private sector*'.

Quite naturally, the authors feel euphoric that the NEP '*ushered in a new era of liberalisation as industrial licensing was abolished, role of public sector diluted, doors to foreign investment considerably opened up and numerous incentives and initiatives granted to private sector to expand business activity*'. The scholarship has aptly been theoretical and expectant, and to that extent honest and real.

A second paper by Ancy P. Anto, Student of KLE Society's Law College, Bangalore, on Critical Analysis on Privatisation and Public Welfare adds: '*Severe inflation and balance of payment crisis facilitated Dr. Manmohan Singh, the Finance Minister, to frame the NEP*' and *Monopoly and Restrictive Trade Practices Act, 1969 and encouraged Liberalisation, Privatization and Globalisation (LPG)*

*that indeed converted India into a free market economy, from more of a welfare State'.*

However, *Rajesh Kumar*, Assistant Professor, (KLE Society's Law College, Bangalore) makes a positive note that paradigmatic shifts are witnessed in the Indian economy since the adoption of the new economic policy in 1991 and this (privatisation) had far reaching impacts on all spheres of life in India. In his view, since the nature of our economy is a mixed economy its growth is possible only through an open and liberal economy, where both private and public sector can work hand-in-hand and contribute for national economic prosperity' and also, 'The on-going economic liberalisation, initiated in 1991 has been highly fruitful with the goal of making the economy more market oriented and in expanding the role of private and foreign investments'.

And a fourth entry by *Ishi Prakash and Krishika GV*, Students also from KLE Society's Law College, Bangalore does insist that: *privatization is an asset; that its strategies are coherent with public welfare and that it also leads to increased opportunity for development of welfare, though these authors caution against complete privatization as being destructive of the Constitutional intention of creating a welfare state.* True enough, as Prof. Rajesh Kumar maintains, (privatisation) 'has succeeded in expanding the role of private and foreign investments'; But, to what effect?

The wisdom of a full Paper presented on Privatization and Economic Reforms, by Dr. M. Viswanath, Assistant Professor, Karnataka University, Dharwar may be availed to provide the forefront for further study. In its analysis, the deliberation for a new economic order for India was triggered, to quote:

*'... (f)or improving the performance of Public Sector Undertakings which, in the 1951 Plan area, marked the slow growth of PSUs. Industrial Policy Resolution (1956) envisaged that PSUs will take lead in the industrial and economic development of the Nation and build the necessary infrastructure for further growth. However, the policy did not meet up the expectations, not just in India but even elsewhere. In the 1980s, the IPR came in for severe questioning, globally and the outcome of the disquiet looming large the New Economic Program (NEP) of the Government of India drawn up in 1991... the NEP projected the objectives of Liberalisation, Privatisation and Globalisation of national economy.'*

The author reports that *Privatisation, most critical for uplifting the industrial wealth of the Nation, came about only in a small way, and in any case, not in the form that was intended*, and adds that: *Privatisation was not as critical in the first round of reform, but loomed larger in late 90s, indicating that disinvestment in industry, agriculture, financial sector, external sector involved a program of more macro-economic stabilization. It is clear in the insidious era of economic globalization, state institutions and their ancillaries have diverted their mission from welfare goals to economic ones, which has resulted in windfall profits to private individuals and bodies. . . My concern is not privatization (because it is inevitable) but how it is done? What are its costs? And who are its beneficiaries?*

Contemporary studies reveal that across human societies the Neo Economic Policy has raised several questions with regard to the practice of economic development and its adverse impact on the under privileged people. A far too general outlook sailing in midair is that the LPG has greatly influenced the lives of the people by bringing economic development and opportunities. The cluster of Papers presented at the Conference make a multiple approach to the effect of the NEP on the various sectors ranging from issues of general welfare like health, education, standards of life and living of the people both urban and rural.

A general observer may tumble into the neo-world of extravagance of modern life and living, characterized by Star Hotels, magnificent Flyovers, float-glass commercial props, Multi-lane Highways, state-de-art Airports, extravagant Schools and colleges with International tagging, the Chain Stores, Fashion Malls, Resorts, Saunas, Cafes and Eateries, and also the spectacular cavalcades of Corporate Social Responsibilities closer only to the Corporate world, far and away from the laboring and the burden-laden colonies, and admire it as high mark of *development!* Their amazement may blind them to the sights of the rural masses that linger in hunger, poverty unemployment, underemployment and unwholesome environs. For these, all this abundance means, only, naught.

This is what Dr. Puneeth .P, Assistant Professor, JNU, speaking of *Privatisation and Public Welfare and Constitutional Imperatives*, puts in his words that: *Globalization might have accelerated economic growth rate, but in the process it has excluded rather forced certain sections of the people to the brink of poverty in the name of development.*

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Mr. Benarji Chakka, Chevening Scholar in the University of London, minces no words in saying that *liberalisation fuelled by economic globalization and new economic policies in India has an adverse impact on the concept of the welfare state and even on the spirit of the basic structure of the Indian Constitution*. The scholar, while observing that *the Indian Constitution has its ethos based on social, political and economic justice*, observes that *in the era of globalization and liberalisation, these ethoses have come to the brink of erosion*.

He finds reinforcement to his thought from a statement of Upendra Baxi: *'... reforms have proceeded as if Part IV of the Constitution did not exist so as to cast imperatives to ameliorate life prospects of the weaker sections of the Indian society'*, and more emphatically, that *'the directive principles are in effect repealed, symbolising a wholesale Constitutional subversion'*. Globalisation may have accelerated economic growth rate in India but, Upendra Baxi opines, *'in the process it has excluded, rather forced, certain sections of the people to the brink of poverty, in the name of development'*. Mr. Susan George (Benarji Chakka quotes) is highly critical of globalization, which term, he terms, is *a trap; because, it masks, rather than reveals, present reality and is convenient shorthand for de-facto exclusion*.

## 2A. Privatisation versus Welfare State

Two young scholars - Tejashree R and Shilpashree L, Students of Bangalore Institute of Legal Studies, Bengaluru, in their stirringly simple thoughts on the subject of privatisation vis-à-vis public welfare have revealed in unpretentious words that: *The service provided by the private sector was chosen over the public sector's. . . But the success of privatisation has not contemplated the objectives of the Nation. . . Though the private has the efficiency, it is deviating from the goals. . . public sector conforms itself to the aims but lacks efficiency* and go on to observe that, *public welfare cannot be accomplished in these circumstances*.

More penetrating is this younger voice of B. Anupama and S. M. Naveen Kumar, PU Students, KLE Independent PU College, Bengaluru, that: *'... There is a wide gap between the rhetoric and reality in terms of privatisation. There has been a major shift from operation of welfare (state) to large scale conglomerate*

*monopoly power. . . Privatisation lacks transparency leading to state-owned assets and public do not have oversight of asset- stripping due to absence of clear-cut policy for disinvestment in India.*

*'Accumulation of great economic powers generally has led to corruption and illegitimate ways of accomplishment of licenses and business deals. Government loses potential dividends and private companies become more profitable and commanding. They even pose threats to civil-liberty rights'*

Ms. B.L Varalakshmi, a Guest Faculty, KLE Society's Law College, Bangalore here, draws us to a new strain of thought. Taking reference to Karl Polanyi's concept of double movement she tries to show how the *political process can, in effect, be re-embedding the market in the State*. She prettily pictures, drawing comparison from Indiana's experiences with welfare administration and Privatization points that: *re-embedding is not a simple question of reversing decisions already taken, but rather a question of complex sequencing of political and legal engagements.*

She further explains: *while welfare is based on principles of equality of opportunity, equitable distribution of wealth and public responsibility for those unable to avail themselves the minimal provisions of a good life, . . . . Privatisation channels public money into private hands; strengthens the two-class welfare state, and reproduces the inequalities of the free market.*

Getting back to Dr. Puneeth, while observing that *the Indian Constitution embodies certain Economic principles*, seeks to add that: *'The Constitutional conception of welfare state is not limited only to provide certain basic facilities, amenities or services . . . . The concept of welfare state envisaged under the constitution (referring to Article - 38), is a holistic one.* He has to say that National Economic Policy aims at achieving welfare through Liberalization, Privatization and Globalization (LPG) and that: *In order to promote LPG the State is on the one hand gradually withdrawing itself from adopting the 3Ds – deregulation, disinvestment and decentralization, and on the other, vigorously promoting foreign trade and investment, by removing the barriers.*

In his assessment, *the State is not only losing its regulatory powers but also more importantly its re-distributionalist capacity as well, both sine-qua-none for a State performing its welfare functions.* It is important to note from his observations, also that the policies of Liberalization, Privatization and Globalization are being

pursued by the successive governments, post-1991, rather more passionately, relentlessly and remorselessly and the results are fraught with grave constitutional impropriety, if not invalidity.

However, Students, Maitri Vipul Folia and VTR Sangamithira of KLE Society's Law College, Bangalore strike a contrast by backing Market Economy, saying: *'Privatisation implicates a direct shift of focus from political goals (of a welfare state) to economic goals, which leads to development of Market Economy'*

### 3. Media and Privacy Rights

On the topic of safeguarding Privacy Rights, there is unanimity in the opinion that the Freedom of expression given to the Media in pursuance of the components of NEP, has totally sunken the individual Right of Privacy i.e. right of every individual to lead his life in a manner that is reasonably secluded from public scrutiny (per Pooja Arora, Student, Home College). Here are some opinions:

Abhimanyu Singh, Student, MATS Law School, Chhattisgarh laments that: *'Our private life is public now, and this is a matter of grave concern in this tiny virtual world of ours where nothing is hidden . . . . and, has directly invaded our lives, willingly or unwillingly'*.

Mrs. Dhanalakshmi C.V, Assistant Professor, Government Law College, Kolar seeks to open up her thoughts, that: *'The law relating to privacy is of recent origin in India and it recognizes an individual's right to be 'let alone'. The meaning of privacy is to be extended by the development process and also in the light of the media law and mass communication which are to be sensitive towards individual personality and progress of the society. Privacy is one of the easily attacked areas in the neo-electronic age. . . . . (Need of the hour is) for a stringent law to regulate conflict of rights.*

Ivan Jose, student NUALS, Kochi (Kerala) has made an interesting note: *'Privacy rights assume significance as it represents diverse notions of human right spread across an expansive politico-legal milieu ranging from privacy rights of a crime victim from third party scrutiny to the immunity from on-line surveillance', on the anvil of which other views may be tested.*

*Ms. M. Sharanya and Ms. Anusha S Kanaran, Students, Bishop Cottons Women's Christian College, Bengaluru* have very well brought out the piquancy of the question of individual's privacy vis-à-vis rights of the Media, in the following analysis: '*The Constitutional framework of privacy is embedded in Article - 21 and the overstepping of the Media is defended through Article - 19 (Freedom of Speech and Expression).*'

*Anita A. Patil, Assistant Professor, Chair on Consumer Law and Practice, NLSUI, Bengaluru* observes that false and misleading advertisements in fact violate several basic rights of consumers: right to information, right to choice, right to be protected against unsafe goods and services as well as unfair trade practices. And so, they caution that a check on misleading advertisements becomes imperative.

#### **4. Adherence to and the Deviations from the Basic Structure**

Dr. N. Sathish Gowda, Assistant Professor (Grade-II), P.G Department of Studies and Research in Law and University Law College, Bangalore University has come up with a brilliant dialogue on the *Constitutional Basis for Basic Structure Doctrine in India*. This is more a vagrant account of the delusion concerning the Basic Structure concept *introduced into the Constitution by the judiciary in the Keshavananda Bharathi's Case*. The relevancy of this paper holds on to the logic of acts of the Parliament violating constitutional conventions regarding appointment of the Chief Justice of India by the Executive and applying application of basic structure doctrine for all cases as a general rule including appointment of judges by judges are against the theory of separation of power. It is not that these misadventures bear on the Neo Economic Policy, but that a shade of incongruence has been set in affecting the otherwise strict Rule of Separation of Powers.

The author has observed that this resulted in the Judiciary exposing the basic principle of Separation of Powers fettered by implied limitations based on an elusive concept that it did not concern to define; not having its origin in the text of the Constitution, the concept cannot also be defined. He feels that this problem would not have arisen if framers had inserted an express declaration under Constitution of India regarding autonomy of amending power of the Parliament under *Article - 368*. His concern is not so much to re-explore the scope of the power of Parliament to Amend the Constitution. The Parliament has thereafter started

asserting vehemently that the power to amend the Constitution was an inherent right and privilege of the Parliament, if not a Constitutional right. This indeed has set up an aperture in the relationship of the Parliament and the Judiciary.

Precisely it is this aftermath that is cause of the author's true concern in his paper. He says: *academicians generally always argue that the basic structure theory is the product of long struggle and conflict between the Parliament and Judiciary but brings out the coming into existence of this elusive doctrine came into existence not because of confrontation between Judiciary and Parliament, but because of framers passive approach, where they did not give any scope and place for agrarian reforms under the provisions of the original Constitution.*

Social welfare being essentially a domain of State administration, one should appreciate, there was little scope for judicial intervention and thus, the courts accepted caste as determinant of backwardness; in determining the constitutionality of classification, the Judiciary stuck a balance with the principle of Secularism operating as the basic feature of the Constitution. The Supreme Court endorsed that, consistent with the maintenance of efficiency of administration, inequalities could be permitted, *if they could produce the greatest possible benefit for those least well off in a given scheme of inequality.*

In author's estimate, incorporating the right to property under the list of fundamental rights was also one of the factors responsible for giving birth to this doctrine by the Judiciary in 1973. If only the provisions for agrarian reforms had not incorporated the right to property in the list of fundamental rights in the original constitution itself, there would not have been a situation of introducing this basic structure doctrine. And very importantly, *if the Parliament had exercised its amending power without disturbing the Supremacy of the Constitution in the case of Ninth Schedule, judiciary would not have made any attempt to propound the doctrine of basic structure.*

Dr. Sandeep S. Desai, Associate Professor, School of Law, Christ University, Bengaluru while attempting his critic on '*Basic Structure Doctrine, post-globalization*' has added note on *Economic Liberalization and Effect of the New Economic Policy of 1991*, wherein he expounds that *since the economic reforms of 1991, the liberalization of the Indian economy has continued in the same manner,*

*barring a few questions that have been constantly raised regarding the control over exercise of power by the government. These questions however become extremely relevant when considering the balance that must be maintained between government control and rights of the citizens and identifies five major areas covered by the reform programme as being: fiscal deficit reduction, industrial and trade policy, agricultural policy, infrastructure development and social sector development.*

The noting from para.2A, above may be redrawn in the context of this topic as well, which in sum echoes the damage visiting the Constitutional goal of the Welfare State. Smt. K.S Indrani, Assistant Professor, Bishop Cotton Women's College presenting her views on *Elite-Meta-Regimes in the Judiciary in post-liberalisation era* puts it concisely, that *constitution is an organic document for the reason that judiciary is vibrant and active, developing interpretative skills and has protected the Constitution whenever attempts were made to defeat it, thus upholding the aspirations of the people. . .*

The author goes on to explain historically, that: *amendments (to the Constitution) caused a lot of doubt from Berubari case to Golaknath's case and, in the post 1990 era courts became most assertive in safeguarding and protecting the Rule of Law when the Executive or the Parliament failed to satisfy the Constitutional Obligations. This elite-meta regime was first applied in social justice and moved on to liberal reforms). On the one hand incidents where the basic structure of the Constitution were reaffirmed in Keshavananda Bharathi case while on the other, in Indira Gandhi's case, issues on protective discrimination erasing socio-economic justice*

The author sums up: *Corruption and misuse of privilege, rights and power have become a universal phenomenon. Each and every institution is infected by it . . . . And, poses the question: Whether the Legislature or the Judiciary should determine the effects of such consequences and give light to good governance and guide towards success of the government?*

In the wisdom of Mr. Prasad NVLN, Guest Faculty, KLE Law College, Bengaluru, *Constitutional values and goals are to be continuously preserved even under the new global market regime (which is) mainly caused due to its*

*predominant economic dimension, technological impact on socio-economic activities. . .*

In the same vein, Ms. Vinutha Kulkarni, Assistant Professor, S.A. Manvi Law College, Gadag adverting on Dogma of Basic Structure takes an analysis of the significance of *Basic Structure* in the epoch of post-liberalization and advocates extreme caution in allowing amendments to the Constitution in order that the claims of NEP do not grind down the Constitutional goals and Objectives, so especially, in today's order of Corruption and misuse of privilege, rights and powers rampant in the Executive –both political and secretarial.

## 5. Other fields of affliction:

The New Economic Policy taking within itself the devices of Liberalisation, Privatisation and Globalisation has engulfed the Constitutional goal of Welfare State for India, has thrown its shadow virtually on every species of commerce and even twirled around health and education aspects of welfare into business. Some snapshots from the scene of the Event are given below:

### Commerce

Dr. Viswanath M, Assistant Professor, Karnataka University Dharwad makes an observation that generally holds in respect of every mode of business transposed on to multi-nationals. It runs thus: *There is a direct conflict between the constitutional goals and guarantees and the provisions of the Act. Primacy of the 'common man' should be ensured from holding him hostage to the hegemony and profit making designs of multi-national corporates.* A fair number of presentations attributing to the impact of the NEP in various applied cases speak of a partisan approach of the Government in effecting the new policy

### Need to synergize Welfare

As Dr. S. Anuja suggests, Assistant Professor, NLSIU, Bangalore '... the need of the hour is synergizing the welfare state ideology enshrined in the Constitution of India in the wake of the challenges raised by the post-liberalized era ...'

## Education

*Mr. Ajitha Rajaram and Harikarthik*, students of KLE Law College, Bengaluru hold the view that privatisation could be the pathway to quality education. They believe in that private educational institutions are a necessity, because, the State even as it has the obligation under the Directive Principles for State Policy, is unable to provide free and compulsory education. However, they caution that the private sector should be involved *only* under strict regulatory control.

Alas! Reality stares at us today; that every leg of education from pre-primary to collegiate is highly commercialized throwing the poor and the underprivileged away from its reach. It meets with its explanation in the observations of *Mr. Jaihanuman*, Assistant Professor, KLE Law College, Bengaluru who has sought to expose the dubious resolve of the Government by drawing comparison between the old and the new ethos of the Nation. He observes that while *Higher Education* (in India) is *traditionally considered as a merit on which the State invested voluntarily without expecting any direct economic return, because in the long run leads to enhanced economic competitiveness, cultural development and social cohesion, there has been a change in the approach and policy of the central government . . . after (it) adopted the new economic policy in 1991, the New Education Policy, 2016 looks forward to establishing at least one hundred new centres/departments of excellence in the fields of higher education, both in the public and the private sector to promote excellence and research innovations and addedly, that, Private Trusts, philanthropists and foundations will be given freedom to establish such centres of excellence.*

*Mr. Mahesh R.S*, Assistant Professor, KLE Law College, Bengaluru portraying the effect of privatisation on education, especially higher education also notes that *global effects have introduced the concept of commoditization of education and it has changed our culture, ethics of social welfare and even the quality of Indian higher education.*

## Agriculture

*Ms. M.P.Chethana*, Visiting Faculty, KLE Law College, Bengaluru has observed that: *Many small farmers in the developing world have been facing unfair*

*competition from highly subsidized products exported by farmers from developed countries, which in world food prices and agricultural dumping in developing countries. This directly causes unemployment and poverty in many sectors, in particular, the farming sector, dismantles local industries, impacts on the ways of production and attendant ways of life and triggers population migration.*

### **Environment**

Pointing to the effect of the NEP and Environment, Ms. Rohini G. C, Student, University Law College, Bangalore has lent her views thus: *'Perhaps the greatest human concern is the protection of environment and achieving sustainable development. This initiative of the signatories of the International convention on protection of environment which prove to preserve the environment on the other side, if wrongly interpreted, shuns the very object of these international obligations; One such issue that demands consideration is ban on plastics. . . The fundamental rights of people must not be thwarted in the guise of environmental protection laws.'*

### **Intellectual Property**

Mr. B. Vivek Anand Sagar, Research Associate and Dr. Prashanth Desai, Assistant Professor, NLSIU, Bengaluru has to relate on the topic that: *'The International Treaties on IPR are always in conflict with laws of developed and developing nations. It is because of industrialization the developed nations are misusing the international treaties on IPR to protect their IP rights all over the world market and created sectorial monopoly which violates human rights of the people all over the world'*

### **TRIPS Law**

Observations of Dr. V. Sudesh, Professor University Law College, Bengaluru stands testimony to common experience that: *The TRIPS' objective of making pharmaceutical industry has resulted in making the poor people in India uncompetitive due to lack of affordable medicine . . . . At the root of the global cry for coherence by the capitalist lies the incoherence of nations as developing, underdeveloped and developed.*

## Patent Law

*Sajal Sharma, Asst Professor at Alliance University, in his Paper on Indian Patent regime vis-a-vis the Constitution has to say: The new law (Patents Act 2005) brought sweeping changes (that are) in tune with the western notion of giving strong monopoly patent rights for any kind of invention for a period of 20 years. There is a direct conflict between the Constitutional goals and the provisions of this Act. . . which, it is strongly argued, goes against the spirit of the Indian Constitution.*

## Corporate Laws:

In 1991, India faced a severe balance of payments crisis, and this circumstance became the occasion for a substantial advance in the pace and nature of economic reforms that were being attempted. In particular, the major steps taken was further trade liberalization, in the form of reductions in tariffs and conversion of quantitative restrictions to tariffs, and sweeping away a large segment of restrictions on domestic industrial investment. These two changes in the early 1990s have come to symbolize or coin the term 'economic reform' in India. Thus, the economic reforms initiated in 1991 introduced far-reaching measures, which changed the working and machinery of the economy

The policy changes can be reviewed in five major areas covered by the reform programme: fiscal deficit reduction, industrial and trade policy, agricultural policy, infrastructure development and social sector development. It is however, pertinent to note that since the economic reforms of 1991, the liberalisation of the Indian economy has continued in the same manner, barring a few questions that have been constantly raised regarding the control over exercise of power by the government. These questions however become extremely relevant when considering the balance that must be maintained between government control and rights of the citizens.

We have a stimulating note from Dr. Kamlesh Kumar, Research Associate at the Nodal Centre of Excellence for Human Rights Education (NCEHRE), School of Law, Rights and Constitutional Governance, Tata Institute of Social Sciences, Mumbai. In his Paper, *Is Corporate Law achieving social justice in India?*, the author claims that the paper is based on social contract theory that promoting social aspects of Corporate Social Responsibility, involving a legal commitment by a company to manage its roles in society-at-large in stipulated criteria covering

a wide range of practices in the area of human rights, employee relations, diversity, consumer protection, environment protection, fiscal responsibility and accountability, marketplace and philanthropy.

The paper is based on Case Study Analysis of several Indian companies like Tata and Birla groups, ITC, Ranbaxy, Infosys and DuPont India, have endeavored to create a better social order. Majority of the companies are said to be covered by the FICCI survey and are private owned, public and foreign companies having areas of operation in India in different sectors such as engineering, manufacturing, food and beverages, bank, insurance and finance, cement, oil and gas, textiles, Tourism and hospitality, electronics, pharmaceuticals, mining, information and technology, real estate, fast moving consumer goods (FMCG), infrastructure, paper and paper products, chemicals, gems and jewelry and metals. This participation of the corporate world, the author relates, has *led to not only legal mandate under the Companies Act, but also broader vision of social justice under the Constitution of India*. A majority of the beneficiaries cared for are the vulnerable group (children, women, disabled, senior citizens and war-veterans) as also youths, supported and prepared for leadership in various sports activities in the country. Can we not dream of such spirit, of rendering justice to the common man, voluntarily from each according to his ability and to each according to his need? May their tribes increase!

*Dr. Viswanath M, Assistant Professor, Karnataka University Dharwar writing on 'In the name of a welfare state - Constitution, government and, we the people' has given expression to his apprehension thus: Coherence and Incoherence in Corporate Laws and the IPR Regime, with the Constitution: It is true that India introduced certain changes to the Corporate and Intellectual Property Laws, but there are still many legal challenges posed in the new legal order and the old legal order of the corporate world. SEBI has since discontinued vetting of the prospectus of a company. On the other hand Intellectual Property is considered as an investment for developed countries. . .*

### **Migration of Labour:**

*Dr. S. Anuja, Assistant Professor, National Law School University of India, Bengaluru, espousing the problems of migrant labour has to say: The problem of*

*migration cuts across the social, cultural, legal, gender, and political dimensions. Accommodating ways which promote peace and respect coupled with protective legislative framework in favor of migrants assumes importance in the wake of development of a global society . . .*

### **Executive Follies**

The aftermath of NEP is pithily summarized in the Paper by Dr. Nataraj and Ms Aparna thus: *The political experience of India has been both pleasant and unpleasant. Corruption and misuse of privilege, rights and power have become a universal phenomenon. Each and every institution is infected by it. The Country has an excellent system, if practiced well.*

And to re-draw from Ms. K.S Indrani's Paper on Elite-Meta Regimes of the Judiciary in post-liberation era, *'In the post-1990 era Courts became most assertive in safeguarding and protecting the Rule of Law when the Executive failed to satisfy the Constitutional obligations.'* And again, *'Ever since Judicial Review came within the realm of strict application of the Doctrine of Separation of Powers, and reaffirmed in Indira Gandhi's case, a sort of bitterness between the Parliament and the Judiciary began to infiltrate'.*

*Mr. Madhu K.M.*, student of Home College holding to the view that this bitterness has dampened the Judiciary from reviewing policy vis-à-vis the spirit of the Constitution, implored that the Judiciary should intervene in matters of policy in order to maintain the social balance.

### **Conclusion**

The above analysis may not be taken as complete and final. It is only a perspective restricted to provincial wisdom. Yet truly, and within its scope, it was an engrossing debate on a fascinating subject putting wisdom - both budding and advanced, together in one dish, for treasuring. The deliberations were thoughtfully capped by a Panel Discussion embracing the theme of the Seminar, which I, as a Guest Faculty, had the privilege of moderating.

The Panel was a happy amalgam of acumen in three different yet articulate fields, of - academics, social science and economics. Prof. Sandip Shastry,

Pro-Vice Chancellor, Jain University, Bangalore, renowned academician and social scientist, represented the constitutional field of exploration; Prof. R.S.Deshpande, National Fellow of the ICCSR and Hon.Prof, Institute for Socio-Economic Change; and Prof. Jeevan Kumar, HOD, Department of Political Science, Bangalore University.

The Discussion sharing the general theme of the Seminar focused on three combative Issues, namely:

- (1) Who or what factors did impel the seeding and expansion of the policy of Liberalisation in India?
- (2) Whether our Constitution has failed us or we have failed the Constitution?
- (3) Given the conflicting visions of the Constitutional goals and the organic nature of our Constitution, what can we say of the post-liberalisation effects – nuances? . . .or novation?

The Theme of the Seminar is suggestive of that the process of Liberalisation has affected the Basic Structure of our Constitution and its goal of India as a Social Welfare State. The effort here is to gather the shades of the malaise perceived. Deliberations thereupon have embraced every field of application of the Liberalisation exercise –from Social Legislation to Municipal laws related to infrastructure development, industrial Licensing and trade regulations, Corporate laws, Migration Laws, Market-driven economy (LPG), impacting Commerce and Industry, Technology, Foreign Investment, Patents Regime, IPRs, Media and Communication, Social Networking to Public Health and Education.

The outcome of the deliberations appears to drive at the point that overall development with Liberalisation, Privatisation and Globalisation (the three-pronged approach of the New Economic Policy) has distorted the ideology, goal and even the Basic Structure of the Indian Constitution. It is apposite to test it on the anvil of the Panel Discussion before closing the debate. The occasion may not afford much room for this event, I shall, at this moment, restrict the match to the underlying aspects:

**(1) Who or What factors did impel the seeding and expansion of the policy of Liberalisation in India?**

*Seminar Outcome:* Due to lack of domestic capital, India had to depend on financial aid and grants from external sources like the world bank, IMF etc., which affected the stability of the Indian economy. To overcome such economic crisis India had to follow foreign capital and attain financial stability, which indeed converted India into a free market economy, from more of a welfare State.

*Academic view:* Liberalisation is a product of our own resolve for an interventionist State. Import of goods for luxurious living of the rich and elite, left Foreign Exchange Reserves depleted. Liberalisation became necessary to balance the FDR and expansion of commercialization.

*Economist view:* It is the Economist that has brought us to this end; Capitalists keep the economy moving.

*Socialist view:* Capitalist lobbies have spawned the conflict between Parliament and the Judiciary.

*Constitutionalist view:* Democracy is sacked because of multi-party politics making a paradox of majority. Resultant is Dictatorship; not Democracy

**(2) Whether our Constitution has failed us or we have failed the Constitution?**

*Seminar Outcome:* There has been a major shift from operation of welfare (state) to large scale conglomerate monopoly power.

Privatisation implicates a direct shift of focus from political goals (of a welfare state) to economic goals, which leads to development of Market Economy in order that equilibrium is maintained especially on the issue of reservation in broader perspectives.

*Constitutionalist:* The State is not only losing its regulatory powers but also more importantly its re-distributionalist capacity as well, both sine-qua-none for performing its welfare functions. Disjunction of Constitutional values and principles and their realization introducing conflicting visions; Context, not Content is the factual state of an organic Constitution.

*Economist:* Privatisation channels public money into private hands; strengthens the two-class welfare state, and reproduces the inequalities of the free market.

Accumulation of great economic powers generally has led to corruption and illegitimate ways of accomplishment of licenses and business deals.

Government loses potential dividends and private companies become more profitable and commanding. They even pose threats to civil-liberty rights'

*Socialist:* We have a great capacity for ruining things; taking the tree for the woods.

**(3) Given the conflicting visions of the constitutional goals and the organic nature of our Constitution, what can we say of the post-liberalisation effects – nuances? or novation?**

*Seminar view:* There is a direct conflict between the constitutional goals and guarantees and the provisions of the Act. Primacy of the 'common man' should be ensured from holding him hostage to the hegemony and profit making designs of multi-national corporates.

Elite-meta regime were first applied in social justice and moved on to liberal reforms (neo-liberal free-market).

Empowerment must happen from within and not by providing reservations, desiring that our Constitution should not feature like reservation-friendly.

*Socialist:* Ideals set by Mahatma Gandhi - Agriculture, Village Industries; Cow Protection and Local Government is a long-gone past.

*Constitutionalist:* Conflicting versions of the *Basic Structure* apart, the preambular aspirations of committing to the form of a Socialist Democratic Republic have been given a go-by.

*Economist:* With today's economy driven by capitalist policies as a result of Liberalisation, can we still claim to be 'socialist'? Market Economy dictated by Capitalist forces like Foreign Direct Investors; Multi-National Companies; Industrial and Trade Lobbies; Land, Infrastructure and Real Estate Lobbies, has made a paradox of a Socialist Welfare State.

*Academic:* If by democracy we understand *a government of the people, by the people and for the people*, the question haunts - can a policy substituting Market Economy for a Welfare Economy be Democratic?

*General view:* Nuances is an understatement of the effect of post-Liberalisation. There is total erosion of constitutional values transgressing the *Basic Structure* norm.

#### **From the Chair:**

This Conference has, by far, given vent to the feelings of the people-at-large that they stand for true values of life, rather than material worth or earthly riches. Individual Liberty and Human dignity are characteristic of Indian ethos embodied in the Spirit of our Constitution.

As a result of the NEP there is development - that has made the rich richer and the poor poorer. It is discernible that political dishonesty (both Executive and Bureaucratic) is at the root of all corrupt, covetous, deceptive practices growing unceasingly rampant day-by-day. This has been agitating the rational minds that want to pull out of dominance of every kind – social or political.

This enthralling debate however, shall not stop here but be taken forward with great stimulus and greater vigor to all big-hearted and well-spirited thought-circles and, so cometh the invigorating wishes from the bottom of Dr. Aman Hingorani's heart:

*"The dedication and enthusiasm of the KLE Society and the KLE law College is truly inspiring. May the success that has come your way today, lead you to bigger achievements in the years to come!"*

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I, Dr. J.M. Mallikarjunaiah hereby declare that the particulars given above are true to the best of my knowledge.

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