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**Affirmative Action Programme:
A Comparative Study of India and U.S.**

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CHAPTER - I

Introduction

1. Equality and Its Bases.

Equality and Justice are the words of passion and power.¹ They were the watchwords of the French Revolution, resulting in the declaration of the rights of men, issued by the National Assembly of France after the fall of Bastille, “men are born equal and always continue free and equal in respect of their rights”² American declaration of Independence too declared in the same vein that “we hold these truths to be self evident that all men are created equal. It has also been the distinguishing characteristic of modern civilization that Equality should not merely be an abstract ideal but a politically aggressive idea. It is generally accepted that it is indeed one of the most deeply rooted conventions of contemporary political thought that the existence of inequality is a legitimate provocation to social criticism.³ And it was with this general trend of politico-legal process the world over in the mind that the founding fathers of Indian Constitution accepted and adored equality as one of the basic organizing principles of Indian Constitution when it was brought into force in 1950.

Justice is integrally related to equality. In fact Aristotle treated justice as synonym of equality. In his Nichomchean Ethics, he wrote Justice is equality as all men believe it to be quite apart from any argument. Indeed in Greek the word Equality means justice. Equality and justice are synonymous. To be just is to be equal and to be unjust is to be unequal.⁴ Aristotle talks of two kinds of Justice, distributive justice and corrective justice. Distributive justice is manifested in the distribution of the honour, money, and other things which fall to be divided among those who have a share in them. He then identifies justice in this area as some sort of equality among those who have to share the common grounds of honour.

Justice is an ethical standard of virtue in social and public relationships and consists in observance of rules of equality. According to Aristotle equality means that things that are alike should be treated alike and things that are unlike should be treated unlike. Injustice arises when equals are treated unequally and also when unequals are treated equally.⁵ Indeed everybody is not equal by nature, attainment or circumstances. The varying needs of different people coming from different classes or sections of population require differentiated and separate treatment. Prof. HLA Hart calls this

¹ Constitution of India, H.M.Seervai, N.M.Tripathi, Bombay, 1989.

² Declarations of the Rights of Man, 1789.

³ A.C.Kapoor, Principles of Political Science, S .Chand and Company, New Delhi, 1989.

⁴ Ethica Nicomchea, Book V Chapter VI, In the works of Aristotle, Vol-XII Sir David Ross 1966 Reprint.

⁵ Aristotle, Ibid.

precept as a central element of the idea of justice.⁶ But this precept of treating like cases alike and different cases differently is incomplete as it lays down no standard for determining the likeness or differences and developing such criteria of relevance has occupied the philosophers for centuries.⁷

Experiences of the past show that arbitrary differentiation have been made for the characteristics which are beyond the control of individuals and groups and such individuals and groups have been exploited for the purpose of ensuring the dominance of certain groups or class of individuals. Justice requires equitable and just distribution of social goods and resources or burdens and benefits but that has not been the case in the past. A whole lot of people have been discriminated against and slavery and serfdom justified on this or that ground right since the dawn of civilization in the east and the west. Either one talks of the segregation of blacks in United States of America, apartheid system of South Africa, or the plight of low caste people of India, all have suffered the same fate, i.e. exploited and deprived for the reasons beyond their control.

Affirmative action programme are the tools to remove the present and continuing effects of past discrimination, to lift the limitations in access to equal opportunities which has been impeding the access of the classes of people to public offices and administration. Such measures as protective discrimination or reservations are adopted to remedy the continuing ill effects of prior inequalities stemming from discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness.⁸ It also addresses the infirmities caused due to purposeful societal discrimination and attacks the perpetuation of such injustices.

2. Indian Case for Correcting Injustices.

It is with the lofty aim of alleviating the sufferings of the underprivileged and exploited sections of Indian society, and for reconstruction and transformation of hierarchical society emphasizing inequality, into a modern egalitarian society based on individual achievement and equal opportunity for all that the protective discrimination programme was devised under Indian Constitution. However this ideal of egalitarianism did not come about in a day or two rather it was the culmination of a long process of change in the traditional pattern of a medieval caste ridden society. These changes were in fact the culmination of a long drawn process of transformation in the traditional pattern of caste ridden society. Two factors basically worked as catalysts in the process, the indigenous reforms and western influences.⁹

The *Varna* System of the early vedic period distorted and turned into a rigidified hierarchical caste system continued to be stubborn fact of social life and was the factor for introduction of preferential policies in pre and post independent India. The founding

⁶ H.L.A.Hart, *The Concept of Law*, (1961) p. 155.

⁷ Upendra Baxi, *Democracy, Equality and Freedom*, Oxford University Press, New Delhi, 1992.

⁸ Justice P.B.Sawant, in *Indira Sawhney v. Union of India*, AIR 1993, SC 477, Para 23.

⁹ Varna system was the Traditional way of classifying people, in Ancient India, According to their occupation, for details see chapter III Indian Panorama of Equality and Justice Ancient of Modern.

fathers of Indian constitution were aware of the prevailing miserable and appalling conditions of backward groups who had remained far behind and segregated from national and social mainstream and had continued to be socially oppressed and economically exploited for centuries due to various types of disabilities. They believed that in a caste ridden society like ours where due to the historical reasons certain castes and classes were for decades socially oppressed, economically condemned to live the life of penury and want and educationally coerced to learn the family trade or occupation and to take to education set out for each caste and class by society.¹⁰ A doctrinaire insistence on formal equality would in fact aggravate and perpetuate inequality. Independent India, therefore has embraced equality as the cardinal value against the background of elaborate valued and clearly perceived inequalities.¹¹

Since the society as a whole was responsible for the handicaps resulting from societal arrangements such as caste structures and group suppressions and these handicaps were relevant differences among men, compensatory treatment for the socially and historically disadvantaged groups was justified whenever these differences stood in the way of equal access to basic advantages enjoyed by other citizens. Constitutionally authorised preferences and protective discrimination created a lot of confusion and conflicts leading to heated debates, court cases street violence and social unrest.¹²

India the biggest democratic system of the world, with a thousand million plus population and mindboggling variety, a system which boasts of more than 5000 years history and continued civilization and a hoary past, now mired in the under-development and medieval hierarchical social order, but raring to rise into a economic powerhouse of the world with convincing democratic credentials, have been experimenting with the protective discrimination programmes of unprecedented variety. Reservations in jobs, in educational institutions, legislatures and in the local self governing institutions, better known as Panchayati Raj Institutions for scheduled castes, scheduled tribes, other backward classes and now women has been a grand experiment by any standard. It may also be noted that scheduled castes, scheduled tribes and other backward classes are a whole cluster of thousands of castes spread over length and breadth of the country. But has it succeeded in achieving the target it has set before itself 53 years ago? If yes to what extent? If not why not? shall be some of the questions to be explored in this work.

An important thing to be noted in Indian context is that the kind of equality and justice with protective discrimination programmes in its tag which have been experimented upon during last half a century or so are of western vintage. As has been seen that India had a hoary past and an elaborate socio-political system. Its civilization is very old and has to its credit many distinction. As A.L. Basham puts it, "the ancient civilization of India differs from those of Egypt, Mesopotamia and Greece, in that its traditions have been

¹⁰ KPK Shetty, Fundamental Rights and Socio-economic Justice in Indian Constitution (1969) for detailed analysis of caste system, See G.S. Ghurye, Caste and Class in India, N.M.Tripathi Bombay (1967) Andre Betielle, Castes, Old and the New (1969).

¹¹ Marc Galanter, Law and Society in Modern India, Oxford University Press, 1992.

¹² Dr. Parmanand singh, Equality, Reservation and Discrimination in India, Deep and Deep Publications, New Delhi, 1985.

preserved without a break down to the present day. Until the advent of the archaeologists, the peasant of Egypt or Iraq had no knowledge of the culture of his forefathers, and it is doubtful whether his Greek counterpart had any but the vaguest ideas about the glory of Periclean Athens. In each case there had been an almost complete break with the past. On the other hand, the earliest Europeans to visit India found a culture fully conscious of its own antiquity – a culture which indeed exaggerated that antiquity, and claimed not to have fundamentally changed for many thousands of years. To this day legends known to the humblest Indian recall the names of shadowy chieftains who lived nearly a thousands years before Christ, and the orthodox Brahman in his daily worship repeats hymns composed even earlier. India has In fact the oldest continuous cultural traditions of the world.”¹³

The interesting thing to be noted in this context is that though at the social plain, one can feel that continuity of the past so distinctly, however on political plain, India has had a complete break with its institutional practices with the advent of British era. With the charter of Queen Elizabeth of 1600 authorising East India company to trade with the countries of the east and far east, and the consequent colonisation of the land resulted in India becoming a kind of experimental laboratory for testing the efficacy and validity of various politico-legal institutions and concepts of the west. Starting with the Charter of 1726 to the Government of India Act 1935, the colonial administration had more than two scores of major reform packages involving legislative, Administrative, Judicial and Land reforms. When finally the Independence of India Act 1947 was passed, The British Parliamentary system of government was the only system with which the then generation of political leaders was reasonably familiar with. And therefore came into effect the Republican Constitution of India 1950 with Parliamentary form of Government and common Law system of British vintage. That system has continued to this day and is so well grounded in Indian soil today. How the western Political Institutions and concepts, wrapped in local indigenous philosophy have functioned is a matter beyond the scope of this study. However what is at stake is the concept of Justice and Equality which had their full play in various hues and colours in post Independent India.

What is sought to be attempted here is to have a glimpse of the Ancient Model of India’s socio-political governance reflecting on the concept of equality and justice and then present modern India’s march towards egalitarianism with the help of the tools, concepts and institutions first experimented and developed in the western soil and sought to be implemented in Indian situations. This might provide a better insight into the issues and problems modern India is grappling with, with an open political system which is called upon to undertake functions that even the comparatively developed western political systems have been hesitant to undertake, while wholly lacking in economic, technological and organizational resources of the latter.¹⁴

Historically speaking, the non western societies have taken over the ideological urges and social aspirations of the western societies without either the time the latter had to deal with primary issues of legitimacy or the economic and intellectual resources that were

¹³ A Wonder that was India, A.L.Basham, Roopa and Company, N.D.New Delhi, India, 1990

¹⁴ Rajni Kothari, In India, Orient Longman, Hyderabad 2002.

built up before they broadened their political base to include mass functions. The shrinking of the world has in this respect become a painful circumstance for India as it has bequeathed to it social and political belief system without the concomitant material and institutional props that are needed for stable and consistent change.

In India, the legacy of a long tradition, the integrity of an historical culture and the great solidarities that were built through religious and social movements that were characteristically Indian had for long acted as buffers against an inherently fissiparous situation. The social system is undergoing profound change and has entered a process of continuous fluidity and fragmentation.¹⁵

The dilemmas that India face today in terms of politico-legal issues should be seen in the perspective of a system called upon to perform the uphill tasks of modernization with open political system lacking in economic technological and organizational resources and wholly devoid of the means and instrumentalities and sometimes even necessary authority to put the power to effective use for solution of the pressing issues.

Since the politico legal developments of India are to be seen in the context of an ancient land slowly seeking to incorporate into its womb the best elements of the culture of modern world, without at the same time destroying its age old traditions and diversities,¹⁶ understanding these traditions and diversities might provide fresh insights into the intractable problems of the modernising tendencies. That is why an attempt is made to have an understanding of the ancient paradigm of India's socio-political governance and then present the perspective of modernising institutions of socio-political system.

3. Competing Claims.

There have been lot of confusion, about protective discrimination in post –independent India. There are competing claims and demands from equally competing equalities, emotions run high, and the entire socio-political system appears to be divided into two, pro and anti type of opposite camps, nobody listening to the sane advice from the other side. Those favouring the preferential policies would give an array of beneficial effects such as that preferential policies provide a direct flow of valuable resources to the historically deprived ones in larger measure than they would otherwise enjoy; that compensatory policies provide for participation in decision making by those who effectively represent the interest of that section of the population which would otherwise be unrepresented or neglected ;¹⁷ that, by affording opportunities for participation and well being, preferences promote feelings of belongingness and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups into Indian society; that preference induce in others an awareness that the beneficiary groups

¹⁵ Rajni Kothari, Ibid.

¹⁶ Rajiv Dhavan, in the Introduction to Marc Galanter's "Law and Society in Modern India" Oxford University Press, 1992.

¹⁷ Pursuing Equality in the land of Hierarchy : An assessment of India's Policies of Compensatory discrimination for his historically disadvantaged groups, Marc Galanter , In Law and Society in Modern India, Oxford University Press, 1992.

are participants in Indian life whose interests and views have been taken into account and adjusted to; that preferences permit forms of action that promote pride, self respect, sense of achievement and personal efficacy that enable the beneficiaries to contribute to national development as willing partners; that by broadening opportunities, preferences stimulate the acquisition of skill and resources needed to compete successfully in open competition, that by cultivating talents, providing opportunities and incentives and promoting their awareness and self consciousness, preferences enhance the capacity of the beneficiary groups to undertake organised collective action; that by increasing the visibility of the beneficiary groups, promoting their placement in strategic locations and emphasising the national commitment to remedy their conditions, preferences serve as a stimulus and catalyst of enlarged efforts for their uplift and inclusion; that preferences compensate for and help to offset the accumulated disablement resulting from past deprivations of advantages and opportunities; that by reducing tangible disparities among groups and directing attention to mundane rather than ritual development of a secular society and that, preferences contribute to national development by providing incentives, opportunities and resources to utilise neglected talent.¹⁸

The other side does not have dearth of arguments too, they would argue that the resources are enjoyed by a small group of the intended beneficiaries and do not benefit the groups as a whole;¹⁹ that by creating new interests which diverge from those of the beneficiaries, preferences obstruct accurate representation of their interests; that by emphasising the separateness of these groups, preferences reduce their opportunities for common participation; that preferences frustrate others by what they consider unfair favouritism and educate them to regard the beneficiaries as separate elements who enjoy their own facilities and have no claim on general public facilities; that preferences subject these groups to manipulation by others, aggravate their dependency and undermine their sense of dignity, pride, self sufficiency and personal efficacy;²⁰ that preferences provide artificial protection which blunts the development and skills and resources needed to succeed without them; that by making them dependent, blunting the development of talent, undermining self respect, preferences lessen the capacity for organised effort on their own behalf; that by projecting an image of comprehensive governmental protection and preferment, preferences stir the resentment of others,²¹ allaying their concern and undermining initiative for measures on behalf of the beneficiary groups; that these arrangements created vested interests in their continuation, while discouraging the development of skills, resources and attitudes that would enable the beneficiaries to prosper without special treatment; that preferences place an unfair handicap on individuals who are deprived of opportunities they deserve on merit; that by recognising and stimulating group identity, preferences perpetuate invidious distinctions,²² thereby undermining secularism and that preferences impede development by misallocation of resources lowering of morale and incentive and waste of talent.

¹⁸ Marc Galanter, op cit f.n. 12.

¹⁹ According a survey conducted by Bar Council of India, 90 percent of the compensatory policies benefits are cornered by 3 percent of the elite among the backwards, See Bar Council of India Review, Vol XVII, 3 and 4, 1991, distributors Universal Book Traders New Delhi, 1991.

²⁰ See Ajit Singh v. State of Punjab, AIR 1999, SC 75.

²¹ See Sukhdev Khanna, Reservations and its implications, Jain Law Agency, New Delhi, 1994.

²² Marc Galanter, ibid, note 11.

4. American Paradigm.

Indian Judicial system which has sought to intervene and provide answers to this entire range of questions has looked for guidance on affirmative action policies all over the world specifically towards United States of America where similar kind of affirmative action policies have been experimented and tested.²³ 14th amendment of U. S. Constitution provides that “All persons born or naturalised in U.S. and subject to the jurisdiction thereof are citizens of U.S. and the states where in they reside.”²⁴ No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of U.S. nor shall any state deprive any person of life; liberty or property without due process of laws nor deny to any person within its jurisdiction the equal protection of laws. The guarantee under this amendment is aimed at removal of undue favour and individual or class privileges on the one hand and the hostile discrimination, oppression or inequality on the other.²⁵

Despite the existence of equal protection clause under 14th amendment racial discrimination had continued in the U.S. up to mid 20th century. However this discrepancy between its ideals and its treatment of Black people began to be corrected around 1950s and most notably in 1954. United States Supreme Court came strongly against the segregation of blacks in schools. The first step as reflected in the decisions of the Courts and Civil Rights laws of the Congress; merely removed the legal and quasi legal forms of racial discrimination. These actions while not producing true equality or even of opportunity socially dictated the next step; positive use of governmental power to create possibility of real equality. The decision in Brown²⁶ overturning Plessey (equal but separate doctrine) foretold that all publicly enforced sponsored or supported racial discrimination was beyond the pale, that equal protection was not a bounty but was their Birthright.

A decade after Brown, Congress joined the movement to eliminate segregation by enacting Civil Rights Act in 1964, which prohibited in general terms discrimination against any person on the grounds of race colour or ethnic origin concerning any programme or activity receiving Federal Funds. These attempts have been viewed as mandating affirmative action programmes using racial classification. The decision of the United States Supreme Court in Allan Bakke and the debates that took place in its wake have further re-inforced the constitutionality of the Affirmative Action Programme in U.S.

It may be worth noting that in view of article 15 (4) and 16 (4) in Indian Constitution, the Bakke type decision and the debate that took place in its wake is not that legally

²³ Oliver Brown v. Board of Education, 347 US 483., Spotts Wood Thomas Bolling v. C.Melvin Sharp, 347 US 497 . Marco Defunis v. Charles Odegaard 416 US 312, and Regents of University of California v. Allan Bakke, 438 US 265.

²⁴ Mason and Beany, American Constitutional Law, Prentice Hall Inc Englewood Cliffs, New Jersey, 1978.

²⁵ Barnard Schwartz, American Constitutional Law, 1976.

²⁶ Oliver Brown et al v. Board of Education of Topeka, et al, 347 US 483, 98 Law Edition 873.

relevant for Indian jurists, judges and policy makers as the group or community oriented concept of equality is in harmony with the Indian Constitution and culture, however the heated debates, judicial pronouncements and academic and philosophical discussions in the United States are referred to and indeed they are helpful in understanding many a complex and complicated issues of India's protective action programme, which is far more difficult to handle in view of India's varied and many hued culture. Reference may be made to Justice Krishna Iyer's pronouncements in Thomas decision²⁷ that repairing the handicaps of the blacks in America was comparable to the problems of repairing the handicaps of the Harijans in India. Similarly justice Iyer referred to Schlesinger v. Ballard Case²⁸ as illustrative of the high judicial bunch in understanding the classificatory clue to promotion of employment of equality. In fact the U.S. Supreme Court upheld a classification in favour of a female Naval Officer by applying rational basis test in this case, which was much like the reasonable basis classification being employed by the Indian Supreme Court right since the Gopalan and Champakam Dorairajan cases.

A rider may be added here, lest the context be forgotten, that though the affirmative action programmes for the historical injustices in India is roughly comparable with the remedial measures being adopted in U.S. for the blacks and Negroes, but the context of "historical injustices" is absolutely different in India from that of United States of America and the plight of Blacks is different in many respects from the plight of Schedule castes and Schedule tribes in India. This particular issue shall be taken up in chapter III in a bit elaborate manner, suffice is to say here that the dynamic of civilizational context is absolutely different in Indian Context from that of America.

A word about French Constitutional scheme of protective discrimination would not be out of place here. French equivalent of affirmative action programme in United States or in India is the concept of Fraternity, which is directed towards helping the poor and the disadvantaged members of society. The declaration of 1793 in article 21 states that public assistance is a sacred debt. Society owed its existence to those who are unable to work. Girondin proposal for rights contained the statement that equality consists in everyone being able to enjoy the same rights. Though the system of equality that has been followed in the fifth Republic has served the French mentality so well, peculiar and contradictory as it is, however the kind of place equality enjoys in the American and Indian system is unlikely to be achieved in French system, either in socio-political debates or constitutional litigation in Conseil Constitutionnel.

5. Scheme of The Study.

The present study aims at looking at three systems, India, United States of America and France, as to how do they work upon the affirmative action programmes, which evidently are the compensatory measures for historical deprivations and come out with some comparative conclusions of the similarities and differences amongst them. It must however be noted that Affirmative Action Programme(as they are called in U.S.) or the Protective Discrimination Programmes (as they are called in India) are some of the

²⁷ State of Kerala v. N.M.Thomas, AIR 1976 SC 490.

²⁸ 419 US 351 (1974)

schemes of preferences, whose success does not depend merely upon the existence of provisions of preferences, rather their success depends upon the careful planning, designing and provision for sufficient resources, general acceptability of such schemes both by the recipients and those excluded and above all upon the capability and political will to make the schemes work with minimum tensions and resentments.²⁹ How do various systems really design and plan their resources would be an interesting point and one of the main foci of this study.

It may also be noted in this context that the affirmative action programmes are only one of the means of promoting equality for the oppressed and underprivileged sections of society. It has been noted above that equality is not the fact of life. Nature has not willed that all men should be equal. Men differ obviously and profoundly in almost every respect. They are as G.D.H. Cole put it, "Radically unlike in strength and physical powers, in mental ability and creative equality, in both the capacity and willingness to serve the community and perhaps most radically of all in power of imagination."³⁰ Nature has not created all men equal. Absolute equality or what some would call it natural equality is an impossible ideal. Nature has itself created such vital differences between men that no power can make and keep them equal. No one with the eyes in his head can or will deny the existence of these human differences. Inequality is an inescapable natural fact and it has to be accepted by society. Nature has endowed men with different with different capacities in satisfying them, equality in its popular sense is inconceivable. Equality does not in any case imply identity of reward for efforts. Therefore saying that men are born equal and always continue to be so, is an erroneous statement as saying that the surface of the earth is level.³¹

In such a situation picking up this or that group for compensatory discrimination itself is a difficult task. The quest for identifying the relevant criterion for differentiation have occupied philosophers for centuries. Starting from Plato and Aristotle to Hart and Dworkin, philosophers have sought to provide justificatory arguments for classifying people or a section of population for special treatment. Are these justifications in consonance with the principles of justice and equality? Or do they suffer from some limitations? Whether these justifications have universal applications? or do they suit the needs of certain politico-legal system alone? Would be some of the questions to be explored in this work.

With this purpose and perspective in mind the second chapter, following this introductory chapter, shall attempt a theoretical insight into the concept of equality justice and affirmative action programme, better known as Reservation system in India. Chapter III shall present the panoramic view of Ancient India's socio-political governance and how the concepts of equality, justice and affirmative action programmes or protective discrimination have been viewed in India. As has been indicated above, this chapter shall also cover the present model of socio-political governance under Indian

²⁹ Parmananda Singh, Equality, Reservation and Discrimination in India, Deep and Deep Publications 1985.

³⁰ A Guide to modern Politics.

³¹ Harold J.Laski, A Grammar of Politics.

constitution reflecting on the concept of equality and justice. Chapter IV shall have a brief overview of the equality and affirmative action programme of United States of America, and France. And chapter V shall attempt to present a comparative evaluation of Indian, and American preferential treatment of historically disadvantaged sections of population.

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CHAPTER- II

Equality, Justice and Affirmative Action : **Theoretical considerations.**

I. Nature of Equality.

The expression “Equality” is incapable of a single definition, as it is a notion of many shades and connotations and has been viewed by Philosophers from many different angles. There is a variety of ways to express the idea of equality and different writers tend to emphasize some forms of equality, rather others, as of overriding importance- equality before law, equality of basic human rights, economic equality or equality of consideration for all persons or equality of opportunity.³² There are those who while being indifferent to or even dismissive of one aspect of equality are deeply committed to another aspect of it. For example most schools of thought in fact cater to the view that complete equality would be difficult to come by. But while there are some that argue that an egalitarian distribution is inimical to freedom and development there are some that insist on precisely the opposite, viz, that an egalitarian distribution is a necessary pre-requisite to any meaningful freedom and development.³³

It is no doubt frequently asserted that all men are born equal, but there is no unanimity as regards the common attributes which makes them equal.³⁴ According to Bernard Williams, “the idea of Equality is used both in a statement of fact or what purport to be a statement of fact- that men are equal, and in a statement of political principles, or aims that men should be equal,³⁵ as at present they are not. It is in this later sense that the notion of equality belongs to the sphere of values. It is in moral judgements to the effect that equality is a good, that it ought in some cases to exist, and that this is so in spite of the obvious ways in which men are unequal in strength, talent and intellect. Nor have most philosophers wanted an equality which is total. The claim that men are equal is a claim that in fundamental respects, regardless of obvious differences between one man

³² Alexis De Toqueville said that men have greater passions than for liberty. J. S. Mill realized the importance of encouraging the widest possible diversities of mind and taste. He argued that the best state for human nature is that in which while no one is poor, no one desires to be rich. Although he urged that social policy be directed to suppress increasing equality, he never intended to convey the idea that it should suppress varieties of individual character and genius. But it is only in a society marked by large measure of economic equality that such varieties were likely to find their expression and due need of appreciation. It is a paradox that the more anxiously a society endeavours to secure equality of consideration for all its members the greater will be the differentiation of treatment.

³³ Pulin B Nayak, “On Equality and Distributive Justice” Economic and Political Weekly, Annual Number March 1991.

³⁴ Dallmayer, Functionalism, Justice and Equality, (1967), 78 Ethics 10.

³⁵ The Idea of Equality, Bernard Williams, In a “Companion to Contemporary Political Philosophy” Edited by Robert Goodin and Philip Petit, Blackwell, Oxford 1995.

and another, all men deserve to be given certain kinds of treatment. They have a right to certain kinds of equal treatment in crucial aspects of their lives, though not in all.³⁶

Indeed there are few words that admit of such wide meanings and interpretations as that of equality. Economists usually focus on the notion of equality of income, wealth or some measure of individual well being, such as utility. However Walzer (1973) has emphasized, at a wider level one may legitimately be concerned with the notion of equality involving not just wealth and power, but honour, work, education and free time³⁷. All of these refer to what we might call equality, or inequality, of individual circumstances. But at the level of societal arrangements, there are important notions of equality of opportunity, equality before law and equality of treatment, to name a few of the commonly examined concepts.

Rashdall advances the principle, that every human being is of equal intrinsic value and is, therefore, entitled to equal respects as an exact expression of the Christian ideal of brotherhood. He, however, points out that the principle does not require that every person be given an equal share of wealth or of political power but rather equal consideration in the distribution of ultimate good.³⁸ He takes it to be self-evident, to be an analytical judgment, to say that what is recognized as being of value in one person must be recognized as being of same value in another, provided it is really the same thing that is implied in the assertion that it has value. Such axioms, he agrees, cannot of themselves solve practical moral problems. They are purely formal but they do offer guidelines on how to distribute the good once its nature is known. What is implied by the principle of equal respect for all persons is impartiality in the treatment of all men; it rules out inequality, or rather, arbitrary inequality, inequality not justified by the requirements of social well being, or some other general and rational principle in the treatment of individuals. No man he asserts, has a right to anything unconditionally except the right to be equally considered. The rights of man are all ultimately resolvable into the one supreme and unconditional right –the right to consideration.³⁹

This meaning of equality was clearly identified by Immanuel Kant in “Fundamentals of Principles of the Metaphysics of Morals”, when he distinguished the possession of value from the possession of dignity. Whatever has a value can be replaced by something else which is equivalent in value; whatever, on the other hand, is above all value, and, therefore, admits of no equivalent, has a dignity. So, commodities that satisfy human wants and needs have a market value. What appeals to human taste, even in the absence of need, may be said to have emotional or imaginative value. But some things in the world cannot be measured on any scale of values. They are invaluable, priceless, and that is the case with every human being. One may be better cook than another or a better student or legislator, and in the restricted sphere of conduct we may and often must appraise their relative merit. But as men they do not have relative merit, for what has

³⁶ Democracy, Equality and Freedom, Edited by Upendra Baxi, Oxford University Press, New Delhi 1993.

³⁷ Complex Equality, By Michael Walzer, in “A companion to Contemporary Political Philosophy” edited by Robert Goodin and Philip Petit, Blackwell, Oxford, 1995

³⁸ Rashdall Hastings, The Theory of Good and Evil, (1907) Vol I, 223-224.

³⁹ Ibid, page-147-148.

relative merit may, in so far as it has that merit, be replaced by another like entity with equal or greater merit. A good cook may be replaced by a better cook; a good legislator by one at least equal in talent for legislation. But as a person, no human being can possibly be replaced by another. What entitles him to a place in this sphere is simply his having human dignity; it is a quality intrinsic to his being. This very thought is expressed in the now commonplace remark that the dignity of every human being must be respected. Dignity here connotes not pride or manner, but the intrinsic worthiness of every human being, without regard to his intelligence, skills, talents, rank, property or beliefs. He who affirms the principle of human dignity in this sense respects equality.⁴⁰

Analysing Rawls' theory of Justice, Dworkin reaches the same conclusion, that "justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice. He goes on to say that "Rawls' most basic assumption is not that men have a right to certain liberties that Locke or Mill thought important, but that they have a right to equal respect and concern in the design of political institutions. Thus according to Dworkin, Right to equal concern and respect is the most fundamental right of all the rights. This right according to Rawls is owed to human beings as moral persons, and follows from the moral personality that distinguishes humans from animals. Thus human beings already possessed this right when they agreed on the two principles of justice enunciated by Rawls. This right is more abstract than the standard conceptions of equality that distinguish different political theories. It permits arguments that this more basic right requires one or another of these conceptions as a derivative right or goal."⁴¹

Looking at the concept of Equality from a common man's point of view, the principle of equality was originally, a common man's protest against the gross inequalities created by the superior claims of the nobility in ancient societies. The idea of equality has, therefore grown out of the idea of privileges.⁴² These inequalities and privileges persists even in our own times. Inequality, as such, refers to the conditions created in society by a limited number of privileged people, who have always dominated the State and used its power for their own purpose.⁴³ This class of vested interests makes the fulfilment of their private desires the criterion of the public good. Equality means, first of all, that special privileges of all kinds should be abolished. All barriers of birth, wealth, sex, caste, creed and colour should be removed so that no one suffers from any kind of social or political disability.

There should be, in short, no difference between man and man and whatever rights inhere in another by virtue of his being a citizen must inhere and to the same extent in me as well. It means that I am entitled to the enjoyment of all those social and political privileges to which others are entitled. My vote in the election of the representatives is as

⁴⁰ See Bernard Williams, AO, "the Idea of Equality" in "A Companion of contemporary Political Philosophy, op cit f.n.6.

⁴¹ Reservation Crisis in India, Bar Council of India Trust, Universal Book Traders, New Delhi, 1991. Also see Taking Rights Seriously by Ronald Dworkin, Harvard University Press, 1997.

⁴² A.C. Kapoor, Principles of Political Science, S Chand and Company, New Delhi, 1984.

⁴³ Ibid.

valuable and potential as that of any other. I can also become the recipient of any office of the State for which I may be eligible.⁴⁴ To refuse any man access to authority is a complete denial of his freedom, because, unless I enjoy the same access to power as others, I live in an atmosphere of contingent frustration. One who lives in an atmosphere of frustration has neither any inspiration in life nor any incentive for it. He accepts his place in society. He accepts his place in society, which accident of birth has given him, as a permanent condition of his life. It is in this way that the faculty of creativeness is lost and men or a class of men become “animate tools” which Aristotle described as the characteristic of the natural slave. There can be no equality in a society where a few are masters and rest are slaves. The principles of equality, accordingly, means that whatever conditions are guaranteed to me, in the form of rights, shall also in the same measure, be guaranteed to others and that whatever rights are given to others shall also be given to me. The chief characteristic of a right is its equalitarian basis.

1. Theories of Equality.

In this section we shall have a brief look as to how various political ideologies theorise the concept of equality to show that though the thinkers of all hues look at it from different perspectives, but there is surprising unanimity in their line of thinking and almost all of them come to some common conclusions ending up in talking, in terms of justice to all individuals and groups, though they will have different perspectives in their conceptions of justice. It is this element of justice that leads to the adoption of policies on affirmative action programmes. Demands of justice compels the state system to resort to the protective discrimination kind of policies and that precisely forms the jurisprudential basis of benign discrimination. But before we talk of the common conclusions and common concerns amongst philosophers of various hues, let's have a look at their viewpoints about equality. We shall cover, liberals, libertarians, Fabians and Marxists.

1.1 Liberal Theory of Equality : John Rawls.

Strictly speaking, there is nothing like a liberal theory of Equality. However, since liberalism has been a very amorphous concept, dynamic and changeable, implying almost a compelling passion for liberty, representing a system of ideas, that aim at the realisation of pluralists society and diversity in politics, economics religion and cultural life, it would not be far of the mark to say that John Rawls represents that face of liberalism which vies for realization of equality of all individuals emphasizing on the care of the least privileged.. Though we find an espousal for equality of all in Locke, Bentham, Mill and Greene, however in modern times the most forceful argument has been developed by John Rawls in his seminal work, “A theory of Justice”.⁴⁵ Rawls argues that the principles of justice are those that would be chosen by free and rational individuals if they had to choose behind a veil of ignorance as to what position in society, they might themselves occupy. Rawls makes a persuasive case for a conception of justice that would improve

⁴⁴ Harold Laski, A Grammar of Politics.

⁴⁵ Oxford University Press, 1972.

the chances of the least advantaged members of society. In other words inequality is only justified if it results in the poor being better off in the social dispensation. Rawls calls this “the difference principle”. Since the Rawlsian prescription is geared exclusively towards improving the lot of the worst off members of society, the rule would obviously be more egalitarian than the Utilitarian principle. More specifically, on the question of bringing about greater equalities.⁴⁶

Rawls has identified what he had called primary social goods. There are things that every rational man is presumed to want including rights and liberties, opportunities, powers, income and wealth, and the basis of self respect. For Rawls basic liberties have priorities over other primary goods and each person is to have an equal right to the most extensive basic liberties compatible with a similar liberties for others. Having ensured basic liberties, Rawls is for ensuring an equitable distribution of primary goods . According to him, primary goods are the necessary means, whatever may be one’s system of ends. He observes; “Greater intelligence, wealth and opportunity for example, allow a person to achieve ends he could not rationally contemplate otherwise.”⁴⁷ He then goes on to propose an index of primary social goods, though he concedes that the attempt would face several difficulties.

Rawls is very clear in his approach that undeserved inequalities call for redress and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for.⁴⁸ The difference principle holds that in order to treat all persons equally, society must give more attention to those with fewer native assets and those born into the less favourable social positions. The idea is to redress the bias in the direction of equality, maintains Rawls.

It must be noted that Rawls thinks of primary social goods as embodying one of the two conceptions of equality, and there is another, more fundamental one. Rawls writes; “some writers have distinguished between equality as it is invoked in connection with the distribution of certain goods, some of which will almost certainly give higher status or prestige to those who are more favoured and equally as it applies to the respect which is owed to persons irrespective of their social position. Equality of the first kind is defined by the second principle of justice (difference principle) which regulates the structure of organisations and distributive shares so that social cooperation is both efficient and fair. But equality of the second kind is fundamental”.⁴⁹ The later is defined by the principle of justice whereby each person is to have an equal right to the most basic liberty compatible with a similar liberty for others. Rawls further emphasises that the natural basis of equality explains its deeper significance and it is defined by such natural duties as that of mutual respect, which is owed to human beings as moral persons.

⁴⁶ Pulin B Nayak “On Equality and Distributive Justice”, Economic and Political Weekly, Annual Number, March 1991.

⁴⁷ A Theory of Justice, John Rawls, Oxford University Press, 1972.

⁴⁸ A Theory of Justice,P.100.

⁴⁹ Ibid, p/511.

The two conceptions of equality proposed by Rawls together make a case for the elimination of substantial inequalities, but they would not lead to elimination of all inequalities. Indeed the difference principle admits of inequalities to the extent that the well being of the worst off member can be ensured to be maximised.

Amartya Sen in a incisive piece, "Equality of what"⁵⁰ criticises Rawls, on the ground that the notion of Primary goods, is "Fetishist". "Rawls takes primary goods as the embodiment of advantages, rather than taking advantages to be a relationship between persons and goods." Utilitarianism or more particularly welfarism does not have this fetishism, since utilities are reflections of one type of relation between persons and goods. For example, income and wealth are not valued under utilitarianism as physical units, but in terms of their capacity to create human happiness or to satisfy human desires. Even if utility is not thought to be the right focus for the person-goods relationship, to have an entirely goods oriented framework provides a peculiar way of judging advantages.

Further, Sen emphasises that the primary goods approach seems to take little note of the diversity of human beings.⁵¹ In the context of assessing utilitarian equality, it was argued that if people were fundamentally similar in terms of utility functions, then the utilitarian concerns with maximising the sum total of utilities would push us simultaneously also in the direction of equality of utility levels. Thus utilitarianism could be rendered vastly more attractive if people really were similar. A corresponding remark can be made about the Rawlsian difference principle. If people were basically very similar then an index of primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament and even body size (affecting food and clothing requirements). So what is involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences. Judging advantage purely in terms of primary goods leads to partially blind morality.

1.2. Libertarian Perspective.

Libertarian perspective on equality has been articulated in the most forceful manner by F.A.Hayek,⁵² Friedman,⁵³ Nozick⁵⁴ and Letwin⁵⁵ amongst others. F.A.Hayek, in his substantial work "the constitution of liberty" emphatically states, that as a statement of fact it is just not true that all men are born equal. We may continue to use this hallowed phrase to express the ideal that legally and morally all men ought to be treated alike. But if we want to understand what this ideal of equality can or should mean, the first requirements is that we free ourselves from the belief in factual equality. From this he went on to argue that if we treat equally, all individuals, who are unequal, the result must

⁵⁰ A Companion to Contemporary Political Philosophy, op cit f.n. 6.

⁵¹ Ibid.

⁵² constitution of Liberty, Routledge and Kegan Paul, London, (1960)

⁵³ Capitalism and Freeom, Milton Friedman, Chicago University Press, (1960)

⁵⁴ Anarchy State and Utopia by R.Nozick, Basil Blackwell, Oxford (1974)

⁵⁵ Against Equality, Mc Millan London (1983)

be inequality in their actual position.⁵⁶ Therefore the only way to place them in an equal position would be to treat them differently. Hayek therefore goes on to conclude that equality before the law and material equality amongst individuals are in necessary conflict with each other, and we can achieve either the one or the other, but not both at the same time. Since equality before the law is regarded as a necessary prerequisite of a free society, this would automatically result in material inequality.

Hayek further argues that the boundless variety of human nature, the wide range of differences, in individual capacities and potentialities is one of the most distinctive facts about the human species. Its evolution has made it probably the most variable amongst all kinds of creatures. It has been well said that biology, with variability as its cornerstone, confers on every human individual a unique set of attributes which give him a dignity he could not otherwise possess. All this goes on to suggest that the quest for perfect equality in individual circumstances is bound to prove fruitless.

It is one thing to acknowledge that inequality is a consequence of the natural order, but it is quite another to make a case for non intervention. Hayek declares that a demand for equality is the professed motive of most of those who desire to impose upon society a preconceived pattern of distribution. Our objection is against all attempts to impress upon society a deliberately chosen pattern of distribution, whether it be an order of equality or of inequality. Essentially the same kind of view is held by other libertarians, such as Friedman, Nozick and Letwin.

Letwin for example argues that any egalitarian policy would necessarily be internally contradictory.⁵⁷ That is, if a government were to equalise any one material dimension of life, such as income, wealth, consumption, or work effort, it would necessarily and inevitably create inequality in one or more of the other dimensions. Suppose for example government sets out to equalise pay by assuring each worker the same wage rate per hour of work done. This would imply that if workers were allowed freedom to choose the number of hours of work per annum, then some would earn more than others per annum. Suppose on the other hand that the government decrees to pay the same amount to each worker annually and if different workers worked different number of hours per year, because of ill health, work stoppage, or whatever reason, then their hourly wages would be unequal. Further, if they worked different number of years during their lives, owing to differences in health, opportunity, or other objective conditions, then their lifetime incomes would be unequal. Thus any rule imposing equality on pay per hour, year of life would necessarily impose inequality on pay realised during any other interval of time.

And this is not all. Suppose that each worker were paid the same annual wage. This will not tell us anything about the persons, expenditure, savings and investment etc. With different saving propensities, equal annual pay may even within one lifetime produce remarkable inequality of wealth. Further if inheritance is permitted then inequality of wealth and income may considerably intensify over time. Most importantly, individuals would in general, respond in different ways to perform risky activities than would involve

⁵⁶ Constitution of Liberty, (1960) p. 87.

⁵⁷ Against Equality, By William Letwin (1983) Mc Millan London.

greater disutility. If individuals were forced to perform these activities, in a regime of uniform pay, then this would, in general entail differences in individual well being. Thus if a government were to ensure equality with respect to some variable then individuals will in fact end up differences with regard to some other variable or variables.

While it is not necessary to over-emphasise the point that complete equality is impossible to achieve, it is worth noting that libertarians usually take the position that it is undesirable. The argument is that an equal world is inimical to growth and incentives⁵⁸. Hayek writes, “The rapid economic growth that we have come to expect seems in a large measure to be a result of this inequality and to be impossible without it. Progress at such a fast rate cannot proceed on a uniform front but must take place in echelon fashion, with some far ahead of the rest.”⁵⁹ After all, knowledge is a vital part of the process of progress and knowledge and its benefits can spread only gradually and the ambitions of the many will always be determined by what is as yet accessible only to the few. In a similar context, Hayek contends that new things often become available to the greater part of the people only because for some time they have been the luxuries of the few.

It may however be noted that the libertarian thinkers such as Hayek and Friedman who had recognised the difficulty of ensuring equality of individual circumstance have invariably at the same time argued for the elimination of moral or political inequality. Most of the relevant discussion of this issue has therefore centred on equality of opportunity and equality before the law, among other related notions. It is presumed that each of these notions of equality goes towards enhancing individual freedom. 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. This is to be contrasted with the notion of equality of outcome, or equality of results which would require action by the state to correct free market outcomes. Harry Jhonsom (1975) has observed, “to be consistent with both the principle of individual freedom and personal responsibility and the requirements of efficient economic organisation, policy should concentrate on providing equality of opportunity rather than equality of measured income ex post results.

Equality before law is equally important and necessary requirement for libertarian thinkers. The problem, however is that in order to ensure any meaningful application of the above two principles, one must ensure a substantial measure of equality in individual circumstance, particularly economic equality. It does not need to be overstressed that a rich man has a great advantage over a poor man when he is involved in the courts of law. Since one cannot ensure complete equality in individual circumstances one would have to conclude that equality in societal rules, viz, equality of opportunity and equality before the law can only be strictly valid as a slogan.

1.3. Marxian Radicalism.

⁵⁸ P.B.Nayak, On Equality and Distributive Justice, op cit f.n. 2.

⁵⁹ F.A.Hayek, constitution of Liberty, p.42.

It is a matter of considerable interest and importance that Marx was clear in his recognition of the impossibility of ensuring complete equality in individual circumstances. But he was not merely questioning the practicability of this goal of equality; he was in fact not even willing to acknowledge this as an ideal worth striving for. Since Marx was fundamentally against oppression in any form one would have expected him to argue for an egalitarian world. But in fact there are no explicit espousals of the notion of equality in Marx's writings. In the writings of both Marx and Engels there are statements to the effect that equality is fundamentally a bourgeois idea, having no place in the statement of working class demands or objectives. It is for this reason that Heller (1988) has observed that "Egalitarianism has no bitterer enemy than Marx himself"⁶⁰.

Marx presupposes a society wherein "the instrument of labour are common property and the total labour is cooperatively regulated, and where the proceeds of labour belong undiminished with equal right to all members of society. Marx does not conceal his preference for the notion of the abolition of all class distinctions as being the more relevant notion as compared to the objective of the elimination of all social and political inequality.

According to Marx, in the first phase of the communist system, "the right of the producers is proportional to the labour they supply, the equality consists in the fact that measurement is made with an equal standard labour. Yet because one man is superior to another physically or mentally and so supplies more labour at the same time, or can labour for a longer time, this "equal right is an unequal right for unequal labour."⁶¹ Thus distribution in the first phase of communism will inevitably be an unequal distribution, and will be so precisely because it is a distribution according to equal right. He goes on to say, one worker is married, another not; one has more children than another and so on and so forth. Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid all these defects, right instead of being equal would have to be unequal.⁶²

After the first phase of communist society is over the principle of equal right to labour would give place to a system where labour not only becomes a source of livelihood but life's principal need. Marx goes on to say, "in a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life's prime want; after the productive forces have also increased with the all round development of the individual and all the springs of cooperative wealth flow more abundantly- only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribes on its banners: "from each according

⁶⁰ Agnes Heller, *Labour and Human Needs in a society of Associated Producers* in Tom Bottomore (ed) *Interpretation of Marx*, Basil Blackwell, Oxford 1988.

⁶¹ Karl Marx "Critique of Gotha Programme, in selected works by Karl Marx and F Engels, Progress Publishers, Moscow 1975.

⁶² *Ibid.*

to his ability to each according to his needs.”⁶³ Marx conceptualises the higher phase of communist society as a world of plenty where each person is allowed to consume as per his needs and contribute to the national cake to the best of his ability or capability. According to him even the higher phase of communist society is not a world that is characterised by equality in individual circumstances. In fact precisely the opposite is the case. Human beings are regarded as unique and separate individuals and an environment is provided where each person gives of his best and is allowed to partake of the social cake to the extent of his needs. All the means of production are socially owned and the question of distribution in the sense of private appropriation of income or wealth amongst individuals simply does not arise. Thus equality of status is established by doing away with the notion of private ownership of holdings altogether.

Thus it would be seen that while Marx is indifferent to the elimination of all social and political inequality, he is for abolition of class distinctions, which for him is of fundamental importance. It is when the class distinctions are eliminated that social and political inequality arising from them would disappear of itself. Thus while Marx was not interested in pursuing the goal of equality in individual circumstance he was at the same time careful to emphasise the importance of equality in the sense of eliminating all class distinctions. He says that with the abolition of classes in socialist society all social and political inequality arising from them would disappear. Implicit in this idea is his belief that even though the rewards of the producers are not going to be exactly equal, income differentials are not likely to be great because society will fulfill such social needs as education and health care and the education from the social product, for these needs grow considerably in comparison with present day society and it grows in proportion as the new society develops.

1.4. Various strands of Socialist thinkers : Fabians and Social Democrats.

It is bit interesting to note that the way the concept of equality has developed and come to be understood in the democratic world today, the socialist thinkers and writers of the past century and a half are among the strongest proponents of equality. Marxists have always taken a drastic redistribution for granted. The socialist thinkers though less radical in their approach, have advocated the redistribution of income and wealth by one device or another. This has been for them the central issue of public policy and to avoid this was to avoid all issues.⁶⁴ It may not be possible or even appropriate to touch on the views on equality in diverse strands of socialist writings in view of the relevance of the topic. Therefore we shall have a brief look on the views of the Fabians, and social democrats.

These were a small groups of intellectuals, inheritors of the philosophical traditions of Bentham and Mill. They were active and resourceful pamphleteers and wrote on all manner of social, political and economic issues. They shared a common conviction of the necessity of the state to intervene to take charge of the commanding heights of the economy and to actively participate in the provision of education, health and other merit

⁶³ Ibid.

⁶⁴ P.B.Nayak, op cit f.n. 6.

goods. The original Fabian thinkers like Webb and Shaw, all shared Marx's moral outrage at the evils of capitalism, particularly as a system that engenders abject poverty, inhuman working conditions, and stark inequalities of income, wealth and social status. They were all convinced that the institution of private property was the principal, if not the sole cause of the malaise, yet paradoxically, most of them were not straight enemies of the established order and in fact were uncomfortable with the Marxian language of class war and revolutions. Most of them did not share Marx's belief that capitalism must inevitably collapse though they were careful to acknowledge that the system is prone to periodic slumps. They in fact were struck by its spectacular long run growth and saw no reason to doubt that it would continue to reap the benefits of successive rounds of technological innovations.

Socialism for most of these thinkers meant nationalisation, municipalisation and government regulation of industry. Shaw, however, extolled the virtues of individual freedom and competition, and believed these to be as important as the freedom of speech or the freedom of the press. By the 1930s they came to accept the necessity of mixed economy. R.H.Tawney, in his classic work, "Equality"⁶⁵ made a forceful presentation of his equalitarian ideology. His concern was with fundamental equalities before the law, the removal of collectively imposed social and economic inequalities, and the equalisation of opportunities for all to secure certain basic goods and services. He emphasised the crucial role of education to make children "capable of freedom and more capable of fulfilling their personal differences",⁶⁶ and make them communicate with each other at an equal level. He believed that it was the individuality in each person that ought to be emphasised and encouraged, "without regard to the vulgar irrelevancies of class and income". Offering one of the most perceptive critiques of the British class system, Tawney lamented that the twin pillars of inequality, viz, inherited wealth and public goods, that stood in the way of ensuring equality of opportunity were Britain's hereditary curse, and the source of most of its afflictions. Tawney made a powerful case for tailoring economic and social organisations to establish institutions to meet common needs, such as education, which would be a source of common enlightenment and common enjoyment.

As such a strong case for social justice was made out by Tawney, and this was the central issue to the hardcore thinking of Fabian and Social democrats. However, they could not extricate themselves from allowing the primacy of private ownership of the means of production to continue. This led Schumpeter to argue that they were the kind of socialists who believed in the productive success of capitalism while they deplored its distributive consequences.⁶⁷

2. Common Grounds of Distributive Justice.

The above discussion brings us into a position where we can draw some conclusions. First of all it is clear from the above that almost all thinkers from liberals to libertarians,

⁶⁵ R.H.Tawney, Equality, Unwin London (1964)

⁶⁶ Ibid.

⁶⁷ J.A.Schumpeter, Capitalism, Socialism and Democracy, Allen and Unwin, London (1976)

and Marxists to social democrats agree on the point that equality of individual circumstances is an impossibility. While Rawls makes a substantial case for reducing inequalities, and his difference principle allows maximum advantage to the worst off members of consistent with some inequality still remaining. He concedes that if inequalities benefit everybody by drawing out socially useful talents and energies, then they would be acceptable to all. Libertarians on the other hand are clear in their minds that equality in individual circumstances is not even desirable, for it would thwart incentives and growth. They do talk about equality of opportunity and equality before law, but equality in the sense commonly understood is clearly undesirable for them. The argument is that an equal world is inimical to growth and incentives. The rapid economic advance that we have come to expect seems in a large measure to be a result of ... the unequal circumstances. Marx's view on equality it turns out, that he is rather indifferent towards the idea of equality of individual circumstances, in the sense of equal distribution of commodities and income. He would rather prefer to eliminate the class distinctions, so that oppression and exploitation may be eliminated and all social and political inequality arising from them would disappear by itself. In the first phase of communism he envisages inequality emerging from the equal right to the labour, but in the final stage of communism he envisaged a world where equality in the sense of distribution of goods or income would cease to have meaning. Social democrats and the Fabians are in favour of substantial measure of equality but they are not in favour of doing away with basic framework of free market capitalism, believing that some form of inequality is not only desirable for the purpose of long term growth, but also is part of the natural order of things.

Secondly almost all the thinkers make out a case for ensuring justice,(though as has been noted everybody will have a different conception of justice) and etch out some kind of an arrangements for redistribution of resources. In Rawlsian scheme of things the conception of justice ensures that the dispensation is designed in such a way that improves the least advantaged members of society. In fact Rawlsian justice is geared exclusively towards improving the lot of worst off members of society. Rawls talks of ensuring equality of opportunity, because it ensures, that fate of the people is determined by their choices and not by their circumstances. "My aim is to regulate inequalities that affect people's life chances and not the inequalities that arise from the people's life choices", which are individual's own responsibility. Rawls seeks to ensure a scheme of things what Prof Dworkin calls "endowment insensitive and ambition sensitive"⁶⁸ dispensation. A system is just if it takes care for the redressal of undeserved inequalities and since inequalities of birth are undeserved these inequalities are somehow to be compensated for.

Libertarian thinkers like Hayek and Friedman have recognised the difficulty of ensuring equality of individual circumstances, but at the same time they have argued for elimination of moral and political inequality. They have centred their discussion on ensuring "Equality of opportunity and equality before law". The presupposition is that this ensures justice and enhances individual freedom. The principle of Equality of Opportunity is that every person has an equal chance to do what he wishes and has the capacity to do. For Marx, a just system is the one, wherein all class distinctions have been

⁶⁸ Taking Rights Seriously, Ronald Dworkin, Harvard University Press, 1997

abolished. It is not necessarily a system where equality prevails for “Equality” is fundamentally a bourgeois idea, having no place in the statement of working class demands and objectives. Since State is an instrument, used by dominant class to suppress and exploit the dependant class, the state in the hands of Proletariate shall be the medium to be used against the bourgeois and other reactionary and counter revolutionary forces and affecting a radical redistribution of resources.

Social Democrats are in favour of ensuring a system (A Just one), wherein substantial measure of equality is guaranteed without doing away with the basic framework of market capitalism. R.H Tawney⁶⁹ is in favour of substantial redistribution and in particular public provision for education, for all children to make them capable of freedom and more capable of fulfilling their personal differences and enlargement of personal liberties. Through the discovery by each individual of his own and his neighbour’s endowment. Amartya Sen emphasises this aspect in his advocacy of “Basic Capability Equality”. He says that “individual claims are not to be assessed in terms of the resources or primary goods, persons respectively hold, but in terms of the freedom they enjoy to choose between different ways of living that they can have reason to value” Public action to improve nutritional intake, life expectancy and reduce morbidity and infant mortality so as to enhance individuals capabilities has received forceful support in the writings of Amartya Sen.⁷⁰

Under Indian Constitution, what is laid down in terms of equality is a twin concept, i.e. equality before law and equal protection of laws, while the former ensures equal status to everybody, from a prince to a pauper, the later concept, is aimed at achieving substantial equality by classifying the advantaged and disadvantaged and provide the disadvantaged ones with protective discrimination which has been specifically taken up in article 15 and 16. This idea of equality under Indian Constitution, thus, emphasizes on the protective aspect of equality which has been the prime concern of most of the philosophers we have talked about above.

This discussion brings us to the idea of Distributive Justice. Whatever the differences of opinions amongst the philosophers of various hues, on the conception of justice and equality, they would all suggest some or the other kind of distributive mechanism to shape the society in the mould of their philosophy. In fact the idea of distributive justice is not something new. Aristotle himself talked about distributive justice. According to him justice is of two types-complete justice and particular justice. Particular justice, is further subdivided by him into Distributive justice and Corrective Justice. Distributive Justice consists in proper allocation of reward to each person according to his worth and desert. It thus looks beyond equality in purely formal sense. Its central concern is to redress the bias of contingencies in the direction of equality. In a democratic world it is taken for granted that policies for the redress of severe social and economic disadvantages are in themselves desirable. Such policies of distributive justice aim at different sectors of society and at the widest possible base. Either we call such policies as protective discrimination, benign discrimination or preferential policies, they are the

⁶⁹ “Equality” by R.H.Tawney,Unwin, London (1931).

⁷⁰ Justice, Means versus Freedom, Philosophy and Public affairs, 19: 111-21.

means for achieving the ideals of distributive justice. Justifications for affirmative action lies in the needs either to remove the grossly unjust inequalities in the system or to raise particular sections of the society to the level of human existence and assure them their due dignity. It is these justifications for affirmative action, that we now turn to in the next section.

3. Affirmative Action Programmes : Jurisprudential Basis.

The fact that Constitution of India specifically provides for affirmative action programmes in an elaborate manner or that the Supreme Court of United States of America has held “Affirmative action Programmes” Constitutionally sanctioned, has not put paid to the controversies dogging this issue. In fact the issue raises questions of great importance to the legal theory and philosophy and as such are required to be looked into a bit more fully and systematically. It has been seen in the introduction that the policies of compensatory discrimination raise a host of questions and arguments. Here an attempt shall be made to look into some of the more important questions and arguments and analyse their theoretical implications. Though the attempt shall be to cover such questions or controversies rather exhaustively, however there is no claim on our part that there are no other questions which have important theoretical implications.

3.1 Merit Argument.

Meritarian Principle dictates that social goods should be allotted on the basis of one’s merit on ability, whether natural or acquired. Leaving aside the general intricacies in the application of the principle, in such matters as admission to institutions of higher education or appointment to the state services it will require that the candidates are selected on the basis of their individual merit, i.e., their ability in terms of achievement of certain grades or marks in an objective test-generally a test of intelligence plus knowledge- held for that purpose. Supporters of this principle claim that it assures best justice in so far as it allocates the rewards or goods on the basis of an objective criterion having nothing to do with such personal characteristic of an individual as his birth, race, colour, sex, caste, etc.⁷¹ They say that it also satisfies the justice precept of “treat like cases alike and different cases differently” in so far as it provides a criterion of immediate relevance to the good to be distributed. This principle assures the selection of the ablest persons from amongst a large number for the limited goods or opportunities available for distribution. It also assures a strong society and its overall progress in so far as it provides incentive for hard work and the development of superior mental and physical capacities.

It appears to be a bit weighty argument but a closer examination reveals its weaknesses. The notion of merit itself is subjective. What is merit after all ? Merit has no fixed or definite meaning free from variations. It is nothing but a criterion to achieve some pre-determined social objective or value or to satisfy certain perceived social need. It does not control the objective value, or need, but is controlled by them.⁷² Thus the merit must

⁷¹ See V.C. Mishra, Bar Council of India Review, Vol XVII, New Delhi 1990.

⁷² M.P.Singh, Reservation Crisis in India (Ed) V.C.Mishra, Universal Book Traders, New Delhi, 1991.

vary according to the variations in the social objective, value, or need for achievement or satisfaction. For example, in a society suffering from under population due to long term war or any other reason, production of more children may be a merit and parent may be rewarded for producing more children because the society needs an increased growth of population. Production of more than one or two children may, however, become a demerit in an overpopulated and underdeveloped society. Similarly, high grades or percentage of marks in educational examinations may be a merit for teaching assignment because the object is to have intellectually sound persons, but for a police or defence job where predominantly physically strong men are needed, physical strength and not the grades in examinations may be the merit.

According to Prof. Dworkin, there is no combination of abilities and skills and traits that constitutes “merit” in the abstract; if quick hands count as “merit” in the case of a prospective surgeon, this is because quick hands will enable him to serve the public better and for no other reason. If a black skin will, as a matter of regrettable fact, enable another doctor to do a different medical job better, then that black skin is by the same token “merit” as well.⁷³ Prof. Dworkin does not say that merit is unimportant, the thrust of his argument is that merit itself can be defined in such a way as to make way for particular kinds of persons in view of social demands and necessities. It is indeed determined in terms of perceived social objectives, values or needs and is bound to change with the changes in the latter.

One may take an example to illustrate the point in another manner. Suppose for example there are three boy claimants for one ticket of a cricket match show. To whom out of these the ticket should go on the basis of merit? To one who has the highest score in the last examination, or the one who has demonstrated exceptional potentiality to obtain better scores in future, or the one who does not fall in either of these two categories but has demonstrated immense interest in cricket? An answer to these questions would depend on what our ultimate objective are. If we want to encourage talent and effort by rewarding it, the boy with highest marks should get the ticket, if we want to encourage the effort and potential, the second boy must get the ticket. And if we want to encourage sports, particularly cricket, the ticket must go the third boy.

Two general conclusions may be drawn from this discussion. First, since merit is dependent upon the value, goal, or the objective to be achieved, a society or the dominant group in a society may set such objectives or goals for which the members of that groups are most suitable and thus use the apparently objective looking criterion of merit to exclude other groups from the social good. For example, a warrior class or race in power may say that they need physically strong and well built men in all walks of public life and administration and accordingly all positions will be filled on the basis of physical strength or prowess. On the face of it physical strength appears to be an objective criterion, but in fact it may result in constant and uniform exclusion of the under nourished and weak.

⁷³ Bakke’s Case : Are Quotas Unfair, in “A Matter of Principle”, Ronald Dworkin, Harvard University Press, 1985.

Secondly, since the merit is determined for serving the perceived social needs or values of the day, satisfaction of such needs is the end and merit is simply a means to achieve that end. For example, efficiency in public administration may be an end and to achieve that end standards that may ensure such efficiency may be set as merit. A society may find that having met the ordinary common needs of the community, it needs highly intelligent and sophisticated doctors, engineers or lawyers to meet the special needs. To achieve that end it may decide that to these courses persons must be admitted solely on the basis of their intelligence measured through a pre-admission test or on the basis of marks or grades achieved in the previous school examination or both.

Conversely, a society may find that it does not need as much intelligent and sophisticated doctors, engineers or lawyers, as it needs the ones who can serve the day to day ordinary needs of the rural and tribal people and may accordingly decide that persons to these courses should not be admitted on the basis of intelligence alone, but also on the basis of their suitability to serve the rural and tribal people. And if the society finds that persons with urban or affluent background are not suitable for the job because of their unwillingness to serve the rural and tribal people as well as their attitude towards them, it may decide that persons with rural or tribal or poor background only will be admitted to these courses or that preference will be given to them. Thus while in the first case intelligence is the merit for becoming a doctor, engineer or lawyer, in the second rural or tribal poor background acquires priority over intelligence and becomes merit.

One may quote a similar kind of an example. Suppose, for instance, a country is not interested in high class cloth, but it wants that everyone must be clad even if the cloth is coarse. In such a situation the entrepreneurs who can produce cheap cloth even if it is coarse should have priority, if a question of granting a textile industry license arises, over those who have highly sophisticated machinery and technical know-how to produce fine quality cloth beyond the common men's reach. Thus the capacity to produce coarse but cheap cloth becomes a merit as against the capacity to produce high quality cloth. These examples should leave no doubt that merit varies with the social needs. It changes with the context and is simply a means to achieve certain ends.

A third point which requires to be noted about merit argument is that what we call merit or talent is not necessarily something which proves the superiority of one individual over another in terms of effort or diligence. It depends on a number of factors which one cannot influence in spite of one's best efforts and lie beyond one's control. Researches have established that intelligence is mainly determined by heredity-specifically that about 80 percent of variance in IQ scores is genetically determined. Prof. Eysenck says that "talent, merit, ability, are largely innate factors. In addition to genetic factors, talent is also conditioned by environmental factors and their interaction with genetic factors."⁷⁴ This is clear from Jensen's assertion that something between one half and three fourths of the average IQ difference between American Negroes and whites is attributable to genetic factors, and the remainder to environmental and their interaction with the genetic factors. Even where heredity is the same as in identical twins, if the social environment is allowed to vary, remarkable differences sometimes occur. Finally IQ is also dependent

⁷⁴ Quoted in V.C. Mishra's Reservation Crisis in India, Universal Book Traders, New Delhi, 1991.

upon motivation and motivation to a great extent depends upon social environment with shapes future hopes, expectations and prospects.

As such if merit depends upon a number of factors beyond one's control, is it not as much suspect as a race, caste, religion, sex or colour for the purposes of classification of allocation of social goods ? We do not suggest that merit must outrightly be rejected as criterion of social justice. But those who argue that merit should be the sole and exclusive criterion should not forget to take into account the factors that constitute it. If we cannot provide uniform conditions of living and development to all, we have no reason to prefer the advantaged over the disadvantaged. Such arrangements is prima facie unjust in so far as it ensures perpetual advancement of the former and condemnation of the latter.

3.2. Rights Argument.

Articulation of the Rights Argument poses some difficulties. It is generally argued 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 and therefore cannot be denied to him simply because he is labelled as a member of an advanced group etc. because another individual is labelled as belonging to a backward group. Every citizen has a constitutional right that he is not made to suffer disadvantages, at least in the competition for any public benefit, because the race or religion or sect or region or other natural or artificial group to which he is a member is the object of prejudice or contempt. Prof. Dworkin blasts out the argument. Commenting on Bakke's claim that he was denied a seat in a medical school at Davis only because he was white and that he did not chose to be born as white, he says " It is true that blacks or jews do not choose to be blacks or jews. But it is also true that those who score low in aptitude or admissions tests do not choose their levels of intelligence."⁷⁵ Certainly, he would have been accepted if he were the black. But it is also true, and in exactly the same sense, that he would have been accepted if he had been more intelligent or made a better impression in his interview, or, in the case of other schools, if he had been younger when he decided to become a doctor. And so he concludes that Allan Bakke is being sacrificed because of his race only in a very artificial sense because of his level of intelligence, since he would have been accepted if he were more clever than he is. In both cases he is being excluded not by prejudice but because of a rational calculation about the socially most beneficial use of limited resources for medical education.

Gregory Stanton takes the view that equality may have three but related concepts (I) Formal individual equality,(ii)Weighted individual equality or substantial individual equality and (iii)proportional group equality..⁷⁶ While formal individual equality is a synonym of mathematical equality in the sense that each man is to count for one irrespective of his characteristics and weighted equality contemplates weightage to be given to the individual handicaps, proportional group equality means equality among

⁷⁵ Bakke's Case : Are quotas unfair, in "A Matter of Principle", By Ronald Dworkin, Harvard University Press, 1985.

⁷⁶ As Quoted in V.C.Mishra's Reservation Crisis in India, Universal BookTraders, New Delhi, 1991.

groups, i.e, if a group of people is shown to be under-represented or is systematically unable to compete on a formally equal basis with other groups for a job or educational opportunity or any other highly valued social good, arrangements by way of reservation of quota can be made to equalise the distribution of benefits between groups. Here the principle of equality among equals applies not to individuals but to groups. The individual has been deprived of certain advantages because he belongs to a group and therefore for benefiting the individuals within that group some weightage has to be attached to the entire group. And since within the group also there may be more claimants than the benefits to be distributed, members of that group are allowed to compete among themselves.

With this view of Gregory Stanton, if one looks at the Constitution of India, one will find that the concept of group equality in so far as it speaks of special provisions for women and children and for any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes, reservations of appointments or posts in favour of any backward class of citizens, promotion of the educational and economic interest of the weaker sections of the people, and consideration of the claims of the members of scheduled castes and scheduled tribes, in the making of appointments to services and posts. In view of these express provisions no one can assert that the right to equality is always an individual right.

Even in the absence of these provisions the concept of group equality should be acceptable to both as a matter of practice as well as of principle. In practice, we see that most legislations, particularly in the area of social welfare, take into account groups and not the individual. For example, a labour legislation safeguarding the interest of industrial workers does not take into account the non-industrial worker, though he may be more in need of such safeguards than the former. The legislation proceeds on the assumption that the industrial workers as a class or group must be protected from the oppression of a class of employers, i.e., the industrialists. Similarly special treatment to veterans and their children in matters of job or admission to educational institutions is given as members of a group regardless of the disadvantage suffered by individuals. Special provisions are similarly made on the ground of group characteristics or handicaps.

Prof Andre Beteille, in an incisive article on “Distributive Justice and Institutional well being”⁷⁷ articulates a critique of “group rights” argument. He argues that at a deeper level the caste system has changed fundamentally. The moral claims of castes over their individual members have weakened at all levels of society, and especially in the urban middle class where the battle over benign discrimination is being fought. It will be safe to say that no caste today has the moral authority to enforce on its middle class members any of its traditional sanctions. Having freed themselves from the moral authority of their caste, such individuals are now able to use it instrumentally for economic and political advantages. In the traditional order, the village priest or the village barber, or the village scavenger had a moral right to claim a share of the social product in the name of caste because each of them was bound by the moral authority of the caste of which he was a member. That moral authority has been, for good or evil, shattered for ever. On what

⁷⁷ Economic and Political Weekly, Samiksha Publications Bombay, March 1991.

grounds can individuals now claim distributive shares for themselves in the name of their caste after having repudiated their moral obligations to it ?

He further argues that it is difficult to see how the idea that castes and communities have rights to proportionate shares in public employment can be made compatible with the working of a modern society committed to economic development and liberal democracy. It is true that caste continues to operate in many spheres of social life; but it does not do so any longer as a matter of right. The continued existence of caste is one thing; its legitimacy is a different thing altogether. The attempt to invest the caste system with legitimacy by claiming that its constituent units have rights and entitlements is bound to be defeated in the end; but in the meantime it can cause enormous harm to society and its institutions. The persistent use of the language of rights in the public debate for and against reservations is bound to lead to an increase in the consciousness of caste, and in that way to defeat the basic objective of affirmative action which is to reduce and not increase caste consciousness. All parties to the debate say that they wish to dismantle the structure of caste. But caste is not a material edifice that can be physically dismantled and destroyed. It exists above all in the consciousness of people-in their deep sense of divisions and separation on the one hand and of rank and inequality on the other; How can we exorcise caste from public mind by deepening the sense in society that castes are entitled to their separate shares as a matter of right.

Prof. M.P. Singh⁷⁸ attempts an explanation by saying that certain castes have been consistently excluded for thousands of years from the goods and opportunities which they would have certainly desired simply because they belonged to that caste. It is true that no classifications based on birth should ordinarily be supported by as the things today certain castes and backwardness are identical. For example, “scheduled castes and tribes are descriptive of backwardness, and nothing else. For thousands of years they have been treated as untouchables and denied the right of association with other members of the society. They have suffered all kinds of indignities and disabilities not as individuals but as members of a group or caste and that entitles them to special treatment as members of a group without violence to the right of equality of the nonmembers. The individual’s right to equality in this situation is given due recognition in so far as the members of the group can compete among themselves for the limited goods available for distribution or allocation.

This leaves us in a peculiar situation, if the caste criterion is used for providing protective discrimination the caste divisions are enhanced and identity based on class or caste lines is underlined. Further on the other hand if caste identities are overlooked in public employment and for admission in educational institutions of higher learning, they are deprived off an opportunity to overcome their disabilities caused due to exploitation and deprivations of hundreds of years. The solution appears to be lying somewhere in between-- the golden mean. Where vast disparities either in Indian situations or in U.S.A., they are required to be redressed. Flexibility is the essence in the design and application of policies to redress disparities that have arisen because of many causes.

⁷⁸ Jurisprudential Basis of Reservations, in Bar Council of India Review, Vol XVII, New Delhi, 1990.

3.3.Efficiency Argument.

It is implicit in the idea of benign discriminations that a less meritorious person is preferred to another who is more meritorious. The entry of a less meritorious shall naturally affect the efficiency of the institutional system. Institutions of our socio economic life like, courts , hospitals, banks, universities, laboratories, posts and telegraph etc, are the vehicles which negotiate the arduous path of the community towards a better, more systematic and healthy life. They are useful not just to the people to whom they provide employment, but for the public at large and the society as a whole. Indeed the institutions shape harness and channelise the collective energies of a people in their quest for a better tomorrow. And as it is said, “Rome was not built in a day” , Institutions do not spring up all of a sudden, they take generations and centuries in their evolution passing through ups and downs, accumulating experiences of generations, their trials and travails and acquiring the shape useful for the social organism. The social utility of public institutions has to be judged not just by the criterion of employment but a whole range of criteria among which employment cannot be the most important. If for the purpose of redressing grievances of the past, we tend to undermine the efficiency of the public institutions, we would be doing unimaginable harm to the generations to come. It was probably for this reason that when the framers of Indian Constitution provided for benign discrimination, they also took care of the efficiency of public institutions and laid down a rider providing that the claims of members of the scheduled castes and scheduled tribes shall be taken into consideration, consistently with the efficiency of administration in the making of appointments to services and posts in connection with the affairs of the union or the state.⁷⁹ It is therefore argued that the efficiency of public institutions is of paramount importance

Though efficiency of public institutions is undoubtedly an important value insofar as it assures greater production and better services, yet its importance has to be compared with and ultimately set against the significance of such other values as integration, prevention of discrimination or eradication of stark social injustices. Through that exercise we might find that for us integration and rectification of socially harmful deprivations and injustices are as, if not more, pressing needs as efficiency. That was the demonstrable perception of the constitution makers of the Indian reality and social needs which have not yet materially changed. Even if we assume the paramountcy or primacy of efficiency, the connection between the existing test for entry into the services and the efficiency of administration has not been empirically established.

According to Marc Galanter,⁸⁰ “the translation of lower academic accomplishment into inefficiency in the administration is difficult to trace. It is not clear how well academic performance correlates with administrative talent. Nor is it clear that differences in the level of such talents are directly reflected in efficiency or inefficiency of administration... ..In part the higher scores of others may reflect cultural disadvantages which are irrelevant to the business in hand; in part, the lower scores of beneficiaries may reflect a

⁷⁹ See B.Shiva Rao, The Framing of Indian constitution, Vol.III N.M.Tripathi, Bombay, 1967.

⁸⁰ Law and Society in Modern India, By Marc Galanter, Oxford University Press, 1989.

remediable lack of polish and experience rather than lack of native ability.”⁸¹ In the words of Justice Krishna Aiyar of Indian Supreme Court, “The very orientation of our selection process is distorted and those like the candidates from the scheduled castes and scheduled tribes who, from their birth, have a traumatic understanding of agrarian India have, in one sense, more capability than those who have lived under affluent circumstances and are callous to the human lot of the sorrowing masses. Elitists, whose sympathies with the masses have dried up are, from the standards of the Indian people, least suitable to run government and least meritorious to handle state business, if we envision a service state in which the millions are the consumers..... Sensitised heart and a vibrant head, tuned to the tears of the people, will speedily quicken the developmental needs of the country and a sincere dedication and intellectual integrity... not degrees of Oxford or Cambridge, Harvard or Stanford or similar Indian Institutions are the major components of merit or suitability.”⁸²

The thrust of the whole argument is that the concept of efficiency should be related to our developmental needs and irrelevance or inadequacy of the existing test system to determine efficiency should be exposed.

3.4. Balkanisation Argument.

It has been noted above that benign discrimination underlines class and caste differences and enhances the social divisions, which are already acute in Indian socio-political system. A similar kind of an argument has been made in United States of America, that affirmative programmes are aimed to achieve a racially conscious society divided into racial and ethnic groups, each entitled as a group to some proportionate share of resources, careers or opportunities.⁸³ In India due to the history of partition and resulting massacre of around one million people, the argument that benign discrimination tends to divide the people revives the history of tragedies of partition. The communal virus which started with Ramsay Mc Donald award culminated in the partition of the subcontinent and generation of issues which remain unresolved to this day. Even the history of the benign discrimination has not been a smooth one. The extension of reservations first for the Scheduled Castes and scheduled tribes and then to Other Backward Classes,(OBC) has already caused so much of heartburn and has led to ample amount of recriminations. And now the forwards too are demanding reservations. Demands of Christians and Muslims for reservations, though subdued at the moment, have started being made. That turns the whole concept of benign discrimination into a political tool, seeking to perpetuate the power of paternalistic Government, which would rather dole out, reservations sops and divide the people than encourage people to stand on their own feet and compete in a world of excellence. All this leads to an acute kind of anxiety about the integrity of the country.

⁸¹ Ibid.

⁸² Quoted by Prof M.P.Singh, in His Jurisprudential Basis of Reservations, op cit f.n. 47.

⁸³ Ronald Dworkin, Bakke's Case : Are quotas Unfair, in "A Matter of Principle", Mass Harvard University Press, Cambridge, 1985.

The proponents of benign discriminations respond to this type of argument by terming it as a displaced argument trying to discredit the affirmative action programme, whose moral and philosophical justifications leave little room for doubt, which sustain and transcend the constitutional text and policy. Their argument is that failure at the implementation front should not be the reason to discard the policy itself. Prof Dworkin has sought to articulate the response to the Balkanisation argument in American context. He dispels the fear that affirmative action programme are designed to produce balkanised America, divided into racial and ethnic sub nations. They use strong measures to uplift the weaker and deprived or else they will fail, but their ultimate goal is to lessen and not to increase the importance of race in American social and professional life.

Prof. Dworkin writes, “American society is currently a racially conscious society; this is the inevitable and evident consequence of a history of slavery, repression and prejudice. Black men and women, boys and girls, are not free to choose for themselves in what roles or as members of which social group- others will characterise them. They are black, and no other feature of personality or allegiance or ambition will so thoroughly influence how they will be perceived and treated by others, and the range and character of the lives that will be open to them. The tiny number of black doctors and other professionals is both a consequence and a continuing cause of American racial consciousness, one link is a long and self fueling chain reaction. Affirmative action programmes use racially explicit creiteria because immediate goal is to increase the number of members of certain races in these professions. But their long term goal is to reduce the degree to which American society is overall a racially conscious society.”⁸⁴

According to Prof. Dworkin, the benign discrimination policies in America rests on two judgments. The first is a judgement of social theory: that the United States will continue to be pervaded by racial divisions mainly the prerogative of members of the white race, while others feel themselves systematically excluded from a professional and social elite. The second is calculation of a strategy: that increasing the number of blacks who are at work in the professions will , in the long run reduce the sense of frustration and injustice and racial self consciousness in the black community to the point at which blacks may begin to think of themselves as individuals who can succeed like others through talent and initiative. At that future point the consequences of nonracial admissions programmes, whatever these consequences might be, could be accepted with no sense of racial barriers and injustice.

This argument perfectly fits in Indian situation as well. The Affirmative Action Programmes in the form of State advantages, here in India, more elaborate, varied and specific as they are, have been designed to end the serfdom of a whole section of the population in which it has fallen due to socio-religious and politico-economic reasons. The policy is intended to help the historically disadvantaged groups to remedy the handicaps of prior discrimination impeding the access of classes of people to public administration, in a society where there exists forward and backward, higher and lower social groups. The first step in this process is to bring the lower and backward social groups to the level of forward or higher social group. Unless all social groups are brought

⁸⁴ Ronald Dworkin, op cit, f.n. 52.

to an equal cultural plane, social intercourse amongst the groups will be an impossibility. Employment and particularly the government employment promote social and economic advancement and provisions relating to protective discrimination precisely aim at achieving this goal. It must be noted in this context that article 15 (4) and 16 (4) specifically refer to social and educational advancement of disadvantaged groups. However economic advancement naturally accompany the social and educational advancement. The expression economically backward or economic advancement has purposely not been used to avoid the inclusion of majority of rural population which continues to groan under poverty conditions. Under Indian Constitution, the protective discrimination programme has been designed specifically to remedy social disadvantages by way of distribution of state advantages. It must, however, be ensured that a fortunate few do not monopolize its benefits for ever. A constant endeavour has to be made that the theoretical justifications are matched by effective implementation.

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CHAPTER - III

Indian Panorama of Equality and Justice : Ancient and Modern.

Times are not static, they change and so changes the life of a nation. Socio-political order of any system in particular is dynamic, live and organic and changes introduced from within or outside initiate a chain reaction in the socio-political life of a system and have cascading effect on the social scenario. Social mores and ideals change from time to time in the backdrop of emerging social crises which create new problems and alter the complexion of the old ones. Indian social system from the beginning of its inception has been witness to the changes of multiple dimensions. Beginning with the *Varna Vyavastha*, the Indian social system boiled down to caste structured system which has taken such deep roots that the education, economic development, political awareness, legal institutions, constitutionalism and even modernisation could not have much impact on it, so much so that even the Protective Discrimination system, when it was introduced under the Constitution of India had to be based on the discredited version of Caste System. It is due to this that we say that the roots of the present lie deeply buried in our past history.

The present set of policies too have more than 100 years history. Initially the policy was introduced by the colonial administration to divide and rule the local people and perpetuate their authority. Apparently a mechanism to maintain the balance of power amongst different sections of society, though the stated objective was to redress the inequality in public services. In the post independence period, however, the set of policies of protective discrimination were adopted as a measure of social Engineering and for the upliftment of weaker and deprived sections of our society for the purpose of redressing the ills of the past and ushering in an egalitarian social order.

This chapter is an attempt to trace the long journey of an ancient system to the present model of administering equality and justice. The ancient past has not certainly been a blameless one, but his also does not justify Henry Maine's dismissive remark that much of Ancient India's wisdom consisted of 'dotages of Brahmanical superstitions'.⁸⁵ This kind of an attitude towards ancient Indian traditions in law and justice represents the attempts made by the colonial administration to discredit the ideological foundations of Hindu hegemony of ideas. It would be interesting to learn how the so called disadvantaged groups in Indian society willingly accepted their position as part of the *Dharmic* order of things. India's genius for accomodation can only be understood against the backdrop of this *Dharmic* order which holistically encompassed all of the society. This social system was not certainly the rigidified hierarchical structure as it has been presented to be, on the contrary, it was comparatively a dynamic order unparalleled

⁸⁵ S.S.Dhavan, Indian Jurisprudence and the theory of State in ancient India, Mussorie, National academy of Administration, Printed Lectures, 1962.

in the contemporary societies and since it still retains a lot of socio-political validity, it would be appropriate to understand the basics of it. The point is, how and whether the inequalities were inherent in this system as has been made out to be? Whether the system was inimical to individual liberty? If yes what remedies were thought about the propounders of that system or they were simply insensitive about it? If not how and why the deterioration set in reducing a whole section of population to thralldom and worthlessness and thus necessitating a programme of preferential treatment? We will start by having a brief sketch of ancient India's organising principles of socio-political governance (I), trying to understand the peculiar setting of Varna system and its rationale (II), which got distorted into a hierarchical caste structure, the burden of which is still carried by the deprived and exploited sections of the social system (III), and which ultimately became the base of the present protective discrimination programme under elaborate provisions of equality and justice under Indian Constitution(IV). The present model, elaborate, complex and bewildering as it is, due to the structural complexities, it would not be possible to cover the whole range of issues that form the part of the present discourse on Protective Discrimination. As such a few arguments, which have been debated in other politico-legal systems (especially U.S) as well, shall be taken up for the purpose of putting the things in perspective.

1. Context of Ancient India's Socio-political governance.

Before we look at the ancient Indian paradigm of equality and justice, we must understand the fact, bewildering as it may appear to a western mind, that the organising principles of Ancient India's socio-political arena were not rights but the duties. Hindu constitutional writers have approached the problem of socio-political organisation from quite different point of view. They usually describe not the rights of citizens but the duties of the state; the former are to be inferred from the later. Similarly they discuss the duties of citizens from which we are to infer the extent of the control, the state could exercise over the citizen. Every individual being, realising the five kinds of debts he owes towards the system has to concentrate on his duties, without caring for the likely outcome. That's how Geeta puts it, "therefore perform your duty effeciently without attachment, because it is only by actions without attachment that a man can attain the supreme".⁸⁶

Another important point which is peculiar to a western mind and is required to be noted for a proper understanding of India's jurisprudential tradition is that there is no essential conflict between individual and society or the state. The western tradition separates the civic and political life of the citizen from that of his moral and spiritual life and defines his rights as against the state which is assumed to be hostile to individual liberty. Hindu tradition considers political duties of the citizens as part of his general duties (Dharma) and assumes that there is no primordial conflict between the state and citizen necessitating a clear cut definition of rights and obligations of both.⁸⁷ The very existence of the state is for the purpose of promoting all sided progress of the citizen. State as such is indispensable for the progress and happiness of the individual. Individual on his part

⁸⁶ Shrimadbhagwadgeeta, 2/47.

⁸⁷ The Cultural Polity of Hindus, Dr. Nandkishore Acharya, Richa Publishers, Bikaner, India.(1969)

having the sense of obligation due to the five fold debt, ⁸⁸he owed to the system as a whole could sacrifice himself for a bigger purpose. State as such for the Hindu system is not a necessary evil but a necessary benefactor. The conception of individual rights therefore could not be a major problem for political and jurisprudential thinking. The proponents of Hindu system had no presuppositions of the possibility of the suppression of the individual and therefore no pretensions were made to secure the rights of an individual.

With this essential complementarity of the individual and the state under Hindu system, when we approach the conception of equality of citizens, the individual citizen is to be understood and defined from a holistic perspective and from the perspective of individuals goal in life. The purpose of the individual as well as that of the state is to take care of the personality of the individual and ensure its all round development . As such the ultimate goal of both the individual and the state, so to say the Dharma of both entities is “*Yato Abhyudayh Nihshreyasah sa Dharmah*”, i.e. something which ensures, complete, absolute and best of development is *Dharma* and therefore ensuring such an environment wherein the character, and the potential of the individual finds their fullest development is the duty of the state and as such the right of the individual . Such an individual whose personality character and potential are developed in a balanced manner shall in turn help in the evolution of the societal and state system and contribute his bit in the overall growth of a united entity, call it state or society.

Individual personality in the Hindu scheme of things is not considered to be unidimensional or unilinear. It is complex of various interacting factors, having many layers of consciousness. At the physical level, the basic equality of the matter constituting the human body is recognised. “ One who considers everybody (including the every creature of the living world) like his own self is the true knowledgeable person”.⁸⁹ At this level human body is nothing but a vibrating pulsating mass of neurons. As such there is no difference between A and B. What distinguishes the two are the means of experiencing the outer world. This is the level of consciousness. At the other level, i.e. the level of physical being, no two individuals are similar in any way whatsoever. Basic nature, circumstances, the character and the potential which an individual is born with, can never be the same for any two individuals . This diversity of natural propensities is to be taken into consideration by the system providing for balanced development of any human individual .

State system has to recognise that no two individuals are similar in their natural propensities and therefore a uniform regimented system would not help every individual in achieving his fullest growth. No one individual is either a paragon of virtues or simply a bundle of evils. On the contrary every individual person possesses a unique combination of virtues and vices. The system cannot simply think of providing similar

⁸⁸ According to Manusmriti (73/69), five kinds of debts, an individual owes to the social system. They are Dev Rin,(Debt of Gods) Rishi Rin,(Debts of the teachers and sages) Pitir Rin,(Debt towards ones ancestors) Manusya Rin (Debt towards ones companions with whom one grows into a fully developed unit of the social system) and Bhut Rin (Debt towards the environment).

⁸⁹ Atmavat Sarvabhuteshu yah pashyati sah Panditah, (Hitopadesh, Vishnu Sharma)

educational facilities, allowing every potential of every individual to develop, rather the system has to take care, and devise the whole educational and cultural set up in such a way that the vicious propensities of the individual are curbed and the virtuous propensities are allowed and helped to flower fully. Aristotelian concept of applying equal laws amongst equals is no different from this. And the concept of equal protection of laws, under Indian Constitution speaks in the same vein.

Psychological researches establish it that our mind is conditioned at a very early young age. It works on the basis of some established beliefs and set convictions. India's philosophic traditions aim at conditioning of human mind at an early age in such a way that man grows with a sense of gratitude and obligations towards all those forces which nurture his elements and psychological personality. He is not allowed to develop the sense of conflict or dichotomy towards the system which he considers as complementary to his personhood rather than contradictory to it. It is for this reason that the complexion and texture of the philosophy of rights in Indian context is a bit different from that of the west and that has got to be understood for the proper understanding of India's ancient jurisprudential thinking, which somehow impinges on the thought process of policy makers, legislators, judges and academicians, even today.

2. Varna System (the Classificatory Principle)

It may be noted that the purpose of any legal system anywhere in the world and for that purpose of *Dharma* in particular in India has been to control and regulate human life without unduly intervening in his private life and natural liberties. There are two sides of this control or regulation, social and individual. Every individual has a certain definite place or status in the society and the duty he owes to the social system are based on this status. This is called "*Varna Dharma*". It represents the social side of *Dharma* and the individual side is represented by the *Ashrama Vyavastha*, which relates to various stages of individuals' life, young age, middle age and old age etc. ⁹⁰Looking at the social side of the individual, individual is not an absolute entity. His ultimate ambition can be realised only in a well regulated social system wherein he has a definite place and a role to play.

It is on the basis of his natural potential and his role in the social system that he becomes part or member of a particular group or community within the social system. Some one who is intellectually very sound and is adapted in policy issues for social regulation, is known as *Brahmin*. One who is physically powerful and has leadership qualities, capable of protecting the oppressed and the weak becomes the one who supports such measures and implements those policies with the help of sanctions he possesses and is known as *Kshatriya*. Those who are efficient in economic planning and execution, they either themselves or with the help of the labour perform their duties for re-enforcement, perpetuation and development of social system and contribute towards economic well being of the social organism are known as *Vaishyas*. And those who find their fulfillment and expression in labour and services of others are known as *Shudra*. This four-fold

⁹⁰ Dr. S. Radhakrishnan, *Eastern Religion and Western Thought*, Rajpal and Sons New Delhi, 1971.

division of labour in Ancient India was known as *Varna* system contemplated for the wellbeing and evolution of socio-political system.

This Varna System was originally an arrangement for the distribution of functions in society, just as much as class in Europe, but the principle on which this distribution was based in India was peculiar to this country..... A Brahmin was a Brahmin not by mere birth, but because he discharged the duty of preserving the spiritual and intellectual elevation of the race, and he had to cultivate the spiritual temperament and acquire the spiritual training which could alone qualify him for the task. The *Kshatriya* was *kshatriya* not merely because he was the son of warriors and princes, but because he discharged the duty of protecting the country and preserving the high courage and manhood of the nation, and he had to cultivate the princely temperament and acquire the strong and lofty Samurai training which alone fitted him for his duties. So it was with *Vaishyas* whose function was to amass wealth for the race and the *Sudra* who discharged the humbler duties of service without which the other *Varnas* could not perform their share of labour for the common good. There was no essential in-equality between a *brahmin* and a *sudra* since both of them were the necessary part of the single “*Virata Purus*” (cosmic spirit).

Etymologically speaking the word *Varna* is derived from the original sanskrit word “*Vri*” which means and stands for choosing or selecting a thing. Thus the word “*Varna*” implies the occupation chosen or selected by an individual in accordance with his nature, disposition, genius and temperament⁹¹. The first use of the term “*Varna*” is found in *Rigvedic* texts in which the mankind has been divided into two. “*Vijanihyaranye chadasyavoh*”⁹² i.e. men are of two kinds “*Arya*” i.e. noble and “*Anarya*” the idiot or *Shudra*.⁹³

Prof. P.V. Kane, after carefully studying the ancient scriptures, concludes that in the earliest times about which literary record exists, there were only two *Varnas*, the *Aryas* and their opponents, *Dasyus* or *dasas*, who were later subjugated and given a position subservient to *Aryas*⁹⁴. But later owing to cultural advance, division of labour arose and numerous arts and crafts developed and they were in the process of contributing to the complexity of the system by creating numerous subcastes based upon occupations⁹⁵. The most prominent and known use of *Varna* is found in *Yajurveda*, wherein four types of *Varnas* have been accepted.

*Brahmanasya mukhamaseet Bahu Rajanyah Kritah
Uru tadasya yadvaishyah padabhyam shudro ajayat.*⁹⁶

A rough and precise translation of the verse is that the Brahmin is born out of the mouth, the *kshatriya* from the arms; the *vaishya* from the stomach and the *shudra* is born from the feet of the Lord. Manu talks about the same in the following manner.

⁹¹ Rigvedadi Bhashya Bhumika, Varnashrama Dharma Vishay, Chaukhamba Publishers Varanasi, 1975.

⁹² Rigveda, Purush Sukta.

⁹³ Ibid.

⁹⁴ P.V. Kane, History of Dharmashastras, {1968} Vol – I Bhandarkar Research Institute Poona.

⁹⁵ Ibid.

⁹⁶ Yajurveda.

*Lokanam tu vivardhyartham mukhbahurupadtah
Brahmanasya Kshatriyam vaishyam shudram cha nikhartayat*

i.e. the Lord has created four *Varnas*, *Brahmin*; *Kshatriya*, *vaishya* and *Shudra* for the upkeep and betterment of society corresponding to the four limbs of the Lord. That means that four *Varna* system has been bestowed on the world by the Lord, the creator.

The point worth noticing is that doubt about this theory of *Brahmanas* having taken birth from the mouth of the Brahma etc. arise when we take the words at their face value i.e. when we do the literal interpretation of the text. However the fact is that this is figurative or rhetorical or symbolical representation that *Brahmana* has been born from the mouth or the head of the Brahma. This may be illustrated by way of an example. *Rigveda* states that the King has been made out of eight elements i.e. *Indra*, *vayu*, *yama*, *surya*, *agni*, *varuna*, *chandra*, *kubera*⁹⁷ etc. Evidently the king cannot be produced by eight elements, simply because the temporal body of human beings have been constituted of five elements i.e. earth; water; fire sky and air. The Eight elements said to be the constituting elements of the king are the eight virtues which are expected to be found/inhered in a king and as such this implies the virtues of the king.

Manu too talks about four *varnas* in the *varna vyavastha* based on *Vedas* and the point to be noted in this context is that the system is based on *Karma* (deeds) and not birth.

*Sarvasyaasya tu sargasya guptyartham sa mahadyutih
Bahurupajjanam Prithakkarmapyakalpayat*⁹⁸

This implies that the Almighty God has created four *varnas* for the security, order and prosperity of this earth, corresponding to the four limbs of the lord and the *Karma* of a particular *varna* shall be entitled for the same. The term *varna* itself establishes that this system is based on *karma* and not birth. Etymological meaning of the word *Varna* is given in *Nirukta* “*Varno vrinoteh*”⁹⁹ meaning thereby that something which is chosen/selected by the person according to his karma is *varna*. Commenting on this Swami Dayananda Saraswati writes .

*“Varno vrinoteriti niruktapramanyad varniya varitumarhah,
Gunkamani cha drishtwa yathayogyam vriyante ye te varnah.”*¹⁰⁰

i.e. the right given to an individual after observing his qualities and dispositions is the *varna*. Further the etymological meaning of the different *varnas* explain the *karma* {duties} of a particular *varna* and it is by adopting the duties of a particular *varna*. The etymological explanation or the derivation of the word *Brahmana* is “*Brahmana Veden*

⁹⁷ Manusmriti, 1/87

⁹⁸ Ibid, 1/89

⁹⁹ Nirukta 2/1/4

¹⁰⁰ Rigvedadi Bhashya Bhumika, Swami Dayananda Saraswati, Chaukhamba Prakashan Varanasi, 1975

Parmeshwarasya upasanen cha sah Vartmano vidyadi uttamayuktah Purushah”¹⁰¹; i.e. one who devotes oneself in the studies and thought of the Vedas and the God, and bears a good moral character is *Brahmana*. Manu too states the same thing. According to him to study and teach Vedas, to do and getting done the *yagnas*, and to give and takes alms/donations are the six duties/deeds of the *Brahmana*.¹⁰²

The word *Kshatriya* is deived from the original word *kshat* and has been explained etymologically in Nirukta “*Kshadati Rakшти Janan kshatrah*”¹⁰³; i.e. one who protects public from violence, invasion or loss etc. is *kshatriya*. Manu explains the duties/deeds of the *Kshatriya*

*Prajanam Rakshanam Danamijyadhyme va cha
Vishayeshva prasavittashcha kshatrisya samasatah.*¹⁰⁴

i.e. one who devotes oneself for the thorough studies of *Vedas*, performs *agnihotra yagnas*, gives alms to worthy people, assures protection, the public at large, not allured by worldly vices and has control over himself, is benign, noble and humble is the *kshatriya* in the real sense of the term. Here the doubt may arise due to the use of the word “*eeya*” in the sense of an offspring, whether Manu treats birth as the determiner of the *varna* of an individual? An approved answer to the doubt is that the relation of an offspring is established not only by birth but by transfer of knowledge or virtues too. For example there are supposed to be no wife/offspring of *surya*, *varuna* etc., but still due to the relation of cause and effect and the transfer of knowledge the son of *Aditi* is called *Aditya*, the wife of the sun is called *Suryaa* and so on.¹⁰⁵

The term *Vaishya* too is indicative of the *varna* system based on merit and deeds and not by birth. *Yo yatra tatra vyavaharvidyasu pravishati shah vaishyah vidyakushalah jano va*”¹⁰⁶; i.e. one who engages in different types of business relations and is different in different pragmatic relations is *vaishya*. In this connection Manu states

*Pashunam Rakshanam Danamijyadhayanmev cha
Vanikpatham kusidam cha vaishyasya Krishimeva cha*¹⁰⁷.

i.e. the protection and betterment of animals like cow, investing money for progress of knowledge, performing *yagnas* like *agnihotra* etc., studies of *Vedas* and other scriptures, doing all kinds of business, not taking interest more than 1.25 percent and not less than 0.25 percent, not accepting even a penny on receipt of double the original money. The

¹⁰¹ Ashtadhyayi, 4/2/59

¹⁰² Manusmriti, 1/88

¹⁰³ For similar views see Etareya Brahmana 8/2

¹⁰⁴ Manusmriti, 13/1/53

¹⁰⁵ Ashtadhyayi, 2/1/19

¹⁰⁶ Vasudha Smriti, for similar views see Tandya Brahman.

¹⁰⁷ Manusmriti 1/90

less interest he takes the more he progresses in terms of money, his dynasty will never suffer from penury and birth of an idiot offspring.¹⁰⁸

Like Brahmin, *kshatriya*, and *vaishya*, *shudra* too is indicative of a *varna* system based on merit and deeds. “*Shudrah shochniyah shodhyam sthitimapanno va sevayam sadhur avidyagun sahito manushya va*”¹⁰⁹ i.e. *Shudra* is that person who can never obtain the position of uprightness due to his ignorance and the one who is looked after by a *swamin* i.e. the owner. Further “*Ashato va Esha Sambhuto yat Shudrah*”¹¹⁰ i.e. one who suffers lowliness due to his ignorance and idiocy and the one who can only serve his master is called *shudra*. Writing on the social status of a *shudra* Manu writes

*Ekmeva tu shudrasya prabhuh karma samadishat
Etevameva varnanam shushrushamanayuya* .¹¹¹

i.e. one who is devoid of knowledge and cannot be taught by teaching process but is efficient in terms of physical robustness, the Lord has instructed him to serve the three upper *varnas* of *Brahmin*, *kshatriya* and *vaishyas* without any ill will. This may create a sense of inferiority and worthlessness of an individual who is *shudra*. But in fact there is nothing in the *varna* system that may warrant this assumption. Manu has used the word *Shuchi* while explaining the duties of *shudras*, which stands for purity of mind and body. And this is also self evident that a person who serves others can never be treated as lowly, inferior or worthless. Justice Rama Jois explains “ the Superiority or inferiority of an individual by birth in any one of these classes appear to have not been in existence. For instance Valmiki and Vyas, the authors of two great epics, the Ramayana and Mahabharata, who are regarded as the greatest poets and writers and philosophers of the country and who are held in the highest esteem down to this day by all sections of society, belonged to the fourth and second *Varna* respectively”¹¹² Further it must be noted that *shudra* is not by birth but one who cannot become *Dwija* or twice born by studies of Vedas is *shudra* or *Ekjanma* i.e. one who is one time born. He is treated as *shudra* since he is not twice born by knowledge; the *shudra* is also called by the synonym *Ekjanmah*.

It is worth noting that castes were not hereditary, and this demonstrated by a verse in *Rigveda* where a poet exclaims “ I am a reciter of hymns, my father is a physician and my mother grinds corn with stones”.¹¹³ In another verse in *Rigveda* a poet asks the God *Indra*; “Oh Indra! Fond of soma, would you make me the protector of the people, or would you make me a king, would you make me a sage that has drunk soma, would you impart me endless wealth.”¹¹⁴ This shows that the same man could be a sage, or a nobleman or a kind, depending upon his desire and activities.

¹⁰⁸ Satyartha Prakash, Swami Dayananda Saraswati, Chaukhamba Prakashan, Varanasi, 1968.

¹⁰⁹ Unadi Sutra Path, 2/19

¹¹⁰ Taitriya Brahmana, 3/2/39

¹¹¹ Manusmriti, 1/91

¹¹² M.Rama Jois, (1984) Legal and Constitutional History of India, vol. I N.M.Tripathi Bombay.

¹¹³ Rigveda, IX, 112.3

¹¹⁴ Rigveda III, 44.5

The most authentic description of *varna* system and the duties of different *varnas* is supposed to have been given in *Manusmriti*. The provisions of *Manusmriti* make it clear that *varna* system used to structure/design social system according to ones deeds and not by ones birth as such. The best illustration/argument to support this proposition is that Manu had discussed at large the duties of various *varnas*. Had he treated *varna* to have been determined by birth, there was no question of discussing the merits and demerits or duties and rights of various *varnas* since the same had been determined by their birth only and the deeds of an individual would not have affected his place/status in the social system. If an individual born in a *Brahmin* family does something which does not suit his place/status in he society and is still held to be a Brahmin, the same undesirable deed would not affect his station in life at a later stage. The account of acts prohibited by law, the duties of various *varnas* specified and other provisions of *Manusmriti* amply demonstrate that Manu treats the merit and demerits of an individual according to his deeds and not by birth alone. If the merit of an individual is accepted by birth alone the entire Karma system of Manu will collapse. He treats every individual a *shudra* by birth. “*Janmana jayate Sudrah*” i.e. ever body is a *sudra* by birth and his merit or station in life is determined by his acts and deeds. The *Manusmriti* is suffused with various examples of it.

*Shudro Brahmanatameti Brahmanshchaiti Shudratam
Kshatriyajjatmevam tuVidyadvaishyattathaiva cha .¹¹⁵*

The above *sloka* implies that a *Brahmin*, may turn into a *shudra* and *shudra* into *Brahmin*, depending on ones deeds and actions. A person born in a *Brahmin* family may remain a *Brahmin* only if his deeds are like those of a *Brahmin*, otherwise he lapses into *shudrahood*. Similarly an individual born in a *shudra* family remains a *shudra* only if his deeds are those of a debauched person. On the contrary if his deeds are like that of a Brahmin or *kshatriya* he gains the *varna* suiting to his karma; deeds and disposition. According to Manu one who does not follow his duties turns into a *shudra*. He writes

*Yondheetya dwijo vedamanyatra kurute shramam
Sa jeevannev shudratwamashu gachhati sanwayah .¹¹⁶*

Roughly the above *sloka* implies that a *Brahmin* who instead of studying Vedas invests his energies in the study of other things attains the *shudrahood* alive *alongwith* his family. The question may arise why an entire family should lapse into *shudrahood* for the deeds of a single person in the family ? The reason is that one who does not study *Vedas* gradually loses his erudite and lapses into *shudrahood* and once the head of the family is *shudra* how can he teach/transfer the erudite to his dependants and therefore they too lapse into *shudrahood*. The point to be noted in this connection is that the word *veda* here has been used as a synonym of knowledge . Not only this, but one who keeps company of *shudra* i.e. who is not knowledgeable, too becomes *shudra*. Manu writes

Uttamanuttamangamangachhanheenanasch varjayan

¹¹⁵ Manusmriti, 10/65

¹¹⁶ Manusmriti 10/66

*Brahmanah Shreshthatameti Pratyavayen Shudratam.*¹¹⁷

i.e. a *Brahmin* by keeping in touch with meritorious and knowledgeable people and by leaving the company of *shudras* and debauched, keeps on attaining merit after merit. One who acts contrary to it lapses into *shudrahood*. A noticeable point in this connection is that the word *Brahmin* here, has not been used for the person born in a *brahmin* family but for the one who attains *Brahminhood* by his deeds and dispositions. The terminology of *Manusmriti* is such that the symbolical words are to be interpreted in their right context and meanings given accordingly. The way a Brahmin loses his *Brahminhood* by not doing the deeds suiting to his *Varna*, similarly a person born in a *shudra* family may attain *Brahminhood* by doing the suitable deeds.

*Shuchirutkrishta shushruvurmtaduvaganah kritah
Brahmanadyashrayo Nityamutkrishtam jatimashnute*¹¹⁸

i.e. a *shudra* of pious body and character serving the higher castes, if is soft spoken and devoid of pride may attain *Brahminhood* or the *Dwijanma* i.e. twice born *Varna*. It was because of this that Chokha Mela, the maratha pariah, became the revered teacher of a Brahmin, who was proud of his caste purity. The *chandala*, (an outcaste who takes care of the burning of died bodies) taught Shankaracharya¹¹⁹ for a *Brahmin* was revealed in the body of the Pariah and in the *Chandala* there was the utter presence of the Lord Shiva. There comes a story in Mahabharata,¹²⁰ that an established Brahmin named Kaushik gets an elaborate lecture from a butcher, “ You appear to have attained the Brahminhood only in this birth for you are so full of pride, and are enmeshed in human vices, therefore you are no better than a Sudra”.¹²¹

The above brief exposition of the provisions of *Manusmriti* and other scriptures makes it clear that the *varna* system of the ancient period far from being birth based rigid system, was based purely on ones deeds and was designed for the maintenance of law and order and progress of the system. The rigidity of the later period jati system was not at all existing and everybody was free to raise or lower his station in life by his action and deeds. The people were divided into four *Varnas* but the *Varna* system was designed for the peace and progress of the people at large. The people were equal by birth and there were available ample opportunities of social mobility horizontal as well as vertical.

It is commonly believed and alleged many times that the caste system has really hampered the growth of a democratic system. Dr. Radhakrishnan, however considers the Varna System as perfectly democratic system. Firstly, because system believed in perfect equality at the spiritual level, (Atmavat Sarvabhuteshu.....) The system was based on

¹¹⁷ Manusmriti 4/45

¹¹⁸ Manusmriti 9/335

¹¹⁹ Shankaracharya, born in 8th century, was one of the greatest religious teachers of India who revived the Vedic Studies and established that Indian Culture is Vedic Culture and that an essential unity exists in the Indian masses from north to south and East to West.

¹²⁰ One of the two all time great Epics of India, based on a story of Mahabharat War supposed to have been fought more than five thousands years back.

¹²¹ Mahabharat, Van parva, III/75-84.

the belief that everybody is the expression of the Supreme Lord and has a natural and fundamental right to develop his person to the fullest extent. Secondly, it also establishes a system of responsibility and accountability. Individualism is not fulfilled by running away from the limitations of responsibilities and accountability. The true individualism lies in the willing acceptance of the social responsibilities tempered with propriety and honesty. Thirdly this system also recognises that all functions have social utility but economically speaking no particular function has any priority. Fourthly, it must be understood that social justice is not a system of rights but a system of equal opportunities. No democratic system would accept that all individuals in the state system should be alike. State is some kind of a machine, an organic system, different parts of which have to perform different functions. What does equality under a democratic system implies is that every part of the system has a right to make his contribution and shall get an opportunity of doing so. Last but not the least individual liberty under a democratic system also implies the regulation of liberties. Under this system a proper balance of spiritual, political and economic power rules out any kind of misuse of power of any organ of the state system.

Under this fourfold division, everybody has to work according to his choice, potential and propensity and has to achieve their fulfilment. A human individual is neither a single cell like creature nor a machine which can be bought and deployed for performing a particular task, according to the choice of the buyer. Human individual is in fact the manifestation of the supreme, the cosmic spirit and what should he do should be determined according to his inborn qualities.

3. Deterioration of Varna System into Rigid Caste System.

During the later years of *vedic* times and post *vedic* period the *varna* system started losing its shine and there started appearing cracks in the system. Though the *varna* system during this period too remained deed based and there still was a bit of mobility amongst castes wherein changing ones *varna* was still possible, however the mental horizon of the people had started narrowing down. There was no prohibition of *varna* marriages amongst three *Dwija varnas*. *Shudras* were placed at the lower station in social system but were not looked down upon. There certainly was no system of untouchability, rather the responsibility of looking after the welfare of the *shudras* shared by the three *Dwija* Communities.

With the changing times, however, the rot started setting in. Now the offsprings of *Brahmins* were started being identified with the specific tasks of *Brahminhood* and offsprings of *kshatriya* for the tasks for *kshatriyahood*. The willingness to change ones *varna* had started weakening. Though the mobility amongst different *varnas* was still possible in theory; the instances of change from one to another *varna* had started becoming rare. The *varna* system which was deed based hitherto, now started taking the shape wherein the birth was important in determining the status of an individual. The offsprings of different *varnas* started inheriting the membership of the particular *varna*. *Brahmins* were at the apex of social system due to their established status in society, now they fortified their position by interpreting the Vedas in their favour. The systemic flux

gave rise to *Budhism* and *Jainism* who attacked *Brahminism* by emphasising upon the equality of birth and deed based *varna* system. Since *kshatriya* gave protection to these *Dharmas* the status of *kshatriyas* in the social ladder recorded an improvement.

When *Budhism* and *Jainism* too started showing the signs of decline, the *Brahmins* once again raised their positions. Rigidity in marital relations and turning of *varna* system into caste system was followed by formation of clusters of *jatis* {castes} and *upjatis* {sub-castes}. The predominance of rituals prohibited intercaste marriages. Though *anuloma*, i.e. the marriage of a high caste male with the low caste female was permissible, their offspring were looked down upon and were treated as crossbreeds and hybrids.¹²² The duties of different castes and subcastes had become determined and at this stage of social development appeared untouchability. The social status of *shudras* had recorded a steep downfall. *Brahmin* made full use of their status and interpreted *Vedas* and *shastras* in their own way distorting the right meanings of the terms.

The *Manusmriti* had established an ideal system of rules for the regulations of social behaviours. But the essence of it had now been lost. The interpreters like Kulluk Bhatt wrongly interpreted the *Vedas* and *Dharmashastras* to serve their vested interests. Due to these interpretations the position of *Brahmins* in society had become fortified but then status of *shudras* and women had been lowered considerably. The word *Varna* had now become a dead letter and the *varna* system was now replaced by the caste system which was of a different genre altogether. There were mainly four *Varnas* initially, i.e. *Brahmin*; *kshatriya*, *vaishya*, *shudra*, But now these were subdivided into various subcastes. Intercaste marriages were prohibited altogether and marrying in ones own community was made essential. *Anuloma* marriage were permitted, but for the offspring of such marriages there was a different caste system. Like marriages, strict do's and donts were prescribed in food relations too. Occupational structure of the social system now had become completely based on inheritance. Administration and reins of power were now completely in the hands of *kshatriyas*. *Kshatriyas* {*Rajputs*} accepted this version of social system simply because it did fit in the protection of their immediate interest of continuance of their tutelage. And since *Brahmins* were being protected by the administration they once again came to dominate the scene. Religious rites had now become ritually dominated. *Upnayan* {wearing of sacred thread} was now completely prohibited for *shudras*. They were now banned from, entering into temples and places of worships to offer their *pujas* etc. Study of *Vedas* too was banned for *shudras*. This resulted into a kind of monopoly over *vedic* studies in the hands of *Brahmins* who interpreted *Vedas* and *shastras* according to their whims and to serve their vested interests. State administration has turned into inherited monarchies, as a result of which the king started becoming lusturous, indignant, indulgent; weak and tyrants. The weak and ignorant kings came to occupy the throne and head the administration.¹²³ The opportunists and weak-kneed elements filled in the layers of administration which ultimately resulted in the weakening of state system which enabled foreign rulers to invade loot and occupy the country at various points in history.

¹²² M.N.Srinivas: *Caste in Modern India*, Asia Publishing House Bombay, 1962

¹²³ L.P.Sharma, *Ancient History of India*, Calcutta, 1978.

According to Justice Ramajois “In the meandering course of our history the society got divided into innumerable castes and subcastes. The evil of discrimination as high and low among men on the basis of birth, hereditary avocations and other considerations raised its head and the pernicious practice of untouchability with all its degrading implications came into existence”.¹²⁴

The weak-kneed executive and resulting chaotic administration attracted the marauding invaders of medieval times and with the onslaught of invasions starting in 327 B.C. India faced foreign armies, including the Huns, Arabs, Turks, Afghans, Persians, Mongols, Portuguese, French, and British. India came under Muslim rule around 12th century A.D. for more than 600 years until the Britishers took over the power at the end of 18th century. This affected the socio-economic and politico-cultural system in a far-reaching manner. According to Dr. Sarvapalli Radhakrishnan,¹²⁵ some of the early invaders like Huns were very cruel and uncivilised and caused a lot of bloodshed in the process of their invasions. When such people and races started settling down permanently, and a situation developed wherein the locals were compelled to stay with them, it was then that marriage and social interaction were restricted and that resulted in the coming up of the caste system. Who should belong to which *varna*, was very difficult to determine taking into consideration the psychological propensities of different people. It was in such a situation that birth started being considered the basis of classifying different *Varnas*. Once this system got established, it became rather an imperative to maintain the sanctity of the descent by education or tradition.

With the decline of Mughals there started European incursions, another curse for the already fractured socio-economic and politico-cultural Indian system. In the course of time Britishers came to predominate the Indian scene. They were not reformers or charityists. They were hard-core businessmen and wanted to exploit the resources of this land for their own gain. As such the economic exploitation of the country continued and the impoverishment of the Indian subcontinent coincided with the industrial revolution of Europe, with Britain working as the engine of growth in the European subcontinent.

Since the Britishers had only economic interests here, no attempt was made to reform the socio-cultural system of the country and the already existing social evils were used by Britishers to perpetuate their exploitation. There were attempts from within Hindu society to reform and rehabilitate the system. Swami Dayananda Saraswati in the late 19th century attempted to reform the system from within by removing social evils and invigorating the system. He was basically a social reformer and the *Shuddhi* movement started by him was intended for removing social evils from Hindu society. It also created an undesirable crack in Hindu-Muslim relations. Jyotiba Phule by establishing *Prarthana Samaj* worked for the social upliftment of the deprived and underprivileged sections of society. Raja Ram-mohan Roy saw a close link between social and political progress and he perceived improvement in social conditions as essential for improvement in political conditions of the country. He attacked idolatry, and through his scholarly research established that idolatry was not sanctioned by *Vedas* and *Upanishads*. Secondly he tried

¹²⁴ M. Ramajois, {1984} Legal and Constitutional History of India, Vol-I, N.M. Tripathi, Bombay.

¹²⁵ Eastern Religion and Western Thought, Rajpal And Sons, New Delhi, (1971)

to get the barbarous practice of Sati abolished. He took up the cause of women and raised the voice against the discriminatory and unjust treatment meted out to them and also favoured widow remarriages.¹²⁶

Before we move on to next section, it should be taken note of that the rigidity and inflexibility which has come to mark India's caste system characterised by inequality and hierarchical nature, was not inherent in the traditional social pattern, but was later day accretion due to may internal and external reasons. In the course of time it gradually hardened into a rigid framework based upon heredity. Inevitably, it gave rise to gradation and put a premium on snobbery. Thus came into being social hierarchy and stratification resulting in perpetration of injustices by the so called on the lower castes. This necessitated a programme for the reconstruction and transformation of a medieval hierarchical society emphasising inequality, into a modern egalitarian society based on individual achievement and equal opportunities for all regardless one's caste race, or religion. This was evidently the intent of India's protective discrimination programme.

4. Post-Independence India : A New Beginning.

Proud of India's rich and varied heritage, but pained at the prevailing social evils of caste system etc, the founding fathers of Indian Constitution were aware of the entrenched and cumulative nature of group inequalities and therefore constitutional policies were designed to offset these entrenched discriminatory practices. Thus independent India came to embrace equality as a cardinal value against the background of elaborate, valued and clearly perceived inequalities¹²⁷. The result has been an array of programmes that are termed here as policy of Protective or compensatory Discrimination. In fact the measures for ensuring equal protection of laws involve the element of protection as well as that of compensation or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past. These protective discrimination policies are authorised by constitutional provisions, that permit departures from norms of equality, such as merit, evenhandedness and indifference to ascriptive characteristics.¹²⁸

These array of protective discrimination programmes can roughly be divided into three broad categories. First are Reservations which allot or facilitate access to valued positions or resources; such as reservations in legislatures, including the reservations for Scheduled castes and scheduled tribes in Lok Sabha (House of the People; the lower house of Indian Parliament),¹²⁹ reservations in government services and reservations in educational institutions. Second type of protective measures are employed though less frequently in land allotment, housing and other scarce resources like, scholarships, grants loans and health care etc. Third type of protective measures are specific kinds of action plans for removal of untouchability, prohibition of forced labour etc. Interestingly few in independent India, would voice the disagreement with the proposition that the

¹²⁶ Verinder Grover; Political Thinkers of India, Deep & Deep Publications, New Delhi, 1998.

¹²⁷ Marc Gallanter, Law and Society in Modern India, Oxford University Press, New Delhi, 1990, P.185.

¹²⁸ Ibid.

¹²⁹ Indian Parliament is a Bicameral Legislature. Rajya Sabha is the upper chamber of the Parliament having 250 members elected indirectly for 6 years. Lok Sabha is the lower chamber, consisting of 544 members elected directly for five years.

disadvantaged sections of the population deserve and need special help, there is no public defence for the caste system, everyone is against untouchability. However there have been controversies galore on a number of issues who really deserve this help and how long ? What kind of a help it should be and what is the efficacy and propriety of this help ? Reservation in jobs and government services and in educational institutions has been the focus of these controversies. We take these three types of reservations one by one in this section and try to present the pros and cons of these protective measures.

4.1. Reservation in Legislative Bodies.

The constitution of India treats the scheduled castes and scheduled tribes in India with special favour and affords them with some valuable safeguards. The scheduled castes are depressed sections of the Hindus who have suffered for long under social handicaps and thus need special protection and help for the amelioration of their social economic and political conditions. Scheduled tribes also known as ab-origines, are those backward sections of Indian population who still observe their tribal ways, their own peculiar customs and cultural norms. The tribal people have remained backward because of the fact that they live in inaccessible forests and hilly regions and have thus been cut off from the main currents of national life.¹³⁰ These scheduled tribes people too need special provisions for safeguarding their interests. The main problem concerning these people is that their socio-economic conditions be improved at such a pace and in such a way as not to disturb suddenly their social organisation and way of living. The need is to evolve ways and means to gradually adjust the tribal population to changed conditions and integrate them slowly in general life of the country without undue and hasty disruption of their way of living.

For the purpose of providing protection in terms of political representation, article 330 of Indian Constitution provides that seats in proportions to the population of scheduled castes and scheduled tribes in particular states are reserved in the Lok Sabha. The states which are predominantly tribal are excluded from the operation of article 330. Earlier section 2 of 23rd amendment of the constitution 1969, excluded the operation of article 330 to the tribal areas of Nagaland, but the exclusion has now been extended in respect of the state of Meghalaya, Mizoram and Arunachal Pradesh by 31st amendment Act as these states are predominantly tribal in nature.¹³¹ Similarly under article 332, seats are reserved in the legislative assemblies of the states in favour of scheduled castes and scheduled tribes in proportion of their population in that particular state. Once again the state of Meghalaya, Nagaland, Mizoram and Arunachal Pradesh are excluded from the operation of article 332, simply because of the predominant tribal population in those states. Article 331 and 333 does the same in favour of members of Anglo-Indian Community.

It is obvious that reservations of seats in Lok Sabha and legislative assemblies of the States in favour of scheduled castes and scheduled tribes is for the purpose of ensuring presence of minimum number of representatives of scheduled castes and scheduled tribes

¹³⁰ M.P.Jain, Indian Constitutional law, Wadhwa and Co Nagpur, 1997.

¹³¹ V.N.Shukla, Constitutional law of India, Eastern Book Company Lucknow, 1990.

in the legislative bodies. As such if the members of said categories are able to secure additional seats there shall not be any repugnancy to these provisions at all.¹³² 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.

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. It is for the scheduled castes and scheduled tribes alone to elect their representatives¹³³. Thus to elect a person belonging to such castes and tribes to a reserved seat, all the voters in the constituency have a right to vote. This method has been adopted with a view to discourage the differentiation of the scheduled castes or scheduled tribes from other people and to gradually integrate them in the mainstream of national life.¹³⁴

It may be noted that initially these reservations were provided for only 10 years from the commencement of the Constitution under article 334. But this duration has been extended continuously since then by 10 years each time. Now the period of reservations in Lok Sabha and State legislative assemblies stands for 60 years from the commencement of the constitution.¹³⁵ It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation. The number of Lok Sabha seats reserved in a state or Union territory for such castes and tribes is to bear as nearly as possible the same proportion to the total number of seats allotted to that state or Union Territory in the Lok Sabha as the population of the scheduled castes and scheduled tribes in the concerned state or Union Territory bears to the total population of the state or the union territory.¹³⁶

The fact that reservation of seats for scheduled castes and scheduled tribes in the legislatures is not on a permanent basis, but is at present provided for 10 years period at a time, shows that it is envisaged that the scheduled castes and scheduled tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel their interests secure without any kind of reservations.

¹³² V.V.Giri v. D. Suri Dora, AIR 1959 SC 1318.

¹³³ M.P.Jain, Indian Constitutional law, Wadhwa and Company Pub, Nagpur, 1997.

¹³⁴ This has a long history, Mahatma Gandhi has undergone a long fast to protest against the Ramsay Mc Donald award, for separate electorate in 1932 resulting into Poona Pact, under which it was agreed to have joint electorate but reservations in legislative bodies. This particular provision was given concrete shape in the Government of India Act of 1935. See Bipan Chandra, Freedom Struggle. Oxford University Press, New Delhi, 1990.

¹³⁵ This has been effected vide, 79th Constitutional Amendment Act 1999, brought into force wef.25.1.2000.

¹³⁶ Article 330 and 332 of Indian Constitution.

4.2. Reservation in Jobs (Government Services)

Reservation in government services as a measure of protective discrimination has been incorporated under article 16 (4) of the Indian Constitution. This particular provision falls under the head of “ Right to Equality”. In order to give effect to general right to equality under article 14, the constitution secures to all citizens a freedom from discrimination on grounds of religion, race and caste. In the specific application of this equality guarantee; the State is further forbidden to discriminate against any citizen on grounds of place of birth, residence, descent, class , language and sex.¹³⁷ Untouchability has been abolished and the citizens are protected against discrimination even on the part of the private persons and institutions.¹³⁸ The constitution after guaranteeing the general right of equality under article 14 defines equality in terms of justice by non discrimination provisions contained in article 15 (1) and 16 (1) and proceeds to incorporate provisions of preferential treatment so as to permit the State to achieve equality to disadvantaged sections by giving them preferential treatment in all its dealings and particularly in the area of public employment. While article 16 (1) guarantee equality of opportunity for all citizens in matters of employment or appointment to any office under the State, article 16 (2) provides 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. And article 16 (4) which provides for protective measure of reservations of seats in government employment lays down, that nothing in this article shall prevent the state from making any provision for 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.

It may be noted that this particular provision of protective discrimination is not intended to negative or derogatory of the guarantee of equality of article 14 or 15 (1) or 16 (1) and 16 (2), but is definitive of equality in relation to backward group¹³⁹. Thus article 16 (4) should be taken as a clarification that while making classification for favoured treatment to backward classes the State might use the forbidden criteria, because any real classification will have to take into account the inequalities based on abuse of caste, religion, race etc. criteria. Therefore on the one hand, the constitution forbids discrimination on grounds of race, caste or religion etc, so that the old inequitous situation may not be continued, on the other hand it permits these very criteria for correcting evil consequences flowing from their past misuse. This view stands supported by the cases decided by the Supreme Court according to which the state is authorised to use caste as an index of social and educational backwardness for making preferences, of course, subject to the rider that caste, cannot be the sole or dominant test, although it can be used in conjunction with other relevant consideration like poverty, occupation , place of habitation etc.¹⁴⁰

¹³⁷ Article 15 (1), and 15 (2) of Indian Constitution.

¹³⁸ Article 17 of the Indian Constitution, also see the Protection of Civil Rights Act 1957.

¹³⁹ Dr. Parmanand Singh, Equality, Reservation and Discrimination in India, Deep and Deep Publications New Delhi, 1985

¹⁴⁰ M.R.Balaji v. State of Mysore, AIR 1963, SC 649.

It is noteworthy that under article 16 (4) reservation in government service can be made not only at the initial stage of recruitment, but even in the matter of promotion from a lower to a higher post or cadre.¹⁴¹ Thus selection posts can also be reserved for backward classes. The expression adequately represented in article 16 (4) imports considerations of size as well as values. Adequacy of representation of backward classes in any service has to be judged by reference to numerical as well as qualitative tests¹⁴². Article 16 (4) neither confers a right on any one nor imposes a constitutional duty on the government to make a reservation for any one in public services. It is merely an enabling provision and confers a discretionary power on the state to reserve appointments in favour of certain classes of citizens.¹⁴³

An important point about article 16 (4) is that, this provision permits state to classify individuals for favoured treatment. Now the point is that classification is possible even under article 14 itself which *inter alia* provides for equal protection of laws. In fact Dr. Ambedkar has suggested a proviso to article 14 that “nothing in this clause shall prevent the state from making any law for the removal of inequality, disparity, disadvantage or discrimination arising out of existing law. Had this proviso been adopted there would have been no need to have provision like article 16 (4), however a cursory glance at the constituent Assembly debates proves that article 16 (4) was incorporated by way of an abundant caution¹⁴⁴. Probably the framers did not want to leave this positive notion of equality as an aspect of justice to the vicissitudes of judicial attitudes which had been thick with formal equality.

Despite this level of caution on the part of constitutional framers, the controversy of formal vs proportional equality equality has not escaped article 16 (4). If one takes the view of formal equality¹⁴⁵ which simply requires absence of any discrimination in the words of law, then formal non discrimination rule in government services has been given under article 16 (1) and article 16 (4) is simply an exception. And if article 16 (4) is an exception, then the permissible limit of reservations cannot exceed 49 percent as the exception cannot override the original provision¹⁴⁶. Further if under formal equality vision article 16 (4) is taken to be an exception then the state is not authorised to choose any method for giving favoured treatment to the backward classes in the area of public employment. Even reservations have to be made subject to the requirement of article 16 (4) regarding backwardness and under-representation of the preferred groups. Article 16 (4) read by itself rules out other possible ways of encouraging the backward classes in the state employment.¹⁴⁷ For instance it is unclear whether the preferential rules such as waiver of age requirement, application of fees and minimum educational qualifications,

¹⁴¹ General Manager S.Rly v. Rangachari, AIR, 1962 SC 36.

¹⁴² Ibid.

¹⁴³ M.R.Balaji, v. State of Mysore, AIR 1963 SC 649.

¹⁴⁴ B.Shiva Rao, Making of India's Constitution, Vol-III.

¹⁴⁵ Justice Mathews articulated the concept of formal vs numerical equality, in his address to the Evening Faculty of Law, University of Delhi, on 25th Jan 1975. This was a Symposium on the Consitution of India, entitled “Fundamental Rights and Distributive Justice”.

¹⁴⁶ M.R.Balaji, v. State of Mysore, AIR, 1963 SC 649.

¹⁴⁷ Ibid.

special coaching and training programmes are included within the power under article 16 (4). Apparently these preferences are not reservations in the strict sense of the term.¹⁴⁸

If on the other hand a broader notion of proportional or substantive equality is adopted 16 (4) would not be an exception but an explanation of article 16 (1), and this vision of article 16 (4) would enable the state in making exceptional provisions for the purpose of benefitting the backward classes. For example if 16 (4) is to be an explanation of 16 (1) then 16 (4) would not be controlled by 16 (1) and quantum of reservations under article 16 (4) is not required to be contained within 50 percent limit.

For long it had been the view that article 16 (4) is an exception of article 16 (1) and as such the claims of backward classes could be projected only through the exceptional clauses and not outside them.¹⁴⁹ The departure from equality could be permitted only to the extent mentioned in clause 4 of article 16. This clause could not be read as completely excluding or ignoring the rights of other citizens. If unlimited reservations were permissible, this would have the effect of effacing the guarantee contained in equality provisions.¹⁵⁰

But in Thomas¹⁵¹ decision the Supreme Court by majority rejected the notion that article 16 (4) is an exception or proviso to article 16 (1). The Court majority held that article 16 (4) is merely an illustration of article 16 (1) and as such is not controlled by article 16 (1). The result is that the state is not confined only to the method of reservations for encouraging the backward groups in the area of public employment; it is free to choose any means to achieve equality of opportunity for these backward classes. This also meant that quantum of reservations is not necessarily to be within 50 percent limits. This case involved the validity of a scheme showing favour to the scheduled castes and tribes employees by exempting them from the necessity of passing the departmental test for promotion in services. The circumstances leading to the scheme were something like this. It was brought to the notice of government of Kerala that a large number of government servants belonging to the scheduled castes and tribes were unable to get their promotions from lower division clerks in the registration department. In order to give relief to the backward classes of citizens, the government incorporated rule 13 AA under the Kerala State and subordinate services Rules 1958 enabling the government to grant exceptions to the scheduled castes and scheduled tribes employees for a period of two years from passing the necessary tests. As a result of this rule, thirty four out of fifty one posts were filled up by members of scheduled castes and tribes without passing the test. N.M.Thomas, a lower division clerk, was not promoted despite his passing the test. He questioned the rule 13 AA as violative of article 16 (1) and not saved by article 16 (4). The Kerala High Court declared the impugned rule invalid under article 16 (1). The impugned scheme resulting in promotion of over sixty percent of employees of the

¹⁴⁸ Dr. Parmanand Singh, Equality, Reservation and Discrimination in India, Deep & Deep Publications, New Delhi, 1985.

¹⁴⁹ P.Sagar, v. State of Andhra Pradesh, AIR, 1968 AP 166.

¹⁵⁰ Devadasan v. Union of India, 1964 (4) SCR 680.

¹⁵¹ State of Kerala v. N.M.Thomas, (1976) 2 SCC 310.

preferred group was held to be excessive and not conducive to the administrative efficiency.¹⁵²

However the Supreme Court on appeal upheld the rule by saying that article 16 (1) permits reasonable classification just as article 14 does and as such the state could adopt any method under the former article to ensure adequate representation of the scheduled castes and tribes in public services. The majority further held that equality of opportunity in matters of employment demanded favoured treatment to enable the weakest elements to compete with the advanced. Justice Krishna Iyer observed, “ To my mind, this sub article i.e. article 16 (4) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to True, it may be loosely said that article 16 (4) is an exception but closely examined, it is an illustration of constitutionally sanctified classification. Article 16 (4) need not be a saving clause but put in due to the over anxiety of the draftsmen to make matters clear beyond possibility of doubt”¹⁵³.

It has been noted that from the very beginning the general explanation given by the supreme Court was that article 16 (4) was an exception of article 16 (1). The implication of this ruling was that since article 16 (4) was an exception and could not eat away the general rule of article 16 (1) the quantum of reservations could not exceed 50 percent. This proposition was forcefully expounded in Devadasan’s case¹⁵⁴. It was laid down that a proviso or an exception cannot be so interpreted as to nullify or to destroy the main provisions and therefore the reservations for backward classes should not be so excessive as to create a monopoly or to destroy unduly the legitimate claims of other communities. Reservations of more than 50 percent of vacancies per se were held to be destructive of the rule of equality of opportunity.¹⁵⁵ The object of the provision under article 16 (4) was to ensure that the backwardness of the backward classes did not unduly handicap their members from securing public employment under the state and when the reservation was so excessive in character as to deny in practice a reasonable opportunity to other classes it was a fraud on the constitution. But this ruling was overturned in Thomas decision and now article 16 (4) is not an exception but an explanation or instance or illustration and as such 50 percent can not be the outer limit of the reservations.

This view of article 16 (4) has been endorsed in *Indira Sawhney v. Union of India*¹⁵⁶. It has been held that Equality postulated under the Constitution is not merely legal but real equality. Holding article 16 (4) to be an explanation of 16 (1), justice Sawant has rationalised that equality of opportunity has to be distinguished from equality of results. Various provisions of constitution show that right to equality is not a formal right or a vacuous declaration, it is a positive right and the state is under an obligation to undertake measures to make it real or effectual. A caveat has however been posted by Justice

¹⁵² H.M.Seervai, Constitutional law of India, N.M.Tripathi Bombay, 1993.

¹⁵³ In fact Justice Krishna Iyer quoted Justice Subba Rao’s dissenting judgement from *Devadasan v. Union of India*, without mentioning the fact that this was dissenting judgment.

¹⁵⁴ *Devadasan v. Union of India*, (1964) 4 SCR 680.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Indira Sawhney v. Union of India*, AIR 1993, SC. 477.

Sahai, who had emphasised that “ reservations being negative in content to the right of equality guaranteed to every citizen by article 16 (1), it has to be tested against positive right of a citizen and is a direct restriction on state power. Judicial review , thus instead of being ruled out or restricted, is imperative to maintain the balance. The court has a constitutional obligation to examine if the foundations of state’s action was within constitutional periphery and even if it was, did the government prior to embarking upon solving the social problem by raising narrow bridge under article 16 (4) to enable the weaker sections of the people to cross the rubicon discharged its duty of a responsible government by constitutional method so as to put it beyond any scrutiny by the eye and ear of the constitution.¹⁵⁷

4.3. Reservations in Educational Institutions.

Provisions for reservations in educational institutions to deprived sections of scheduled castes and scheduled tribes has been secured under article 15(4). Article 15 (1) specifically bars the state from discriminating against any citizen, race, caste, sex, place of birth or any of them. Article 15 (4) on the other hand lays down that the state is not prevented from making any special provision for the advancement of any socially and educationally backward classes.. The expression “making any special provision” is evidently an open ended provision and government can really go on providing a whole array of facilities for promoting the interests of socially and educationally backward classes, for example waiver of fees, waiver of age requirements, special coachings, scholarships, grants, loans etc. Interestingly, however, the use of article 15 (4) has exclusively been made so far for providing reservations in educational institutions.

The two most contentious issues about providing reservations in educational institutions for scheduled castes and scheduled tribes is ,(1) Determination of backward class status and (2) extent or quantum of reservations. Determination of socially and educationally backward class status is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determination¹⁵⁸. Article 15(4) lays down the criteria to designate backward classes, it leaves the matter to the state to specify backward classes. Article 340 contemplates appointment of a commission to investigate the conditions of socially and educationally backward classes and such other matters as are referred to the commission. Article 341 provides that the President may by notification in a particular state; after due consultations with governor in a particular state specify the castes, races or tribes which shall for the purpose of this constitution be deemed to be scheduled castes in relation to that state. The second clause of this article provides the list of scheduled castes specified in the notification issued under scheduled tribes. However it may be noted that the courts are not precluded from going into the questions whether the criteria used by the state for the purpose are relevant or not.¹⁵⁹

¹⁵⁷ Ibid.

¹⁵⁸ M.P.Jain, Indian Constitutional Law, Wadhwa and Company, Nagpur, 1997.

¹⁵⁹ Moosa v. Kerala, AIR 1960, Ker 355.

The question of defining backward classes has been considered by the Supreme Court in a number of cases.¹⁶⁰ On the whole the courts' approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens maintained in public services because it is implicit in the very idea of reservation that a less meritorious person is being preferred to a more meritorious person. The court also seeks to guard against the perpetuation of the caste system in India and the inclusion of advance classes within the term backward classes. From several judicial pronouncements concerning the definition of backward classes, several propositions emerge. First the backwardness envisaged by article 15 (4) is both social and educational and not either social or educational.¹⁶¹ This means that a class to be identified as backward should be both socially and educationally backward. Secondly, poverty alone cannot be the test of backwardness in India because by and large people are poor and therefore, large sections of population would fall under the backward category and thus the whole object of reservation would be frustrated.¹⁶² Thirdly backwardness should be comparable, though not exactly similar to scheduled castes and scheduled tribes. Fourthly, castes may be a relevant factor to define backwardness, but it cannot be the sole or even the dominant criterion¹⁶³. If classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian society. Also this test would break down in relation to those sections of society which do not recognise caste in the conventional sense as known to the Hindu society. Fifthly, poverty, occupations, place of habitation, all contribute to backwardness and such factors cannot be ignored. Sixthly, backwardness may be defined without any reference to caste. As the Supreme court has emphasised¹⁶⁴ Article 15 (4) does not speak of castes, but only speaks of classes, and that caste and class are not synonymous. Therefore exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests.

Second most contentious issue as has been noted above is the quantum of reservations which has become a knotty socio-political issue of the day. Because of keen competition for limited opportunities available in the country, governments are pressurised to indulge in all kinds of reservations for all kinds of groups apart from the reservations for scheduled castes and scheduled tribes and backward classes. Basically any reservation is discriminatory for reservation means that as between two candidates of equal merits, the candidate belonging to the reserve quota is preferred to the one having no reserve quota. Many deserving candidates thus feel frustrated because of reservations for the less deserving persons and they seek to challenge the scheme of reservations as unconstitutional.

Till Thomas¹⁶⁵ case, the Supreme Court decisions on article 15 (4) had held that this article was an exception and that speaking generally, reservations should be less than 50 percent. In Devadasan's¹⁶⁶ case, the majority held that reservation should be less than 50

¹⁶⁰ See D.N.Chanchala v. State of Mysore, AIR 1971, SC 839.

¹⁶¹ State of Andhra Pradesh v. P.Sagar, AIR 1968 SC 1367.

¹⁶² Pradip Tondon v. State of U.P. AIR 1982.

¹⁶³ D.N.Chanchala, v. State of Mysore, AIR 1971 SC 1762.

¹⁶⁴ Indira Sawhney v. Union of India, AIR 1993 SC 477.

¹⁶⁵ State of Kerala v. N.M.Thomas, AIR 1976 SC 490.

¹⁶⁶ Devadasan v. Union of India, 1964 (4) SCR 680.

percent. However in Thomas decision this long held position was reversed and 15 (4) and 16 (4) as well held to be not an exception but an illustration of 15 (1) and 16 (1) the effect of which was that since 15 (4) is just and illustration of 15 (1), 15 (4) would not be controlled by 15 (1) and as such the quantum of reservations could go beyond 50 percent. The rationale of such a turn around was articulated by Justice Krishna Iyer, "The expression, 'nothing in this article' is a legislative device to express its intention in a most emphatic way that of the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception but has preserved a power untrammelled by the other provisions of the article".¹⁶⁷

This Theory of legislative device is not tenable and can be criticised on a number of counts. H.M.Seervai, lists the following criticism.

1. It ignores the scheme of article 15 and 16 and more particularly the relation of clauses (1) and (2) of article 15 and 16, to clauses (3) and (4) of article 15 and to clauses (3), (4) and (5) of article 16 respectively
2. It ignores the fact that the words 'nothing in this article' appear as the opening words not only in article 16 (4) but also in article 15 (3) and (4) and in article 16 (3) and (5) and in those four sub clauses the opening words are not a legislative device.
3. It ignores the fact that it is impossible to argue that clauses (3) and (4) of article 15 and clauses (3) and (5) of article 16 were inserted, *ex majore Cautela*.
4. It ignores the legislative history of article 16 (4) which shows that 16 (4) was an exception of article 16 (1).
5. It ignore the decisions of high authority which show that the words 'nothing in this Act' or 'nothing in this article' are apt words for introducing exceptions.
6. When the passage propounding the theory of a legislative device is examined it will be found that it is difficult to give the words in the passage a rational meaning and at any rate the theory leads to absurd results.¹⁶⁸

It may be added in favour of the ibid argument that sub article 15 (1) and 15 (4) are parts of article 15 which appears under the group heading 'right to equality'. A plain rereading of sub articles 15(1) and 15 (2) show that they confer fundamental rights. Article 15 (1) confers a fundamental right on every citizen by commanding the state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. If any action of the state violates a citizen's fundamental right under article 15 (1), then article 13 declares such action to be pro tanto void, and article 32 and 226 give him a speedy and effective remedy against the state for the protection of his fundamental rights. Article 15 (2) is directed not only to the state but also to any person and it provides that no citizens shall, on the prohibited grounds, be subject to any

¹⁶⁷ Justice Krishna Iyer, supra f.n. 80.

¹⁶⁸ Constitutional law of India, H.M.Seervai, N.M.Tripathi, Bombay, 1993.

disability, liability, restriction or condition with regard to the matters set out in sub clauses (a) and (b) of article 15 (2). In the present discussion we are not concerned with sub article 15 (2) except in so far as it reflects the scheme of article 15, namely, that sub article 15 (1) and (2) confer legally enforceable fundamental rights. Article 15 (3) does not confer any right much less a fundamental right on women and children but merely confers a discretionary power on the state to make special provisions for them. Article 15 (4), with which we are directly concerned, again confers no right much less a fundamental right, on any socially and educationally backward class of citizens or on the scheduled castes and scheduled tribes, but merely confers a discretionary power on the state to make any special provision for the advancement of aforesaid classes¹⁶⁹. It would evidently be an absurdity if the part which confers merely a discretionary power is given primacy over the part which confers a fundamental right enforceable directly in the highest court of the land.

Evidently if article 15 (1) stood alone, no discrimination could be made for example in favour of scheduled castes, first, because discrimination on the ground of caste is prohibited by article 15 (1), and scheduled castes are castes. In any event discrimination on the ground of religion is also prohibited by article 15 (1) and scheduled castes are based on religion, because no one can be deemed to be a member of scheduled castes if he does not profess the Hindu or Sikh religion. Therefore article 15 (4) takes out discrimination in favour of scheduled castes from the prohibition against discrimination on the grounds of caste or religion. But in a section or an article, a later provision which takes something out of an earlier provision, is recognised to be an exception because, but for the exception, its subject matter would fall within the earlier provision. Secondly this subordination of sub article 15 (4) to article 15 (1) is further strengthened by the fact that sub article 15 (1) confers legally enforceable fundamental rights and sub article 15 (4) confers no right at all. And in this scheme of things a sub article conferring no right but conferring a mere discretionary power on the state is put on a higher plane than the one which confers a fundamental right. This conclusion can further be tested in another way. If article 15 (1) were repealed, because, then article 15 (4) must fall with it or stand impliedly repealed because, apart from article 15 (1) there is nothing in the constitution which prevents the state from making a special provision for the advancement of the classes mentioned in article 15 (4). The above analysis of article 15 supports the view consistently taken by the Supreme Court prior to the Thomas decision, with the consequences that the permissible limit of reservations could not exceed the limit of 50 percent.

N.M. Thomas decision which has been noted above in detail holds that 15 (4) and 16 (4) are not exceptions, then what is the relation of article 15 (1) and 15 (4), must be ascertained. Can it be said that sub article 15 (4) is the dominant article and 15 (1) is subordinate sub article? To ask this question is to answer it in the negative. For a sub article which confers no right but a discretionary power, cannot be described as occupying a dominant or primary position over an enforceable fundamental right. But if sub article 15 (4) cannot be treated as the dominant provision can the two sub articles be treated as independent of each other? the answer is "no". First because article 15 (4) opens

¹⁶⁹ H.M. Seervai, *ibid.* p.557.

with the words “ Nothing in this article shall prevent the state...” which shows that article 15 (4) is in some way related to or connected with article 15 (1). Secondly the statement that sub article (1) and subarticle (4) are independent of each other leads to an internal contradiction and to an absurd result. For to say that sub article 15 (1) is not in any way affected by sub article 15 (4) and vice versa. This means that a citizen can enforce his fundamental right against the state regardless of what is contained in sub article 15 (4). Equally that the state can exercise its discretionary power under article 15 (4) regardless of what is contained in sub article 15 (1). This leads to the self contradictory and absurd result that a citizen cannot exercise his fundamental right not to be discriminated against on the ground of caste or religions if the state can discriminate against him on the ground of caste and religion in favour of scheduled castes. And similarly the state cannot exercise its discretionary power to discriminate against a citizen, the citizen has a fundamental right under article 15 (1) not to be so discriminated against. Therefore it follows that the two sub articles are not independent. There is no third alternative which would describe the relation of article 15 (1) and 15 (4) unless it is said that article 15 (4) has been enacted *ex majore cautela*, that is by way of abundant caution. But to say this is to say that sub article 15 (4) was not necessary and that the result would have been the same even if it had not been enacted or was struck out. But if the terms of sub article 15 (4) were struck out, the state would have no power to make special provision for the advancement of the classes mentioned in article 15 (4), because such a provision would violate the prohibition of article 15 (1).

It has to be noted that since every reservation is a permission of discrimination in reverse the quantum or the extent of reservation assumes great importance for the citizen, for the public generally and for the state as well. An instructive illustration of such a case can be found in a number of cases occurring almost every year where candidates who have scored as low as 20 percent marks are admitted into coveted courses and those who have scored above 60 or even 70 percent marks are left out simply because they happened to belong to forward castes¹⁷⁰. Such left out candidates would naturally feel a deep sense of resentment and injustice at being passed over in favour of candidates who have scored very low in entrance test. On the other hand those who gets admission into such courses are not able to make through the relevant courses for a number of years and prove to be drain for the state's scarce resources. The injury to the public is that they have to deal with a less able public servant and for the state it is a less efficient public service. These facts do not disappear because it is said that to redress a great historical wrong done to a section of Hindu society the individual must put up with the feeling of resentment and injustice and the public and the state must put up with a less efficient public service at least for a reasonable period of time.

It was for the purpose of avoiding this contingency of getting the inefficiency introduced in the services that article 335 was provided in the Constitution of India, which laid down that the claim of the members of the scheduled castes and the scheduled tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with affairs of the union or the states. Supreme Court in a rather recent case has taken note of

¹⁷⁰ Jan-Satta, 13th June, 1994, New Delhi.

article 335 in the interpretation of article 15 (4) and has ruled that selection for the post graduate course in Medical sciences should be inconsistent with article 335, as these entrants occupy posts in teaching Hospitals. The element of public interest in having the most meritorious students is also present at the stage of post graduate level in medical specialities like superspecialities. Those who have specialised medical knowledge in their chosen branch are able to treat better and more effectively. Patients who are sent to the hospitals are treated by these students who enroll for such speciality courses. At this level an ability to assimilate and acquire special knowledge is required. Therefore selection of the right calibre of the students is essential in the public interests at the level of specialised postgraduate education. In view of this supervening public interest which has to be balanced against the social equity of providing some opportunities to the backwards who are not able to qualify on the basis of marks obtained by them for post graduate learning. It is also for an expert body such as the medical council of India, to lay down the extent of reservations. Lowering of the marks, if any, are to be consistent with the broader public interest in having the most competent people for specialised training and the competing public interest in securing social justice and equality.

It has been stated above that the expression under article 15 (4) “Any special provision for the advancement of” Is an open ended and very wide provision. It is unfortunate that it has not been utilised for other purposes. The underlying assumption of the interpretation of article 15 (4) so far appears to be that unless posts, including promotional posts are reserved for backward classes in public employment, their status can never be improved. It cannot be said that there are no other methods to consider by which that status can be improved because to say this is to overlook the wide scope of article 15 (4). The language of article 15 (4) shows first that reservations as such are not expressly mentioned in article 15 (4), but fall within the wide expression “special provisions for the advancement of...” It is overlooked that special provisions include every kind of assistance which can be given to backward classes and scheduled castes and scheduled tribes to make them stand on their feet or as is commonly said to bring them into the mainstream of Indian life. Illustratively those measures would include grant of land either free or on nominal rent the supply of seeds and agricultural implements, the supply of expert advice as to how to improve the yield of land, provisions for marketing the produce and the like¹⁷¹. Those measures would also include schemes for training the backward classes to pursue trades or small business which would fetch a reasonable income. In relation to education itself, under article 15 (4) the state can give free education, free text books free uniforms and subsistence allowance, merit scholarships and the like, starting from the stage of primary education and going right up to University and post graduate education. Once this is realised, how vast and varied are the powers at the disposal of the state if it really takes care to improve the lot of scheduled castes and scheduled tribes, and backward classes, the controversies of reservations, of preferring less meritorious to the more meritorious one, or of impairing the efficiency of administration for the purpose of providing protective discrimination, which more often than not are accused to be governed by political considerations shall lose much of their shine.

¹⁷¹ Dr. Parmanand Singh, Equality, reservations and discrimination in India, Deep & Deep Publications New Delhi, 1985.

4.4. Preferences in Resource Distribution.

The Preamble to the Indian Constitution of India, has enjoined the “sovereign, socialist, secular¹⁷², democratic Republic of India, to secure to all its citizens, social economic and political justice”. Political justice is ensured by reserving seats and ensuring a minimum representation to deprived and exploited sections of society in the legislatures and other political bodies.¹⁷³ Social and economic justice is intended to be achieved by the state in pursuance of the Directive Principles of state policy contained in chapter IV of the Constitution, which command the state to remove existing socio-economic inequalities by special measures. All these provisions are intended to promote the constitutional scheme to secure equality. These provisions set forth a programme for the reconstruction and transformation of Indian Society by a firm commitment to raise the sunken status of the pathetically neglected and disadvantaged sections of our society. Before we note how the reconstruction and transformation of Indian society is intended to be realised, it must be noted that the provisions included in Directive Principles of State policy are not enforceable in the courts, however the principles laid down in this part of the Constitution are fundamental in the governance of the country.

These provisions may better be described as the active obligations of the state¹⁷⁴. The State shall secure a social order in which social, economic and political justice shall inform all the institutions of national life.¹⁷⁵ Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to subserve the common good. And there shall be adequate means of livelihood for all and equal pay for equal work.¹⁷⁶ The state shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work and living wage for workers¹⁷⁷ a uniform civil code¹⁷⁸, and free and compulsory education for children.¹⁷⁹ The state shall take steps to organise village panchayats,¹⁸⁰ promote the educational and economic interests of the weaker sections of the people, raise the level of nutrition and standards of living, improve public health, organise agricultural and animal husbandry,¹⁸¹ separate the judiciary from executive¹⁸² and promote international peace and security.¹⁸³ Article 46 which specifically refers to the obligation of the state towards the weaker sections and scheduled castes and scheduled tribes etc 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 the scheduled

¹⁷² The word Secular was added in to the Preamble by 42nd Amendment, 1975.

¹⁷³ See Articles 330 to 334 of Indian Constitution.

¹⁷⁴ V.N. Shukla, Constitutional Law of India, Eastern Book Company, Lucknow, 1990.

¹⁷⁵ Article 38 of Indian Constitution.

¹⁷⁶ Article 39 of Indian Constitution.

¹⁷⁷ Article 41, 42 and 43 of the Constitution.

¹⁷⁸ Article 44 .

¹⁷⁹ Article 45.

¹⁸⁰ Article 40.

¹⁸¹ Article 47 and 48.

¹⁸² Article 50.

¹⁸³ Article 51.

castes and scheduled tribes and shall protect them from social injustices and all forms of exploitation”.

In pursuance of these directives , various land re-distribution and allotment programmes have been initiated. In fact so great was the enthusiasm of the government in this particular respect that hundreds of land reform laws were passed in the first five years of Indian Republic. This ensued a spate of litigation in the courts, as the land reforms laws infringed the right to property of the land owners.¹⁸⁴ However the government was so determined to effect land reforms that the right to property which was provided under article 31 of the constitution was modified six times and finally was done away with for the purpose of avoiding litigation in land reform measures of the government¹⁸⁵.

For the purpose of providing legal aid to the poor and indigent a vast network of legal aid programmes involving judicial officers, Bar Councils and law Schools, have been established all over the country. Legal Services Authority Act, 1987 which was meant to provide legal aid to all those who cannot afford access to legal services either due to poverty indigence or illiteracy or backwardness, has been a big success and apart from legal services authorities at the central and state level various legal aid committees have been successfully and effectively working at the district and taluka level.

Apart from this various health care programmes such as primary health centres all over the country have been established and various scholarships grants, loans etc for the deprived sections of the population have been contributing their bit towards the socio-economic transformation of the country. These distributive schemes are accompanied by efforts to protect the backward classes from exploitation and victimisation.

4.5. Action Plans and Amelioration Programmes.

In the third group of preferential policies aimed at protective discrimination are various action plans for the removal of incapacities on the part of the underprivileged groups. Constitution itself talks about prohibitions of forced labour under article 23, in pursuance of which Bonded Labour Abolition Act was passed in 1976. In recent years there have been strenuous efforts to release the victims of debt bondage, who are mostly from scheduled castes and scheduled tribes. Anti-untouchability programme is another area of governmental concern. Constitution itself abolished untouchability vide article 17 which lays down that “ Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence, punishable in accordance with law. It is noticeable that the word “Untouchability” is not to be construed in its literal sense which would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic contagious disease or on account of social observance such as are associated with birth or death etc. On the other hand Untouchability is to be understood in the sense of a practice as it has developed historically in India. The word refers to those regarded as untouchables in the course of historical developments in this country.

¹⁸⁴ See Kameshwar Singh v. State of Bihar, AIR, 1962, SC 1116.

¹⁸⁵ 44th Constitutional Amendment Act of 1978 abolished the Right to Property from Indian Constitution.

Anti-untouchability propaganda and the Protection of Civil Rights Act, attempts to relieve untouchables from the social disabilities under which they have suffered. These measures may not strictly be called compensatory discrimination in the formal sense of the term, but in substance it is special undertaking to remedy the disadvantaged position of the untouchables.

5. General Observations.

It may be summed up by way of general observations that the present model of compensatory discrimination policies presents a very perplexing conundrum, which can be said to be *sui generis*. In such a system nothing can remain sans controversies. However an impartial observer of the Indian scene may not have difficulty in concluding that the contemporary discrimination policies have vigorously been followed in post independent India. And they have produced a substantial redistributive effects as well. Reserved seats provide a substantial legislative presence and swell the flow of patronage, attention and favourable policies to scheduled castes and scheduled tribes. The reservation in jobs and educational institutions has given to a sizable portion of the beneficiary group earnings, and the security, information, patronage and prestige that goes with government job in India. However this has not gone without costs. In fact the costs have been enormous. Lot of frustration amongst those who have been deprived off the jobs, which they would have got in the absence of preferential policies, undermining the efficiency of administration, underlining the differences and leading invidious discriminations, making the beneficiary groups dependent and blunting their development and initiative etc could be said to be costs of these preferential policies. The criticism that these policies have evoked and the debates that take place in India today, represent the vivacity of the Indian Civilisation, wherein the advantages and disadvantages, hopes and frustrations are indisolubly bound to one another, and connects the past with the future with an unbreakable continuity of the present.

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CHAPTER-IV

Equality and Affirmative Action Programme in U.S.A.

We have seen in chapter II, how the equality and justice was viewed and administered in Ancient India and how the well thought out socio-political strategies got distorted and rigidified resulting into deprivation of a whole section of the population. This necessitated a protective action programme as an equalising measure repairing the deprivations and injustices of the past.¹⁸⁶ That's how we concluded in the last chapter that the roots of our present lie deeply buried in the past and that the justifications of such protective measures cannot be properly examined without looking into the past history of any system. The affirmative action programmes or benign discrimination in United States of America too have a definite history. Not only that these programmes have been adopted and justified due to a definite past, a past of deprivations and inhuman treatment of a whole section of the population, but they have had a definite evolution as well. Starting with the depraved slave system, to the civil Rights movement- a horrendous civil war, and adoption of fourteenth amendment; developing of the policy of "separate but equal" doctrine and the desegregation measures, finally evolving into a full fledged protective action programme, American benign discrimination has a chequered history. This chapter shall make an attempt to look into this history and then evaluate the policy perspective and the philosophic debates that formulate the present benign discrimination programme of America's socio-political governance, thus preparing the grounds for some useful comparative conclusions.

1. A Peep into the History of Slave system.

As far as we know American continent had no contact with Europe and Asia until the discovery of the new world in the late 16th century.¹⁸⁷ There are no accounts of any effective contact of this distant and different world which remained uninfluenced by the happenings in Europe and Asia. With the discovery of the new land there started the influx of Europeans into the American continent. "Mayflower" was the first ship that took a batch of Protestants, that came to be known as "Pilgrim Fathers", from England in 1620.¹⁸⁸ They did not like the autocracy of James I, nor did they like his religion. So these people since then called the "Pilgrim Fathers" shook the dust of England from off their feet and went to the strange new land across the Atlantic Ocean,¹⁸⁹ to found a colony where they would have greater freedom. They landed in the north and called the place New Plymouth. Colonists had gone before them to other parts of the North American coastline. Many others followed them, till there were little colonies dotted all over the east coast from north to south. There were catholic colonies, and colonies founded by cavalier nobles from England, and Quaker colonies- Pennsylvania is named

¹⁸⁶ M.P.Jain, Legal And Constitutional History of India, N.M.Tripathi, (P) Ltd Bombay, 1990.

¹⁸⁷ Allan Nevins and Henry Steele Commager, A Pocket History of U.S. (Pocket Book) 1951.

¹⁸⁸ Jawahar Lal Nehru, Discovery of India, Oxford University press, 1989.

¹⁸⁹ Allan Nevins, op cit, f.n.2. Also see J.H.Franklin, From Slavery to Freedom (1974)

after the Quaker Penn. There were also Dutchmen and Germans and Danes and some French men. They were a mixed lot.

By the late 17th century, large tobacco and cotton plantations had developed in the Southern America, for which there was a big demand of labour. The Red Indians, who once inhabited the whole continent, were basically nomads and did not like to settle down. They also refused to work under the conditions of slavery. They would not bend, rather they preferred to be broken and broken they were in the subsequent years. They were either exterminated or died off under the new conditions.¹⁹⁰ Therefore the demand of the labour was met by the supply of the people of Africa who were captured in horrible manhunts and sent across the seas in a manner the cruelty of which is almost beyond belief. Spanish and Portuguese were the dominant partners in the slave trade; though English too took their full share in this abominable trade. Africans specially Negroes were hunted and caught like wild beasts and then chained together and transported to America. It was found That this carrying of Africans to America and selling them as slaves was a very profitable business. The slave trade grew and was subsidized as a business chiefly by the English, the Spanish and Portuguese.¹⁹¹ Special ships slave traders were built with galleries between decks. In these galleries the unhappy Negroes were made to lie down all chained up, and each couple fettered together. The voyage across the Atlantic lasted many weeks sometimes months. During all these weeks and months these Negroes lay in these narrow galleries, shackled together, and all the space that was allowed to each of them was five and half feet long by sixteen inches wide.

Vast numbers of such slaves died even before they could reach their destinations at the American Coast.¹⁹² The early days of the Industrial revolution led to a great advance in cotton spinning in Lancashire in England, and this led to a demand for more slaves in the United States, for the cotton plantations of the southern states. These cotton plantations were rapidly extended, more slaves were brought over from Africa and every effort was made to breed Negroes. In 1790 there were 697,000 slaves in America, in 1861, the number rose to 4,000,000.¹⁹³

From the very beginning there was great difference between northern and Southern states. The northern states had taken a lead in Industrial development where the new big machine Industry spread rapidly. In the South there were large plantations worked by slave labour. Slavery was legal but in the north it was not popular and had little importance. The south depended entirely on slave labour. Apart from this the economic interests of the north and the South were different, and as early as 1830 friction arose about tariffs and customs duties. Threats of breaking away from the union were made. The States were jealous of their rights and did not like too much interferences from the Federal Government. Two parties arose in the country, one favouring State sovereignty, the other wanting a strong central government. All these points of difference divided the

¹⁹⁰ History of civilization, Arjun Dev NCERT New Delhi, 1986.

¹⁹¹ Jawahar Lal Nehru, Glimses of World History Oxford University press, New Delhi 1989.

¹⁹² Vidyaratna Swami Nair, History of America, Prakashan Kendra, Aminabad, Lucknow, 1977.

¹⁹³ Jawaharlal Nehru, op cit f.n.6.

North and South farther from each other, and where-ever new states were added to the union, the question arose which side they would support.¹⁹⁴

In the meanwhile anti-slavery movement gathered momentum in the north under the leadership of William Lloyd Garrison. The election of Abraham Lincoln was a signal for the South to break away.¹⁹⁵ Despite Lincoln's all efforts to avoid civil war, even his assurances that he would respect slavery where-ever it existed, 11 States of the South broke away, calling themselves Confederate States and war ensued in 1861. After four long years of civil war slavery was abolished and the Negroes were given full rights as citizens and this was made part of the United State's Constitution, in the form of fourteenth amendment. It was also laid down that no state could dis-enfranchise a man on account of his race, colour or previous slavery.

This did not break the travails of blacks. Despite abolition of the slavery system and fourteenth amendment rights to all citizens the discrimination against Negroes continued well into mid 20th century. Everywhere they were segregated and kept apart from the whites in hotels, restaurants, churches, colleges, parks, bathing beaches, trams and even in stores. In railways they had to travel in special carriages, called "jim crow cars". Marriages between whites and Negroes were forbidden.¹⁹⁶ The State of Virginia had passed a law as late as 1926 prohibiting while and coloured persons, from sitting on the same floor. There were innumerable number of cases, even in the nineteen thirties and forties, wherein the areas, having scarcity of labour, Negroes were sent to prisons, on trumped up charges, and convict labour was leased out to the contractors.

2. Towards Equality.

One of the main ideas that went into the formulation of fourteenth amendment was that the States defeated in war should be deprived constitutionally of their power to discriminate against the emancipated blacks and their white protectors.¹⁹⁷ The Acts of 1866 and 1870, guaranteed equality of legal status and voting rights against state action, the Act of 1875, placed the right to equal enjoyment of public inns, conveyances and amusements regardless of race within the protection of federal law. "Equal Protection" expressed the desire to lift that great and good law, above the reach of political strife. This also envisaged the abolition of all class legislations in the states and to do away with the injustices of subjecting one class to a code not applicable to another.

Interestingly, however, the Supreme Court refused to construe the fourteenth amendment as altering the existing design of federalism.¹⁹⁸ In denying the application of the equal protection clause to the Louisiana butchering monopoly, Justice Miller doubted that the equal protection clause could have any application except in cases involving the rights of blacks. But when in 1883 the court was confronted with congressional legislation,

¹⁹⁴ Allan Nevin, op cit f.n. 2.

¹⁹⁵ Ibid.

¹⁹⁶ Arjun Dev, History of Civilization NCERT New Delhi 1986.

¹⁹⁷ Bernard Schwartz, American Constitutional Law, 1976.

¹⁹⁸ Hall v. Decur, 95 US 485 (1878) and Slaughter House cases.

guaranteeing equal protection of the laws to blacks, it balked at giving the clause positive meaning.¹⁹⁹ By reading the first and fifth sections of Fourteenth Amendment to mean merely that Congress could pass legislation to supersede discriminatory state legislation and official acts (a power similar to that of judicial review), it preserved the existing federal system at the expense of implementing the principle of “Equal Protection” of laws. The persistent question, however for the states was, what would be an acceptable legal principle to support the policy of holding blacks in their former status. And the answer was found in the formula of “Separate but equal” which got the final approval of the Supreme Court in *Plessey v. Ferguson*.²⁰⁰ Justice Brown, articulated the majority opinion that the fallacy of the (Negroe) plaintiff’s argument consisted in his assumption that the enforced separation of the two races stamps the coloured race with a badge of inferiority. If this be so, it is not because of the reason of anything found in the act, but solely because the coloured race chooses to put that construction upon it..²⁰¹ This was certainly an astounding formulation of Fourteenth Amendment, which was dissented by Justice Harlan who insisted that the “Law was colour blind”.²⁰² It may be noted that though the opinion of justice Harlan has the touch of progressivism, it however fell far short of the modern ideals of the Principles of Equality. It was not until the late 1930s that the court began to give serious attention to equality requirement. In 1938, the Court invalidated a law under which Gaines, a black applicant, was refused admission to the School of law, of the State University of Missouri.²⁰³ Missouri made funds available to Gaines and other qualified black applicants to finance their legal education in schools of adjacent states that offered unsegregated educational facilities, and argued that by this action it was meeting the separate but equal requirement. Chief Justice Hughes, for the majority of seven, disposed of the state’s contention emphatically, “The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of colour. The admissibility of laws separating the races in the enjoyment of privileges afforded by the state rests wholly upon the equality of the privileges which the laws give to the separated groups within the state.”²⁰⁴ That Obligation is imposed by the constitution upon the states severally as governmental entities- each responsible to its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one state upon another, and no state can be excused from performance by what another state may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system.

¹⁹⁹ Mason and Beany, American Constitutional Law, Prentice Hall Inc Englewood Cliffs, New Jersey USA. 1978.

²⁰⁰ 163 US 537 (1886)

²⁰¹ Ibid

²⁰² Dissenting Judgement of Justice Harlan in *Plessey v. Ferguson*, op cit f.n. 15.

²⁰³ *Missouri ex rel Gains v. Canada*, 305 US 337.

²⁰⁴ Ibid.

3. Death of “Separate But Equal” Doctrine & Protective Discrimination.

Around 1945-50 a group of cases heralded the impending death of the “separate but Equal doctrine”. The case of *Sweatt v. Painter*,²⁰⁵ was highly significant. In this case the applicant, who had been denied the admission to the University of Texas Law School solely on the basis of colour claimed that the instruction available in the newly established law School for blacks was markedly inferior to the instruction at the University, and that equal protection of laws was thus denied. In a unanimous decision the Supreme Court ordered his admission to the white School, indicating that it was virtually impossible in practice, at least in professional education, for a state to comply with the separate but equal formula.

Following this the National Association for the Advancement of Coloured people and other organisations pressed the fight against segregation in public schools. Finally it was in may 1954 that the famous *Brown v. Board of Education*²⁰⁶ ruling came. The unanimous opinion of the Court articulated by Justice Warren, declared that in the field of Public Education the Doctrine of “Separate but Equal” has no place. Separate Educational facilities are inherently unequal. Earlier decisions had eroded the constitutional foundations of the “separate but equal” formula to the vanishing point. Nor did the historical evidence, furnished at the Court’s request and available to it in briefs of counsel, influence the decision. In approaching this problem, said the Chief Justice, “we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson*²⁰⁷ was written. We must consider public education in the light of its full development and its present place in American life throughout the nation.

Brown v. Board of Education,²⁰⁸ sounded the death knell for all racial segregation- at least where the requirement of state action is met. Brown is based upon the categorical finding that segregation must involve discrimination, regardless of the tangible factors, involved in the separate facilities provided. That is inevitably true of any and all segregation. After all, everyone knows that the purpose of segregation is not to exclude white persons from the facilities used by Negroes, but to exclude coloured people from those used by whites. The post Brown decisions strike down all forms of segregation in publicly operated facilities, public buildings, public housing, eating facilities and hospitals and other health facilities.²⁰⁹ It is no longer open to question that a state may not constitutionally require segregation of public facilities. Failure to comply with the desegregation demand cannot be justified by the mere fact that officials seem it necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil.²¹⁰ The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.²¹¹ Important as is the

²⁰⁵ 339 US 629 (1950)

²⁰⁶ 347 US 483 (1954)

²⁰⁷ 163 US 573 (1896)

²⁰⁸ *ibid* f.n. 21.

²⁰⁹ *Gaffin v. Maryland*, 378 US 130 (1964), *Watson v. Memphis*, 373 US 526 (1963) *State Athletic Comm’n v. Dorsay* 359 US 533 (1959) *Gayle v. Browder* 352 US 903 (1956)

²¹⁰ *Wright v. Georgia* 373 US 284 (1963)

²¹¹ *Watson v. Memphis*, *Ibid* f.n. 24.

preservation of public order it cannot be accomplished by the depriving of Negro children of their constitutional right.²¹²

Thus came to be established the “Right to Equal Protection” for all without distinction as to race, colour, and ethnic origin etc. Shorn of all its contextual interpretations of 14th Amendment, the “Equal Protection” clause providing that “All persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of U.S. and States wherein they reside. No State shall make or enforce any law which shall abridge the privilege and immunities of citizens of U.S. nor shall any state deprive any person of life, liberty or property, without due process of laws, nor deny to any person within its jurisdiction the equal protection of laws”, means exactly what it says in so far as its application is concerned. Its language applies to every person within State jurisdiction without regard to accidents of sex, birth, or fortune. Unless words are deprived of their ordinary meaning, it includes every human being irrespective of citizenship, sex or race- as well as artificial persons such as corporations.²¹³ However, as has been noted that despite its existence in the United States’ Constitution for around a century, there have been discriminations of most invidious kind and the interpretation of this clause has changed from time to time for example, at one time Fourteenth Amendment was quoted as supporting the “separate but equal”²¹⁴ doctrine. Historical data were cited to show that segregated school systems were in existence when Fourteenth Amendment was adopted and the advocates of Amendment had not questioned their constitutionality.²¹⁵ However, beginning most notably with the Supreme Court’s condemnation of school segregation in 1954, the United States Supreme Court has finally begun to correct the discrepancy between its ideals and its treatment of the blackman. The first step as reflected in the decisions of the courts and the civil rights laws of Congress,²¹⁶ merely removed the legal and quasi legal forms of discrimination. These actions while not producing true equality or even equality of opportunity logically dictated the next step; positive use of governmental power to create possibility of real equality. This is how the language used in “Equal Protection” clause expressed in the individualistic terms came to be used to defend a group, the blacks and by an activist Supreme Court. This very language came to be interpreted as designed to defend the rights of Chinese, Japanese, Mexican Americans, Celtic Irishmen, Indians, aliens and many others.²¹⁷ By 1964, the United States witnessed the emergence of busing to achieve racial balance, quotas in employment and public housing and inclusionary admission standards for colleges and universities. These developments signified the relevance of race as a factor to achieve actual equality for Negroes and other disadvantaged groups.²¹⁸

²¹² Cooper v. Aaron 358 US (1958)

²¹³ Bernard Schwartz, American Constitutional Law, (1976)

²¹⁴ Plessey v. Ferguson, 163 US 537 (1896).

²¹⁵ John W Davis, appearing on behalf of states presented the historical data to press his claims. Also see Mason and Beaney American constitutional Law, prentic Hall Inc Englewood Cliffs New Jersey 1978.

²¹⁶ Civil Rights Act, of 1964 specifically title VI and VII of the said Act.

²¹⁷ Yick Wo v. Hopkins 118 US 356 : Bayside fish flour co v. Gentry 297 US 422 : (1936) Patson v. Pennsylvania 232 US 138 : Terrace v. Thompson 263 US 197 (1923) : Takahashi v. Fishgame Commission 334 US 410 (1948)

²¹⁸ See Robert O’Neil Discriminating against discrimination and Jimmy Beyond Defunis :Disproportionate impact analysis and mandated preference in law school admissions 54 NCL Review 317 (1976)

It may be noted that today “equal Protection” clause as well as the Civil Rights Act has come to be viewed as mandating affirmative action programme using racial classifications. But those affected by affirmative action programmes have begun to fashion the weapon of equal protection clause as a shield for the argument that race cannot be a factor in affirmative action programmes. The opponents of these programmes have begun to call such measures as discrimination in reverse.²¹⁹ The Statement that American Constitution is colour blind, expressed in Justice Harlan’s dissent in Plessey’s case has come to be claimed as the law of the land. Why should a white care how many Negroes are there as doctors, lawyers or professors ? He should be considered on his own merits. If a Negroe cannot be discriminated against on grounds of race neither can a white be discriminated against on ground of race. The Constitution is colour blind, it was argued. Justice demanded equality without regard to colour and special treatment for Negroes meant recognising colour just when the forward movement of history was turning towards obliteration of colour as a factor in the areas of life. The equalitarian guarantees of the Constitution accrued to the individuals and not to groups.

These competing arguments against and in favour of benign racial discrimination reached their acme in the case of *Regents of University of California v. Allan Bakke*,²²⁰ and later in the *United Steel Workers of America v. Weber*.²²¹ Interestingly, however, neither *Bakke* nor the *Weber* case has decided finally the question of constitutionality of racial quota, system. These cases, however, have brought into focus, the entire range of issues, involved in preferential action policies. Before we have a look at the range of issues, involved and discussed in these cases, let us have a look at the facts of Bakke’s case. Allan Bakke, a white male who applied for admission to the University of California Medical School at Davis, was denied admission twice, claimed his individual right to admission on a non-discriminatory basis. He complained that he was denied admission precisely because Davis had reserved 16 percent of its places for minority applicants and only 84 percent of the places were open for those belonging to the majority community. The minority applicants could however compete for all the one hundred places. The trial court found in favour of Bakke, and ordered the Davis School to admit him. The California Supreme Court struck down the Davis’ special admission programme as violative of equal protection clause. It ruled that race can never be used as a factor in admission programmes. The University appealed to the United States Supreme Court.

The Supreme Court was equally divided on the issue. Out of nine Justices who participated in the proceedings, four justices considered the case on narrow statutory grounds and held that Title VI of Civil Rights Act 1964 mandated “colour blind” approach. Whether race can ever be a factor in admission programmes is not the issue, rather, they held that Allan Bakke was excluded because of his race. This was

²¹⁹ Dr Parmanand Singh, Equality, Reservations and Discrimination in India, Deep and Deep Publications New Delhi, 1985.

²²⁰ 438 US 265 57 L.Ed 2nd 570.

²²¹ 99 Supreme Court Report 2721 (1979), For an analysis of Weber case see O.N Fiss “The Supreme court 1978 term: A foreword 93 Harvard Law Review (1979) and Ronald Dworkin’s How to read civil Rights Act, in Taking Rights Seriously, Harvard University Press, 1997.

impermissible . Out of five who considered the issue on Constitutional grounds, one Justice, i.e. Justice Powell held that both the equal protection clause and Title VI were designed to protect the individuals right to equality, regardless of race, colour or skin. He held that race could be a factor in admission programme provided that none was excluded. While deciding this Justice Powell had in mind the Harvard School kind of a flexible programme, that do not set target numbers for minority students. Rather it aims at diversity in the student body. They recognise that racial diversity is as important as geographical diversity or diversity in extracurricular talents and career ambitions, and so take race into account in such a way that the fact that an applicant is black may tip the balance in his favour just as the fact that another applicant is an accomplished flutist may tip the balance in his.

Remedial use of race could be made only when appropriate finding of past or present discrimination had been made by judicial, legislative or administrative agency. Voluntary use of racial classifications was impermissible. He held that in no case had the court upheld voluntary use of race conscious remedy as the one adopted by Davis. And in earlier cases where remedial use of race was upheld none was excluded from the State benefits. In none of the earlier cases one individual was preferred at the expense of another. Justice Powell therefore concluded that racial and ethnic distinction of any sort are inherently suspect and thus call for an exacting judicial scrutiny. He conceded that the state had a legitimate interest in ameliorating or eliminating the disabling effects of of identified discrimination but this could be achieved not by favouring some persons perceived as members of relatively victimised group at the expense of other innocent individuals in the absence of judicial legislative or administrative finding of constitutional and statutory violations. However the goal of having a diverse student body was constitutionally permissible but racial quotas were not the least onerous or least intrusive methods to achieve the goal of having a diverse student body. Justice Powell indicated that a more flexible approach based on individualised treatment adopted in Harvard Law School was lawful method to achieve the goal of having diverse student body.

Thus four justices who decided Allan Bakke's claim on narrow statutory grounds and Justice Powell who decided his claim both on Statutory and constitutional grounds formed the majority affirming the judgement of the California Supreme Court in so far as it held that Allan Bakke was entitled to admission because he had been discriminated against on ground of race or colour. As such Allan Bakke won because five justices thought that he should win on some grounds even though they disagreed on which grounds.

There was another question, whether the race can ever be taken into account in admission programmes. The four justices who considered the issue on narrow statutory grounds had concluded that Title VI of the Civil Rights Act of 1964 mandated "colour blind" approach and whether race can ever be taken into account for such benign discrimination programmes was not the issue required to be considered on Constitutional grounds. On this particular question Justice Powell , who decided the issue both on statutory and constitutional grounds joined the other four, in upholding the proposition that race could

be so used. These five judges thus formed the majority for the proposition that racial classification is not *per se* invalid.

The other four judges whose opinion on racial classifications was most emphatically articulated by Justice Brennan, held that those racial classifications are suspect which impose unfair burdens on the disadvantaged groups or saddled them with disabilities or relegate them to a position of political powerlessness as to command extraordinary protection from majoritarian political process. These justices held that the Davis programme had not discriminated against whites who had no special history of past discrimination. Whites were not stigmatized or disabled by preference given to the Negroes and other historically disadvantaged groups. These justices believed that both the Fourteenth Amendment and the Civil Rights legislation mandated preferential treatment. Voluntary use of race for remedying the effects of past societal discrimination was both constitutionally required and desired. Justice Blackman said that to end racial discrimination race had to be taken into account. These justices were all agreed that to treat some persons equally, they have to be treated unequally for equal treatment of unequals is probably the worst and most pernicious kind of inequality.²²²

The standard of review applicable in gender discrimination cases was applied for reviewing the benign discrimination cases and the test formulated by these Justices was that a racial classification designed to further remedial purposes, must serve important government objectives and must be substantially related to achievement of those objectives". Applying this standard of review they held that Davis' articulated purpose of remedying the effects of the past discrimination was substantially important to justify the use of race conscious admission programme where there was a sound basis for concluding that minority under-representation was substantial and chronic and that the handicaps of the past discrimination impeded access of minorities to the medical school. The aim of Davis was to remove the disparate racial impact. Davis programme did not violate equal protection clause. A legislative, judicial or executive determination of past discrimination was not a condition precedent for remedial use of race. Equal Protection clause could not be so interpreted as to perpetuate racial supremacy.

Justice Marshall observed that quotas were implicit in preferential policies. Preferences were already there for veterans and children of alumni etc. All these preferences excluded others. Justice Marshall traced the history of racial discrimination in America and concluded that a university could employ race conscious measures to remedy past societal discrimination without the need for a finding that those benefited were actually victims of that discrimination. It was too ironical, he said, that after several hundred years of group based discrimination against Negroes the Court was unwilling to hold that a class based remedy was permissible. He remarked that in declining to so hold, "Today's judgement ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the colour of their skin. It was unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination". And he concluded that

²²² D.D.Basu, Shorter constitution of India, Wadhawa Publishers Nagpur, 1997.

“this court in Civil Rights cases and *Plessey v. Ferguson*²²³ destroyed the movement toward complete equality. For almost a century no action was taken and this non action was with the tacit apporals of the Court. Then we had *Brown v. Board of Education*²²⁴ and the Civil Rights Act of the Congress, followed by numerous affirmative action programme. Now we have this court again stepping in this time to stop affirmative action programme of the type used by the university of California”.

Thus, though Allan Bakke did get the remedy in terms of getting admission in Davis medical Programme, however the questions as to whether racial quota is permitted by “Equal Protection” clause was left unresolved. The other important case which came before the Supreme Court was that of *United Steel Workers of America v. Weber*.²²⁵ Bakke tested the affirmative action programme in Univertisties and professional schools. But Weber tested the legality of programmes giving blacks advantages in training programmes for industry, programmes that would benefit more blacks directly and might be expected to have an earlier impact on economic racial inequality. Blacks were seriously underrepresented in the work force of the Kaiser Alunminium company’s plant in Gramercy, Louisiana, where Brian Weber a white labour was employed. Blacks held hardly any of the plant’s craft or skilled jobs. Kaiser agreed with its union to establish a training programme for craft jobs to which current employees would be admitted in order of seniority, that is in the order in which they had entered the plant—except that one black employee would be admitted for each white employee until the number of blacks in skilled jobs formed the same proportion of all skilled workers as blacks formed of the labour force in the Gramercy area. Weber applied for the programme, Louisiana, where Weber worked, maintained a seniority list on the basis of which employees competing for seniority were ranked. Two seniority list were maintained, one for the whites and the other for blacks. Vacancies were filled alternately from the top of the two lists. Weber a white employee with about five years seniority in that plant at that time, was refused admission to three different training programmes, although, because of the quota plan in force some nonwhites having less seniority than Weber were admitted. Weber thought that he was not admitted only because he a was a white. He brought a suit against Kaiser and the Union, on behalf of himself and all white employees at that plant. Weber argued that Kaiser quota plan violated Title VII of the Civil Rights Act 1964.

The Supreme Court by a majority of five to two, upheld the racial quota in the allotment of on the job training opportunities amongst competing employees, instituted by management union agreement. Justice Brennan who articulated the majority opinion held that a quota of 50 percent set up by Kaiser Aluminum Corporations (A private industry) did not violate Title VII of the Civil Rights Act 1964. It was held that the impugned quota plan was designed to eliminate a manifest racial imbalance . Title VII did not prohibit private employers from voluntarily adopting racial quotas. Justice Brennan turning to the legislative history of Title VII and intent of the Congress²²⁶ in

²²³ 163 US 537 (1896)

²²⁴ 347 US 483 (1954)

²²⁵ 99 Supreme Court Report 2721 (1979)

²²⁶ For the analysis of the doctrine of Intention fo Legislature, See Ronald Dworkin, How to read Civil Rights Act, in Taking Rights Seriously, Harvard University Press 1997.

enacting the civil Rights Act concluded that the aim of Congress was to remove the plight of the Negroes in America's economy and Congress really wanted the employers to act voluntarily to end racial discrimination. The Private employer's voluntary effort to correct racial imbalance was, therefore, lawful.

It may be noted that the result reached in Weber is in contrast with that reached in Bakke. Weber did not present a constitutional question because the action of private employers not being a state action is not controlled by fourteenth amendment. Only governmental agencies must obey the fourteenth amendment guarantee of equal protection. The result is that although Bakke prohibits racial quota by a state instrumentality like University of California Medical School at Davis, Weber permits private racism like the one adopted by a Kaiser aluminum corporation.

It may also be recalled that Bakke decision was indecisive because the four justices who held that the Davis plan was illegal under Title VI of the Civil Rights Act 1964, expressed no opinion on whether it was unconstitutional and therefore no explicit opinion on the underlying issue: the moral issue of the fairness of affirmative action. Weber however is important because it permitted valuable programmes developed by Private initiative to go forward. It is true that the Weber was decided on very narrow statutory grounds, involving an interpretation of one Title of Civil Rights Act 1964, and does not speak about any constitutional issue. "Nevertheless", Prof Dworkin²²⁷ put it, "the development of Constitutional law is governed more by the latent moral principles that are presupposed by a good justifications of Supreme Court decisions than by the more technical arguments and limitations set out in the discrete opinions. And weber as such marks a step forward on the part of the judiciary in developing new conceptions of equality.

4. Competing Arguments.

This however has not put paid to the controversy as to whether racial quotas are legally or ethically valid and here we would like to summarise the arguments that are raised in favour or against the benign discrimination programme. Theoretical underpinnings of these arguments have been more comprehensively taken up in chapter II, here an attempt is made merely to summarise the argument, so as to prepare the ground for some valuable comparative statement taken up in chapter V.

Those who favour the benign racial discrimination argue that even if such preferences impose burdens on the members of the excluded groups, they are valid if designed to promote integration of the larger social system.²²⁸ The compensatory treatment is fully consistent with the values underlying the fourteenth amendment and that such racial classifications should be tested by reference to the present day social realities and against the history of civil war amendments. And the current social reality is that white people as a group have always been more equal than black people. Their argument is that Brown

²²⁷ Ronald Dworkin, op cit f.n.42.

²²⁸ John Hart Ely, The Constitutionality of Reverse Racial Discrimination *Ch Law Review* 723 (1974), Also see Robert J Willey "A case for Preferential Admission, *Howard Law Journal*, 175 (1978).

decision did not hold that all racial classifications are per se unconstitutional; rather it held that invidious racial classifications i.e. those that stigmatize a racial group with a stamp of inferiority are un-constitutional. Even Justice Harlan's remark in Plessy on the colour blind approach was intended to protect Negroes from hostile discrimination and not to prevent efforts to overcome such discrimination and its effects. The majority can be trusted when it discriminates against itself and that the stigma arising from benign discrimination is far less than that resulting from malign discrimination.

The second argument is that the continuing and systematic under-representation of racial and ethnic minorities in the mainstream of American life reduce them into a discrete self-perpetuating racial underclass a condition which is neither desirable nor consistent with the ideals of American's representative democracy. The preference for Negroes will not stigmatize whites. It is the collective interest, governmental as well as social, in effectively ending unconstitutional discrimination. They argue that racial preference does not disadvantage a white any more than a veteran preference or a preference to the disabled and other disparate groups in the society.²²⁹ Benign discrimination has been part of American heritage and the constitutional tradition requires the courts to allow the legislatures the power to authorise the preferences for racial and ethnic minorities. The courts should not interdict the attempts to achieve genuine equality.

Another argument advanced is that the individual claim for equality is based on the notion that the distribution of goods and services should be on the basis of competence, merit or desert. But these claims based upon the principle for rewarding efforts and competences can be countered by the group's claim for equality. Where there is a need for rapid and substantial integration of races one's race can be part of one's own merit. Merit can be defined by past performances and potential achievement, but if past performance has been disadvantaged by racial prejudice, poverty or segregation, an evaluation of potential seems much more appropriate. Potential as used here might include reference to the needs of the society and the society might need favoured treatment to the disadvantaged groups. Prof. Dworkin, calls the supposed conflict between desirable social goal and important individual right of being judged on his own merit, "a piece of intellectual confusion". He goes on to argue that "There is no combination of abilities and skills and traits that constitutes merit, in the abstract; if quick hands count as merit in the case of prospective surgeon, this is because quick hands will enable him to serve the the public better and for no other reason. If a black skin will as a matter of regrettable fact, enable another doctor to do a different medical job better, then that black skin is by the same token merit as well. That argument may strike some as dangerous; but only because they confuse its conclusion- that black skin may be socially useful trait in particular circumstances- with the very different and despicable idea that the one race may be inherently, more worthy than another:.

The opponents on the other hand argue that racial discrimination or preferential policies utilize and later the distributional practice and effects of existing institutions; they alter

²²⁹ These arguments were more succinctly articulated in De Funis case See The Road Not taken Virginia Law Review 917 (1974)

the rules of the competition so that the favoured have more chances of success. Such policies reduce, efficiency and productivity of administration and destroy standards.

Such policies also unfairly place the burden of helping those who are preferred on those who are excluded. This is an unfair way of distributing the cost of a legitimate goal.²³⁰ Better qualifications confer upon the holder a prima facie right to be chosen in preference to any one who is less qualified. The equal protection guarantee and the Civil Rights Act 1964 both mandate a colour blind approach and as a consequences cannot abide the race conscious approach. It may be noted that this is same “Merit” argument which has been noted in Chapter II, and which has been criticised by Prof Dworkin as a “Piece of Intellectual confusion”.

Another very favourite argument of the opponents of preferential policies is that “Affirmative action programmes should aim at helping the disadvantaged sections of the society enabling them to catch up to the standards of competition set up by the larger society. But numerical quotas or reservations are impermissible as they impose unfair burdens on those excluded and they involve the suspension of standards. Compensation to the disadvantaged should be made in such a way as not to exclude anyone.²³¹ This argument is similar to the argument advanced by Justice Powell in the case of Bakke, wherein he supported the flexible protective discrimination programmes like the one of Harvard University that do not even set target numbers for minority acceptance. Such programmes are aimed at diversity of student body. They recognise that racial diversity is as important as geographical diversity or diversity in extracurricular talents and career ambitions, and so take race into account in such a way that the fact that an applicant is black may tip the balance in his favour just as the fact that another applicant is an accomplished flutist may tip the balance in his.

It is true that a flexible programme is likely to be more efficient in the long run, but what matters for a person excluded because of quota system is the chance this gives him in the competition and it does not make any difference to him in principle whether his race is a constant small handicap in the competition for the places or no handicap at all in the competition for a slightly smaller number of places. His fate depends on how much either the handicap or the exclusion reduces his overall chances of success. The handicap and the partial exclusion are only different means of enforcing the same fundamental classifications.²³² In principle they effect a white applicant in exactly the same way, i.e. by reducing his overall chances and neither is, in any important sense more individualised than the other. The point is not that factually administering a flexible system may covertly transform it into a quota plan. The point is rather that there is no difference, from the standpoint of individual rights, between the two systems at all.

²³⁰ Posner, *Defunis case and the Constitutionality of preferential treatment of racial minorities*, I SC Review (1974)

²³¹ This argument was put forward by Justice Powell in *Allan Bakke Judgment*, 438 US 265.

²³² What did Bakke really decide? Ronald Dworkin in *Takin Rights Seriously*, Harvard University Press, 1997.

This brief review of the competing arguments between those who favour benign discrimination and those who do not, brings home the point that one can argue the case equally effectively on either side and that there is no dearth of arguments on either side. This also brings forth the limitation of the instrumentality of law in social engineering. It is undeniably a very crude strategy to induce social transformation. The ultimate solution of such vexed issue like benign discrimination, it appears, depends on the creativity and the goodwill of a social system committed to equality of all citizens. Either one talks of American society which is remarkably uniform in its individual rights approach or India which chooses the path of group rights approach, sanctioned by the Constitution, each has to bear the social tension and unrest which accompany the idea of benign discrimination. How the two systems respond to this tension and unrest in differing social settings and structural realities is the question which shall be looked into in the next chapter, for which stage appears to have been set.

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CHAPTER – V

Evaluations and Conclusions

Equality and quality are two incongruous quantities, but if the Democracy is not to be a teasing illusion, but humanism in action for underprivileged sections of society, these quantities are to be so harmonised by social technology as to live in functional friendliness, and not snarling fretfulness.²³³ In a Democratic political system every person from a pauper to a prince has full title to full personhood which includes social economic and political status and opportunity. For the purpose of realising the fullest potential of democracy the victims of social injustices of bygone generations in whichever country they are, are to be provided “Equal Protection of Laws” by special strategies, hand in hand with equal opportunities to the more privileged and well to do sections of the population. A modus vivendi between equal opportunities to the advanced sections of society on the basis of merit and special or protective provisions for the less privileged has got to be worked out to make the democratic system functional in the real sense of the term. This is not a one shot affair but an incessant struggle between two opposing trends which involve so much of social history, pathological politics and Constitutional law internalised in this type of social engineering.

The essence of equality and justice lies in some kind of a leveling process. It implies the giving of favoured treatment to those who are governed by unfavourable circumstances and thus lacking in resources opportunities, incentives and background to achieve success on terms of formal equality²³⁴. In fact equality is furthered by favouring competence and by creating a favoured group for redressing rooted inequalities. Distribution according to merit, desert, or contribution and distribution according to need, both are consistent with the essential principles of equality. The need criteria takes into account the inequalities of men affecting their abilities to contribute to the society and decides to disperse benefits to the unequals in order to counterbalance their deficiencies,²³⁵ weaknesses and inferiority caused due to genetic, environmental or historical reasons. Redistribution of society's goods and services in order to remove or eliminate existing inequalities may ultimately be beneficial to the society as a whole. Even if compensation involves social costs, imposes burdens on those excluded and affects the standards and meritocracy, the benefits accruing to the society as a whole will in the long run outweigh the costs. The compensatory treatment provides the beneficiaries an access to the opportunity structure of the society than they would have otherwise enjoyed. The preferences promote integration of the disadvantaged groups into the larger society and promote national development as well.

It may be noted that stipulations of equality and justice in a constitution are often expressed in the universalistic or individual terms. They do not lay down any particular

²³³ Justice Krishna Aiyar, in the foreword to the “Equality, Reservations and Discrimination in India” by Dr. Parmanand Singh, Deep and Deep Publications New Delhi. 1985.

²³⁴ The competing arguments for and against compensatory discrimination have been analysed in Chapter IV, supra, Also see the introductory chapter for competing arguments.

²³⁵ For details see chapter II.

or specific concept of equality and justice . In fact the contents have to be poured into the equality clauses from time to time responding to the currently accepted social values or norms, established morality or the constitutional goal to achieve equality overall. This meaning of equality as an aspect of justice is capable of universal application irrespective of the fact whether the constitutional text of a society defines broader notions of equality as defined by the Indian Constitution or it uses the language in the individualistic and universalistic terms as has been done in the constitution of the United States of America.

With this perspective in mind when we look at the two largest Democracies of the world, India and United States, their social history and causes of present disparities existing amongst various sections of society; the way they look at these differences; the way the provisions for benign discrimination have been framed in their constitutions; the way they administer these policies of affirmative action, certain interesting conclusions can be drawn which have great theoretical implications not only to the administration of these policies in these countries, but also for the democratic functioning and the role of law in the democratic process. These comparisons and contrasts not only lead to “Cross Fertilisation” of the ideas, but also to a better understanding of the other. It must be noted that a Legal System, have a peculiar mix of specificity and immutability on the one hand and the dynamics of the evolutionary process on the other. Such comparative conclusions are necessary desiderata of institution’s evolutionary process that shape the destiny of the human race.

In a democratic order, the state system has the responsibility of ensuring an environment in which every individual irrespective of his caste and creed, community, sex, descent or place of birth could find the fullest development. For a balanced equitable and healthy growth, the individual should have the power to make choices and in an structurally hierarchical society, this can not happen unless conscious interventions by the state system, to alter the normal processes and existing patterns, are made through public action. “ There is nothing as unequal as the equal treatment of unequals” and therefore the state system has an obligation to take positive steps for the amelioration of the historically deprived and exploited sections of population. Here an attempt has been made to compare the two systems, we had discussed in the preceding pages, to bring out the differences and similarities between the two systems in their conception, articulation and administration of compensatory discrimination policies.

1. **Social Pathology : Caste and Race.**

It has been noted in the preceding pages in an elaborate manner that what we know as the caste system of India, which has been subjected to second rate denunciations for so long, was originally known as *Varna* System and was an arrangement for the distribution of functions in society²³⁶, just as much as class in Europe, but the principle on which distribution was based in India was peculiar to this country. A *brahmin* was a *Brahmin* not by mere birth but because he discharged the duty of preserving the spiritual and intellectual elevation of the race, and he had to cultivate the spiritual temperament and

²³⁶ For details see chapter III.

acquire the spiritual training which could alone qualify him for the task. The *Ksatriya* was a *kshatriya* not merely because he was the son of a warrior and prince, but because he discharged the duty of protecting the country and preserving the high courage and manhood of the nation, and he had to cultivate the princely temperament and acquire the strong and lofty samurai training which alone fitted him for his duties. So it was with the *Vaishya* whose function was to amass wealth for the race and the *Sudra* who discharged the numbler duties of services without which the other castes could not perform their share of labour for the common good.²³⁷

In this scheme of things there was no inequality between a devout *Brahmin* and a devout *Shudra* as both of them were essential parts of the single *Virat Purush*, (the Cosmic Spirit). Later on the same system was perverted into a machine of exploitation resulting into deprivations of a large sections of the population. It is the nature of human institutions to degenerate, to lose their vitality and decay, and the first sign of decay is the loss of flexibility and oblivion of the essential spirit in which they were conceived. The spirit of the caste arrogance, exclusiveness and superiority replaced the spirit of the duty under *Varna* system, and caste system became the synonym of abominable thralldom and human injustices under which a substantial class of the people had been groaning for centuries. It was this realism of Indian scene that led to the adoption of protective discrimination programmes under specific and elaborate provisions of Indian Constitution.

The racism of the United States vintage, has had a different course altogether. In contrast to the ideal beginning of Varna system, what one finds in the U.S. system is abominable slave system, wherein the Negroes in Africa were hunted and caught like wild beasts chained together and brought over to America. Vast number of such slaves died even before they could reach their destinations at American coasts. Specific thing about American slavery was that it was exclusively a Negro slavery. Most of the features that characterised it were connected with the race and not status. A consistent overworking, flogging and disruption of families due to sale of slaves were the worst aspects of it. Frederick, Law Olmsted, visited one of the first rate cotton plantations in Mississippi. He found a large and handsome mansion; nearly fourteen hundred acres planted to cotton, corn and other crops; and two hundred hogs. Of the one hundred thirty five slaves, nearly seventy worked in the fields, three were mechanics and nine were house of stable servants. They laboured from dawn to dark, with Sundays and sometimes Saturdays free. In summer the hoe gang thus spent sixteen hours in plodding labour, with one short interval at noon for rest. The food allowance was a peck of corn and four pounds of pork apiece each week, supplemented by vegetables, eggs and poultry grown by the slaves themselves. Every Christmas molasses, coffee, tobacco, and calico were generously distributed. The Negroes got their own fuel for their little cabins from a wooded swamp, where on Sundays they buy small comforts.

This was a plantation of better sort, Olmsted found plantations where slavery was harsher and more brutish. The lot of indigenous people, which Americans called Red Indians (or simply Indians) was no better. Basically nomads these indigenous people refused to work under the conditions of slavery. And in the subsequent years they were literally wiped

²³⁷ Aurobindo, *India's Rebirth*, Institut de recherche evolutive, Paris, 2000.

out. The Civil Rights movements of 19th century created an awareness about the Rights of these people and the civil war and subsequently 13th and 14th amendments completely changed their status at least in legal terms. In the later half of 20th century benign discrimination kind of a thing was read into the 14th amendment and protective provisions enforced for the upliftment of these exploited sections of the U.S. population.²³⁸

The contrasts between the social history of benign discrimination in India and U.S.A. are so obvious. In one, the beginning was an ideal one, in the other the very start of the social system was abominable and depraved. While in India, there was little inequality in terms of principles at least, in as much as the people belonging to fourth Varna were considered as part of the whole, in U.S. the Church continued to debate well into 20th century whether the blacks and Indians have souls at all? In the perverted caste system people were exploited in the name of religion, as their conditions were attributed to their 'Prarabdha' or destiny, in U.S. the slave system was justified in economic terms, being beneficial to both the masters and slaves, as it protected the workers in unemployment, sickness and the old age, making masters chivalrous and the slaves loyal and Christianised the heathen people and gradually elevated them.²³⁹ The perpetrators of injustices under the caste system were the people of their own kind, (belonging to the same race) in U.S.A. the perpetrators of injustices under the slave system were a different race.

2. Benign Discrimination Provisions.

Indian Constitution drafted in mid 20th century has clear cut provisions for social justice and benign discrimination. The Preamble makes explicit in bold letters, the resolve of the system to constitute India into a "socialist and democratic Republic", with a view to securing, *inter alia*, social economic and political justice, equality, liberty and above all, dignity of the individual.²⁴⁰ Translating these general principles into concrete legal propositions, part III of the Constitution guarantees certain fundamental rights to the individual which are not all negative in character but envisage positive state action. Among these rights, the right to equality in its various facets, including the authorisation of the state to take affirmative action for the benefit of the backward classes,²⁴¹ the scheduled castes and the scheduled tribes, abolition of untouchability,²⁴² prohibition of traffic in human beings, and prohibition of employment of children in factories²⁴³ are clearly representative of egalitarian as opposed to meritocratic concept.

A similar kind of a concept with greater vigour and clarity has been expressed in the directive principles of state policy contained in part IV. The directives in no uncertain terms require the state, *inter alia* to promote the welfare of the people by securing and protecting a social order in which justice, social economic and political, should inform all the institutions of national life, to reduce economic disparities, to make available adequate

²³⁸ For details see chapter IV.

²³⁹ Allan Nevins and Henry Steele Commager, Pocket History of America 1959.

²⁴⁰ Preamble to the Indian constitution, 1950.

²⁴¹ Article 14, 15 and 16 of the Indian Constitution.

²⁴² Art 17.

²⁴³ Article 23 and 24.

means of livelihood; to distribute the ownership and control of material resources so as to subserve the common good; to operate the economic system in such a way that it does not result in the concentration of wealth and means of production²⁴⁴ to the common detriment; to protect health and strength of workers and children of tender age against abuse; to provide for legal assistance and aid, to provide 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; to secure just and humane conditions of work and provision of maternity relief; to provide for living wages and conditions of work ensuring decent standard of life and full enjoyment of leisure and social and cultural opportunities; to promote with special care the educational and economic interests of weaker sections of the people and their protection from social injustice and all forms of exploitation; and to raise the level of nutrition and standard of living and public health.²⁴⁵ These principles can be enforced notwithstanding the general right to equality in article 14 and right to the six freedoms under article 19 of the Indian Constitution.

There are also provisions to ensure due representation of the weaker sections (scheduled castes and scheduled tribes) in Parliament and state legislatures through reservations of seats.²⁴⁶ It also directs for their induction into state services and provides special administrative safeguards for them. A backward class commission to make recommendations for improving the conditions of the backward classes and a commission to report on the administration of scheduled areas have also been conceived in the Constitutional text. Special provisions have also been made for such minorities as Anglo Indians.

In the U.S., on the other hand the Fourteenth amendment provides that “All persons born or naturalised in the U.S. and subject to the jurisdiction thereof are citizens of U.S. and states wherein they reside. No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of U.S., nor shall any state deprive any person of life, liberty or property, without due process of laws, nor deny to any person within its jurisdiction the equal protection of laws. The guarantee under this amendment is aimed at removal of undue favour and individual or class privileges on the one hand and at the hostile discrimination or oppression on the other. Fifth amendment contains a due process clause, which seeks the same ends as the equal protection clause. Equality of right is fundamental in both clauses and each forbids unequal government action such as class legislation that arbitrarily discriminates against some and favours others in like circumstances.

There is clearly an absence in the United States’ Constitution, of the enabling provisions like Article 15 (4) and 16 (4) which specially authorise the state to take affirmative action for elevation of oppressed classes, not to talk of social welfare provisions like the one enshrined in Directive Principles of State Policy in Part IV of the Indian Constitution. And this was accepted by Justice Powell in so many words when he remarked that “nothing in the Constitution supports the notion that individuals may be asked to suffer

²⁴⁴ Article 38.

²⁴⁵ See Generally the Directive Principles of State Policy.

²⁴⁶ Article 334 of the Indian Constitution.

otherwise impermissible burdens in order to enhance the societal standing of ethnic groups. He rejected the argument that the guarantee of equal protection permits the recognition of special wards entitled to a degree of greater protection than accorded to others. There is no principle to force an innocent individual to be asked to suffer in order to promote the welfare of the victims of societal discrimination when such an individual might not be the actual victimiser. The overall tenor of the Indian Constitution offers much support to interpret equality as permitting protective discrimination, even at the cost of an individual's right, who have not been a victimiser. In U.S. on the other hand, the Constitution contains no comparable language helpful in deciding whether equal protection clause permits or proscribes protective discrimination to racial minorities. The Indian Constitution affirms the economic and educational betterment of the weaker section of the Indian society whereas no such guideline is supplied in the text of the U.S. Constitution.

3. Group Right vs. Individual Right.

It has been noted in the preceding pages that in India the express text of the constitution provides for group rights in so far as it speaks of special provisions for women and children and for any socially and educationally backward classes of citizens²⁴⁷ or for the scheduled castes and scheduled tribes, reservations of appointments or post in favour of any backward class of citizen,²⁴⁸ promotion of the educational and economic interests of the weaker sections of the people and consideration of the claim of the members of the scheduled castes and scheduled tribes... in the making of appointments to services and posts. In view of these express provisions no one can assert that the right to equality is always an individual right.

In the U.S. on the other hand the language used in the Equal Protection clause can plausibly be used to defend both, the claims of the individual equality as well as the claims of the disadvantaged groups. But the whole concept of legal rights has been developed in the United States in individual terms. And if the equal protection clause is used to provide justice for the groups by creating a quota or reservation the right of discriminated against individuals of the excluded groups is said to be violated. In the United States in the absence of constitutional language used to defend group claims, (as used in Article 15 (4) and 16 (4) of Indian Constitution), the deprivations of individual rights on the basis of group characteristics, race, religion, national origin is nevertheless treated in law as a problem of protecting the rights of an individual. It is not that only the constitutional and legal language used in the United States, in Fifth, Thirteenth and Fourteenth amendment, in Civil Rights Act 1964, in Voting Rights Act 1965, is used as suggestive of a colourblind theory, even the recent philosophical discussions on the problems of justice ignores the problem of justice for the groups.

The majority opinion in the United States of America, appears to be very uniform on their individual rights approach. George Gallup, remarked sometime back that from the Public opinion in today's America, one finds a striking degree of consensus against

²⁴⁷ Article 15 (3) and (4).

²⁴⁸ Article 16 (4)

quotas and special preference. Americans support strict adherence to meritocratic standards but will countenance programmes that help bring the disadvantaged group up to the level set by those standards.²⁴⁹ It seems however, that there is nothing like an emerging national consensus that has appeared in America on the permissibility of quotas. There are competing arguments justifying both the individual and groups rights approach.

Prof. Dworkin, clearly rejects the group rights approach for the purpose of redressing past injustices. According to him, “affirmative action programme seems to encourage....a popular misunderstanding, which is that they assume that racial or ethnic groups are entitled to proportionate shares of opportunities, so that Italian or Polish ethnic minorities are in theory as entitled to their proportionate shares as blacks or Chicanos or American Indians are entitled to the shares the present programmes give them. That is a plain mistake, the programmes are not based on the idea that those who are aided are entitled to aid, but only the strategic hypothesis that helping them is now an effective way of attacking a national problem, i.e. the problems of racial consciousness.”²⁵⁰

4. Policy vs Rights Approach.

In India the popular perception about benign discrimination, and that has been noted in the preceding pages, is that, since the scheduled castes, scheduled tribes, or other backward classes for that matter, have been subjected to all kinds of discrimination for hundreds of years and that has left them socially and educationally backward. They are born in unequal conditions and die in those conditions. These lowliest and the lost people were denied access to wells, temples, schools and other places and asked to perform unclean and impure tasks without which their very existence and continuance would have been impossible.²⁵¹ These inhabitants of the less visible area of humanity were socially oppressed, economically condemned to the live life of the penury and educationally coerced to learn the family trade or occupation and to take to education set out to each caste and class by society. An uneven socio-economic landscape hardly gave them the joy of equal opportunity and development or draw forth their best from man power resources.

Justice demands that historical deprivations of these people be repaired and special protective measures be provided to them so as to eliminate their disabilities. So far so good. But do they have a right for protective discrimination which can be demanded from the state as against the so called victimising community ? As regards the Indian Constitution there is nothing therein, which sanctions such a conclusion. The provisions for protective discrimination have been held to be enabling provisions . They do not

²⁴⁹ Nathan Glazer, “Individual and Group Rights: Is there any way to resolve the conflict” in Human Rights (ed) Eugene Kamenka and Alice Erhsoon (1978)

²⁵⁰ Bakke’s Case, are quotas unfair, in Ronald Dworkin “ A matter of Principle” Harvard University Press, 1985.

²⁵¹ KPK Shetty, Fundamental Rights and Socio-Economic Justice in Indian constitution, (1969).

impose an obligation but merely leaves it to the discretion of the appropriate government to take suitable action if necessary.

However the case of reverse discrimination during last two decades has been made out persistently and with increasing intensity in the language of Rights and entitlements. This at once raises the temperature of the debate and forces people to adopt intransigent positions. Understandably, they find it far more difficult to yield on what they believe, or are led to believe to be matters of right and Justice than they would, on matters of utility of policy. The persistent use of the language of rights in the public debate for or against benign discrimination is bound to lead to an increase in the consciousness of caste and in that way to defeat the basic objectives of affirmative action which is to reduce and not increase caste consciousness.²⁵² After all how one can exorcise caste from the public mind by consistently deepening the sense in society that castes and communities are entitled to their separate shares as a matter of right. Policies unlike rights are not absolutes; they have to be examined in terms of costs and benefits. We may not always be able to measure these, but that should not prevent us from trying to form clear judgements about them. Both costs and benefits should be taken into account in assessing any policy of affirmative action.

There is no doubt that caste continues to operate even today in many spheres of social life and in some cases with more vigour and perspecuity, but that it does not do as a matter of right. Its continuance in socio-political life is one thing and its legitimacy is altogether a different thing. The attempt to invest the caste system with legitimacy by claiming that its constituent units have rights and entitlements is an attempt to give it legitimacy and this might in the long run may lead to enormous harm to society and its institutions.

In United States on the other hand the case for reverse discrimination has consistently been made out in the name of policy and utility, rather than in the language of rights. The “quotas for disadvantaged groups are best viewed as matters not of right but of policy”. The strongest argument in support of reverse discrimination are made not on grounds of rights and justice but on those of policy and utility. Prof Dworkin rejects categorically the assumption that racial and ethnic groups are entitled to proportionate shares of opportunities and adds, that is a plain mistake, the programme are not based on the idea that those who are aided are entitled to aid, but only on the strategic hypothesis that helping them is now an effective way of attacking a national problem.²⁵³ Among other things, adopting a policy oriented approach allows a degree of freedom and flexibility in the formulation and administration of such programmes.

The philosophic debate that ensued in the wake of DeFunis and later after Bakke’s judgment make the above point a bit clearer. DeFunis a white applied to the University of Washington Law School, he was rejected though his test score and college grades were

²⁵² Andre Betielle, Distributive Justice and Institutional Well being, Economic and Political Weekly, Samiksha Publications, Bombay March 1991.

²⁵³ Bakke’s Case: Are quotas unfair, in Ronald Dworkin’s “A Matter of Principle” Harvard University Press 1985.

such that he would have been selected if he had been black. DeFunis claimed that his rights to equality under Fourteenth Amendment was violated. Prof. Dworkin met the argument squarely. He maintained that DeFunis has no Constitutional right, that the state provide him the legal education of a certain quality. Nor does he have a right to insist that intelligence be exclusive test of admission. Law schools rely on intelligence test not because people have a right to be tested on intelligence but because it is reasonable to think that community with intelligent lawyers is better off, that is to say that intellectual standards are justified not because they reward the clever but because they serve a useful policy.²⁵⁴

Prof Dworkin sought to differentiate, between 'Equality as a policy' and 'Equality as a right'. According to him there are two different sorts of rights which a member of a democratic society deemed to possess, the first is the 'Right to Equal treatment' which is the right to an equal distribution of some opportunity or resources or burden. The second is the 'Right to treatment as an equal', which is the right not to receive the same distribution of some burden or benefit but to be treated with the same respect and concern as anyone else. I have two children, one dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of drug.. This example shows that the "Right to Equal Treatment" is fundamental and "Right to Equality is derivative".²⁵⁵ He returned to the same argument sometime later in an essay on Bakke's case, where a white applicant had been denied admission to a medical school that had set aside a number of places for members of educationally and economically disadvantaged minorities. He repeated the argument that Bakke had no Constitutional right that had been violated by the medical school, when it denied him a place in the interest of its affirmative action programme. That programme was good one as it served a useful policy and although it might cause disappointments or even hardships to the individual, but it did not violate his constitutional right.

The above argument is no doubt a very convincing one, but Prof. Dworkin makes the concept of "Equality of Opportunity" to stand on its head when he concludes that the 'Right to Equal Treatment' is the principal right and 'right to equality' a derivative right. It is true that sometimes the particular right derived from a general right may be more important in view of contemporary needs of the society. But that does not make the derivative right a principal right and a principal right a derivative one. It may be submitted that in view of contemporary political situation an individual citizen may or may not have an unqualified right of admission to a medical or law school, on the grounds of merit, but the principle of "Equality of Opportunity" is certainly a principal right that we can not afford to devalue. Extension of massive quota in India in the name of protective discrimination or making reparations for historical injustices is exactly that kind of a devaluation.

It may be noted in this context, that a similar kind of an argument was used by Indian Supreme Court in the State of Kerala v. N.M.Thomas, wherein the exception i.e. article 16 (4) was treated as the main provision and the main provision in article 16 (1) just a

²⁵⁴ Taking Rights Seriously, Harvard University press, 1997.

²⁵⁵ Ibid.

derivative principle, thus making the whole concept of equality to stand on its head. The principal argument have been extensively dealt with elsewhere in this work, however, a brief review would not be out of place here. Article 16 (1) of Indian Constitution provides that “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. Article 16 (4) provides that the State may provide reservations of appointments or post 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. For long it has been the considered opinion of the Supreme Court of India that article 16 (4) is an exception (i.e. a derivative principle) of the main provision (i.e. article 16 (1) This meant that the claims of backward classes could be projected only through the exceptional clause and not out of it. The departure from equality i.e. from the main principle of “Equality of Opportunity” enshrined under article 16 (1) could be permitted only to the extent mentioned in clause 4 of article 16. This clause cannot logically be read as completely excluding or ignoring the right of other citizens. If unlimited reservations were permissible say to the extent of 80 percent that would have the effect of effacing the principal provision i.e. article 16 (1), giving primacy to the exception clause and by logic the derivative provision over principal provision.

But in Thomas case, Supreme Court of India rejected this logic and held that article 16 (4) is not an exception but simply an illustration of article 16 (1). As such the state is not confined on to the method of reservations for encouraging the backward groups in the area of public employment. It is free to chose any means to achieve equality of opportunity for these backward classes. Justice Mathew observed, that “Article 16 (4) is capable of being interepted as an exception of article 16 (1), if the equality of opportunity visualised in article 16 (1) is sterile one, geared to the concept of numerical equality which takes no account of the social economic and educational background of the members of scheduled castes and scheduled tribes. If Equality of opportunity guaranteed by article 16 (1) means effective material equality, then article 16 (4) is not an exception to article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be caused even up to the point of making reservations.” Elsewhere in the judgement Justice Mathew expressed the opinion that the expression in article 16 (4) “nothing” is a legislative device to express its intention in almost exphatic way that the power conferred thereunder is not limited in any way by the main provisions, but falls outside it, it has not really carved out an exception but has preserved a power untrammelled by other provisions of the article. One of the logical consequences of this kind of an interpretation was to hold that though the amount of reservations should normally not exceed 50 percent, however, since article 16 (4) is not controlled by 16 (1), the amount of reservations could go beyond 50 percent. This was said to be the “Positive Equality”.²⁵⁶

The minority opinion was that it was dangerous to authorise the State to give preferences outside the protective clause. The minority argued that if inroads were allowed into the equality notion beyond those permissible under the exception clause, not only that the ideal of merit, efficiency of services and absence of discrimination in the sphere of public

²⁵⁶ For an incisive critique of Justice Mathew’s argument, see H.M. Seervai, Constitutional Law of India, N.M.Tripathi, Bombay, 1993.

employment would be obvious casualties, but the concept of equality of opportunity shall also be undermined.

Going back to Prof Dworkin's argument, it is true that there is no absolute right of merit and that merit itself is contextual thing, it is also true that there is no absolute right of merit and that merit itself is a contextual thing depending on societal circumstances needs, objectives and policies; but it is also true that merit in absolute sense has been the hub of civilizations and has been instrumental in the growth and development of human society. The rapid economic growth that we have achieved is in a large measure, is the result of this merit alone. American democracy from the very beginning has generally been meritarian in enterprising in character. The Horatio Alger stories of rising from rags to riches, the tales of how the west has won by the sheer individual persistence and determination and accounts of early settlers, their courage and conviction are all part of the popular lore that most American hold very dear. There has been Horatio Algers in India as well and that too in millions. The millions of refugees who crossed over from what is now the territory of Pakistan, without any aid from the state and within a decade rose to prominence and became the star performers of Indian economy. It shall be very difficult to found such rags to riches story any where in the world. They did not ask for sops from the state system in the form of preferential treatment, but celebrated excellence. An argument against merit tends to put a premium on inefficiency which propels the individual to look towards the state for succour in times of crises. This putting of crutches in the hands of individuals tends to perpetuate the parasitic existence of a whole section of the population while discouraging and marring the excellence.

5. Concluding Observations .

Going back to our theme of Equality and justice which we had taken up in the introduction, it may be observed that the human race in its quest of peace and prosperity and to control its destiny, has always been endeavouring to devise legal institutions of such character that may ensure a dignified place to every human individual. While the ancients sought the deliverance of human race in religion and God, the medieval societies slipped into hierarchical setting of institutions. The advent of modernity marked a comprehensive change in its outlook and the human race sought refuge in legal institutions to better its lot. The growing emphasis on justice and human rights the world over, during recent years, should be seen in this perspective. Philosophers like Dworkin and Rawls, therefore, have emphasized that the "Right to equal concern and respect" is the most fundamental of all rights". The idea of affirmative action has grown in response to this quest of human race to ensure a dignified place to every human individual under the sun.

This idea of Affirmative Action and adoption of policies of preferential treatment in India in the form of Reservations in government services, educational institutions, legislative bodies etc and in the United States of America, in the form of preferential treatment of blacks in jobs and educational institutions, embodies the commitment of these societies to eliminate inequalities of status and invidious treatment. The contents of such policies differ in the two systems as the differing needs of the socio-economic circumstances

demand. However the basic commitment of quest for just and equal socio-political order remain the same. The excluded ones due to the emphasis on preferential policies have raised some very valid objections as has been seen above, however these very discontents shall prove to be the touchstone for testing the commitment of these societies towards Justice and Equality.

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