

Perspectives on Social Cohesion and Social Justice

Shri Konda Lakshman Bapuji Universal Foundation First Endowment Lecture delivered on 23rd June, 2012 at Osmania University, Hyderabad

By

Sri Justice M.N.Rao*

Shri Konda Lakshman Bapuji, is a legend among our politicians and Statesmen. Throughout his public life spanning over seven decades, he not only evinced great interest in the welfare of the backward classes including Scheduled Castes and Scheduled Tribes but also fought for the protection of their rights and their upliftment. He played an astoundingly great role even risking his life in the fight for the emancipation of Hyderabad State from the autocratic rule of the Nizam. Like all Patriots of his generation who fought for the liberation of their people from the shackles of tyranny, Shri Bapuji courted arrest many a time and was incarcerated for a long periods. A Member of the Legislative Assembly of the erstwhile Hyderabad State in 1952 he held many high offices like Deputy Speaker for one term and Minister for two times in the State of Andhra Pradesh with great distinction. Highly transparent in the discharge of his duties in public as well as private life he earned in a great measure respect of the civil servants and admiration and adoration of the general public. Growing rich in politics, a vitiating factor befouling the present day political atmosphere, was totally alien to him. Himself being a distinguished member of an OBC I

** Former Chief Justice, Himachal Pradesh and Chairperson, National Commission for Backward Classes.*

thought it would be relevant and appropriate to choose the topic “Perspectives on Social Justice and Social Cohesion” for the first lecture of the endowment set up by him in the Osmania University, a great seat of learning.

Phrases like social cohesion and social justice frequently occur in the speeches of politicians and writings of social scientists and other academics. Social cohesion is commonly understood as a necessary concomitant for the stability of the society: it is a necessary prerequisite for achieving social integration. Lack of harmony among various groups and classes in the society affects its cohesion. The expression social cohesion has to be viewed from many perspectives notably economic, social, political and religious. Social cohesion aims at ensuring the well being of all the members of the society whatever be its division, vertical or horizontal. The idea of oneness is fostered by social cohesion which in turn results in stability enabling individual members to become partners in the inclusive growth. Rapid economic growth and educational advancement is possible only in such an atmosphere.

In our country achieving social cohesion is a gigantic task. Ours is a vast country of continental dimensions, the second most populous in the world. Persons professing Hindu religion are overwhelmingly in majority in the country. Among the minorities Muslims occupy the first place followed by Christians and Sikhs. The following are the details as per 2001 census:

Hindus	80.5%
Muslims	13.4%
Christians	2.3%
Sikhs	1.9%
Buddhists	0.8%

As per the publication of the National Book Trust of India¹ the Hindu Population has gone down from 83.4% in 1961 to 80.5% in 2001, while the Muslim population increased from 10.7% in 1961 to 13.4% in 2001.

Out of the 28 States and 7 Union Territories of our country Jammu and Kashmir is the only Muslim majority State. The Scheduled Castes comprise 16.2% of the total population whereas Scheduled Tribes constitute 8.2%. The number of Scheduled Castes in the country as of 2001 is 1221 and the Scheduled Tribes, 793². The Constitution of India recognises 22 languages in the Eighth Schedule.

The Hindu society is broadly divided into four classes namely Brahmins, Kshatriyas, Vaishyas and Sudras. The first three are privileged and considered twice born, the fourth one Shudhras are a conglomeration of thousands of castes. Besides these four classes there are Scheduled Castes and Scheduled Tribes. In order to ensure social cohesion the society must ensure the welfare of all its members by minimising if not eliminating disparities. Social cohesion cannot be achieved without the all round development and progress of all people irrespective of region, religion and caste. To achieve solidarity the loyalties must be shared and people must display ability to work in unison.

Brahmin having been born from the mouth, the noblest part of the human anatomy, was assigned the noblest function namely custodian of knowledge and learning. Kshatriya who emanated from arms was assigned the function next below the Brahmin, namely fighting; the Vaishya who sprung up from thighs was assigned the lower position in the order of precedence, namely trade; and the Sudra who originated from feet was placed lowest in the social order. The Sudra is not entitled to perform sacrifice, is Godless as no deity was created after him and therefore he does not go beyond washing the feet of the other three Varnas. However rich a Sudra may be, he must perform the menial duties for Divijas (the three upper castes). He is at the beck and call of the other three Varnas. He can be made to rise at will; he can be beaten at will. The privileges, duties and liabilities were fixed. The division of society into four classes was very ancient and to be as natural and God- ordained as the Sun and the Moon³.

When we look at the problem of social cohesion what strikes prominently is the apparent contrariety in the social perceptions of the people: the perceptions differ depending upon the social or religious group to which a person belongs. Objectivity is to a large extent absent when the question of social cohesion is viewed narrowly from a caste or a religious angle. When we talk of perspectives of social cohesion subjectivity is to a major extent removed: the issue is examined from different viewpoints without forsaking objectivity. Differently stated, perceptions are mostly subjective while perspectives are based upon objective considerations, although conclusions may vary.

The aforesaid difference between perception and perspective in relation to social cohesion applies in equal measure to social justice.

Legal and Social Justice:

Lawyers and Sociologists are well acquainted with the terms social justice and legal justice. Although both form part of the expression justice, the two convey different meanings. Legal justice concerns with framing of penal laws the breach of which is visited with punishments depending upon the nature of the crime that was committed. In the sphere of civil law, legal justice regulates the rights and obligations of individuals and prescribes procedure for enforcing the same. On the other hand social justice deals with distribution of benefits and burdens throughout the society in the functioning of the major social institutions- property system, public organisations etc. The term social justice is synonymous with egalitarian justice thereby implying that the principle of equality must be applied resulting in each member of the society enjoying the same level of well being as every other⁴.

Social Justice is a modern concept born in the twentieth century when law came to be considered not merely an instrument to exercise authority and regulate the social institutions, but also an instrument for the well being of the society as a whole. When members of a society are ranked collectively above or below one another based upon economic status it was treated as social stratification in western societies⁵. The same analogy cannot hold good in the Indian context. It is true that the behaviour of an

individual is guided by the values internalised by him- the values of the society in which he lives. In western societies social values act as impetus for economic development of the individual. The ranking assigned to the groups although in the western societies described as class, status etc. are founded essentially on economic considerations and the social disabilities to which they were subjected were incidental to their economic status.

In the pre Independence era the economic development of the individual suffered greatly because of the social structure and the values upon which the structure was built. The science of society called "sociology" came to be founded by Comte. The value system of different societies came under scrutiny with reference to their social utility. The basic tenets of every legal system were put to scrutiny, the yardstick being the advancement of all sections of the society. Law thus became an instrument of social change. Social control becomes possible when the legal system is structured in a manner conducive to social cohesion. Some of the agencies of social control are religion, law and morals. If social control is to be evaluated critically on the touchstone of sociology of law inevitably religious and moral principles have to be separated from legal principles.⁶

As the objective of social justice is the welfare of the society as a whole, legislation introducing differential measures for different sections cannot be characterised unreasonable or arbitrary. Realisation of social justice by the instrumentality of law is the inevitable device for resolving the challenges in the contemporary

society- social, political and economic. Any failure in this regard will surely result in chaos and destruction.

Social justice concept has found its way into all legal systems. The Universal Declaration of Human Rights 1948 incorporates essentials of social justice in Articles 22 to 27.

As social cohesion and social justice are interconnected necessarily the historical evolution of the Indian society must be noticed.

HINDU Society – Historical Evolution:

The original inhabitants of India were Adivasis commonly referred to as aboriginals. Long prior to the entry of Aryans there was highly developed civilisation in India built up by Dravidians. The Aryans referred Dravidians as Dasa and Dasyu. India was also populated by other ethnic entities- Negroites (in South Indian jungles speaking Dravidian dialects), the Austrics represented by Kol or Munda people and Bhils. The Aryans after subjugating Dravidians and other races, had built up a synthetic Hindu culture out of the different cultural elements in India⁷.

Before the Muslim invasion India was essentially a caste society. It is believed that Aryans came to India in about 1500 B.C by way of Eastern Asia Minor, Mesopotamia (Modern Iraq) and Iran where a distinct Indo Aryan race retaining to a great extent their primitive character as a semi nomadic people whose main wealth was their herds and flocks was inhabiting. It is in India the Aryns

found their fullest expression. In the Rig Veda there was a hymn alluding to the origin of the caste.

“When the Gods made a sacrifice with the Man as their victim...

When they divided the man, into how many parts did they divide him?

What was his mouth, what were his arms, what were his thighs and his feet called?

The Brahman was his mouth, of his arms were made the warrior.

His thighs became the Vaishya, of his feet the Shudra was born.

With sacrifice the Gods sacrificed to sacrifice, these were the first of the sacred laws.

These mighty beings reached the sky, where are the eternal spirits, the Gods.

Rig Veda, 10.90 tr. A.L. Basham, The Wonder that was India Page 241⁸”

Caste system was governed by a rigid code.

1. The caste of the person is the one in which he is born.
2. Endogamy and (3) Xogamy i.e. restriction on marriage – No one should marry outside the caste. Restrictions as to food (What food and water may be taken or not and from whom).
4. Occupation – No one can take up occupation which was not assigned to his caste
5. Gradation of castes- Some at top at the social scale and others are so low that they are untouchables.

The caste system also described as Chaturvarnas is based upon the colour of the individuals of different castes for the reason that first three classes- Aryans- differ in colour from Shudras who are dark. From the times of Rig Veda there was hostility between Aryans

and Dasas. Dasa means a slave. The Manusmriti says Shudra has been created by God for service (Dasya) of the Brahman⁹.

“....therefore it is reasonable to infer that the Dasas or Dasyu, conquered by the Aryans were gradually transformed into the Sudhras”

The writers on Dharamshastras emphasise that the four Varnas i.e Brahman, Kshtriya, Vaishya and Sudhra are arranged in a descending scale of social status. Marriage was permissible between a male of higher varna and woman of lower varna. The union of a woman of a higher varna with a male of lower varna was prohibited. A person belongs to a particular varna by birth only and

“no actions of his can alter that fact, that several castes are like the species of animals and that caste attaches to the body and not to the soul. The duty is cast upon the King to compel people to conform to their duties assigned by the caste to which they belong¹⁰”

Apart from the four varnas there is another class of people called chandalas who were subjected to the harshest form of social disability namely untouchability. According to Manu they are the offspring of Sudhras from Brahmin women – the form of marriage known as pratiloma. The Vedavyasa Smriti mentions three kinds of chandalas: (1) offspring of Sudhra from Brahmin women; (2) offspring of unmarried women; and (3) offspring of a union with sagotra girl. The chandalas were condemned to live outside the villages.

The caste system was subjected to criticism by both Indian and Western writers. Sir Henry Maine in his Ancient Law described the caste system as “the most disastrous and blighting of all human

institutions”. Sherring another author in his “Hindu Tribes and Castes” describes the institution of caste “it is the most baneful, hard hearted and cruel social system that could possibly be invented for damning the human race¹¹”

The law of Karma was cited in support of compelling people to follow hereditary occupations. The concept of law of Dharma was invoked to give religious sanction for the caste based stratification of Hindu society. Divine sanction was obtained to caste system by attributing to Lord Krishna that he was the creator of the caste system. Different types of Dharmas were prescribed for people belonging to different castes.

“since the lower castes are deprived of all forms of social, political, cultural and economic freedom, all avenues for upward mobility in the caste hierarchy are closed¹²”

The divine sanction given to the caste system in Bhagwat Gita has totally changed the mindset of Sudhras and untouchables. They lost all their will even to complain against their sub human existence. When God had ordained them to be born in lower castes they could think of better life only in the next birth provided they fulfil the caste duties assigned to them cheerfully. The legal system was structured in such a way that for the same crime different punishments were prescribed for people belonging to different castes. The criminal laws were based on caste-distinctions, the penalties for Brahmins were light, and those for Sudhras were cruelly severe.

Bhagwat Gita laid emphasis on every person performing the duties of his caste. The social picture was:

“A barber’s son must be a barbar, whatever may be his capacities and his opportunities of raising himself. The son of a slave must be a slave. There is this compensation, however, the very nearest- even women and slaves- may attain salvation if they place their entire trust in Krishna¹³”

Absence of Social Cohesion:

In a highly stratified Hindu society with institutionalised subjugation of lower castes there was no question of any trace of social cohesion. The picture presented in the scriptures about absolute peace prevailing in the society was an utterly distorted one. There was no sense of belonging on the part of the subjugated classes either to the society as an entity or recognition of their masters as partners for the common good. The separation between the classes was too wide to generate any feeling of the existence of a homogeneous society. When there were different Dharmas for different divisions of the society social injustice reigned supreme. Deprivation and oppression were the order of the day.

Society exists only when its members have some interest or object in common which was totally absent in Hindu society. The dominant classes inherited power to command and the subjugated classes inherited physical strength to endure the tyranny.

Caste System – Different Views:

Inspite of the stark reality of enslavement of large sections of the people both by conquest and divine sanction, some text book writers

and commentators attempted to defend the hierarchical caste system. It is said that “the caste system served as a steel frame that has preserved the Hindu community down the centuries¹⁴”

According to Sidney Low in his “Vision of India”

“There is no doubt that it is the main cause of the fundamental stability and contentment by which Indian society has been braced up for centuries against the shocks of politics and the cataclysms of nature. It provides every man with his place, career, occupation, his circle of friends. It makes him at the outset a member of a corporate body, it protects him through life from the canker of social jealousy and unfulfilled aspirations, it ensures him companionship and a sense of community with others in like case with himself.”

In 1817 Abbe Dubois a missionary worked in India for fifteen years considered the caste system:

“as the happiest effort of their (Hindu) legislation¹⁵”

An English author J.Murray Mitchell whose work “Hinduism Past and Present” published in 1885 attacked the caste system:

“The incubus of caste has heavily weighed down the soul of India for ages; and it is at this day the chief obstacle to elevation and advancement. Yet the ‘Song’ (Bhagwat Gita) accepts it; glories in it; and asserts that varnasankara, or the mixture of classes, is the cause of the most pernicious consequences¹⁶”.

The dignity of man was not the concern of Manu whose main contribution was ensuring the purity of the Aryan race by inventing the caste system.

“One becomes sick at heart when he thinks of what caste has done and is doing. Even politically it is a curse. It goes on multiplying divisions; men of the same caste, if from different localities, will not eat with each other. Society splits and splits. All feeling of brotherhood is destroyed; that of nationality is also destroyed; and if the Hindus are ever to become one nation, they must first cast off Hinduism¹⁷”.

Another astonishing fact brought about by Mitchell was the attempt of Pandits in justifying the Sati (burning of the widows on the same funeral pile with their dead husbands) on the ground that it was authoritatively prescribed in Vedas. The Brahmin Pandits quoted a passage enjoining that widows should consign themselves to the fire

“They quoted the precise passage enjoining that widows should ‘consign themselves to the fire.’ But when examined, the passage in question was found to inculcate the very reverse of what the Brahmans affirmed. Professor H. H. Wilson proved that they had actually falsified the text, and not merely mistranslated it; they had changed the words of the one book which they professed to receive with awful reverence as the ‘eternal’ utterance of heaven¹⁸”.

This was when Lord William Bentick was preparing to abolish the sati system. Max Muller the famous Sanskrit scholar denounced this act of Brahmin Pandits as

“Perhaps the most flagrant instance of what can be done by unscrupulous priesthood¹⁹”

Between 1756 and 1829 when sati was prohibited in the British territory about seventy thousand widows had been sacrificed in the name of sati. When Maharaja Ranjit Singh died nine women (four wives and five slave girls) were forced to commit suicide. The great Max Muller after an exhaustive study of Hindu scriptures and Shastras confessed that the Shastras contain:

“ much that it is not only unmeaning, artificial and silly but even hideous and repellent²⁰”

In spite of the presence of the abominable caste system in Hindu India, the country was eulogised by very eminent foreign authors. According to Will Durant, the celebrated author of the “story of civilisation”

“Let us remember, further, that in the northern and more important half of India the people are predominantly of the same race as the Greeks, the Romans, and ourselves-i.e., "Indo-Europeans" or "Aryans"; that though their skin has been browned by the tireless sun, their features resemble ours, and are in general more regular and refined than those of the average European; that India was the mother-land of our race, and Sanskrit the mother of Europe's languages; that she was the mother of our philosophy, mother, through Arabs, of much of our mathematics, mother, through Buddha, of the ideals embodied in Christianity, mother, through the village community, of self-government and democracy. Mother India is in many ways the mother of us all²¹”.

Village Panchayats:

Whether the village communities really enjoyed democracy and self governance ?

The caste system structured on division of labour and graded inequalities did not allow common participation by the individuals of any village. Power and authority were wielded by upper castes. The idyllic picture of peace and tranquillity depicted about Indian villages of the bygone era is a deliberate attempt to paint a false picture for misleading the future generations. The Indian history was sought to be painted with the authority wielded by upper castes belonging to the dominant groups. Dr. Ambedkar while introducing the draft Constitution in the Constituent Assembly on 4th November, 1948 while referring to the praise lavished on village communities by Metcalfe describing them as little republics contributing to the preservation of

the people, presented the real picture rebutted the same by quoting Metcalfe himself who described the village communities:

“Dynasty after dynasty tumbles down. Revolution succeeds to revolution. Hindoo, Pathan, Mogul, Maratha, Sikh, English are all masters in turn but the village communities remain the same. In times of trouble they arm and fortify themselves. A hostile army passes through the country. The village communities collect their little cattle within their walls, and let the enemy pass unprovoked²².”

Thus exposing the worthless role the village Panchayats played in the history of the country Dr. Ambedkar asserted:

“Such is the part the village communities have played in the history of their country. Knowing this, what pride can one feel in them? That they have survived through all vicissitudes may be a fact. But mere survival has no value. The question is on what plane they have survived. Surely on a low, on a selfish level. I hold that these village republics have been the ruination of India. I am therefore surprised that those who condemn provincialism and communalism should come forward as champions of the village. What is the village but a sink of localism, a den of ignorance, narrow- mindedness and communalism? I am glad that the draft Constitution has discarded the village and adopted the individual as its unit²³”

Buddhism – Assimilation by Hinduism:

The birth of Buddhism had given hope for recognition of human equality and dignity in social relations. The Buddhist doctrines swept aside the vedic rituals, openly displayed antagonism against the vedic concept of religion and the stratification of society. The enlightened precepts of Buddhism had a lasting impression on Dr. Ambedkar to convert himself and his followers to that religion. It is surprising that attempts were made by historians to glorify Hinduism by assimilating Buddhism into it:

“....it was the mission of Buddhism to throw down the barriers and to unite Aryans and non-Aryans into that one great community now known as Hindus...²⁴”.

Hinduism had assimilated Buddhism practically causing its disappearance from the Country of its birth and made Buddha an incarnation of God. Among the Dasavatharams of the Supreme God, Hinduism treats Gautam Buddha as the Ninth incarnation.

Indianisation of Islam and Christianity:

Islam:

After the Muslim conquest of India, Islam became the religion of the State. The spread of Islam was partly by conquests and partly by proselytization. The social equality preached by Islam had attracted large number of Hindus especially the lower castes and out castes. They embraced Islam in order to escape from the tyranny of social inequality and untouchability. All the disabilities these communities suffered when they were part of Hinduism did not disappear on their conversion to Islam. Muslims of Iranian and Arab descent as well as upper caste Hindu converts to Islam occupied the highest position in the social hierarchy. They are known as Ashrafs. The Shudra castes which chiefly consisted of artisans, on conversion occupied the second position. They are known as Ajlabs. The erstwhile untouchables occupied the lowest social position among the Muslims; they are called Arzals.

Social cohesion even among Muslims based upon religion could not be achieved. The advanced sections among the Muslims despite the basic tenet of social equality of Islam did not treat the

other sections as equal members of the society. The social exclusion suffered by them had resulted in denial of access to education ultimately culminating in economic backwardness. The consequence is that these social groups have retained their erstwhile caste identities which are evident from the large number of Muslim castes (about 250) recognised officially as backward classes. There are no empirical studies as to what is the extent of social inequality and social exclusion Muslim backward classes are facing. It is doubtful whether untouchability is prevalent in the Islamic society; at any rate no specific cases have surfaced.

The caste system with its graded inequalities has found its way into Islam and Christianity was recognised by the Supreme Court in the Mandal Case (Indra Sawhney Vs. Union of India)²⁵.

“ As far as Islam is concerned , Islam also does not recognise castes or caste system. However, among the Muslims, in fact there are Ashrafs and Ajlafs i.e High born and low born²⁶”

“1. Ashraf or better class Mahomedans:

(i) Saiads, (ii) Sheikhs, (iii) Pathans, (iv) Moghul, (v) Mallik, (vi) Mirza.

2. Ajlaf or lower class Mahomedans:

(i) Cultivating Sheikhs, and other who were originally Hindus but who do not belong to any functional group, and have not gained admittance to the Ashraf Community e.g. Pirali and Thakrai,
 (ii) Darzi, Jolaha, Fakir and Rungrez,
 (iii) Barhi, Bhathiara, Chik, Churihar, Dai, Dhawa, Dhunia, Gaddi, Kala, Kasai, Kula, Kunjara, Laheri, Mahifarosh, Mallah, Nuliya, Nikari,
 (iv) Adbad, Bako Bediya, Bhat, Chamba, Dafali, Dhobi, Hajjam, Mucho, Nagarchi, Nat, Panwaria, Madaria, Tuntia.

3. Arzal or degraded class:

Bhanar, Halalkhor, Hirja, Kashi, Lalbegi, Mangta, Mehtar²⁷”.

“476. Though Christianity also does not recognise caste system, there are upper and lower castes among Christians. In Goa, for example, there are upper caste Catholic Brahmins who do not marry Christians belonging to the lower castes. In many churches, the low caste Christians have to sit apart from the high caste Christians. There are constant bickerings between Goankars and Gawdes who form a clear cut division in Goan Christian society. In Andhra Pradesh there are Christian Harijans, Christian Madars, Christian Reddys, Christian Kammas etc²⁸”.

The upward mobility of Ajlabs and Arzals to reach the level of Ashrafs is almost impossible.

Christianity:

The case of Christianity is no better. With the advent of British rule, many communities, high and low, among Hindus embraced Christianity. The upper caste Hindus did so to enjoy the benefits of lucrative jobs and important positions. The lower caste-converts (Sudras and out castes) converted to Christianity to escape the tyranny of caste system, but they could not escape the social disabilities they suffered in Hinduism. Among the officially listed backward classes, there are many Christian classes identified with reference to their castes.

The social stratification of non-Hindu communities needs special study. Despite the conspicuous incompatibility between caste and Islam and caste and Christianity, social stratification prevails. They practice endogamy to a great extent, Conversion failed to obliterate the caste disabilities among Christians and Muslims The

bigger question is: had there been no welfare measures undertaken by the State in fulfilment of its policy of realisation of social justice and Constitutional safeguards, whether caste-identity groups in Islam and Christianity could have claimed themselves as separate entities?. This is an important facet of Indianisation of Islam and Christianity.

During the long period of Muslim Rule in India, the question of absence of social cohesion did not surface. The reasons are obvious; Islam was the State religion and to a great extent Islamic law was in operation without any hurdles.

The term Hindu first occurred as a geographical nomenclature referring to the inhabitants of the Country - all those who live in the land across the Sindhu or Indus River. The need to project Hindu community from political point of view was thought of in the 19th Century when positions of power came to be distributed by the British to religious communities. Conversion to Hinduism was invented to bring in the untouchables and the tribals by making them undergo a process of purification called 'Suddhi'. The earlier segmented Hindu identities were sought to be amalgamated into one major community²⁹.

Dalit Muslims and Dalit Christians:

In the context of the demands for inclusion of Dalit Muslims and Dalit Christians in the list of Scheduled Castes it is not out of place to refer to the existing legal position. The pernicious practice of untouchability was confined only to Hinduism; no other religion in the world has treated any of its sections as untouchables. That is the

reason why the list of Scheduled Castes is confined to classes among Hindus. The Government of India (Scheduled Castes) Order, 1936 was issued in order to give effect to the provisions of the Government of India Act 1935 concerning reservation of seats in favour of Scheduled Castes Backward Areas and Backward Tribes (Section 61 and Schedule V of the Government of India Act 1935). In the 1936 Scheduled Castes Order certain groups which were subjected to the degraded practice of untouchability were included. Untouchability was the primary factor for inclusion. This was reflected in the 1950 Constitution Scheduled Castes Order which originally contemplated only inclusion of classes and groups among Hindus subjected to untouchability. This was amended in 1956 to include groups and classes belonging to Sikh and Buddhist religions, the justification being that the same degree of untouchability found in Hinduism was there among Sikhs and Buddhists. Buddhism in India practically had no followers and it was only in 1956 when considerable number of Dalits under the leadership of Dr. Ambedkar embraced Buddhism, the religion became relevant. As practically there was no Buddhism in India, its membership was almost confined to the Dalit converts. The question of Dalit converts among Buddhists being subjected to untouchability by the rest of the Buddhist-Society is a non existent situation. Among the Sikhs the Dalit converts suffered untouchability was commonly recognised. What is to be noted prominently is that Explanation II to Article 25(2) of the Constitution lays down that the term Hindu encompasses persons professing the Sikh, Jain and Buddhist religions. The

amendment to the Scheduled Caste Order 1956 in effect did not travel beyond Hindu religion.

Can the above situation be approximated to Dalit Christians and Dalit Muslims for inferring the alleged social disability of untouchability suffered by them? No survey appears to have been done in this regard. Social equality being the basic tenet of both Islam and Christianity, no presumption in the absence of credible evidence can be drawn, that the practice for untouchability is still prevalent in both the religions. It is no doubt true that some of the classes and groups among the converts to these two religions have suffered social discrimination resulting in social and educational backwardness. But backwardness attributable to social and educational factors is fundamentally different from social exclusion and segregation on account of the untouchability factor.

It is not out of place to refer to a decision of the Supreme Court which is directly in point. The Scheduled Castes Order, 1950 as amended subsequently bringing within its fold certain communities belonging to Sikhism and Neo Buddhists was challenged by a Christian claiming himself to be a Dalit and demanded that Dalits in other religions also must be included in the Scheduled Castes Order. His contention was that he suffered disability as a Dalit even after conversion to Christianity. Rejecting the contention and holding that the degree of degradation suffered after conversion must be of the same nature of what the Dalits among Hindus have suffered, a three Judge Bench of the Supreme Court in *Soosai Vs Union of India*³⁰ made the following observations:

“6.....we shall assume, for the purposes of this case, that the caste is retained on conversion from one religion to the other.....

7.....And through most of Indian History the oppressive nature of the caste structure has denied to these disadvantaged castes the fundamentals of human dignity, human self respect and even some of the attributes of the human personality. Both history and latter day practice in Hindu society are heavy with evidence of this oppressive tyranny, and despite the efforts of several noted social reformers, specially during the last two centuries, there has been a crying need for the emancipation of the depressed classes from the degrading conditions of their social and economic servitude. Dr.J.H.Hutton, a Census Commissioner of India, framed a list of the depressed classes systematically, and that list was made the basis of an order promulgated by the British Government in India called the Government of India (Scheduled Castes) Order 1936.....Paragraph 3 of the same Order declared that the Indian Christians would not be deemed to be members of the Scheduled Castes. During the framing of the Constitution, the Constituent Assembly recognised “that the Scheduled Castes were a backward section of the Hindu community who were handicapped by the practise of untouchability”, and that “this evil practice of untouchability was not recognised by any other religion and the question of any Scheduled Caste belonging to a religion other than Hinduism did not therefore arise”.....

8.....To establish that Paragraph 3 of the Constitution (Scheduled Castes) Order 1950 discriminates against Christian members of the enumerated castes it must be shown that they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of Constitution. It is not sufficient to show that the same caste continues after conversion. It is necessary to establish further that he disabilities and handicaps suffered from such caste membership in the social order of its origin-Hinduism- continue in their oppressive severity in the new environment of a different religious community. References have been made in the material before us in the most cursory manner to the character and incidents of the castes within the Christian fold, but no authoritative and detailed study dealing with the present conditions of Christian society have been placed on the record in this case”.....

There are no authoritative figures as to the population of Dalit Muslim and Dalit Christian in India. In other words there is no identification of

these groups. In the event of Dalit Muslims and Dalit Christians being included in the Scheduled Caste Order they cannot be denied reservation of seats in the Lok Sabha and Legislative Assemblies in proportion to their population as mandated by Articles 330 and 332 of the Constitution. Would it not lead to the further legal complication that on the basis of religion seats are reserved? Would the Dalit Christians and Dalit Muslims cease to be members of their respective religions? Would not their inclusion in the list of Scheduled Caste Order result in introducing classification which was held to be illegal and unconstitutional in E.V.Chinnaiah case? Whether all round progress of the Dalits who are covered by the present Scheduled Caste Order would not suffer to a great extent?

As regards admission to educational institutions and employment in public services the inclusion of Dalit Muslims and Dalit Christians in Scheduled Caste list would result in the total reservations exceeding the 50% limit put by the Supreme Court in Balaji case³¹ long ago and reiterated in Mandal case³².

Scheduled Tribes:

A tribe according to Dr. Majumdar:

“is a social group with territorial affiliation, endogamous with no specialization of functions, ruled by tribal officers, hereditary or otherwise, united in language or dialect, recognising social distance from other tribes or castes but without any stigma attached in the case of a caste structure, following tribal traditions, beliefs and customs, illiberal of naturalization of ideas from alien sources; above all conscious of a homogeneity of ethnic and territorial integration³³”.

In relation to tribal population, the concept of social justice has a different connotation. Egalitarian justice which is treated as a synonym for social justice cannot be the determining factor in judging the tribal population, especially those living in scheduled areas. Each tribal society is a separate class by itself with distinct social customs and ways of living. The social inequalities resulting in social stratification, the bane of Hinduism, fortunately are absent in the case of tribal communities. They cannot be grouped under one category as there are no distinct uniform standards among all tribal communities and therefore uniform laws cannot be enacted for them. Far removed from civilization, the tribals are accustomed to primitive conditions of living and they are clearly distinguishable. They are identifiable distinctly by tribal characteristics and cultural isolation from the main stream of the society.

In the erstwhile State of Madras, several laws were enacted in the administration of Civil and Criminal Justice for protecting the tribal communities in certain areas. Rules known as Agency Rules were made for the administration of tribal areas. The Agency Rules comprehensively deal with the jurisdiction of Agency Courts, filing of suits, appearance of pleaders and other procedural matters. Restrictions on transfer of lands by tribals and ceiling of interest rules also was the subject matter of legislation – The Agency Tract Interests and Land Transfer Act, 1917.

That there are certain areas in the Country inhabited by tribals who require special treatment was recognised by the Government of India Act, 1919. The Government of India Act, 1935 also had taken

care to see that the interests of the tribal communities were safeguarded.

Normal laws could not be made applicable to tribals for the reason that they were far removed from civilization, unsophisticated and primitive. The Government of India's aim was to save them from the wiles of the money lenders and greedy landlords hailing from advanced areas. In the erstwhile State of Hyderabad, Tribal Panchayats backed by the authority of Government to run their own affairs without outside interference were established and that gave confidence to the tribal population.

Constitutional Safeguards for the Tribals:

At the time of the Constitution-making one of the tribal representatives, Shri Jaipal Singh, pleaded for uniform laws for all the tribals in the Country. But that suggestion was rightly rejected. Replying to the debate in the Constituency Assembly Shri K.M.Munshi, a Member of the Drafting Committee, said:

“....There is nothing in common between one tribe and another...I am sure no one would agree with the view that the Santhals of Bihar, the Gonds or Bhils of Bombay and the Nagas of Assam are members of the same ethnic, religious or social group. They belong to different types of civilization and different geological periods and it is necessary that different considerations should be applied for bringing them up to the level of the rest of the country. To call them all Adibasis and group them together as one community will not only be an untruth in itself but would be absolutely ruinous for the tribes themselves. Therefore, it is necessary that in order to give them a proper place in society, different sets of activities would have to be adopted....Adibasis are not one conscious, corporate collective whole in the country so that somebody can

“speak in its name or can lead a movement combining them into a simple unit. It would be fatal to the tribals themselves if such a policy is followed in this country³⁴”.

Part X of the Constitution consists of Articles 244 and 244A which deal with Scheduled and Tribal areas. The provisions of Schedule V of the Constitution of India are made applicable in the administration of tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. Schedule V of the Constitution mandates that the Governor shall submit an annual report to the President regarding the administration of Scheduled areas and the executive power of the Union shall extend to giving all directions to the States regarding the administration of the tribal areas. A Tribes Advisory Council is established in each State having scheduled areas and each Council shall consist of not less than three fourth of representatives of the scheduled tribes in the legislative assembly. The Tribes Advisory Council tenders advice to the Governor regarding the welfare and advancement of Scheduled Tribes. What is more important is the Governor is empowered to exclude the application of any Act of Parliament or the State Legislature in its applicability to a scheduled area. The Governor also is empowered to make regulations for peace and good governance in the scheduled area and such regulations may restrict or prohibit the transfer of land and also allotment of land to members of scheduled tribes. The business of money lending also can be regulated by the Governor by making regulations.

In regard to the States of Assam, Meghalaya, Tripura and Mizoram, there are special provisions in the Sixth Schedule treating the tribal areas as autonomous districts. District Councils and Regional Councils are set up and the powers of those bodies also are specified. Law making power was conferred upon the District Councils and Regional Councils.

In *Edwingson Vs. State of Assam*³⁵, it was ruled by the Supreme Court that under the Fifth Schedule the Governor is the sole legislator. As regards the provisions in the Sixth Schedule, in the same case, the Supreme Court held that the laws made by the Parliament and Legislatures of the States do not automatically apply to the Scheduled areas. The District and Regional Councils enjoy wide jurisdiction including the power of taxation. Complete autonomy is conferred on the Councils in regard to their powers and jurisdiction.

Assimilation of Tribals into the Main Stream:

There are two distinct views about the assimilation of tribal communities into the main stream. One view is that their distinct culture and way of life should be protected while at the same time efforts should be made for their advancement, social economic and educational. The other view is that social justice will become meaningless if the distinct identity of the tribal communities is retained which will always act as manifestation of divisiveness in the society. The situation was explained by Shri K.M.Munshi in the Constituent Assembly:

“We want that the Scheduled Tribes in the whole country should be protected from the destructive impact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time, we want them to take a larger part in the life of the country adopted. They should not be isolated communities or little republics to be perpetuated for ever³⁶...”

In relation to Scheduled Tribes social justice demands as a preliminary step (1) preservation of their culture; (2) improvement of their economic status by safeguarding their present source of living – land rights, to gather forest products and protection from usurious money lenders. After these are ensured, they must be given their due share in admissions to educational institutions, employment in public services and political reservation in law making bodies.

In spite of the protective measures contained in the Constitution, the tribals in many areas are unable to overcome the hurdles they faced. In the name of industrialisation in several areas tribals are uprooted from their traditional habitats. The Land Acquisition Act has not ensured adequate alternatives for the tribals to adhere to their way of life and culture. Uprooted from their traditional habitat the tribals find themselves helpless to find out alternative employment since they do not have the requisite skills for any alternative jobs. The only thing known to them viz. Cultivation of land and gathering of forest produce, having been denied to them, they end up as construction workers, daily wagers etc. Many of the tribal communities bitterly complain that their women are subjected to exploitation.

In the matter of public employment and admissions to schools, the tribals did not receive fair treatment. In the tribal areas the schools do not maintain comparatively high standards so as to enable the tribal children to secure admissions in professional schools and institutions. Although tribal children are entitled to reservations in educational institutions, their quotas are snatched away by non-tribals by producing false caste certificates. The loopholes in the law have enabled the fake certificate holders to escape punishment.

In the Scheduled Tribes Order promulgated by the President of India, there are several tribal communities which have attained high degree of social and educational advancement. In the competition, these advanced communities, not more than two or three in the country, are cornering all the creamy jobs. If we look at the All India Services select list, year after year, we are bound to notice this.

Classification of Scheduled Tribes:

The classification of Scheduled Tribes on the basis of comparative primitiveness viewed from the cultural, civilizational, and geographical aspects would go a long way in rendering justice to them. Critics may say that just as there cannot be a classification of Scheduled Castes on the basis of their comparative backwardness so also in the case of Scheduled Tribes, there cannot be any valid classification. This type of criticism appears to be not sound. In the case of Scheduled Castes, the primary factor is untouchability: all the communities of Hindu religion subjected to untouchability are found in the list of Scheduled Castes. When attempts were made by the

State of Andhra Pradesh to classify the Scheduled Castes in order to render equitable justice to various groups among them, the same was struck down by the Supreme Court in *E.V.Chinniah Vs. State of Andhra Pradesh*³⁷. The reasoning of the Supreme Court is that the Scheduled Castes consist of the lowest among the low and so there cannot be anything lower than the lowest. If the State is of the view that some of the listed Scheduled Castes are not able to compete effectively with the other advanced sections of the Scheduled Castes, the remedy is only by extending affirmative action in their favour but not by resorting to classification.

The principle laid down in Chinniah case may not apply to Scheduled Tribes. Untouchability was there only in Hindu religion and that was the determining factor in the preparation of the list of Scheduled Castes, but in the case of Scheduled Tribes neither untouchability nor religion has any relevance. The Scheduled Tribes are not castes in the customary sense. The Government of India Act, 1935 contains provisions for special electoral representation to backward tribes in the Provincial Legislative Assembly and the Government of India therefore issued an order listing the backward tribals who are none else than the tribal communities. The Constitution -makers have recognised the undeniable fact that the tribal communities in different parts of the country “belong to different types of civilization and different geological periods and it is necessary that different considerations should be applied for bringing them up to the level of the rest of the country. Adibasis are not one conscious, corporative collective whole in the country so that somebody can speak in its name or can lead a movement combining

them into a single unit". Thus the legal impediments do not appear to be present in to deal with the question of classification of the tribals.

Division of Hindu Society – Views of early Reformers

Many of the early reformers of Hinduism were neither revolutionaries nor persons with total commitment for abolition of the tyranny of the caste system. One factor that solely weighed with them was sympathy for the outcastes and lower castes. Their social perception did not extend to the stage that in the absence of recognition of all sections of the society as equals, the concept of social welfare could not be achieved. Another great Hindu Reformer of the 19th Century – Raja Ram Mohan Roy who founded Brahma Samaj in 1828 although openly advocated against the caste system, did not permit any Brahmin to recite Vedas in the presence of lower castes at the meetings of Brahma Samaj. It is evident that he could not overcome the inborn prejudices and the general hostile atmosphere in the society against the lower castes. Was he really afraid of criticism by the Orthodoxy or he was prejudiced against the lower castes? It is very difficult to fathom. The great service rendered by Raja Ram Mohan Roy to the Hindu society especially his success in abolishing the Sati system and improving the lot of widows cannot be forgotten.³⁸

Maharishi Devendra Nath Tagore who continued the work of Brahmasamaj started by Raja Ram Mohan Roy held the view that the study of holy scriptures:

“must remain the privilege of those who were Brahmins by birth”.³⁹

Swami Vivekananda, the internationally renowned Hindu Monk and philosopher despite showing sympathy for the downtrodden lower castes and outcastes did not contemplate any radical measures to weld the Hindu society into one entity. While stating that the caste has its darker side, he openly expressed the view that:

“its benefits outweigh its disadvantages”.

He even reconciled with the position of castes remaining a permanent feature of the Hindu society:

“It is in the nature of society to form itself into groupsCaste is a natural order, I can perform one duty in social life, and you another, you can govern a country, and I can mend a pair of old shoes, but that is no reason why you are greater than I, for can you mend my shoes?...Caste is good. That is the only natural way of solving life⁴⁰.”

There is no evidence of Swami Vivekananda denouncing the caste hierarchy and advocating its abolition. It is but natural that Dalits openly expressed their anger against Swami Vivekananda's halfhearted attempts at projecting Hinduism as a universally acceptable creed. Swami Vivekananda was a Kayasth. There is a controversy as to whether Kayasthas are Sudras or Kshatriyas. The Calcutta High Court in I.L.R. 51 Calcutta 488 Bholanath Vs. Empire held that Kayasthas of Bengal are Sudras. But this question was left open by the Privy Council in Asita Mohan Vs. Nirode Mohan in I.A. 140-145 as to the status of Kayasthas in Bengal. The Allahabad High Court in 12 Allahabad 328 Tulsi Ram Vs. Biharilal and the Patna High

Court in Eswari Prasad Vs. Rai Hari Prasad 6 Patna 506 held that Kayasthas are Dvijas and not Sudras. The obstacles placed by him in worshipping the deity at Dakshineswar were mostly due to his status of not being a Dvija⁴¹.

The first great social revolutionary who ferociously fought against the caste system was Mahatma Jotirao Phooley. It would be an understatement to describe Jotirao Phooley as a social reformer; he was a great social revolutionary. Realising that the caste based inequalities were the result of manipulations of the priestly class he was determined to wipe out heredity as the basis in the social order. He was the first to open schools for Sudras and Dalits. His wife Savitribai Phooley participated in all his struggles for changing the basic structure of the Hindu society. It was due to his efforts the Government of Bombay passed an order in 1856-1857 to the effect that all aided Government Schools shall be opened to all classes of people without distinction. Even though he fought against Brahmin domination, Jotirao Phooley did not discard the company of Brahmins. Most of his colleagues were Brahmins who stood by him courageously for building a society to enable vast population to enjoy human rights.⁴²

There was an attempt on his life organised by his enemies who were opposed to his attempts to reorganise the Hindu society. He favoured the continuance of British Rule not because he had great love for the British, but the atmosphere generated by the British Rule enabled the downtrodden classes to receive education and the

British Rule was favourable to social reform and progress. In his own words:

“.....British rule is there today, Jotirao remarked, “it may not be there tomorrow. It may not even outlast us. Nobody can be sure about its permanency. But as long as it is there, the lower classes should educate themselves and release themselves from the age-long thralldom of Brahmins, which had kept them bound with ignorance and deprived them of social and personal and human dignity”.⁴³

In recognition of the great service rendered by him, the people on 11-5-1888 conferred upon him in Bombay the title ‘Mahatma’ at a grand function “amidst thunderous clappings”.

Shri M.G.Ranade was another important social reformer in the 19th Century. Inspired by British liberal values, he fought for widow remarriages, fought against child marriages, dowry system, untouchability, polygamy and caste restrictions against inter-caste marriages, inter-dining and denial of education of women. One noticeable distinction between Ranade and Phooley is that unlike Phooley, Ranade did not denounce Hinduism. His social philosophy as described by Prof. P.J. Jagirdar in his book “Studies in the Social Thought of M.G.Ranade” at page 97:⁴⁴

“....Social progress or social evolution, to Ranade, means moral progress, and this view follows from his religious conviction that God is the moral governor of all human souls and that the purpose of human soul is to attain freedom from the trammels and lusts, of the body. Ranade equates the social nature of man with his divine nature, meaning thereby that God, out of benevolence, has implanted in human heart the impulse to live with others in society.....”

Ranade was a great admirer of British traditions which made him support the British rule. He honestly believed that social reforms could be achieved only by changing the religious views.

Shri Narayana Guru of Kerala is another great person who succeeded in emancipating large sections of Hindu society from the scourge of untouchability. He himself was well versed in Vedas and Hindu scriptures. Narayana Guru did not believe in religious superstition. He advocated that the status of men should not be determined by birth in a particular religion or caste. He described caste system as negation of the spirit of Advaita. When Gandhiji met Narayana Guru in 1925 in Sivagiri, their conversation turned to religious conversions. His view was:

“If a Hindu has no belief in his religion and has belief in another religion, it is good that he embraces the religion in which he believes. Such a conversion will help Hinduism in getting rid of a non-believer, and the religion to which the man gets converted will have the benefit of adding one more believer to it. Moreover, the man will be benefited with love and sympathy which he will get from his fellow-believers. There is nothing wrong in such conversions”.⁴⁵

Shri Sahuji Maharaj, a descendent of Chhatrapati Shivaji and ruler of Kolhapur, who reigned from 1894-1922 introduced many far reaching reforms to ensure social justice. In 1919, he enacted a law legalizing inter-caste marriages, prohibited devadasi system, permitted inheritance for illegitimate children. Being a ruler of the State, Sahu Maharaj did yeomen service for social transformation. Kolhapur was the first State prohibiting by legislation untouchability.

Mahatma Gandhi:

According to the father of the Nation, Mahatma Gandhi, the Varnashramadharma must be understood as divine and moral. In 1926 writing in Young India, Gandhiji made clear his views on the Hindu Caste System:

“In accepting the forefold division, I am simply accepting the laws of Nature, taking for granted what is inherent in human nature, and the law of heredity. We are born with some of the traits of our parents. The fact that a human being is born only in the human species shows that some characteristics, i.e. caste, are determined by birth⁴⁶”.

Gandhiji also advocated that:

“everyone followed as a matter of dharma the hereditary calling of his forefathers in so far as it is not inconsistent with fundamental ethics⁴⁷.”

Sardar Vallabhai Patel also supported the hierarchical division of Hindu Society.

The thinking of some of the great social reformers was conditioned by the rigid code of the castes in which they were born, and despite their attempts to extricate themselves from the mind set conditioned by the prevailing notions in the society in which they were born, they could not completely succeed.

Periyar:

Shri E.V.Ramasamy, popularly known as Periyar, was a great social revolutionary. Starting as a member of the Congress party, he left it as a protest against the degraded treatment meted out to the

depressed classes and Sudras by the upper classes. The practice of untouchability according to him was to perpetuate the slavery of the Dalits. What triggered his exit from the Congress was its caste oriented approach resulting in the segregation of non-brahmins. He pleaded with Gandhiji that abolition of caste system and eradication of untouchability must get precedence over the struggle for freedom. When Justice Party came to power it implemented in 1928 communal reservation scheme ending the monopoly of the Brahmins over the administration. In 1925, Periyar founded the Self Respect Movement with a view to enabling the Dravidians to preserve their race, language and culture which had been degraded by the caste system. His aggressive style in fighting against the social evils has resulted in non-brahmin sections gaining ascendancy in all the fields in Tamil Nadu. Words like “Dravidian” and “Dravida Nadu” found universal acceptability in Tamil Nadu because of Periyar’s successful fight against social injustices.

Dr. Ambedkar:

The idea of social justice must be the foundation of the Indian Society was put forth with great force by Dr.B.R.Ambedkar. The position of the outcastes was so pathetic and the attitude of the upper castes being antagonistic, Dr. Ambedkar felt that in the absence of political recognition for the Dalits, their problems would never be solved. Strongly faulting the Hindu Society for not doing anything for the upliftment of untouchables, Dr. Ambedkar said:

“What is wrong with the Hindu is that his sense of moral obligation towards others is restricted to a limited class of people, namely the members of his class....The Untouchables

do not belong to the society of the Hindus and the Hindu does not feel that he and the Untouchables belong to one society. This is the reason why the conduct of the Hindu is marked by a moralistic unconcerned-ness. Not having conscience, the Hindu has no such thing in him as a righteous indignation against the inequities and injustices from which the Untouchable has been suffering...By his absence of conscience, the Hindu is a great obstacle in the path of removal of untouchability⁴⁸”.

At the time of the Constitution making, Dr. Ambedkar in his memorandum submitted to the Sub Committee on Fundamental Rights very candidly stated the prevailing situation in the Country “....administration being wholly in the hands of Hindus hostile to untouchables suffering discrimination”.

“The Untouchables are surrounded by a vast mass of Hindu population which is hostile to them and which is not ashamed of committing any inequity or atrocity against them. For a redress of these wrongs which are matters of daily occurrence, the Untouchables have to call in the aid of the administration. What is the character and composition of this administration? To be brief, the administration in India is completely in the hands of the Hindus. It is their monopoly. From top to bottom it is controlled by them. There is no department which is not dominated by them. They dominate the police, the magistracy and the revenue services, indeed any and every branch of the administration. The next point to remember is that the Hindus in the administration have the same positive anti-social and inimical attitude to the Untouchables which the Hindus outside the administration have. Their one aim is to discriminate against the Untouchables and to deny and deprive them not only of the benefits of law, but also of the protection of the law against tyranny and oppression. The result is that the Untouchables are placed between the Hindu population and the Hindu-ridden administration, the one committing Wrongs against them and the other protecting the wrongdoer, instead of helping the victims.

Against this background, what can Swaraj mean to the Untouchables? It can only mean one thing, namely, that while today it is only the administration that is in the hands of the Hindus, under Swaraj the Legislature and Executive will also be

in the hands of the Hindus. It goes without saying that such a Swaraj would aggravate the sufferings of the Untouchables. For, in addition to a hostile administration, there will be an indifferent Legislature and a callous Executive. The result will be that the administration unbridled in venom and in harshness, uncontrolled by the Legislature and the Executive, may pursue its policy of inequity towards the Untouchables without any curb. To put it differently, under Swaraj the Untouchables will have no way of escape from the destiny of degradation which Hindus and Hinduism have fixed for them⁴⁹”.

Poona Pact:

Upon the insistence of Dr. Ambedkar as leader of the depressed classes, the British Prime Minister Ramsay McDonald made an announcement on 13-8-1932 providing for separate electorates for depressed classes. His announcement popularly came to be known as Communal Award. It provided for separate electorates for depressed classes; apart from voting in the general elections, additionally certain special seats were assigned to them. The electorates in these earmarked constituencies comprised only the depressed classes. I do not want to go into the details of the difference of opinion on Communal Award between Gandhiji and Dr. Ambedkar. It was Gandhiji's threat to go on fast unto death that made Dr. Ambedkar not to insist upon the Communal Award. But the two leaders signed an agreement in Poona on 24-9-1932 which came to be known as Poona Pact. Even though the separate electorates are done away with, the Pact secured special rights for the depressed classes. It envisaged election of a panel of four candidates by the depressed classes. In each of the constituencies those candidates could be contestants for elections by the general electorate. This

principle was incorporated in the Government of India Act, 1935. What would have been the consequences if the Communal Award had been implemented? I answered the same elsewhere:

“It is also true that if the Depressed Classes had a separate electorate, enjoying the status of a minority, the consequences would have been catastrophic: it would have greatly upset the demographic balance of the country. The predominantly majority position enjoyed by the Hindus would have been greatly reduced by the exit of one-fifth of the total Hindu population, the Depressed Classes. After the signing of the Poona Pact, which ensured special representation for the Depressed Classes without excluding them from the Hindu fold, the chances of having a separate communal electorate in regard to the Depressed Classes virtually disappeared.”⁵⁰

Demand for Adult Franchise:

Under the 1935 Act, right to vote was not given to everybody. Strongly pleading for repealing of the Government of India Act, 1935 for framing of the Constitution by the Constituent Assembly, the congress leader A. Sathyamurthy in his speech made on September 17, 1937 in the Central Legislative Assembly said that the 1935 Act should be replaced by the Constitution framed by the Constituent Assembly elected on the basis of adult franchise:

“.....We stand for adult franchise, no disqualification by birth, caste, race or religion or wealth; we want every man and woman in this country, to have a voice in the shaping of the constitution of this country. Can anybody object to that ? Why do you want then separate communities, separate classes, and separate electorates? I want my friends to notice that, in this Resolution, we swear by adult franchise; we do not want the scales to be weighted in favour of anybody for reasons of wealth or birth”.⁵¹

The seeds of social justice started germinating even in 1937. The Indian National Congress in its resolution passed on November 20, 1946 on the eve of the summoning of the Constituent Assembly to frame the Constitution for the Country demanded that “social objectives are laid down to promote freedom, progress and equal opportunity for all the people of India”.⁵²

Abolition of Untouchability:

The biggest stigma on the Indian Hindu society was untouchability. Without abolishing untouchability there was no scope to improve the condition of the depressed classes. By Article 17 of the Constitution, untouchability was abolished and its practice in any form is forbidden. Any disability arising out of untouchability if sought to be enforced is made an offence punishable in accordance with law. This provision was introduced by Sri B.N.Rau, the Constitutional Adviser in the draft constitution prepared by him and the same in its final form was incorporated in Article 17.

Why did not this article concerning untouchability emanate from Dr. Ambedkar ?

I attempted an answer to this in my monogram ‘Ambedkarism and its Impact on the Constitution of India’ at pages 24-25, which I would like to reproduce :

“....He was fighting for an honourable place for the Depressed Classes in Indian society by securing for them the position of a minority, which he thought was the complete answer. The safeguards that he wanted for the Depressed Classes – how they should be protected as a separate minority, their share in law-making bodies as well as elective offices, the financial help

that should be given to them and reservation of posts in their favour – are all contained in great detail in the Ambedkar's memorandum submitted on 24 March 1947 to the Constituent Assembly. As a strong believer in separate electorates, he thought that the initiation of any legislative effort to eradicate untouchability might result in a situation where the Depressed Classes were still treated as a part of the Hindu religion, occupying the lowest position with no prospect ever of climbing up the social ladder. The panacea for the plight of his people, he thought, was a separate electorate. As a minority, there was no need for the Depressed Classes to have a provision in the Constitution abolishing untouchability. That disability would have automatically disappeared: A constitutionally recognized minority with a separate electorate would never be an untouchable. But by giving up the demand for a separate electorate, Dr. Ambedkar saved Hinduism from a lethal split. That is why Dr. Ambedkar did not think of a provision in the Constitution for the abolition of untouchability”.

Political battles for Social Justice:

Till 1992 until the Mandal Commission case was decided, there were no reservations at the Central level. But in some States, there were reservations. The monopoly of the administration by one or two upper castes has led to resentment by other sections. Already in 1902, the ruler of Kolhapur, Sahuji Maharaj, had introduced caste based reservations. Much earlier to that in 1895, in the erstwhile princely State of Mysore, reservations were implemented. The following figures with regard to employment position in the composite State of Madras would reveal the extent of domination by one upper caste:

1892-1904 - out of 16 successful I.C.S Officers, 15 were Brahmins.

1913 – Out of 128 permanent Munsifs in the judiciary, 93 were Brahmins.

1914: 452 out of 650 registered graduates of the University of Madras were Brahmins.⁵³

A political party by name Justice Party was formed in 1916 in the composite Madras State to secure administrative positions and power for non-brahmin sections. This party came into power in 1920. They justified the formation of the party on the basis that when the population of the Brahmin community was only 3%, it could not have huge monopoly on all the posts in the administration.

The Hindus were happy to be governed by the Hindu Law with all its hierarchical institutionalised divisions. After the advent of the British, they did not tinker with personal laws for the fear of promoting hostility among various sections of the people. Nonetheless, it must be said to the enduring credit of the British that they have given to our country a modern legal system, a good administration and enlightened governance. Some of the abominable practices like Sati, Child Marriages, caste disabilities had been to a great extent abolished by the British.

The Muslim League at the time of constitution-making unequivocally demanded a separate State for them had pointedly referred to one aspect which has a bearing on the Hindu caste system. In the resolution passed by the All Muslim League Legislators' Convention on 9th April, 1946, it was emphasized that the rigid caste system was responsible for the degradation of 60 million people to the position of untouchables and that the Hindu caste system is direct negation of equality and democracy. I feel it relevant to extract a few paragraphs from this Resolution:

“Whereas in this vast sub-continent of India, a hundred million Muslims are the adherents of a faith which regulates every

department of their life (educational, social, economic and political), whose code is not confined merely to spiritual doctrines and tenets or rituals and ceremonies, and which stands in sharp contrast to the exclusive nature of Hindu Dharma and philosophy which has fostered and maintained for thousands of years a rigid caste system resulting in the degradation of 60 million human beings to the position of Untouchables, creation of unnatural barriers between man and man and superimposition of social and economic inequalities on a large body of the people of this country, and which threatens to reduce Muslims, Christians and other minorities to the status of irredeemable helots, socially and economically,

Whereas, the Hindu caste system is a direct negation of nationalism, equality, democracy and all the noble ideals that Islam stands for;

Whereas, different historical backgrounds, traditions, cultures and social and economic orders of the Hindu and Muslim have made impossible the evolution of a single Indian nation inspired by common aspirations and ideals, and whereas after centuries, they still remain two distinct major nations;.....

The resolution declares that Muslims are a separate nation and they will never remain part of India and they will never submit to any Constitution for united India and that a separate Muslim state – Pakistan – should be established”.⁵⁴

Social Justice under the Constitution:

As the aim of social justice is securing of a just order to meet the aspirations of all sections necessarily it has several facets. The Constitution-makers with great foresight had incorporated certain provisions for the guidance of all the three organs of the State, the executive, legislature and also the judiciary. These are contained in Part IV of the Constitution which bears the heading Directive Principles. I have deliberately included judiciary also since the definition of the State as contained in Article 12 of the Constitution includes all the three organs the executive, the legislature and the judiciary. In what manner power should be exercised by the

executive and the legislature is clearly incorporated in Part IV, the principles of which although are not justiciable, nonetheless are fundamental in the governance of the Country. Socio-economic transformation of the society is visualised in Articles 38 to 48 of Part IV forming part of Directive Principles. Article 38 lays down the duty of the State to promote the welfare of the people establishing a social order in which justice social, economic and political shall be reflected in all the institutions of the national level. The gap between the rich and poor and elimination of inequalities in status, facilities and opportunities amongst not only individuals but also groups of people also finds a place in Article 38. Six important principles to be followed by the State are contained in Article 39 viz. (1) right to adequate means of livelihood; (2) distribution of material resources to subserve the common good; (3) economic system not to result in concentration of wealth and means of production to the common detriment; (4) equal pay for equal work; (5) protection of the health and strength of workers and economic necessity should not drive people to take up avocations unsuited to their age and strength; and (6) Children are given opportunities and facilities to develop in a healthy manner and they are protected against exploitation. The organisation of village panchayats is referred to in Article 40; Article 41 directs the State to make provision for securing the right to work, to education and to public assistance in cases of unemployment, and old age. The duty of the State to secure to all workers a living wage and decent standard of life besides promoting cottage industries are emphasized in Article 43. In 1977, by the Constitution (Forty-second Amendment) Article 43-A was added by which participation of

workers in the management of industries was made a Directive Principle. Article 44 lays down the duty of the State to make endeavour for securing uniform civil code for all the citizens throughout the Country. It shall be the endeavours of the State to provide education for all children till the age of 16 is the mandate of Article 45. Article 46 directs the State to promote the educational and economic interests of weaker sections and in particular Scheduled Castes, Scheduled Tribes and Other Backward Classes. Raising of nutritional standards, improvement of public health, organisation of agriculture and animal husbandry are dealt in Articles 47 and 48. The State is obligated to provide admission for all children.

The preamble portion of our Constitution reads:

“We, the people of India, having solemnly resolved to constitute India into Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

The social justice comprehends economic and political justice and equality of status and of opportunity. Freedom of religion implies liberty of thought, expression, belief, faith and worship, all of which are mentioned in the preamble. The preamble is part of the

Constitution and the objectives contained therein are part of the basic structure was emphasised by the Supreme Court in *Keshavananda Bharathi Vs. State of Kerala* (AIR 1973 SC 1461).⁵⁵

Besides the preamble and directive principles, our Constitution incorporates the principles of social justice in Part III, X, XVI, Schedules V and VI to the Constitution in particular Articles 14, 15(4), 15(5), 16(4), 16(4A), 16(4B), 17, 19, 23, 24, 38, 39, 330, 332, 334, 335 to 342. Part III consists of justiceable fundamental rights. Articles 14 to 16 deal with principles of equality and non-discrimination while at the same time affirmative action is comprehended in clauses (4) and (5) of Article 15 and clauses (4A) and (4B) of Article 16. Abolition of untouchability is covered by Article 17. Articles 23 and 24 deal with the right against exploitation and prohibition of forced labour. Articles 330 and 332 speak of reservation of seats in Lok Sabha and Legislative Assemblies in favour of Scheduled Castes and Scheduled Tribes in proportion to their population. Article 335 recognises the claims of members of Scheduled Castes and Scheduled Tribes for appointment to services and posts in the Union and States consistent with the maintenance of efficiency in administration.

There are two National Commissions, one for Scheduled Castes and another for Scheduled Tribes set up under Article 338 and 338-A of the Constitution for investigating and monitoring of matters relating to the safeguards provided for them under the Constitution, to enquire into specific complaints, to evaluate the progress made by these communities and make specific

recommendations as to what steps the Union and the States should take for effective implementation of the safeguards for the welfare and socio-economic development of these classes.

The State is empowered to relax qualification in any examination or lower the standards of evaluation in relation to members of Scheduled Castes and Scheduled Tribes for reservation in the matters of promotions. By the Constitution (Seventythird and Seventyfourth Amendment), Part IX and Part IXA were inserted in the Constitution to usher in effective Panchayats and Municipalities; their composition and the type of functions they should be entrusted with. The States are obligated to make laws endowing these local bodies to enable them to function as institutions of self Government. Plans for economic development and social justice, implementation of schemes are to be covered by such laws. These bodies are to be conferred with the power to impose taxes. Two Schedules – 11th and 12th are added to the Constitution specifying the matters in respect of which power is to be conferred on these local bodies. An important aspect to be noticed is that apart from mandatory reservation of seats in favour of the Scheduled Castes and Scheduled Tribes, provision is made in Article 243(6) and 243T conferring power on the States to legislate providing for reservation of seats in favour of “Backward Class citizens”.

Thus for the first time, the right of backward classes other than Scheduled Castes and Scheduled Tribes to have political reservation separately has been constitutionally recognised.

No difficulty was felt as already stated supra about the identification of Scheduled Castes and Scheduled Tribes. Great difficulty was faced in the identification of Backward Classes for the purpose of the benefits under Articles 15(4) and 16(4).

So far as political justice is concerned, free and fair elections ensured the same in our country. There is no dissent from any quarter that elections in India are conducted in a free and fair manner and that the Election Commission is doing an admirable job in conducting and supervising the elections.

Industrial Justice:

Industrial Justice concerning relationship between workers and employers is by itself a special topic for a separate lecture. Several enactments aimed at taking care of the welfare of the workers are now in force. The International Labour Organisation formed in 1919 (I.L.O.) which ensures harmony between the management, workers and Governments is founded upon the principle:

“Poverty anywhere is a threat to prosperity everywhere”.

Several conventions of the International Labour Organisation which are in force in India seek to ensure the welfare and protection of the workers. Some of the laws concerning industrial jurisprudence which need mention are:

- (1) Workmen Compensation Act, 1923
- (2) Trade Union Act, 1926
- (3) Industrial Disputes Act, 1947
- (4) The Factories Act, 1948

- (5) Maternity Benefits Act, 1953
- (6) Payment of Bonus Act, 1955
- (7) Payment of Gratuity Act, 1972
- (8) Equal Remuneration Act, 1976

Industrial Justice is possible only when participation of workers in the management of industry is allowed by legislation. This is a distinct goal yet to be achieved in our country especially in the atmosphere of globalisation and privatisation under the WTO regime.

The capacity of the employer to pay is commonly understood as the basis in fixing the wages. This perspective when tested on the touchstone of social justice cannot stand. Social Justice which aims at common good and the discretion of the employer in fixing wages do not go together. This was made clear by the Supreme Court in AIR 1958 SC 30 at P.34: ⁵⁶

“No industry has a right to exist unless it is able to pay its workman at least a bare minimum wage. It is quite likely that in under developed countries, where unemployment prevails on a very large scale, unorganised labour may be available on starvation wages; but the employment of labour on starvation wages cannot be encouraged or favoured in a modern democratic welfare state. If an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence of minimum wage, he would have no right to conduct his enterprise on such terms”.

The directive contained in Article 43 that the State should endeavour by legislation to secure living wage is something which has eluded the realisation of nonetheless the perspective on State endeavouring to ensure living wage to the workers was more realistic in the prevailing context of economic situation as held by the

Supreme Court in Reserve Bank Employees Association Case – AIR 1966 SC 305 page 305 at pp.316-317:⁵⁷

“It has now been generally accepted that living wage means that every male earner should be able to provide for his family not only the essentials but a fair measure of frugal comfort and an ability to provide for old age or evil days. Fair wage lies between the concept of minimum wage and the concept of living wage....It may thus be taken that our political aim is ‘living wage’ though in actual practice living wage has been an ideal which has eluded our efforts like an ever-receding horizon and will so remain for some time to come. Our general wage structure has at best reached the lower levels of fair wage though some employers are paying much higher wages than the general average”.

Property Rights:

Right to property generates controversies. When the zamindari system was prevalent and large extents of land were owned by individuals, it was felt that the public good would subserve by bringing in radical land reforms for rendering social justice. Although Article 19(1)(f) and Article 31 dealing with the fundamental right to property were deleted by the Constitution (Forty-fourth) Amendment Act, 1978, it is of some relevance to refer briefly the views of the constitution-makers on the question of land reforms.

Pandit Jawaharlal Nehru while introducing draft Article 24 (which was enacted as Article 31) drew the basic difference between two types of compulsory acquisition – acquisition of small bits of property for improvement of local areas about which law is clear and the acquisition intended for the Community at large which is essential for the progress of the society. In the words of Jawaharlal Nehru:

“If we have to take the property, if the State so wills, we have to see that fair and equitable compensation is given, because we proceed on the basis of fair and equitable compensation. But when we consider the equity of it we have always to remember that the equity does not apply only to the individual but to the community. No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons”.⁵⁸

Shri K.M.Munshi, one of the members of the Drafting Committee felt that when the legislature enacts a law in accordance with Article 31 laying down the principles of compensation, the manner and form in which the compensation must be paid and if the compensation is:

“an equivalent recompense, no Court will go behind the policy of the measure”⁵⁹

Legal complications have arisen as to whether the principles of compensation laid down in the statutes for compulsory acquisition should really ensure the market value of the land acquired. The Supreme Court had taken the view that the principles fixed for compensation “must ensure that what is determined as payable must be compensation” (State of West Bengal Vs. Mrs. Bella Banerjee AIR 1954 SC 170 at 272).⁶⁰

The Constitution (Fourth) Amendment Act, 1955 was enacted to overcome the Supreme Court Judgment and the amended provision in Article 31(2) was to the effect that when properties are acquired compulsorily for the public purpose by law fixing the amount of compensation or specifying principles on which the compensation

is to be determined and given, no such law shall be called in question on the ground that the compensation provided by that law is not adequate. As the expression compensation has been retained even in the amended provision, the owner of the property which has been acquired must be paid “just equivalent of what he has been deprived of” was the view taken by the Supreme Court in *Vajravelu vs. Special Deputy Collector* AIR 1965 SC 1017 at page 1024.⁶¹

Social Cohesion - Prominent Points of Conflict:

The permanence of the Indian caste system sanctifying hierarchical set up had compelled Constitution-makers in order to render justice to the lower castes and outcastes, to provide for reservations in educational institutions, public employment and political reservation – seats in law making bodies – State Legislature and House of the People Lok Sabha. In the draft Constitution prepared by Shri B.N.Rau, Article 12 was relevant. Incorporating the principle of non-discrimination in matters of employment it contained an exception in clause (3) which read:

“(3) Nothing in this section shall prevent the State from making any provision for the reservation of appointment or posts in favour of any particular class of citizens who in the opinion of the State, are not adequately represented in the services under the State”.

The word “backward” was not there in the draft prepared by Shri B.N.Rau. It was the Drafting Committee headed by Dr. Ambedkar which substituted the word backward class for the words

particular class. In its final form, this clause became Article 16(4) which is in the following terms:

“16(4). Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State”.

The inclusion of the word backward class in Article 16(4) was resented by some members of the Constituent Assembly notably Shri T.T.Krishnamachari. His anger was that a large number of people might come under the category of backward classes. He pointed out that the word backward was not there in draft Article 10(3) when the Drafting Committee discussed the same. In his own words:

“It was an afterthought which the cumulative wisdom of the Drafting Committee has devised for the purpose of anticipating the possibility of this provision being applied to a large section of the community”.

He concluded his speech with a pessimistic note:

“I cannot congratulate the Drafting Committee on putting this particular word in, whatever might be the implication they had in their mind. I cannot help feeling that this clause will lead to a lot of litigation”.⁶²

Shri Krishnamachari went to the extent of condemning the Directive Principles as “a veritable dustbin of sentiment”.

Curiously some members of the Constituency Assembly belonging to Scheduled Castes had a doubt whether Scheduled Castes are covered by the expression backward, Shri K.M.Munshi's reply in the Constituent Assembly was that:

“.....I cannot imagine for the life of me how, after an experience of a year and a half of the Constituent Assembly, any honourable member of the Scheduled Castes should have a feeling that they will not be included in the Backward Classes so long as they are backward. I cannot also imagine a time when there is any backward class in India which does not include the Scheduled Castes.....”⁶³

While Article 16(4) provides for reservations in public employment, there was no specific provision with regard to reservations in educational institutions when the Constitution was originally enacted. I do not want to refer in detail to the events leading to the Constitution (First) Amendment Act, 1951. The Supreme Court in the State of Madras Vs. Champakam Durairajan struck down the order of the Government of Madras commonly called Communal G.O. on the basis of which seats were reserved in medical and engineering colleges. The attempt of the State to justify the G.O. on the basis of Article 46 directive principle did not succeed. The Supreme Court rejected the argument that the directives contained in Article 46 obligating the State to promote the interests of weaker sections could override the guaranteed fundamental right contained in Article 15(1) and (2) – non discrimination on grounds of religion, race, caste and place of birth. Since the reservations were made caste-wise, the G.O. was struck down. What is of importance is that the Supreme Court pointed out that the special provision with regard to reservation of appointments in favour of Backward Classes is an indication that the constitution-makers did not intend to provide for reservations in educational institutions. To overcome this legal hurdle the Constitution was

amended by inserting clause (4) in Article 15 by the Constitution (First) Amendment Act, 1951, which reads as follows:

“15(4). Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”

Stating the necessity for the amendment, Dr. Ambedkar said in the Parliament while moving the bill:

“Every Hindu has a caste – he is either a Brahmin or a Maratha or a Kurmi or a Kumbhar or a carpenter. There is no Hindu – that is the fundamental proposition – who has no caste. Consequently, if you make a reservation in favour of what are called Backward Classes, which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste. On these points, I do not personally think that the judgment is a very satisfactory judgment....Now the point has to be borne in mind that in Article 46 of the Directive Principles, an obligation has been laid upon the government to do everything possible in order to promote the welfare and the interest of what are called the weaker sections of the public, by which I understand to mean the Backward Classes or such other classes who are for the moment not able to stand on their legs – the Scheduled Castes and the Scheduled Tribes. It is, therefore, incumbent not merely on the government but upon this Parliament to do everything in its hands to see that Article 46 is fulfilled; and if that fulfilment is to come, I cannot see how one can escape an amendment so as to prevent Article 29 (Clause (2) and Article 16 Clause (4) (from) being interpreted in the way in which it has been interpreted and being made to block the advancement of the people who are spoken of as the weaker class. That is the necessity for amending Article 15”.⁶⁴

Article 16(4) which speaks of Backward Classes of citizens in the matter of reservations was interpreted by the Supreme Court in

Venkataramana Vs. State of Madras AIR 1951 SC 229, the first case in which Article 16(4) was judicially tested to the effect that earmarking of posts caste-wise was unconstitutional. The communal G.O. which earmarked certain percentage of posts for Brahmins and other communities was struck down by the Supreme Court. Reservation of seats in favour of backward classes was different from fixing quotas caste-wise.

Identification of Backward Classes:

Identification of Backward Classes always presented difficulties. In many States, reservations made in favour of backward classes were set aside by the High Courts on the ground that there was no proper survey to ascertain the social and educational backwardness.

The first attempt to identify the backward classes was made in 1953 by the Government of India by appointing a Commission headed by Kaka Kalelkar. This Commission was appointed under Article 340 (1) of the Constitution which contemplates a Commission to investigate the conditions of socially and educationally backward classes and the difficulties they are facing and suggest measures for removal of those difficulties. The Commission identified 2399 backward classes and prepared State-wise lists. In March, 1955, Kalelkar Commission submitted its report. The Commission recommended different percentage of reservations in educational institutions and government services for OBCs. Unfortunately in the forwarding letter to the Government, Shri Kalelkar contradicted the very basis of his report. Kalelkar's 185 degrees "U" turn is quite

shocking. Blaming backward classes that they were responsible for their plight, he was not willing for any financial help by the State to improve their condition. In his own words:

“....If such communities have neglected education it is because they had no use for it. Now that they have discovered their mistake it is for them to make the necessary efforts for making up the leeway.

Till recently, good many Communities were organising caste conferences and collecting funds for granting scholarships to boys and girls of their own community. That was a good lesson in self help and a good number of communities have thus come forward in material well-being. But now all burden is sought to be thrown on the common exchequer and those who have thoughtlessly neglected education in the past are now seeking preferential treatment in Government services. This is anything but fair....

I am definitely against reservation in Government Services for any Community for the simple reason that the services are not meant for the servants but they are meant for the service of society as a whole.

I believe that in Class I and Class II services, the backward classes will stand to gain, both morally and materially, if they do not demand a reservation percentage in the vacancies and simply rely on the fair-mindedness of the administration to use their preference in favour of the backward classes...”⁶⁵

No wonder, in the face of open hostility of Shri Kalelkar, the report was ignored.

Mandal Commission:

The second attempt for the identification of backward classes under Article 340 of the Constitution fortunately succeeded. In December, 1978, the then Prime Minister of India Shri Morarji Desai announced the appointment of a Backward Classes Commission

under the Chairmanship of Shri B.P.Mandal, popularly known as Mandal Commission. The Commission started its work in March, 1979 and completed the same in December, 1980. The terms of reference of the Commission were:

- (i) to determine the criteria for defining the socially and educationally backward classes;
- (ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;
- (iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and
- (iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper.”

The Mandal Commission found that:

“.....in the traditional Indian society social backwardness was a direct consequence of caste status and, further, that various other types of backwardness flowed directly from this crippling handicap.”⁶⁶

How the religious structure hypnotised the vast majority of the people into accepting the role of servility with humility, the Mandal Commission observed:

“ 4.23. If religion was ever used as an opium of the masses, it was done in India, where a small; priest-class, by a subtle process of conditioning the thinking of the vast majority of the people, hypnotised them for ages into accepting a role of servility with humility. As labourers, cultivators, craftsmen, etc.,

shudras were the main producers of social surplus. Their social labour was the life-blood of India's great civilisation. Yet socially, they were treated as out-castes; they had no right in private property; they carried the main burden of taxes, and the heaviest punishments were awarded to them for minor infringements of the social code. As their low caste status was tied to their birth, they toiled and suffered without any hope."⁶⁷

In the preparation of the list of Other Backward Classes, a multiple approach was adopted by the Mandal Commission:

- “(i) Socio-educational field survey;
- (ii) Census Report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes;
- (iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described in Chapter X of this Report; and
- (iv) Lists of OBCs notified by various State Governments”.⁶⁸

The Mandal Commission found that among non-Hindu communities, social and educational backwardness is more or less of the same order as among Hindu communities. Even after conversion to Islam and Christianity, the converts “own with them their deeply ingrained identities of social hierarchy and stratification”. In regard to non-Hindu OBCs, the Commission adopted a rough and ready criteria for identification:

- “(i) All untouchables converted to any non-Hindu religion; and
- (ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples: Dhobi, Teli, Dheemar, Nai, Gujar, Kumhar, Lohar, Darji, Badhai, etc.”⁶⁹

The total population of Hindu and Non-Hindu OBCs was 52% of the Country's population (43.70 Hindu OBCs, 8.40 non-Hindu OBCs). Poverty is the direct consequence of social and educational backwardness resulting from caste based handicaps. The Commission's recommendations comprehend reservations in educational institutions and in public services. The Mandal Commission recommended 27% reservations not only at the initial appointment but also to promotions at all levels. Several measures for rendering financial assistance are recommended by the Commission. All the State Governments are advised and encouraged to create a separate network of financial and technical institutes to foster business and industrial enterprises among OBCs. In the political field, one of the important recommendations of the Commission needs special mention:

“(4) With a view to giving better representation to certain very backward sections of O.B.Cs. like the Gaddis in Himachal Pradesh, Neo-Buddhists in Maharashtra, Fishermen in the Coastal areas, Gujjars in J & K, it is recommended that areas of their concentration may be carved out into separate constituencies at the time of delimitation”.

One of the members of the Commission, Shri L.R.Naik submitted a dissent note. He wanted OBCs to be classified into two categories, (1) Intermediate Backward Classes and (2) Depressed Backward Classes. The Intermediate Backward Classes, according to him are relatively more advanced and they have the capacity to integrate with the general population - the castes whose traditional

occupations are agriculture, pastoral activities, village industries like artisans, weavers, tailors, oil-mongers, toddy sellers etc. Depressed Classes are those who are either denied or prohibited intermingling with the rest of the Indian society on account of stigma on their trade and occupation. They are generally called as Ex-Criminal Tribes, Nomadic and wandering tribes, earth diggers, fishermen, boatmen washermen, barbers, basket makers, toddy-tappers etc. According to him the depressed backward classes constitute 25.56% and Intermediate Backward Classes constitute 26.44% population. He, therefore, recommended preparation of two lists of backward classes and the benefits to be apportioned as above.

The Commission did not agree with the views expressed by Shri L.R.Naik in his dissent note mainly for the reason that as per the then prevailing law as held in *Balaji Vs. State of Mysore* AIR 1963 SC 649⁷⁰, there cannot be categorisation of backward classes on the basis of comparative backwardness. The Commission also doubted the correctness of the figures given by Shri L.R.Naik.

The Judgment of the Supreme Court in *Indra Sawhney* case (1992) 3 Supp. SCC 217 (popularly known as Mandal Case) proved that Shri L.R.Naik's views were not wrong. The principle laid down in *Balaji* case that since OBCs are comparable to Scheduled Castes in their backwardness, there cannot be any classification among OBCs on the basis of their relative backwardness was overruled by the majority judgment of the Supreme Court in Mandal Case.

The Government of India accepted partly the recommendations of the Mandal Commission and issued Office Memorandum on

13-8-1990 reserving 27% of Civil Posts and services under the Government of India in favour of OBCs. Candidates belonging to OBCs recruited on the basis of merit, it was made clear, should not be counted against the reservation quota of 27%. The reservation was to be applied only at the initial stage of direct recruitment. Same reservation was contemplated with regard to posts in Public Sector Undertakings and Financial Institutions including Public Sector Banks. The above Memorandum was amended subsequently on 25-9-1991 directing that within the 27% of reserved posts, “preference should be given to candidates belonging to poorer sections of the SEBCs”. One more feature of the amendment is that 10% of the vacancies in civil posts and services under the Government of India were reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

Views of Judges in the Mandal Case:

The aforesaid office memoranda of the Government of India came up for consideration before a larger bench of 9 Judges of the Supreme Court in Indra Sawhney case (Mandal Commission Case). Six opinions were delivered by the Bench. On behalf of four Judges constituting the majority, Justice Jeevan Reddy wrote the Judgment. Justice Ratnavel Pandian agreed with the majority on all aspects except in regard to the creamy layer that is exclusion of benefits of reservation to affluent sections among the OBCs. Justice Sawant in his separate judgment agreed with the majority. Three Judges who

were in minority viz. Justice Thommen, Justice Kuldeep Singh and Justice Sahai wrote separate judgments expressing definite views that there was no valid classification of backward classes and that caste cannot be equated with a class and the remedy to improve the position of backward classes is by affirmative action.

Some of the observations made in the majority judgment are very relevant in the context of rendering social justice. The rationale for reservation was explained by Justice Sawant :

“420. There cannot be a more compelling goal than to achieve the unity of the country by integration of different social groups. Social integration cannot be achieved without giving equal status to all. The administration of the country cannot also be carried on impartially and efficiently without the representation in it of all the social groups and interests, and without the aid and assistance of all the views and social experiences. Neither democracy nor unity will become real, unless all sections of the society have an equal and effective voice in the affairs and the governance of the country.

421. In a society such as ours where there exist forward and backward, higher and lower social groups, the first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups. Unless all social groups are brought on an equal cultural plane, social intercourse among the groups will be an impossibility. Inter-marriage as a matter of course and without inhibitions is by far the most potent means of effecting social integration. Inter-marriages between different social groups would not be possible unless all groups attain the same cultural level. Even in the same social group, marriages take place only between individuals who are on the same cultural plane. Culture is a cumulative product of economic and educational attainments leading to social accomplishment and refinement of mind, morals and taste. Employment and particularly the governmental employment promotes economic and social advancement which in turn also leads to educational advancement of the group. Though it is true that economic and educational advancement is not necessarily accompanied by cultural growth, it is also equally true that without them, cultural advancement is difficult. Employment is thus an important aid for cultural growth. To achieve total unity and integration of the

nation, reservations in employment are, therefore, imperative, in the present state of our society”.⁷¹

In his view a caste has all the attributes of a class and can form a separate class. Discussing the question of relevance of economic backwardness in the determination of social backwardness, Justice Sawant unambiguously expressed the view that:

“482..... Even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes. Their economic backwardness is not on account of social backwardness. The educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who are socially backward such as the lower castes or occupational groups, are also educationally backward on account of their social backwardness, their economic backwardness being the consequence of both their social and educational backwardness. Their educational backwardness is not on account of their economic backwardness alone. It is mainly on account of their social backwardness. Hence mere economic aid will not enable them to compete with others and particularly with those who are socially advanced. Their social backwardness is the cause and not the consequence either of their economic or educational backwardness..... The backwardness that is contemplated by Article 16(4) is the backwardness which is both the cause and the consequence of non-representation in the administration of the country. All other kinds of backwardness are irrelevant for the purpose of the said article. Further, the backwardness has to be a backwardness of the whole class and not of some individuals belonging to the class, which individuals may be economically or educationally backward, but the class to which they belong may be socially forward and adequately or even more than adequately represented in the services.”⁷²

Often times, it is mistaken that the expression weaker sections of the people is the same as backward classes of citizens under Article 16(4). The doubt in this regard has been clarified by Justice Sawant stating that both are different. The purpose of Article 16(4) is to give adequate representation in the services of the State to the

classes which have no such representation. The benefit contemplated by Article 16(4) is not to individuals but to classes.

A class which is not socially and educationally backward cannot be considered to be a backward class even though it is economically or educationally backward. What is the purpose of giving reservations was explained by Justice Sawant:

“492. While discussing Question No. I, it has been pointed out that so far as “backward classes” are concerned, clause (4) of Article 16 is exhaustive of reservations meant for them. It has further been pointed out under Question No. II that the only “backward class” for which reservations are provided under the said clause is the socially backward class whose educational and economic backwardness is on account of the social backwardness. A class which is not socially and educationally backward though economically or even educationally backward is not a backward class for the purposes of the said clause. What follows from these two conclusions is that reservations in posts cannot be made in favour of any other class under the said clause. Further, the purpose of keeping reservations even in favour of the socially and educationally backward classes under clause (4), is not to alleviate poverty but to give it an adequate share in power”.⁷³

The adequacy of representation in the services was explained by Justice Sawant:

“495.....Broadly speaking, the adequacy of representation in the services will have to be proportionate to the proportion of the backward classes in the total population.....”⁷⁴

So long as socially backward classes continued, reservations in services on economic basis under clause (4) or clause (1) of Article 16 are not permissible. If candidates belonging to both backward and forward classes are equal in merit, Justice Sawant held that:

“preference should be given to those belonging to the Backward Classes”.

On the question of weeding out the so called creamy or advanced sections of the backward classes, the reasoning of the learned Judge is important. If in the absence of exclusion of affluent sections from backward classes for the purpose of reservations, the consequence as described by the learned Judge is:

“520.What is more, it will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness.”⁷⁵

In the determination of the extent of forwardness achieved by the backwards for the purpose of application of creamy layer, the learned Judge held:

“..... it is necessary to add that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes.....”⁷⁶

Non-Hindu OBCs:

There are backwards among non-Hindus has been recognised. It is a social reality. Among the Muslims, the Census Act of 1901 in the Province of Bengal refers to the division of Muslims into Ashraf, Azlab and Arzal. Ashrafs are noble and they are the descendants of foreigners and converts from very high caste Hindus. All other Mohammedans including occupational groups and converts from

lower ranks are known as Azlals (wretches or mean people). Arzals are lowest of all.

Among Christians also, social divisions are there and several examples are given in the judgment. The observation in the judgment that the lists of Scheduled Castes in some States contain converts from Islam and Christianity, does not appear to be correct. The caste mentioned by the learned Judge are not in the Scheduled Castes List but some of them are in the list of Backward Classes.

Justice Sawant also highlighted the fact that sub-classification of the backward classes into backward and more or most backward would be justifiable. According to Justice Sawant, it is not only justifiable but essential.

Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purpose of Article 16(4). According to Justice Jeevan Reddy, the emphasis under Article 16(4) is mainly on social backwardness whereas under Article 15(4) the backwardness must be both social and educational. If some of the members of a backward class are far too advanced socially which in the context necessarily mean economically and also mean educationally forward. The test laid down by Justice Jeevan Reddy is that the basis for exclusion should not be merely economic unless the economic advancement is so high that it necessarily means social advancement.

Reservation of 10% of vacancies on the basis of economic backwardness was held to be constitutionally impermissible. Such reservation cannot be made under Article 16(4). Even under Article

16(1) it is not permissible. The reasoning given by Justice Jeevan Reddy is that it would amount to excluding those above the demarcating line from those 10% seats. It is not permissible to debar a citizen for being considered for appointment to a post under the State solely on the basis of his income or property held.

While analysing the caste structure, Justice Jeevan Reddy held that even if one does not follow the occupation of the caste, he continues to be the member of that group. Stating that the caste is nothing but a social class as opined by Dr. Ambedkar, the learned Judge observed:

“.....Lowly occupation results not only in low social position but also in poverty; it generates poverty. ‘Caste-occupation-poverty’ cycle is thus an ever present reality. In rural India, it is strikingly apparent, in urban centres, there may be some dilution. But since rural India and rural population is still the overwhelmingly predominant fact of life in India, the reality remains.....”⁷⁷

Although the Mandal Commission case has nothing to do with reservations in favour of Scheduled Castes and Scheduled Tribes, the majority judgment struck down the reservations in promotions in favour of Scheduled Castes and Scheduled Tribes, the reasoning being that such reservations are bound to affect the efficiency of administration.

"While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category

apart from the mainstream -a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and heart burning among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast track would necessarily result in leap frogging and the deleterious effects of leap frogging need no illustration at our hands”.

The earlier view of the Constitution Bench in Balaji case that in the matter of backwardness the other backward classes should be similarly situated to the Scheduled Castes and Scheduled Tribes was not accepted. The outer limit of reservation should not exceed 50% and a little relaxation may be permitted but while doing so great care should be taken was the view of the majority.

The reservation of seats in Parliament and Legislatures in favour of Scheduled Castes and Scheduled Tribes often have been subjected to criticism on the ground that indefinitely the same are being extended. The criticism also covers reservations in other spheres viz., educational and public employment. Any one who raises this controversy should bear in mind the assurance given in the Constituent Assembly by Shri K.M.Munshi, Member of the Drafting Committee:

“the safeguards are given to them to protect their rights only till they are completely absorbed in [the] Hindu community (emphasis added).”

The distinction between Hindu Community and Scheduled Castes is the barrier of untouchability and after the same was removed by Article 17 of the Constitution, Shri K.M.Munshi stated:

“.....we have removed the artificial barrier between one section of the Hindu community and the other.”

Reservations in Local Bodies: Supreme Court judgment in Krishnamurthy case:

A difficult problem has arisen due to the judgment of the Supreme Court in *Krishnamurthy Vs. Union of India* (2010) 7 SCC 202 delivered by a Constitution Bench. Articles 243D(6) and 243T(6) were challenged before the Supreme Court and a Constitution Bench in the above-said case held they are constitutionally valid.

While scrutinising the constitutionality, the Supreme Court observed that the principles evolved in relation to reservation policies under Article 15(4) and 16(4) cannot be readily applied in the context of local self government. The identification of backward classes under Article 243-D(6) and 243-T(6) should be distinct from the identification of SEBCs for the purpose of Article 15(4) and 16(4). So far as the existing lists of Scheduled Castes and Scheduled Tribes are concerned, the Supreme Court has not stated anything. The justification for upholding the constitutionality of the above provisions by the Supreme Court is that social and economic “in some localised settings, backwardness in the sense can also act as a barrier to effective political participation and representation. When it comes to creating a level playing field for the purpose of elections to local

bodies, backwardness in the social and economic sense can indeed be one of the criteria for conferring reservation benefits”.

The existing lists of backward classes have already been upheld by the Supreme Court in several decisions. It is impossible now to prepare a separate list for the purpose of political reservations in favour of backward classes other than the Scheduled Castes and Scheduled Tribes. The expression used in Article 243-D(6) and 243-T(6) is “backward classes” which means necessarily the backward classes as mentioned in Article 340(1) which is part of the original Constitution. The Backward Classes as per Article 340(1) are only “socially and educationally backward classes” in respect of whom the President may appoint a Commission to investigate their conditions. Article 16(4) which is part of the original Constitution speaks of backward class of citizens for the purpose of reservation in services. This backward class of citizens are none other than socially and educationally backward classes referred to in Article 340(1). This position was made explicit in The Constitution (First Amendment) Act by which clause (4) in Article 15 was added.

Other than social and educational backwardness which leads to economic backwardness, there cannot be any other rational method to ascertain the backwardness for the purpose of providing for political reservation. If the lists SCs and STs figuring in the Presidential Orders under Articles 341 and 342 are good for providing political reservation, it is difficult to understand how a separate test requires to be evolved in respect of OBCs. It is practically not possible to prepare a new list of backward classes exclusively for the

purpose of political reservation in the local bodies. The term “backward classes” must be understood in the context of what is laid down in Article 340(1) and that is the intention of the founding fathers of the Constitution. There cannot be a backward class in this Country which is free from social and educational backwardness.

Religion, as a factor to achieve social cohesion:

In a theocratic society, where only one religion exists, religion and law merge and so perfect social cohesion is possible. But definitely not so in a democratic pluralistic society like ours. Mixing of religion and law is anti secular. I have briefly traced the position with regard to social cohesion in Hinduism in the context of the hierarchical caste system. In the undivided India, there were separate electorates for religious minorities. It is a matter of history that the partition of the Country was in no small measure due to the presence of separate electorates which fostered a sense of separatism among Muslims.

After the partition of the Country, the Constituent Assembly critically examined the question of retention of reservation of seats for religious minorities. Sardar Vallabhai Patel, the Chairman of the Advisory Committee on Minorities and Fundamental Rights, in his letter to the President of the Constituent Assembly observed:

“Conditions have, however, vastly changed since August 1947 and the Committee are satisfied that the minorities themselves feel that in their own interests, no less than in the interests of the country as a whole, the statutory reservation of seats for religious minorities should be abolished....”⁷⁸

Pandit Jawaharlal Nehru, the first Prime Minister of India, while moving the motion on “pledge by members” in the Constituent Assembly declared on the mid night of 14-15 August 1947 that:

“India does not belong to any one party or a group of people or caste. It does not belong to the followers of any particular religion. It is the country of all of every religion and creed”.

There are two Articles viz. Articles 29 and 30, clearly dealing with the cultural and educational rights of the minorities.

“ Article 29. Protection of interests of minorities – (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30. Right of minorities to establish and administer educational institutions – (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language”.

It must be said to the credit of the minorities in India that they accepted the rule of the majority (in terms of religion majority rule

implied – rule by persons belonging to Hinduism). Dr. Ambedkar in the Constituency Assembly while referring to this aspect has laid stress on protecting the interest of minorities:

“.....It is for the majority to realise its duty not to discriminate against minorities. Whether the minorities will continue or will vanish must depend upon this habit of the majority. The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish”.⁷⁹

Our Constitution apart from guaranteeing equality before law and equal protection of laws contains specific provisions for safeguarding the interests of the minorities. In the matter of enjoyment of Fundamental Rights, there is no difference between Hinduism on one hand and the minority religions-Islam, Christianity, Sikhism and Zoroastrianism on the other.

Article 25 of the Constitution guarantees freedom of conscience and freedom to profess, practice and propagate religion. Freedom of every religious denomination to manage its own religious affairs including the right to own and acquire property and administer the same in accordance with law is guaranteed in Article 26. The guaranteed freedom goes to the extent of upholding the rights of a Muslim religious denomination - Dawood Vohra Community to excommunicate its members which entails loss of civil rights – rights which are enforceable in a Civil Court. Section 3 of The Bombay Prevention of Ex-Communication Act, 1949 invalidated excommunication of members of any religious community. That provision was found to be unconstitutional by the majority judgment of

the Supreme Court in *Sardar Sydna Taher Saifuddin Saheb Vs. State of Bombay* AIR 1962 SC 853. This case illustrates how the cohesion in a religious group could be protected by the Constitution although such cohesion is brought about by excluding persons who did not obey the command of the head of the sect.

To foster Social Cohesion as far as Hindus are concerned, it was felt democratisation of the religion was desirable. It is now recognised that the State under Article 25(2) can regulate secular activities associated with any religious practice and also undertake social welfare measures and reforms in respect of Hindu Religious Institutions of a public character. The State of Tamil Nadu amended the Tamil Nadu Religious and Charitable Endowment Act, 1959 dispensing with the hereditary principle in the appointment of Archakas. This amendment was the subject matter of interpretation by a Constitution Bench of the Supreme Court in *Seshammal Vs. State of Tamil Nadu* (1972) 2 SCC 11.⁸⁰ The Archaka was held to be only a servant of the temple and the appointment of Archaka is essentially a secular act:

“The archaka is not a spiritual head, but only a servant of the temple. The appointment of the archaka is essentially a secular act. The trustees are released from the obligation of appointment of archakas on the basis of heredity. Descent cannot be a part of usage”.

The desired result in making the amendment could not be achieved because of the concession made in the Supreme Court by the Advocate-General for the State that appointments of archakas would be made according to the tradition by following the

agamasastras which laid down that the appointment of archaka has to be made only from among members of a specified denomination.

In subsequent decisions the Supreme Court upheld the appointment of non-Brahmins as temple priests. N.Adithyan Vs. Travancore Devancore Devaswom Board (2002) 8 SCC 106: A secular interpretation was given to the concept of appointment of archakas in temple. The Supreme Court held:

“If traditionally or conventionally, in any temple, all along a Brahmin alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahmin is prohibited from doing so because he is not a Brahmin, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private temples”.⁸¹

In another path-breaking decision, the Supreme Court ruled that the expression religious denomination is not confined to any caste or community or social status. What is required is that (1) common faith based on religion; (2) common organisation; and (3) designation of a distinctive name.

Personal Laws and Social Cohesion:

The controversy whether by excluding the personal laws from legal scrutiny on the touchstone of the fundamental rights, social cohesion among the people of different religions could be protected, is not yet settled. The view of the Bombay High Court in State of Bombay Vs. Narasu Appa AIR 1952 Bombay 84 that the Constitution makers deliberately refrained from interfering with the provisions of

the personal laws still holds the field. See Ahmadabad Women's Action Group Case 1997 (3) SCC 573.⁸²

Even when the Constituent Assembly was discussing the draft Article 35 relating to uniform civil code (in the final form it became Article 44), there was resistance from some Muslim members asserting that no section of the people should be obliged to give up their personal law. Examples of European Countries like Yugoslavia which granted freedom to Muslim minorities in respect of family law in accordance with Muslim usage were cited.⁸³

Shri K.M.Munshi explained the object of incorporating the Article on uniform civil code:

“as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt would be made to unify the personal law of the country.

Dr. Ambedkar, Chairman of the Drafting Committee explained in detail how Hindu Law was made applicable to Muslims in the matter of succession upto 1937 when the Shariat Law was enacted. He visualised uniform civil code emerging as and when option is exercised in its favour.

“It is perfectly possible that the future Parliament may make a provision by way of a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the code may be purely voluntary. Parliament may feel the ground by some such method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province”.⁸⁴

The attempt to achieve Social Cohesion by a uniform civil code applicable to the people of the entire Country irrespective of religion, caste or sect could not succeed.

It is doubtful whether uniform civil code as stated in Article 44 can bring about social cohesion in a greater measure especially when there is no common ground in the religious beliefs between Hindus, Christians and Muslims.

In spite of the progress made by the Hindu religion in cultural and religious fields, the hard reality is that the social field was totally neglected since the custodians of the Hindu Culture persons are belonging to upper classes. Swami Ranganathananda, Head of the Ramakrishna Mutt admitted this fact in his "India's Vision of Samanvaya", lecture delivered under the aegis of late Kaka Kalelkar Foundation in 1995.

It is difficult to hide the truth that the harmony (Samanvaya) achieved in religious and cultural fields is only at a surface level. Overwhelming majority of the population had no role in the shaping of that Samanvaya because they were all kept out deliberately due to hierarchical caste structure.

Conclusion:

The process of Social Cohesion has spawned mixed results. While the goal is the well being of all the members of the society, each of the distinct entities (caste, language and religion) while strengthening itself is reluctant to sacrifice even to a little extent its identity for the common good. What is glaringly present in the

contemporary scenario is the consolidation of caste groups so far as Hindu religion is concerned. Upholding of the Mandal Commission's Report by which reservations were sanctioned by the Government of India has raised hopes in many sections of the population with the consequence that depending upon its popularity and power, each social group is trying to find a place in the list of Backward Classes for securing the benefits under Articles 15(4) and 16(4). Unless there is cohesion between one group and another which emerged as strong entities, social-strife becomes unavoidable.

One other noticeable feature is that when castes which have advanced socially by virtue of reservations and succeeded in securing positions became dominant in the society - the reservations enabled the protected classes to secure financial benefits in the matter of grant of licences for setting up businesses and industrial establishments. Depending upon the size of the population the dominance of the castes vary. Some times it is observed that power is wielded not by dominant castes but by dominant individuals of those castes. It is also true that the castes of the dominant leaders become strong and influential and the members of those castes utilise opportunities to acquire wealth and power. The establishment of Caste based associations has contributed a great deal in presenting a divisive society fragmented on caste lines.

As part of implementing social justice land reforms were taken up by several States. The erstwhile land owning classes whose social position and power rested on their feudal status lost their position of dominance along with the large estates owned by them.

Land ownership being the traditional means of wealth and power in the rural areas and the land owners always being members of upper castes the implementation of the land reforms resulting in surplus land being distributed to landless poor who mostly belong to Scheduled Castes, Scheduled Tribes and Other Backward Classes has further widened the gulf between the upper castes and the lower castes. The concept of social justice therefore did not find favour with the upper castes.

The temptation to corner the benefits of reservations by persons who do not belong to the reserved classes presents a darker side of the affirmative action by the State. The castes which do not qualify for the benefits under Articles 15(4) and 16(4) succeeded in getting themselves included in the lists of Backward Classes due to extraneous reasons – mostly political influence. This fact was noticed by Justice Ranganatha Mishra Commission:

“Both at the Central level and in States instances can be cited to establish that political considerations have largely guided ‘inclusions’. The dynamics for inclusion suggests that whether it be ‘Jats’ or Vokkalingars contingencies arising out of political compulsions have guided inclusion rather than the concern for the backward or the need for reaching out to that segment of the community”.....⁸⁵

How caste became a democratic incarnation

In several States where social cohesion among backward classes is weak and the tendency to unite and fight against the erstwhile feudal classes is absent, power has slipped into the hands of powerful castes which even though have lost monopoly over the land could make it up in Industry and Commerce. When power is captured it generates money is

an open secret. Political power is an instrument through which enormous wealth is acquired and that accounts for many families of politicians figuring as successful industrialists. In such a scenario over a period of time awareness is bound to spread among the communities who are numerically large to unite and fight against the upper castes for capturing power. Uttar Pradesh and Bihar are the two States where this experiment has succeeded. The newly acquired power through democratic process by the erstwhile marginalised sections has witnessed social-strifes commonly described as caste-wars.

The unity among the Scheduled Castes achieved through efforts by enlightened leaders made them targets of attack by the advanced sections. Between 1966 and 1976, there were 40,000 attacks on Harijans. Between March 1977 and January 1980, there were another 17000 such incidents. In one year 1429 crimes against Harijans were registered in Uttar Pradesh, in 1981. (see generally pages 345-380 – Castes, Society and Politics in India by Susan Bayly).⁸⁶

With regard to minorities, it cannot be said that they are cohesive entities. As described earlier prominent minority religions like Islam and Christianity do not always present a picture of unity. Within each religion, there are divisions based upon descent and caste identities. It is only when common questions concerning the religion as a whole crop up, we find large scale unity amongst them.

What has been implemented so far in the name of social justice by the State are all protected by the Constitution. What the Constitution of India has assured to the majority of the Country's population – Scheduled Castes, Scheduled Tribes and Other Backward Classes who in the

aggregate constitute 75% of the total population - cannot be destroyed in the name of the principle of equality, that is all are equal before law. In an unequal society like ours, equality has to be brought about only by differential measures. That is the mandate of the Constitution - very clearly stated in the preamble itself apart from other provisions.

Caste cannot be wished away in the name of equality before law. Matrimonial advertisements we see every day in the newspapers, the formation of political alliances along caste lines, distribution of tickets by the political parties for contesting in the elections, all convey the message unmistakably that the caste is a reality in the Indian society. If reservations are removed, the advantages enjoyed by the protected classes will disappear and due to the absence of economic strength they will go down in the social scale and ultimately the oppressive Hindu social structure will be revived. That should not be allowed to happen: as long as universal adult suffrage is our democratic norm, a minority segment of the Indian population hailing from the advanced sections cannot succeed in scrapping the entire scheme of reservations. As long as social inequalities are there, reservations will continue. Caste will disappear only if Mahatma Joti Rao Phooley's vision of low castes and outcastes become successful in:

“smashing up of the entire oppressive structure, ideological and material”.⁸⁷

In 1997 delivering Dr.B.R.Ambedkar Memorial Lecture at the Nagpur University I said:

“Social diversity must be reflected in the set up of all instrumentalities of the State and all institutions controlled or funded by the State. Real equality is possible only when past victims of social disabilities are able to claim on their own higher positions enjoying fair equality of opportunity without any demand for preferential treatment. For this the necessary precondition is social integration which in turn depends upon all social groups achieving more or less uniform development. The transience of affirmative action depends upon the duration of reaching this goal”.⁸⁸

Nothing has happened since then to change my opinion.

In the preparation of this lecture, I have received very able assistance from my Private Secretary Shri S.Mohanan Pillai, who ungrudgingly has worked for long hours taking dictation and going through the proofs for which I am highly thankful to him. My former Junior Mrs. Manjeet Kirpal, Advocate, patiently has gone through the manuscript and made my task of completing the lecture easier. I express my thanks to her. My wife Dr. M.Shalini unmindful of the inconvenience caused by my keeping awake for long hours consulting the books and taking down notes has greatly helped me in completing this lecture. Partly her cooperation is due to the fact that she considers Shri Konda Lakshman Bapuji as a father – figure. I place on record my debt of gratitude to her.

¹ Population of India in the New Millennium Census 2001 at page 122

² Population of India in the New Millennium Census 2001 at page 235

³ The History of Dharamshastras by P.V.Kane Vol II, Part I, page 33

⁴ David Miller: Social Justice, 1976 pages 22, 277 and 317

⁵ See Prof W.G.Ruciman, Relative deprivation and social justice- A study of attitudes to social inequalities in twentieth century in England.

⁶ See: Justice M.N.Rao, Random Reflections on Law and Society, 1995 pages 12-13.

⁷ See: The Cultural Heritage of India, Volume I, Page 84

⁸ The Penguin History of Early India by Romila Thapar page 125.

⁹ The History of Dharamshastras by P.V.Kane Vol II, Part I, page 33.

¹⁰ The History of Dharamshastras by P.V.Kane Vol II, Part I, page 51-53

¹¹ The History of Dharamshastras by P.V.Kane Vol II, Part I, page 21

¹² The Enworlded Subjectivity: its three worlds and beyond by R.Balasubramanian, Vol.XI, Part IV at page 108

¹³ Hinduism Past and Present by J.Murray Mitchell at page 77

¹⁴ Cultural Heritage of India, Vol-II, Page 351

¹⁵ The History of Dharamshastras by P.V.Kane Vol II, Part I, page 20

¹⁶ Hinduism Past and Present by J.Murray Mitchell at page 77

¹⁷ Hinduism Past and Present by J.Murray Mitchell at page 263

¹⁸ Hinduism Past and Present by J.Murray Mitchell at pages 92-93

¹⁹ Hinduism Past and Present by J.Murray Mitchell at page 93

²⁰ Hinduism Past and Present by J.Murray Mitchell at page 279

²¹ The Case for India by Will Durant, 2007 at page 3.

²² The Framing of India's Constitution, by Shiva Rao, Vol-IV, Page 429

²³ The Framing of India's Constitution, by Shiva Rao, Vol-IV, Pages 429-430

²⁴ The Civilization of India by Romesh C Dutt page 34

²⁵ 1992 Supp. (3) SCC 217. In Paras 475 and 476 Justice Sawant says that certain Muslim and Christian communities are included in the list of Scheduled Caste in Tamil Nadu. To the extent I could verify the castes mentioned by Justice Sawant are not in

-
- Scheduled Caste List but some of them are in the list of Backward Classes. This clarification is necessary so that it may not be said that Dalit Christians and Dalit Muslims have already been included in the list of Scheduled Caste.
- ²⁶ 1992 Supp. (3) SCC 217 at 533
 - ²⁷ 1992 Supp. (3) SCC 217 at 534
 - ²⁸ 1992 Supp. (3) SCC 217 at 535
 - ²⁹ History and Beyond by Romila Thapar page 86
 - ³⁰ 1985 Supp. SCC 590 at 594-596
 - ³¹ AIR 1963 SC 649
 - ³² 1992 (3) Supp) SCC 215
 - ³³ 28th report of the Commissioner for Scheduled Castes and Scheduled Tribes at page 551.
 - ³⁴ Constituent Assembly Debates, Vol.9, Page 997
 - ³⁵ AIR 1966 SC 1220
 - ³⁶ The Framing of India's Constitution, by Shiva Rao, Pages 582
 - ³⁷ 2005 (1) SCC 394
 - ³⁸ Albert Schweitzer: Indian Thought and its Development, 1960 Edn. P.211
 - ³⁹ Albert Schweitzer op.cit.p.214
 - ⁴⁰ Susan Bayly: Caste, Society and Politics in India- Pages 165-166
 - ⁴¹ Swapan K.Biswas: Gods, False Gods and untouchables at pages 236 – 240.
 - ⁴² Dhananjay Keer: Mahatma Jotirao Phooley – Father of Indian Social Revolution, page 72
 - ⁴³ Dhananjay Keer: Mahatma Jotirao Phooley – Father of Indian Social Revolution page 78
 - ⁴⁴ Prof. P.J. Jagirdar in his book Studies in the Social Thought of M.G.Ranade at page 97
 - ⁴⁵ <http://www.sndp.org/Html/BiographybyDr.S.Omana.html> # Narayana Guru and Mahatma Gandhi and MN Rao: Ambedkarism and Its Impact on the Constitution of India published by the Administrative Staff College of India, page 6.
 - ⁴⁶ Susan Bayly: Caste, Society and Politics in India- Pages 252
 - ⁴⁷ Susan Bayly: Caste, Society and Politics in India- Pages 247
 - ⁴⁸ Ambedkar Writings and Speeches, Vol.5 Page 99
 - ⁴⁹ The Framing of India's Constitution, by Shiva Rao, Pages 103
 - ⁵⁰ MNRao: Ambedkarism and its Impact on the Constitution of India page 25.
 - ⁵¹ B.Shiva Rao: The Framing of India's Constitution Vol. 1, pages 94-95
 - ⁵² B.Shiva Rao: The Framing of India's Constitution Vol. 1, pages 342-343.
 - ⁵³ Sudipta Kaviraj: Politics in India, page 80.
 - ⁵⁴ B. Shiva Rao: The Framing of India's Constitution: A Study and Select Documents Vol. 1, pages 193-194.
 - ⁵⁵ Keshavananda Bharathi Vs. State of Kerala (AIR 1973 SC 146)
 - ⁵⁶ AIR 1958 SC 30 at P.34:
 - ⁵⁷ Reserve Bank Employees Association Case – AIR 1966 SC 305 page 305 at pp.316-317:
 - ⁵⁸ Constituent Assembly Debates Vol. 9 page 1192.
 - ⁵⁹ Constituent Assembly Debates Vol. 9 page 1300.
 - ⁶⁰ (State of West Bengal Vs. Mrs. Bella Banerjee AIR 1954 SC 170 at 272).
 - ⁶¹ Vajravelu vs. Special Deputy Collector AIR 1965 SC 1017 at page 1024.
 - ⁶² Constituent Assembly Debates, Vol. 7, Page 669.
 - ⁶³ Constituent Assembly Debates, Vol. 7, p.696-697.
 - ⁶⁴ M.N.Rao: Reflections on Law, page 144.
 - ⁶⁵ Mandal Commission Report: Vol. I, page 3.
 - ⁶⁶ Mandal Commission Report Part I, Vol. I, Page 17.
 - ⁶⁷ Mandal Commission Report: Part I, Vol. I page 16.
 - ⁶⁸ Mandal Commission Report: Part I, Vol. I, page 54.
 - ⁶⁹ Mandal Commission Report: Part I, Vol. I, Page 56
 - ⁷⁰ Balaji Vs. State of Mysore AIR 1963 SC 649
 - ⁷¹ Indra Sawhney Vs. Union of India (1992) Supp. 3 SCC 217 paras 420 & 421 at page 512-513.
 - ⁷² Indra Sawhney Vs. Union of India (1992) Supp. 3 SCC 217 para 482 at page 537-538.
 - ⁷³ Indra Sawhney Vs. Union of India (1992) Supp. 3 SCC 217 para 492 at page 541:
 - ⁷⁴ Indra Sawhney Vs. Union of India (1992) Supp. 3 SCC 217 para 495 at page 542-543.
 - ⁷⁵ Indra Sawhney Vs. Union of India (1992) Supp. 3 SCC 217 para 520 at page 553.
 - ⁷⁶ Indra Sawhney Vs. Union of India (1992) Supp. 3 SCC 217 para 520 at page 553.
 - ⁷⁷ Indra Sawhney v. Union of India (1992) Supp 3 SCC 217, para 779 at pages 714-715.
 - ⁷⁸ Constituent Assembly Debates, Vol. 5 pages 243-247.
 - ⁷⁹ The Constituent Assembly Debates, Vol. 7 page 39.
 - ⁸⁰ Seshammal Vs. State of Tamil Nadu, 1972 (2) SCC 11 (Constitution Bench)
 - ⁸¹ N.Adithyan Vs. Travancore Devancore Devaswom Board (2002) 8 SCC 106
 - ⁸² Ahamadabad Women's Action Group Case 1997 (3) SCC 573.
 - ⁸³ See Constituent Assembly Debates Vol. 7 page 541
 - ⁸⁴ Constituent Assembly Debates Vol.VII page 551
 - ⁸⁵ Report of the National Commission for Religious and Linguistic Minorities page 66
 - ⁸⁶ see generally pages 345-380 – Castes, Society and Politics in India by Susan Bayly.
 - ⁸⁷ Selected Writings of Joti Rao Phooley – Edited by G.P.Deshpandey, Page 21.
 - ⁸⁸ MN Rao: Dr.B.R.Ambedkar Memorial Lecture at the Nagpur University