LAW AND STATE : A STUDY OF JUDICIAL DISCOURSES IN CONTEMPORARY INDIA

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Submitted by

Gitanjali Chaturvedi

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI - 110 067
INDIA
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Jawaharlal Nehru University
New Delhi - 110067, India

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES

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CERTIFIED that the Dissertation entitled "Law and State: A Study of Judicial Discourses in Contemporary India" submitted by Ms. Gitanjali Chaturvedi, an M.Phil. student of the Centre for Political Studies, School of Social Sciences of this University, in partial fulfilment of the requirements for the award of the Degree of **Master of Philosophy** is a original piece of research work.

To the best of our knowledge and belief this has not been submitted to this or any other University in the past for grant of any degree.

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PROF. KIRAN SAXENA
Chairperson

DR. NIRAJA GOPAL JAYAL
Supervisor

CHAIRPERSON
CENTRE FOR POLITICAL STUDIES,
SCHOOL OF SOCIAL SCIENCES-II,
JAWAHARLAL NEHRU UNIVERSITY,
NEW DELHI-110067.

Ph. : 6107676, 6167557 / Ext. 257 Fax : 011-6165886 Gram : JAYENU

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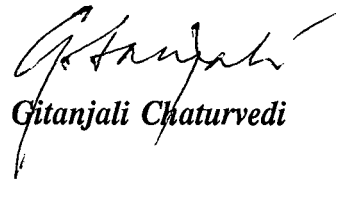

- Gitanjali Chaturvedi

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INTRODUCTION

Introduction

To study Judicial Discourses in Contemporary India, one must first locate the role of law *vis-à-vis* state –society linkages. The nature of law in a society such as ours is bound to have peculiarities of its own as it is a product of modern rationality and prevails in a tradition bound society. The role of law and therefore the state and its institutions – the executive, legislature and the judiciary, becomes that of a reformer. The state can be seen, in the Indian context as such, championing ideals such as secularism, democracy, equality and social justice.

In order to understand state – society linkages, it becomes necessary to examine the relationship between major societal transformation and the state, their ability to establish comprehensive political authority and their success in defining the prevailing moral order or in determining the parameters of daily social relations. Thus the state, as a set of organizations invested with the authority to make binding decisions for people and organizations, juridically located in a particular territory and to implement those decisions if necessary, by the use of force, wields power as an infrastructural capacity to penetrate civil society and to implement logistically, political decisions throughout the realm.[1]

It is difficult to envisage the society as being independent of the state. The creation of the state has activated the society, and the two may be found to be mutually reinforcing. Also, clashes between the social forces, including the state are mediated through struggles and accommodations in various arenas of society. Such struggles are significant in altering or affecting the disposition of resources, the nature

of stratification, the character of gender relations and the content of collective identities. Meeting grounds between states and other social forces can range from conflict and complicity, opposition and coalition, corruption and cooptation.

The state has, however, always tried to achieve domination over the social forces – whether integrated or dispersed. The state makes inroads via ideology in order to create a hegemonic presence. The goal is to penetrate the society deeply enough to shape how individuals throughout the society identify themselves and the organization of the state affects such far-reaching domination. It includes vertically connected agencies designed to reach all pockets within the territory and specialized components to promote the state's system of meaning and legitimacy (schools) to make universal rules (legislative bodies), to execute those rules (bureaucracies) to adjudicate (courts, to coerce (armies and police).

Migdal observes that in the multiple meeting grounds between states and other social components, the struggles and accommodations have produced a range of outcomes.[2] He identifies four ideal types -- that of *total transformation* wherein the state's penetration leads to the destruction, cooptation or subjugation of local social forces and to the state's domination. This can affect or even change the way in which people choose to identify themselves and in seen most commonly in instances of forced migration, the replacement of locals by a settler population, the widespread use of violence and similar draconian measures.

Often *existing social forces may be incorporated* within the state. The state may inject new social organizations, resources, symbols, and force into an arena

which enables it to appropriate existing social forces and symbols in order to establish a new pattern of domination. These changes and accommodations also occur on the part of the state and its components as they adapt to the specific patterns and forces in the arena, affecting thereby, its overall coherence and hence, its ability to reallocate resources, establish legitimacy, achieve integrated domination and so on.

Migdal doesn't rule out the possibility of *existing social forces' incorporation* of the state. Herein, the new state presence need not generate new patterns of domination, but ones in which new non-state forces rise to the top. Also, the presence of the states' components may initiate adaptation by dominating social forces but may not result in radical changes in patterns of domination. The personal identity and moral order resulting thereby, is not always the one envisioned by state leaders. Given the above scenario, the chances of achieving integrated domination in society by the state may be harmed considerably.

The state may also *fail altogether* in its attempt at penetration. Disengagement or lack of engagement of the state in the local arena will result in little transformative effect on society; and limited effects of the society on the state; thus affecting resource allocations and support from the larger society.

However, the state and society cannot be envisaged as having distinct boundaries. The Civil Society assumes the existence of a normative consensus or hegemony of fundamental ideas among social forces, even among contending groups; the consensus supporting a prevailing moral or social order. Migdal envisages the civil society as a tie that binds all; bearing a hand-in-glove relationship with the state.[3]

Intermediary institutions, in his opinion, signify a civil society in which organizations guard a degree of autonomy from the state. Such autonomy leaves the way open for some differences between state and non-state agencies.

The existence of the Civil Society reinforces the dominance of the state and allows it to rule without constant recourse to coercion or without an outlay of resources that would cripple it. Conflicts may persist on particular issues, but implicit agreement prevails over the rules for interaction and competition. Also for the most part, it is the legal framework of the state that establishes the limits of autonomy for the associations that make up the society. The state and civil society are thus, in a sense, mutually reinforcing.

Since the legal framework of the state plays a crucial role in determining state-society relations, it becomes necessary to examine the nature of law and its scope. Austin has defined the law thus -- `A law in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him... Every *law* or *rule* (taken with the largest signification which can be given to the term properly) is a *command.* Or, rather, laws or rules properly so called, are a species of commands...(A) law, properly so called, ...is a command which obliges a person or persons, and obliges generally to acts or forbearances of a class...(that is to say) to a course of conduct...(T)he term superiority (like the terms duty and sanction) is implied by the term command... Strictly speaking, every law properly so called is a positive law. For it is put or set by its individual or collective author...Laws, properly so called are a species of commands. But, being a command,

every law, properly so called flows from a determinate source or emanates from a determinate author... If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society, political and independent.[4]

Such a definition of law according to L.C. Green, is limited/relevant only to criminal law as matters relating to religion, family, commerce, property and so on, do not require a determinate superior for their existence or any sanction in the punitive sense. From occupying a position as the legitimiser of morals, law has certainly changed its scope over the centuries. The science of jurisprudence which studied law with a view to ascertaining whether or not it was in consonance with morality (and thus, to an extent, religion), has shifted in focus. The true role of law in society today, is the maintenance of peace, order and reasonable existence within the group.

This shift can be attributed to the growth of Pragmatism in the study of law which is a naturalistic experimental and this – worldly philosophy.[5] The Law is perceived to be forward looking and envisioned as the servant of human needs. Cardozo emphasizes that this pragmatic tendency stresses that it is not the origin but the goal that is important. This view asserts that the judge in weighing the social interests shaping the law should seek adequate knowledge from experience, study and reflection, and from life itself. The judge is not a finder, but a maker of the law in this sense.

Quite akin to the pragmatic view is the trend of legal positivism, a view that law consists entirely of black letter rules.[6] 'Rules are ascertainable in some way that does not involve making any moral judgements about their content. Legal rules can be

identified by their source. Joseph Raz, a legal positivist maintains that all laws emanate from sources. Law has a source if its content and existence can be determined without using moral arguments. He makes no assumptions about the contents of the legal order. One cannot assume, therefore, that rules are just, or that they embody a conception of justice, or that they pursue a coherent and mutually compatible set of purposes. Legal positivists maintain that laws may have been enacted in response to the shifting and changing pressure of powerful interest groups. Human actions, practices and institutions are analyzed into patterns of behaviour by legal positivists. In such a view, the doctrine of precedent becomes increasingly formalised as legislation becomes the dominant model for all law making. Legal positivism, is an attempt to reinterpret traditional institutions and patterns of reasoning along lines consistent with a changed and changing situation.

However, it needs to be emphasized that law is based on some conception of justice. The positivists see it, instead as an instrument of shifting and changing social policies.

The legal system is thus, a complex body of practices, particular practices of reasoning and justification. It includes elaborate conceptual structures of doctrines and principles, explicit and sophisticated forms of reflection and criticism.[7]

The intellectual, theorised aspect of the legal order is embodied in legal doctrine: the corpus of rules, principles, doctrines and concepts are used as a basis for legal reasoning and justification. Doctrine represents the heart of a legal system as well as its brain. Only having understood the nature of legal doctrine can we

comprehend the workings of Courts, lawyers and even legislatures. Legal science is thus a systematic and ordered exposition of legal doctrine in the works of juristic commentators.

Mac Coruick notes that, `the concept of contract denotes a legal institution whereby legal relations are established on the basis of agreement between parties (or something like that)'.[8] Different specific conceptions of contract prevail in different times, places and systems. His definition of a legal institution has induced Professor Simpson to comment that `perhaps a neutral definition; which does not reflect, current ways of looking at the law, is not attainable'. American jurist Roscoe Pound, treated concepts of interest, right, duty and remedy as ranged on a scale of logical priority. Historically the legal system had moved from emphasis on remedies to duties, to rights and finally to interests; but the logical sequence, he held, was the reverse of that, and *interests, being logically basic, should play the central role in a scientific understanding of the law.* (emphasis added).

The articulation of interests into legal theory and into laws determines the nature of the state and thus the society. Indeed, since interests emanate from various sections of the society, the state is conceived of as an arena where bargaining takes place and the view of the majority/elite is considered.

One of the approaches which brings the predominance of interests sustained within laws to light is the feminist. The feminist legal theory (which determines the course of the first chapter on UCC), brings to light the contradictory ways in which law is implicated in the oppression of women. Legal discourse has constructed

women as gendered subjects --- as wives and mothers, as passive and weak, as subordinate and in need of protection.[9] The construction of women's roles and identities has further contributed to their subordination. At the same time, law is a site where roles and identities have been challenged. It is the site where social reformers and feminist activists have sought to displace previously dominant understandings, of women's appropriate roles and identities, and sought to reconstruct the same as full and equal citizens. The law needs to be reconceptualized as a site of discursive struggle, where competing visions of the world, and of women's place therein, have been and continue to be fought on.[10] Such a reconceptualization, can better capture both the possibilities and limitations of law, and laws contradictory nature in women's struggle for social change.

The feminist approach to law identifies the family as a site where legal regulation of women takes place. The oppression of women takes place via a set of norms, values etc., about the way in which family life should be organized. These ideas have been universalized to a large extent and apart from appearing as the norm, diverse societies seem to subscribe to a common ideology of the family that informs the legal regulation of women. Women are conceived as wives and mothers and such a conception limits law's ability to deliver on its promise of equality for women.

This approach holds law responsible for historically contributing to the inequality of women and for the construction of their sexuality,. It notices three perspectives on the literature on women and law. These are:

(a) Protectionism – which conceives women as weak, biologically inferior, modest and so on. This approach perceives feminine

characteristics as natural and reinforces patriarchy and glorifies marriage and motherhood.

(b) Equality approach – assumes that law can play a very important role in bringing about equality and in removing the legal obstacles that limit women's full and equal participation.

> [The Report on the Committee of Women in India held that one of the main characteristics of modern society is a heavy reliance on law to bring about social change]. The role of the state as envisaged in by the Committee was to perform the tasks of social reconstruction, development and nation building all of which call for major changes in the social order, to achieve which legislation is one of the main instruments. It can act directly, as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable.

Legislation, however, is not sufficient to change society. To translate these rights into reality is the task of other agencies. Public opinion has to be moulded to accept them. Legislation is often narrowly interpreted by Courts and thus they have failed in giving effect to the principles underlying them.

Kapur and Crossman insist on a simultaneous move to alter the social and economic structures and culture of the society. They note that law is a necessary but insufficient part of a more general strategy of bringing about social change.

(c) Patriarchy – The views of Nandita Haksar, Lina Gonzalves among others have contributed to this approach which holds that law enforcers discriminate between women and men and unconsciously tend to reflect traditional and rigid attitudes towards women. The police, public prosecutors and the judges, who are products of a patriarchal society, are by and large biased against women, and ...help to perpetuate and preserve the oppression of women.

They feel that law has done little to transform the social order. The outcome of trials and the unwillingness of the police to probe violence against women at home and in society has led to a situation in which the law as a whole can easily be taken as an instrument of patriarchal oppression. Law is thus seen as an instrument of patriarchy.

This approach is criticized as it is limited in perspective and sees patriarchy as ahistorical and universalistic; constructs women only as victims rather than as agents of resistance and change, as well as for its focus on gender oppression to the exclusion of other forms of oppression.

Socialist Feminists try to remedy the shortcomings of the previous approach to law by analysing both gender and class and locating oppression in both patriarchal and capitalist relations. They analyse the relation between law, society and state in order to examine the way in which this relationship is implicated in women's oppression. Fivia Agnes, one of the chief proponents of this school, is largely concerned with examining how reforms in law serve to enhance women's suffering. She observes that each law vests more power with the state enforcement machinery. Each enactment stipulates more stringent punishment, which is contrary to progressive legal reform theory of leniency to the accused. She questions whether progressive legal changes for women's rights can exist in a vacuum in direct contrast to other progressive legal theories of civil rights. Instead of empowering them, laws which purport to protect women, strengthen the state.

Lucinda Finley sees law as an authoritative discourse. She holds that through law, meanings are reflected and constructed and cultural practices organised. Such meanings shape popular and authoritative understandings of situations.

Carol Smart observes that law's claim to truth `in setting itself out of the social order' from where it can reflect upon the world from which it is divorced gives it a powerful ability to disqualify opposing discourses. It may be argued that legal discourse constitutes subjects as legal citizens; as individuals with rights and responsibilities, *vis-à-vis* other citizens and the state. This discourse is both universalizing and naturalizing as it implies that all legal citizens are the same and all legal citizens are natural subjects.

However, legal discourse and law is not homogenous and does not constitute all legal citizens in the same way. It sees them as gendered subjects. As an official, though relatively autonomous discourse of the state, law plays a role in legitimizing unequal power relations. At the same time, it is the relative autonomy of law from other branches of the state that creates the possibility of it operating to challenge these unequal power relations. The legitimacy of law lies in its purported objectivity, neutrality and universality. In order to sustain its legitimacy, the law should appear to be equally applicable to all its citizens. The principles of equality before the law and of equal protection of the law must be accessible to all legal subjects including members of socially disadvantaged groups. These values of legal liberalism create law's counter hegemonic potential. Women, colonized peoples, lower castes and other historically disenfranchised groups have been able, with some degree of success, to appeal to legal discourse, to legitimize and realize their struggle for inclusion.[11]

Marxist theory regards ideological hegemony as a rationale for law and state and to that end considers all institutions that participate in the creation of ideology as part of the state apparatus. The Constitution and the law consist of legitimizing norms, institutions and practices. Struggles in society over the distribution of advantages and disadvantages are reflected in changes in the law through control over the political authority of the state.[12] Law, according to Marxists excludes many through doctrine, procedure, etc., and seeks to maintain and reproduce a capitalist system.

Marxist theory, further argues that the notion of `neutrality' often attached to the offices of bureaucrats, public servants and so on is often, misleading, as such men are not altogether immune to ideological inclinations. Miliband adds that in every capitalist country, individual leaders have occasionally played a notable part in social, economic, administrative and military reform. This has however, been an exception rather than the rule; where reform does occur, it takes place with a strong determination to strengthen the existing social order.

Similarly, the judicial application of the law and judicial acceptance of the repressive efforts of governments and legislatures, do not simply constitute a `neutral discharge of the judicial function', they constitute a political act of considerable significance to provide the government and legislatures with an element of additional legitimization.[13] Courts thus, strengthen the arm of the government especially in dealing with dissent.[14] Judiciary has thus not been `above' the conflicts of capitalist society and the judges have been as deeply involved as members of any other part of the state system. Moreover, the dominant classes, Miliband observes, have had the

least to complain about the nature and direction of that involvement. Both the law and the legal system thus have a distinct class bias.

Upon attempting to view the Indian state and providing a Marxist analysis of the same, Sudipta Kaviraj[15] arrives at the conclusion that the Indian state is bourgeois. He holds that a bourgeoisie format of the state, or the bourgeois character of the legal system, property structure and institutions of governance are clearly evident. The Indian Constitution clearly reveals this in setting down some limits and prohibition through the rights of property, although this serious and decisive core is surrounded by looser reformist advisory clauses, and based on some necessary illusions of bourgeois power, like its extreme constructivism the myth seriously believed by the early ruling elite, that patterns of law can direct social relations rather than reflect them, an illusion which made the framers carry the constitutional document to an unreadable and agonizing length.[16] The Indian Constitution is considered to be a lawyer's document which is subject to manipulation and interpretation. However, the original draft of the Constitution reflected the acceptance of the social plan of the elite. Subsequent insertions of socialistic principles in Kaviraj's view were ceremonial and were objected to from several quarters.

The role of the state in the planning process in setting economic targets and thus in the reproduction of capital was in a sense compatible with the bourgeois development perspectives. Any bourgeois state tries to consolidate its dominance over all spheres by establishing some degree of moral-cultural hegemony. In addition to economic control and directive power, the state in advanced capitalist societies in the West employ what Poulantzas call its `institutional materiality'[17] to reinforce, extend

and elaborate its dominance.[18] Kaviraj expresses this in the Gramscian form by holding that `one of the crucial legal-formal principles of the capitalist state is the investiture on the state of the title of universality, a legitimate title to speak on behalf of the society `in general'; this includes an implicit admission that other interests, at least in their raw, economic form constitute a `civil society' representing the rule of particularity of interests'.[19] To apply the Gramscian method to the Indian situation would be problematic as the Indian capitalist class does not exercise the kind of moral-cultural hegemony envisaged by Gramsci. The application of political dominance to the capitalist class in a society where the capitalist form of production is still not entirely predominant would raise theoretical problems. Kaviraj thus maintains that the hegemony is maintained by a coalition strategy carried out partly through the state-directed process of economic growth and partly through the allocational necessities indicated by the bourgeois democratic political system. The Indian bourgeoisie is not politically predominant either as there is a strong presence of pre-capitalist political forms in our governance; also because the pre-capitalist form of political life in rural India must be given analytical weight.[20]

Having established then, the nature of the state in India it is necessary to view the law and the legal system that prevails in the country. Before embarking on an examination on the nature of law, we must bear in mind that since the Indian state is governed by a coalition of classes, it follows that the political arena is prone to bargaining. The legal, being inextricably tied with the political since interests of these classes are involved, is similarly prone to influence and bargain. The coalition of classes is rather a coalition of castes, and the state is always concerned to placate their

interests. Due to the constant social changes in society, the coalitions of classes/castes is never constant as castes/classes continue to align, realign, reconfigure themselves and create new bargaining arenas for themselves.

Indian law, according to Galanter has the following four peculiar features[21] --

> ...first, legal materials are normative rather than descriptive. They are so immersed in technicalities and at the same time so given to rhetorical idealizations so as to obscure rather than reveal social realities. Second, doctrine does not necessarily reflect practice. The actual behaviour of the regulators and regulated does not necessarily bear any constant relation to doctrine; doctrine, therefore, provides no reliable index either of actual patterns of regulative activity or of the degree of conformity of the behaviour purportedly regulated. Third, nationwide generalizations are of little value. India is a vast and heterogeneous society. Since the law largely ignores local conditions in favour of nationwide generalizations, it is of little value in understanding local conditions and inevitably obtrudes misleading generalizations. Finally, Indian law is foreign. Much of the greater part of modern Indian law is palpably non-Indian in origin and is notoriously incongruent with the attitudes and concerns of most of the Indians.

The reason behind the existence of such peculiarities in the nature of Indian law can be attributed to the intention of the founding fathers to reform a traditional orthodox society by introducing modern laws envisaging equality before the laws, of opportunities, social justice and so on. The founding fathers wanted to bring society at par with its legal system and the state apparatus – the legislature, executive and the judiciary, thereby granting them tremendous roles and scope for socio-economic development. A compromise, however, was made on two major standpoints:

(a) Personal laws of communities has been retained

(b) Compensatory/positive discrimination by way of reservations to the historically disadvantaged, backward and marginalized classes has been envisaged.

Both these compromises are of a temporary nature. They put the onus of social reform on the State and its organs. Indeed, abolition of Child Marriage, Sati, Untouchability, introduction of divorce etc., have been endeavours on part of the state to reform society. The Judiciary, as an important arm of the state, is required to further such reforms thereby reducing the gaps between the state and society.

The process of ushering in reforms through the judicial wing have been slow and gradual. The state does aspire to bring about a uniform Civil Code in the country; indeed, there are some laws pertaining to `public life' which are applicable to all. These are:

1. Indian Penal Code, 1860, legislating against bigamy and adultery
2. The Code of Criminal Procedure 1898, amended in 1923, 1958, 1973 and 1974 which provides for protection and care by children of parents and for wives by husbands. Sec.125 makes it the husband's duty to provide maintenance to a divorced wife within a certain period of time. Other common laws are: Child Marriage Restraint Act, 1929; The Maternity Benefits Act, 1969; The Dowry Prohibition Act 1961, amended in 1984.

The Diverse Acts/Codes that prevail are:

1. The Hindu Marriage Act 1955 and the Hindu Succession Act 1956.
2. The Muslim Personal Law (Shariat) Applications Act, 1937; The Dissolution of Muslim marriages Act, 1939; The Muslim Women's (Protection of Rights on Divorce) Act, 1986.
3. Christians are governed by the Indian Christian Marriage Act 1872; The Indian Divorce Act, 1869; and the Indian Succession Act, 1925.

The prevalence of diverse codes becomes problematic as not all religions envisage the `private domain' – of family, marriage, inheritance and so on in the same

manner. Entitlements vary according to gender and denomination. Uniformity in this sphere is necessary not only to ensure gender justice, but also to curb the iniquitous outcomes it leads to in the public sphere; as the public and the private spheres are related and determined by each other. The minorities, however, have been safeguarding the existence of personal laws as they fear that a reform might affect their identity and thwart community life and sentiments. There is also a feeling amongst these communities that a UCC will necessarily be one which will keep the interests of the majority in mind, homogenising thereby a diverse Indian tradition and introducing laws alien to their – lives, cultures, traditions, customs and so on. Another angle which obtains in a discussion on the UCC is the feminist one which sees a reluctance on the part of the communities and the state to usher in a common code as a means of maintaining the existing patriarchal relations. Even if a UCC is introduced, the laws shall be far from gender just.

Perhaps the insecurity on part of women and minority communities stems from the fact that the state has given in to the demands of the majority and has continued to play the politics of divide and rule in encouraging insecurities among communities, thereby ensuring its political survival. For the state is constitutive of an alliance/coalition of classes, interested in preserving their domination. The compensatory/positive discrimination policy of the state can be seen as an extension of the coalition politics. The state being an arena for bargaining, co-opts members from classes/castes to perpetuate its own existence. This leads to an expansion in the vote bank on the one hand and the placation of emergent classes/castes through one of the compensatory discrimination schemes, on the other.

The role of the Judiciary in the above sense is that of a legitimiser. As the guardian of the Constitution, and the reformer of a society in transition, the Court is required to support the policies of the state on the pretext of national unity, development, social justice and so on. The judiciary therefore, makes a conscious attempt at ensuring that the status quo is maintained. Its judgements, on close examination seem coloured, and the judiciary seems in most cases to be a conservative wing of the State. The pace of reforms tend to slow down on the plea that the society will encourage reform from within. In adopting such a stand, the State perpetuates traditionalism, patriarchy and division rather than unity, modernity and progress.

That such bargaining and alignment takes place in a democratic set-up can be justified on the basis of the fact that any liberal society gives enough space to individuals, communities and institutions to effectively project their interests. It is a matter of concern however, whether it involves a compromise on the ideal of secularism that the Indian state so dearly espouses. Three `secular' question becomes important since the arena available for bargaining is dependent on the primordial identities of individuals. The Indian State, in other words, allocates resources on the basis of ascribed identities. Conflicts between members of different groups, communities and so on are bound to emerge, threatening the secular nature of the State and society. The role of the judiciary in this sphere becomes important; and it is important that the distinction between religion and law be emphasized. A.A.A. Iyzee makes such a distinction by recognizing that although in Islamic law, for instance, the Shariat makes law and religion interchangeable and thus the same; this intermeshing

produces an anomaly especially in the context of the modern nation state because the law by its very nature can be changed whereas religious texts cannot. Secular law can be changed without necessarily invalidating the ideology on which it was founded. Religious or textual law can be challenged on the basis of contradicting the ideology on which it was founded. It follows then, that not only does the preservation of personal law contradict with the secular principle, it is also antithetical to the principles of liberal democratic theory. One must ask whether a collective cultural right could be mused as an instrument to perpetuate thoroughly illiberal practices within the group? Would individual members have the right to leave the group? If the individual right to exit is granted, would that not in effect undermine the right of the group to preserve its identity?...If a right of exit is denied, would we still have a liberal society?[22]

The question of secularism involves an examination of the principle of equality and freedom of religion as has been granted by the Constitution and as is practised in the state. It involves respect for individual autonomy and deep tolerance for each other's beliefs and faiths.

The Indian state, practices a policy of reform and maintains a principled distance in all religious matters. The Court is often asked to adjudicate on these issues and such decisions have given rise to a distinct policy – largely conservative, championed by the judiciary.

The Indian political scene has witnessed an intensification of the communal problem. The state has come in for a lot of flak over the issues of both Mandal and the

Uniform Civil Code. In fact, the secular character of the state, to many seems to be under threat especially in the face of such events as the demolition of the Babri Masjid and the failure of the State to intervene and prevent the occurrence of the event. Communities have increasingly become intolerant of each other and to many observers the secular ideal on which the state was founded is gradually eroding. The judiciary seems to be lenient also in cases where the religious symbols or the Hindutva rhetoric is used. To many scholars, India cannot sustain a secular society because of its deep religiosity. To yet another section, Indian society, despite its deep-seated religious outlook, can arrive at a secular democratic model given ample time. The debate on secularism becomes necessary and is discussed in the last chapter to clarify the notions and issues involved. The relation of secularism with the issues of UCC and Mandal are also discussed. It is important to analyse the issue of Secularism with regard to the judiciary and its judgements especially when political issues are concerned, for many often argue that the judiciary gives considerable latitude to political parties and the organs of the state while meting out severe punishments to individuals and organizations. The Judiciary has been critiqued also of taking a conservative attitude by not sufficiently punishing, stray incidents of Sati and the more frequent dowry death cases.

The discussion of what a secular society in the Indian polity entails and the role played by the judiciary in preserving this secular nature is therefore, very important.

On the basis of the above discussion, the foregoing study seeks to study the following:

(a) Judicial Discourses on two specific areas – the issue of the Uniform Civil Code and the issue of reservations especially with regard to the recommendations of the Second Backward Classes Commission, also called the Mandal Commission

(b) In this regard, it will examine the nature and scope of the laws concerned and view the judiciary as part of the State apparatus on the basis of the judgements and judicial pronouncements.

(c) An examination of the judiciary as a conservative apparatus of the state, in keeping with the politics championed by the State will also be important and a brief study of judiciary and secularism will be required. This will be in specific connection with the two areas mentioned before.

The study makes the following assumptions:

(a) It sees the state and society as mutually reinforcing. The existence of a dominant class in such a society is taken as self evident and the existence of coalition of classes and of bargaining arenas is recognized. The Indian laws are subject to myriad interpretations and the law is prone to manipulation.

(b) It recognizes that law by itself cannot usher social change in India. This has to be supplemented by other factors such as strong secular institutions, efficient bureaucracy, social reforms, independent judiciary and so on.

(c) The scope of the law is wide but the Judiciary prefers a narrow interpretation of the law.

By this I mean to emphasize the fact that law can be manipulated. This, however, depends entirely on the judiciary and its view of what the law should entail and the degree to which it could be stretched. Here, the judiciary prefers to follow the exact letter of the law whereas more creative solutions could be offered, and the scope of law enhanced by such a precedent.

The Methodology adopted ins a study of Constitutional Provisions, of Judicial Pronouncements on the one hand; and a review of literature in the form of comments made by political commentators, jurists, sociologists, academicians and legal experts.

END NOTES

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CHAPTER I

Chapter I

JUDICIARY, LAW AND UNIFORM CIVIL CODE

A discussion on the necessity and the feasibility of a Uniform Civil Code in India, should first involve an examination of the pluralities that constitute Indian society and their prevailing customs and traditions, as well as their desire to maintain the same so as to preserve community identity. An examination of what a Uniform Civil Code would entail for these communities in a patriarchal society is essential. For in a society such as ours, women have and continue to occupy a marginal position and the same is legitimized by the traditional roles envisaged for them by the community and the state. The law therefore, serves to strengthen patriarchy and impede the women's movement. Finally, the question whether a Uniform Civil Code would usher in a more secular state and whether the existence of personal laws undermine the same needs to be addressed. In addressing these questions, we must bear in mind the fact that Indian society although primarily traditional in nature, like other societies is subject to the process of modernization and of westernization. Hence, identities of people vary with time and progress. There has been on the one hand, a weakening to an extent of primordial identities based on religion, *jati*, caste and so on, while a strengthening of class on the other. However, the role of the state in determining how people choose to identify themselves is considerable. At the heart of the debate on the Uniform Civil Code is the fact that the ascribed religious identity of people is given prime importance rather than the other identities which an individual might prefer, undermining thereby, his autonomy. This has also given space for the emergence of

conservatism in a society which looks towards achieving a progressive socialist objective.

To develop a discourse which addresses all these issues, one must observe law prevailing in the state as being a legitimization of the roles envisaged for women in the family and community. In the opinion of Brenda Crossman and Ratna Kapur, familial ideology as a set of norms, values and assumptions about the way in which family life should be organized, a set of ideas that have been so naturalized and universalized that they have come to dominate common sense thinking about the family. Despite diversity in family forms, it is possible to identify a dominant ideology of family that informs the legal regulation of women. Familial ideology constructs the family as the basic and sacred unit in society and women's roles as wives and mothers as natural and immutable.[1] This vision of family appears throughout the law as self-evident and beyond question and limits the ability of the law to deliver on its promise of equality of women. The state and its institutions, therefore, despite espousing equality between sexes, continue to define women in relation to men and as Kumkum Sangari observes, enforced the rule of property in ways specially unjust to women, created class and gender inequalities through 'development', reproduced women's economic dependence, co-opted many women's initiatives, and is now, with the new economic liberalization, withdrawing from its welfarist functions (which could have mitigated the patriarchies operating in the family community and workplace.[2]

Sangari goes on to argue that the state via its institutions – the police, judiciary and so on tolerates patriarchies and has supported patriarchal interests on religious

grounds both ideologically and in practice. Further the codification of patriarchy as religion by community spokesmen has been shared by the state which upholds denomination as opposed to caste, class, gender, regional practices as the primary basis for defining family laws. Thus, male privilege is preserved in personal laws through co-parency provisions, male testamentary rights, unilateral divorce, bigamy, restitution of conjugal rights, inadequate maintenance, lack of residence, guardianship and custodial rights for women. She goes on to add that the state commits yet another error by distinguishing the public domain from the private. Thus, while religion no longer determines laws related to the ownership of agricultural land, tenancy, crime, international relations and so on, it continues to influence laws relating to family, marriage, inheritance etc. Such a division, in her opinion, is both uneasy and unreal.[3] Unreal because the areas in which the personal laws operate are inter-related and inter-dependent with all other areas in law and therefore women's lives. Women are governed both by family laws and other laws; inheritance, in different regional and legal combinations, straddles both public and private spheres.[4] This division extends the sphere of religious regulation to the public domain instead of limiting it to the `private' family. At the same time, by being confined to the private domain, such issues are beyond legal purview. The classification of laws relating to family and marriage as personal produces a gendered definition of religion that falls more heavily on women.[5] It serves to transpose the liberal rationale of the family as a private sanctuary ideally beyond state intervention on to the religious community and its personal laws and shifts the onus of maintaining community identity to women in marriage and in familial relations. Finally the notion of religion assists in the

reinforcement of a classic logic, in which patriarchies had to be at once preserved and reformed.[6]

Sangari and others acknowledge the existence of a plurality of patriarchies which can be located in customs, traditions, laws and religion. The customary domain is not reducible to personal laws which are a compound of new statutes, derivations from customary law and suppression of customary variation.[7] Its scope is far wider than religion as it transcends primordial boundaries of social organizations. Customs may conflict or co-relate with scriptural tenets or religious texts. They may be formed in ignorance in tacit contravention or as rejection of religious texts, or through exclusion by scriptural texts (as of low castes).[8] They may invent ways and means for religions to adapt to social change and also to circumvent the rigidity of a static text. Customs go on to show, that religion is not, and seldom has been, the unalterable letter of law.[9]

Customs too, play a major role in patriarchal assertion in the form of caste and class differentiation – subject to both consensus and conflict. Thus, upper caste customs can be regarded as privileges which lower castes are not permitted to follow. Similarly in granting or denying rights to women, they reinforce patriarchy. However, despite the importance enjoyed by customs in the social life of communities, and despite their diversity, flexibility and so on, the customary domain is far too ambivalent to be a source of laws.

Legal pluralism can be noticed in two different spheres: as established through laws and functioning of the state, and as practised in the realm of non-state customary

arbitration. While the former can be exemplified by various constitutional provisions and by highlighting contradictions between such provisions for gender justice, and fundamental rights and statutory laws producing a multiplicity of competing interpretations. Plurality can be built into the laws through narration in the state law, continuation in colonial law, partial codification and internal inconsistencies, as well as through available options and exemptions positing different principles and or categories of principles. The source of customary arbitration leading to plurality can be seen in historical precedents which established certain norms for meting out justice. Caste, gender and denomination determined punishments in ancient India establishing entitlements, obligations and punishments on violation of law on a descending scale. This led to the establishment of certain principles as no right was theoretically universalisable, and no crime was the same, that is, open to identical punishment.

Customs are legally established and become effective through precedent and case law. Custom is the interface between law and practice[10] and was given different recognition in different legal systems – brahmanical, mughal and colonial. Customary variations are not subject to any convincing rationalization".[11] In recent times, customs are upheld by caste councils, caste and village panchayats and the village elite. The force that custom has come to occupy in reinforcing patriarchies can be seen in the practice of Sati, punishments for inter-caste marriages or `community' virginity tests. These forms of customary arbitration tend to be more punitive than law courts. Despite their ability to be easily implemented and their flexibility, customs have become a source of greater oppression and local patriarchal coercion. Indeed, the

realities of extra-jural pluralism need to be addressed as customs do tend to legitimize patriarchy and very few women are convinced over the efficacy of legal systems and therefore shy in taking recourse to it.

Indeed, patriarchies could not be homogenized into a particular type. They have been differentiated by virtue of different modes of production, regional specificities and cultural differences. Also, the emergence of new schools of law, conquest respecting custom acculturation and assimilation of brahminical faith led to the formation/embedding of multiple patriarchies. Various divisions created complications with regard to the lower caste woman's freedom, and the upper caste woman's lack of it. This discrepancy was founded on the group's relation to the means of production as it was believed that lack of stringent inheritance, property and corollary lineage concerns would eventually create patriarchal systems different from those of the upper castes and subsequently lead to lesser attachment to the written word/texts, orthodox religion and political power by lower groups.

Absence of uniformity of punishments among varnas was possibly also due to the fact that it would amount to the higher varnas inaccessibility to the labour and sexual services of the lower varnas. Thus, brahmanization did not universalize a patriarchy, different patriarchies listed granting different degrees of sexual access to upper and lower castes, as well as access to remarriage and a public world of work to lower caste women.[12] The Smritis therefore allowed for discrete as well as overlapping or intersecting patriarchal arrangements.[13]

It is interesting to note that despite different religious affiliations, the patriarchal arrangements manifest similar tendencies and derive their legitimacy from

religious texts and scriptures. Thus, as Kumkum Sangari has pointed out, that diversity in religio-legal systems, when subjected to continuous restructuring in the customary domain and by class imperatives produce sets of practices which are both common and different, rendering the separateness of communities as partly ideological.[14]

Ancient Brahminical written law, for instance, was derived from a multitude of texts, scriptures and interpretations, and was centred on sets of entitlements and obligations whose nature content was determined by a hierarchical and largely agrarian social formation as well as displacing and imbibing earlier patriarchal forms. Classical Islamic law was distinct in that it constituted claimable rights and contract that governed property and marriage and underwrote the elaborate proviso for women's maintenance.[15] This was largely influenced by the Roman law and pre-capitalist mercantile contract; the crystallization of written Islamic law was a function of changes in family forms and a moment away from tribal and wider kinship forms to those based on narrower family forms. Thus, while women were released from pre-Islamic tribal patriarchal ties, some of these were retained.[16]

Striking similarities can be seen in the areas of greatest difference. Islam allows for greater individuation of women, granting them property rights not only in the form of `mehr' but as inheritors to natal property and heirs in the husband's estate; they were allowed also, to independently manage their share thereby producing strong potentials for bilateral devolution. In theoretically much more dilute ways, forms of limited bilateral devolution through `stridhan', limited entitlement to specific forms of property and to maintenance, can also be found in the brahmanical repertoire

and its customary variants. The gap between the two varieties of religio-legal forms is bridged the dilution of the Islamic law whereby denial of women's access to property has reduced any possibility for greater individuation. A similar trend in non-Muslim patriarchal families exemplifies similarity in social practice and therefore in the status of women.

Contractual marriage among Muslims as opposed to the Hindu sacramental, indissoluble marriage has been overplayed at the expense of its religious character. Thus, while the `Nikah' is a contract between two parties which can be broken at any point, it favours men in that it provides for male initiated divorce. However, it does at times allow women to add provisions limiting their husband's legal control and lawmakers have always attempted to delimit divorce by intending `Nikah' to be a lifelong, permanent bond with rights and duties.

Brahminical legal texts similarly stipulated indissoluble sacramental marriage for the upper castes but they tacitly conceded that marriage was an institution with a material base and also encoded certain contractual elements such as correlative rights and duties, and some stipulation for dissolution. The Arthashastra provided possibilities for termination of some categories of marriage for women and men, and provided some limited recourse for the former if they were widowed or deserted by way of remarriage. Similarly Smritis, while defining marriage as indissoluble, allow women in few special cases to regard a marriage as terminated. The textual clauses stating the grounds for male desertion and annulment of marriage are, far more sanctioning thereby male rejection of `bad' wives. One can surmise therefore that marriage was more sacramental for women than men and such contractual elements as

existed favoured them. Sacramental marriage was limited to upper castes and desertion of wives became a Hindu male privilege. Such practices pitted Hindu women in a far more vulnerable position than their Muslim counterparts.

Further, polygamy practised by Muslim men was fully matched, if not outdone by upper caste Hindu men. Polygamy was common to most ruling groups, and to male status and without a numerical limit as in Islam. Non-formal cohabitation and/or secondary marriages were common. Both Islamic and Brahminical laws recognized irregular marriages and tended to limit the liability of men to `proper wives' without eliminating their access to other women. Mutah or irregular marriage is comparable to secondary marriages in Brahminical legal texts.

These distinctions either diminish on closer examination of the laws or melt in practice. There are also more obvious, ideological similarities. Women, as legal subjects are envisaged as non-productive confined to reproduction and domestic labour in their marital home, construed as dependent wives, mothers, daughters, with little custodial or guardianship right over children, dependent on male provisions, inheritance is patrilineal. The arena of their claims to rights or entitlements is also negative -- that of maintenance, perpetuating a dependence that could be exploited to enforce obedience, as well as restricted to the familial and contingent on `behaviour'.[17] Husbands can be excused from their obligation to provide maintenance if their wives are improper, disobedient or unchaste.

Attempts at arriving at some uniformity as far as laws relating to marriage, inheritance and divorce are concerned have led to several problems as many of those

diversities/pluralities were not taken into account and the sphere of law was divided into the public and the private domain. Attempts at codification of Hindu and Muslim laws were initiated first by the British for the sake of administrative convenience. Perplexed and baffled by the diversity and flexibility of Hindu law which through adequate interpretation of texts could be updated and its older versions circumvented by Sastris, they decided to formulate a legal system, akin to the British jurisprudential method. Not only did they homogenize personal laws through codification and codify custom through accumulation of case law, they also reflected the enormous diversity or variations of belief, sect and practice in different regions and classes that existed within the rubric of the major denominations. The British also fell into the trap of relying on the most ancient of Dharmashastras, and translated works of ancient authorities on European text book writers for the purpose of verifying the opinion of the Sastris/pundits and ascertaining the law. The process of codification was thus a process of arbitrary elimination of rules which were thought unfit to survive. The British administration of Sastric law changed the very character of that literature and Sastras became fossilized as a body of law. Hindu law became case law based on published law. Similar homogenization in Muslim personal law resulted in inflexible application of Islamic laws in spheres which were previously open to customary usage.

The commitment of a newly independent nation towards unity, integrity and secularism, led to further reforms of the Hindu personal law. The Hindu Code Bill which was broken up and passed as five discrete bills in 1955 was a product of such an enterprise. The bill, despite its commitment towards initiating reform displayed

certain notable characteristics. To begin with, the state veered between secular or religious legitimization. The first proposals for reform of Hindu law was on religious grounds but the final proposals such as divorce could not be traced to any text, the claim of some pundits to be legislators was disallowed; at the same time, some rules were allowed to continue because they were religious even though they contravened constitutional principles of gender equality.[18] As a result the Hindu Code Bill was both Hinduising and dehinduising; in an arbitrary way it made the case both less and more religious.[19]

It also had a tendentious legal description of `Hindu' as it purposively included the Buddhist, Jain and Sikh despite protests. This was done on the pretext that there were few differences amongst these religions from Hinduism. A Hindu would further include anyone who was not a Muslim, Christian, Parsi or Jew. The Act would apply to any Hindu, Buddhist, Sikh or Jain who has merely deviated from the orthodox practices of his religion but has not embraced Islam, Christianity, Zoroastrianism, or the Jewish faith. It was extended to include even those who did not `profess' Hinduism and were not `actual followers'. It did not make any regional exemptions.

The Bill thus attacked most principles of religious plurality and choice. It first recognized the existence and claim of inbetween and unclassifiable areas, discrete belief systems, overlapping religious, nonbelievers, regional specificity, and then proceeded to deny them any legal governance.[20] The negative definition of a Hindu as being one who did not profess Islam, Christianity etc., bound one highly to one's birth which could not be redeemed by nature of being a non-believer. It took away, the

autonomy of legal self-definition and self-designation from individuals born in Hindu families. The bill further generated a dangerous trend of describing Hinduism solely in relation to the four excluded religions, thereby making them its legal others.[21] The artificial enlargement of the definition of Hinduism meant that as per matters of conversion, a Hindu could only convert to one of the four excluded religions.

Thus homogenization of diverse schools of Hindu law was based on a northern upper caste model which ignored regional variations. Thus, women all over the country relinquished rights of inheritance and property which had earlier been granted to them in some areas. Also, the uneasy and inconsistent break from its upper caste shastric origins and models made it difficult for the Hindu Code Bill to either fully absorb lower caste and class practices into homogeneous laws or to consider them separately.[22] The State, therefore, in projecting itself as an agent of unification, homogenized patriarchies but with uneven results.

1937 witnessed the codification of the Shariat Application Act. Muslims had followed Islamic law in certain matters and customary usage in others which regional laws and usage had been continuously engrafted as custom.[23] The bill aimed at legal reform, securing uniformity among Muslims in all their social and personal relations, to thereby do "justice to the claims of women for inheriting family property, who, under customary law are debarred from succeeding to the same".[24] The act was initiated by the Ulema to ensure that Muslims who had hitherto been governed by customary law would be brought under a central personal law applicable to Muslims all over the country. While the law did improve the status of women *vis-à-vis* property and inheritance it did bring them under stricter textual legal scrutiny by abolishing

customary law altogether. By abolishing customs and usage which handicapped law due to their changeability, an attempt was made to bring in some amount of certainty and definitiveness in laws.

The process of codification continued when in 1939, the Dissolution of Muslim Marriages Act was passed which granted Muslim women limited rights to seek divorce. The 1937 Act tackled the discrepancy between women's Shariati rights to property and custom in such a way that attacking custom became a means for homogenization. The 1939 Act appropriated the same rhetoric of restoration and made a notable departure from classical Islamic law in ruling that apostasy of women would no longer be a ground for dissolution of marriage. Whereas this could have been a provision encouraging intra-religious marriages, tolerance and individual choice, the fact that it excluded men from its ambit (by retaining male apostasy as a ground for dissolution of marriage) gave it a different ideological location. It became difficult for women to get out of a difficult marriage through conversion to another faith. This was partly in keeping with the fear of the Ulema that Muslim women would continue to use conversion as a ground for obtaining divorce under the Hanafi law.[25] The Act could have granted women better rights to divorce, while the prevailing judicial practice of the option of applying personal law in cases of conversion of married women could have continued. If the 1937 Act asserted the rule of personal law over a singular Muslim community, the 1939 Act asserted the role of personal law and community over Muslim women, but in doing so, it reversed the method of the earlier act, now men were more fully governed by classical Islamic law than women.[26] Boundaries were tightened to keep women within the Islamic fold as their conversion did not affect their personal laws or their conjugal status.

Significantly, conversion provided adequate ground for seeking divorce among Hindu, Christian and Parsi women as well. However, in many cases, the Courts declared marriages not dissolved on grounds of conversion as on the pretext of not holding the sanctity of marriage vows in any personal law. The intent behind this seems to be patriarchal – while men could seek divorce both legally and extra-judicially; the conversion of women in order to obtain divorce, on the other hand, seemed to threaten religious boundaries, male proprietorship and patriarchal laws.

Despite a directive in the Constitution expressing the hope that a Uniform Civil Code would exist in the country, so that disputes would be settled in consonance with the principles of justice, proportionality and equity, the task has been impeded due to controversies and conflicts over the kind of uniformity that will characterize the common code. Women's issues and their demand for gender justice, by way of gender sensitive laws as opposed to patriarchal personal ones form the core issue of the debate. Reforms from `within' and `without' have been suggested – the former would involve continuity taking the initiative of reforming their obsolete, personal laws and bringing about gender-sensitive reforms. The latter, on the other hand leaves the state with the responsibility of taking the initiative of reforming the law and evolving a common code. This, the state is reluctant to do, as being composed of pluralities – communities – religious regional, caste and so on, it would not want to incur the ire of any, and thereby alienating any section.

Issues which have been identified in particular, as being contentious, deal specifically with women in relation to men, the first issue revolves around the demand

of women to adequate maintenance in the event of divorce. Laws pertaining to the maintenance of wives and children are contained in personal laws (the civil code) and also the Criminal Procedure Code (CrPC). In order to ensure that women and children are not subjected to destitution, in the event of desertion, Section 488 of the CrPC of 1898 made a provision requiring maintenance to that effect. This section was revised in 1973 and the new section 125-128 brought in. These sections enlarged the scope of law to include the right of elderly parents, unable to maintain themselves to seek maintenance from sons with sufficient means. A wife could also demand maintenance long after divorce had taken place, not merely in the event of a divorce. It simplified the procedure for women and held that the Court could penalize the defaulter by attaching his property and in the final instance, by selling it in the event of non-payment of maintenance dues.

It was however, left to the wife to prove that her marriage was valid and that she did not possess sufficient means to maintain herself. The onus of providing that she had indeed been neglected and ill-treated in her marital home and that she had not committed any adultery also fell on her. She further relinquished any right to claim maintenance dues in case she remarried or was found to have been adulterous.

This law was found to be congruent with all personal laws. It was only in 1985, when Shah Bano demanded maintenance under these sections, and was awarded the same by the lower Courts (upheld both in the High Court and the Supreme Court) that a fresh debate and discourse on Uniform Civil Code was initiated. The Shah Bano case reinforced a divorced Muslim woman's right to seek

maintenance from her husband beyond the period of iddat (3 months) during which reconciliation is possible.

Shah Bano was married to Mohd. Ahmad Khan, an advocate in 1932 and a mehr of Rs.3,000/- was settled between them. Five children were born of the union. However, in 1946, Mohd. Khan remarried and neglected Shah Bano Begum, denying her even clothes and medicine. In 1975, he drove her out of their marital home which they shared with Mohd. Khan's second wife.

In 1978, Shah Bano approached the Judicial Magistrate, First Class, Indore, under Section 125 of CrPC asking for maintenance at the rate of Rs.500 p.m. the maximum rate allowable under that Section. The husband was earning Rs.60,000 p.a.

The proceedings dragged on for a year and a half before an order could be issued. There was unfortunately no court order for interim relief as the prevailing view was that such relief could not be granted under Section 125 of the CrPC. Mohd. Ahmad Khan took advantage of the delay and divorced Shah Bano Begum by an "irrevocable" triple talaq pronounced in a single sitting on 6 November 1978. Ahmad Khan maintained before the Indore Magistrate that since he had already paid her maintenance at the rate of Rs.200 p.m. for the past two years together with the sum deposited in Court by him (Rs.3000/- by way of mohar) plus another Rs.600 as maintenance for the iddat period, he was under no further obligation to provide her any more.

The Magistrate by his order dated August 1979, directed Ahmad Khan to pay her a sum of Rs.25/- a month to keep body and soul together. On appealing to the High Court, this amount was increased to Rs.179.20 p.m. (July 1980).

Khan then appealed to the Supreme Court challenging the correctness of the earlier Supreme Court decisions, delivered by Justice Krishna Iyer in Bai Tahira case & Fazhinbi's case which the Magistrate and the High Court had followed.

The Supreme Court was faced with the question of deciding the correctness of the judgement pronounced by Justice Krishna Iyer, who was of the view that a divorced Muslim wife is entitled to maintenance under Section 125 of CrPC and unless her maintenance is adequately and reasonably provided for to the satisfaction of the Court, the liability of the husband continues until death or remarriage of the divorce.

The Supreme Court held that a divorced Muslim woman is entitled to maintenance. It held further, that even if there was a conflict between personal law and criminal law, the criminal law would prevail.

> 10. The Conclusion that the right conferred by Section 125 can be exercised irrespective of the personal law of the parties, is fortified especially in regard to Muslims, by the provision contained in the explanation to the second proviso to Section 125 (3) of the Code...According to the Explanation:
>
> "If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him". According to Mullah's Mohammedan Law, `A Mohammedan may have as many as four wives at the same time but not more. If he marries a fifth wife, when he already has four, the marriage is not void, but merely irregular. The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage leave alone three or four other marriages, showing unmistakably that Section 125 overrides personal laws in case of any conflict between the two.[27]

The Supreme Court also cited various Ayats of the Quran and their interpretations, holding them to be the highest authority, to show that Muslim personal law did provide for maintenance of divorced women by their husbands.

Ayat 241

> For divorced women/maintenance should be provided/on a reasonable scale/This is a duty on the righteous

Ayat 242

> Thus doth God/Make clear His Signs/In order that/Ye may understand.[28]

The Supreme Court, further rejected the argument that Mehr was the amount payable on divorce. Instead, it held that mehr is the amount which a wife is entitled to receive in consideration of the marriage. Therefore, it could not be described as an amount payable in consideration of divorce.

> The alternative premise that Mehr is an obligation imposed upon the husband as a mark of respect for the wife is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry a woman for love, looks, learning or nothing at all. And he may settle a sum upon her as a mark of respect for her. Therefore, a sum payable to the wife out of respect cannot be a sum payable `on divorce''.[29]

By clarifying the fact that mehr was not a sum payable on divorce, the court pointed to an error which had crept into the Bai Tahira case.

The Court noted further that it was `a matter of regret that Art.44 has remained a dead letter'. It noted that the three agents capable of initiating reform within personal laws and arriving at a Common Code were the religious communities, the State and Courts. It noted that the prevalence of a common code was necessary to

further the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to take the lead by making gratuitous concessions on this issue. Although the state which is enjoined to perform this task has the legislative competence to do so, it often lacks the political courage to use that competence. Failing any action from the state, the role of the reformer has to be assumed by the Courts because, `it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable'. `But piecemeal attempts on the part of the Courts to bridge the gap between personal laws could not take the place of a Common Civil Code', for `justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

Justice Y.V. Chandrachud also cited a plea made by Tahir Mohamood in his book `Muslim Personal Law' (1977 Edn., pp.200-02) where he says `In pursuance of the goal of secularism, the State must stop administering religion-based personal laws; but the lead must come from the majority community. Justice Chandrachud added that whether or not majority community took the lead, the state must act. He quoted Mahmood's plea to the Muslim community to explore and demonstrate their traditional personal laws and show how the true Islamic laws, purged of their time worn and anachronistic interpretations can enrich the common civil code of India.

While the Supreme Court dismissed Mohd. Ahmad Khan's appeal and upheld Shah Bano's right to receive adequate maintenance, while at the same time making a case for the implementation of a Uniform Civil Code, the state on the other hand took a step backwards by passing `The Muslim Women's (Protection of Rights on Divorce) Bill' of 1986, which completely ruled out Muslim Women's access to

Section 125 of the CrPC. Section 3 of the bill lays down the provisions of the new law according to which a divorced Muslim woman must be paid the mehr agreed upon at the time of marriage. She is also entitled to `reasonable and fair maintenance to be made and paid to her within the iddat period by her former husband'. If she has custody of the children, then, the husband is entitled to pay two years of maintenance for them, from their respective dates of birth. She further possesses no right over any property or gift which she received from her husband or by friends and relatives or by virtue of being married to him. The burden of proof of the validity of her marriage to her husband, lies with the wife as before.

The passage of this Bill has led to some very significant changes. Not only has it reinforced patriarchal dominance and made women the site on which tradition is debated and reformulated,[30] it has also brought about a qualitative change in gender relations as the legal definition of Muslim men's responsibilities has been undergoing considerable change. As a result, many subsequent maintenance suits initiated by women under Section 125 have seen men implicated resorting to Section 3 of the Bill to bail them out.

Justice Chandrachud's judgement which was progressive in that it granted a divorced Muslim woman the right to adequate maintenance was critiqued severely. So was his plea for the formulation of a common civil code in which he held that the `State must act' irrespective of whether the majority community took the lead or not. Tahir Mahmood clarifies, `The State cannot discard personal laws of the minorities, while it has by its own direct action gifted to the majority community a separate religion based personal law...The state can codify and reform the personal laws of the

minorities as it has done in the case of the majority. But neither the personal law of the minorities can altogether be repealed while that of the majority community remains intact – protected and fortified by statutes – nor can the personal law of the majority, despite its reformed and codified shape, be a substitute for a uniform civil code so as to be imposed on the minorities.

Syed Shahabuddin in his letter to the Mainstream listed, the Muslim objection the Shah Bano judgement:

(a) Justice Chandrachud's derogatory remarks against Islam
(b) His reinterpretation of the Quranic verses on maintenance of divorces against the consensus of theologians for a thousand years
(c) His judicial impropriety in ignoring both the Shariat Application Act, 1937 and Section 127(3)(b) of the CrPC 1973;
(d) His plea for introduction of the Uniform Civil Code exceeding his judicial authority.[31]

In his opinion, the Muslims do not oppose social reform or codification but they perceive the endeavour of establishing a common code as an attempt at destroying their religious identity, to undermine the essentials of faith – commitment to the Quran as the word of God and to assimilate them. As a secular state India is bound to respect personal law of any religious community to the extent it is based on its scriptures.[32] He went a step further and introduced the Constitution Amendment Bill 1975 in the Lok Sabha on 17th August 1995. This Bill seeks to amend Art.44 and substitute it by the following:

4. The State shall endeavour to introduce a model family code which shall apply to the citizens who or the social groups which, opt for it in lieu of the customary or statutory personal law applicable to them. 4

Thus, it is evident that community identity, fear of being mainstreamed and assimilated, and maintenance of religious legal purity form the core of the debate which veers away from women's issues and reinforces a patriarchal structure. To view the issue of establishing a common code merely from the point of view of the religious community is not wholly correct. Primordial community claims co-exist, or intersect with claims to non-primordial collectivities —class, work and occupational identities, forms of contiguity in neighbourhoods and villages, which along with gender have been the bases for non-community specific mobilization. Thus, any single basis of community will not only be ephemeral or provisional, liable to fragmentation by other cross-cutting affiliations, but it cannot represent the full spectrum of social divisions and locations, cultural diversities and aspirations. Also, assuming that if all but territory is movable, and territorial claims can be made at long distance, then `community' claims are disguising a new real heterogeneity as they to a limited extent or do not recognise existing cultural plurality.[33]

Broad ideological conceptions of religious communities have uncomfortable implications and pose problems as these `religious' communities are not only inegalitarian or class differentiated, but also specifically undemocratic regarding women. There is little evidence to show that communities are committed to internal democratisation of gender differences. Women's own religious beliefs, consent to a religious identity and community as well as their agency in maintaining these, are often presented as a rationale for maintaining personal laws and reforming them only from within. In so far as the personal laws curtail women's rights they define and defend male privileges; only the institution of women's rights can dismantle them.

Another issue which has produced significant discourse on the necessity of a Uniform Civil Code, is that pertaining to the practise of bigamy. Here again, the central issue of meting out justice to women is sidelined; instead the Hindu demand for a Uniform Civil Code which is an attempt to abolish personal law is largely to prevent Hindu conversion to Islam in order to access Muslim personal law is pre-eminent. Herein, the state is being called upon to maintain religious boundaries rather than being an authority which allowed people to opt for laws other than their personal laws.[34] This debate has been generated by the recent judgement on Sarla Mudgal and others Vs. Union of India in 1995, which attacked Hindu conversion to Islam solely for the purpose of bigamy. Hindus are not opposed to the patriarchal practise of bigamy, they do not favour conversion to a different faith to gain legal access for the purpose. The Hindu right which poses itself as the liberator of Muslim women from a patriarchal personal law, wants to universalise monogamy (when the real intent is prevention of conversion) and to equalise male privileges.[35] In fact the legal sanction that Muslim polygamy enjoys is envied by many Hindus, who, during the formulation of the Hindu Code Bill in the 1950s had defended polygamy as having Sastric sanction. They had also justified its necessity as being a means for fulfilling the ritual necessity of sons and thus of ensuring spiritual benefit, and also administered a warning that if it were to become illegal Hindu men would have to convert to Islam to marry more than once or keep concubines.[36] The above argument proves that male privilege is stronger than primordial loyalties since all spiritual benefits would cease on conversion.

The preponderance of cases where married Hindu men had converted in order to marry a second time, without having to resort to a formal divorce on the assumption that apostasy dissolved an earlier marriage was noted in Sarla Mudgal Vs. Union of India. The judiciary noted that such cases were quite common and that conversion did not give one the privilege of circumventing the formal procedure of securing a divorce. In the absence of a unified matrimonial law in India, these cases should be decided on the basis of natural justice, equity and common sense. This was the practise of the Courts when such cases were brought to its notice. Personal law was used very rarely and only in cases where two persons to a dispute belonged to the same religion by birth or conversion, or if personal law was relevant in specific cases or conducive to justice. This principle was eroded in 1983 when a tendentious judgement gave an unprecedented, formulaic, virtually religious sanction to Hindu personal law by insisting on a supreme and unchangeable regime of primordiality.[37] Justice Leila Seth of Delhi High Court ruled in Vilayat Raj Vs. Sunita that a Hindu husband is bound to dissolve his first marriage by the Hindu personal law after conversion. She ruled further, that even if both parties had converted to another religion, the marriage had to be dissolved under the Hindu law under the provisions of the Hindu Marriage Act (1955).

Thus, while deciding Sarla Mudgal's case, the judges resorted not only to case law set by precedence, but also took recourse to the Hindu personal law and to Section 494 of the IPC. The Court cited the views of a senior judge who had, in a similar situation opined that one spouse could not, by changing his or her religion (or purporting to do so) force his or her newly acquired personal law on a party to whom it was entirely alien and who did not want it. It referred also to the Andal

Vaidyanathan Vs. Abdul Allam Vaidya, AIR 1946, Madras 46 in which a Division Bench of the High Court dealing with a marriage under the Special Marriage Act 1872 held:

> The Special Marriage Act clearly only contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion. Such a person commits bigamy if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of his second marriage...

Such a marriage can only be dissolved under the Divorce Act and the same would apply even if one of them converted to Islam.

The Court held further that a man converting solely for the purpose of bigamy would be punishable also because he would be violating the rules of natural justice. He would be guilty of not having divorced his first wife before conversion/contracting a second marriage. His second marriage would therefore be void and he would be punishable under Section 494 of the IPC

> Marrying again during the lifetime of husband or wife. Whenever, having a husband or wife living, marries in any case in which such void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

This Section applies to all marriages solemnised under the Hindu Marriage Act of 1955 which applies to all Hindus by religion, in any of its forms and developments and to Buddhists, Jains and Sikhs. The Act (Hindu marriage) expressly professes monogamy and thus a case wherein a Hindu husband solemnises a marriage after conversion to Islam is in violation to the Act and therefore void.

Apart from applying the Hindu Marriage Act to a case where principles of gender justice would have sufficed, the judge made a somewhat conservative plea for

the implementation of a Uniform Civil Code. Justice Kuldip Singh in pronouncing his judgement, enmeshed with it, the Hindu rhetoric of the necessity of a Uniform Civil Code. He rested his statement on an ideologically loaded reinforcement of religio-legal boundaries in which the very existence of Muslim personal law was represented as an encouragement for Hindu bigamy.[38]

> . . . till the time we achieve the goal – UCC for all the citizens of India – there is an open inducement to a Hindu husband, who wants to enter into a second marriage while the first is still subsisting, to become a Muslim. Since monogamy is the law for Hindus and the Muslim law permits as many as four wives in India, an errant Hindu embraces Islam to circumvent the provisions of Hindu law and to escape from penal consequences.

The judgement attacks not the practice of bigamy instead it focusses on comparing men across religious communities. To that end, it aims at suppressing Muslim polygamy and checking Hindu conversion. A principled attack on bigamy would have distanced itself from the Hindu rhetoric, confronted gender inequality and all prevailing patriarchies, sought to improve secular laws on bigamy divorce and intra-community marriages and critiqued the antagonities of Hindu personal law that assist bigamy.[39]

Justice Kuldip Singh also puts forth a weak, negative, majoritarian argument for the implementation of a Uniform Civil Code,

> The utmost that has been done is to codify Hindu law in the form of the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80 per cent of the citizens have already been brought under the codified personal law, there is no justification whatsoever to keep in abeyance any more, the introduction of "Uniform Civil Code" for all citizens in the territory of India".

This argument assumes a dangerous logic: the Hindus have reformed themselves; others have to be brought in line with them or, more patronisingly, raised to their level; and minority communities are anti-national in retaining `special privileges through personal laws.

Flavia Agnes agrees that the judgement has sidetracked the basic issue of bigamy. Instead, it has been based on a few assumptions:

- that Hindu marriages are monogamous in nature;
- The Judiciary has consistently and systematically upheld the principle of monogamy among Hindus by penalising errant husbands;
- The only breach of monogamy among Hindus is conversion to Islam.
- A uniform civil code will plug this loophole and ameliorate the sufferings of Hindu women/
- All the four petitions which the judgement dealt with were filed by women whose husbands had converted to Islam and remarried; and
- Both the judges who heard the matter advocated enforcement of a Uniform Civil Code on a priority basis as the only remedy to conversion and bigamy by Hindu men.[40]

She adds that legal loopholes existed in the Hindu Marriage Act of 1955 which made it possible for men wanting to remarry, to circumvent the Act. As the Act recognized customary forms of marriage and divorce, the uniformity among Hindus, established by the Act was a legal fiction. Prior to the Act, since bigamy received Shastric sanction, women in bigamous marriages had a right to residence and maintenance; which they forfeited with the introduction of monogamy. However, despite the loopholes, she maintains by an analysis of cases reported in the Law Journals that bigamy among Hindu men persists with the active benevolence of the

Supreme Court. She illustrates that a decade after the Act was passed, the Supreme Court decided its first case and set the seal upon the monogamy of the Hindu male. In the case of Bhairav Shankar Lokhande Vs. State of Maharashtra, 1965, the Court laid down two ceremonies for a valid Hindu marriage: (1) invocation before the sacred i.e., `vivaha homa' and (2) seven steps round the fire by the groom and the bride i.e., `saptapadi'. Subsequent cases relating to bigamy were decided on the judgement pronounced by the Supreme Court in the Bhaurao case which made it almost impossible for even High Courts to convict the husbands for the same. The Supreme Court made it binding that:

- proof of homa and saptapadi is essential for the conviction of Hindu man for bigamy;
- performance of valid ceremonies cannot be inferred by leading the evidence of a purohit or an officiating priest;
- if custom to the contrary is to be relied on, it must be validated by a law text;
- admission by neither the husband nor the second wife is sufficient to prove bigamy; nor is the fact of husband and wife living together and the community accepting them as such.[41]

The Supreme Court erred in fusing the customs and rituals of a pluralistic society into an absurd notion of uniformity by enforcing upon them rituals which were traditionally confined only to higher castes or specific regions. If a community observed a custom contrary to the Shastric ritual, the custom had to be privileged enough to attract the attention of a legal scholar, who would mention its existence in a law text and further, it should have remained static throughout the years. This was virtually impossible given the changing nature of communists, their heterogeneity and the process of rapid modernization.

The purpose of this section, however is not to discuss bigamy among Hindus in particular, but to view the incidence of Hindu bigamy in relation with that of their Muslim counterparts. In the light of the above illustration, the judgement rendered in the Sarla Mudgal case, which held that existence of Muslim personal law was solely responsible for errant Hindu husbands to convert and remarry, stands falsified. It also falsifies the claim that a Uniform Civil Code would set matters straight. The existence of a unified Hindu code has not done much to curb Hindu bigamy – it continues and due to legal loopholes conversion is not necessary for the purpose. In most cases, the legality of the first marriage is also called into question, rendering Hindu women in a very vulnerable situation as far as their respectability, position and security in the community is concerned. Children of such marriages are more delicately placed than their mothers and have more ambivalent statuses. The Court in its decision has not commented upon the status of children.

Justice Sahai, however made a valuable suggestion that the government should consider the feasibility of appointing a committee to enact a Conversion of Religion Act to check the abuse of religion by any person. The law may provide that people of all denominations be required to divorce their first wife in case they want to enter into a second marriage. Justice Sahai also noted that although the Uniform Civil Code was an ideal to be aspired to, he cautioned that it would be possible only when sentiments and emotions have evolved and tempered by sincere effort, and advocated several intermediary measures as stepping stones towards the objective. He suggested that personal law of minorities should first be rationalised to develop religious and cultural amity. It can be argued that the notion of `rationalization' is subjective and ambiguous

and that only laws of minorities do not need rationalizing. However, an intermediate code can be valuable in ushering in uniform laws in the near future.

Efforts made by the legislature towards evolving gender just laws have fallen through. By way of example, a Private Member's Bill was introduced by Congress Member Veena Varma, titled The Married Women's (Protection of Rights) Bill 1994. The Bill highlighted the exploitation faced by women:

> The woman has no right in the house of her husband or to his property. The laws confer the right of property on a woman only after the death of her husband and not during marriage. If a woman's right in the property of her husband is recognized, she will overcome her sense of helplessness and economic insecurity...

The bill was unanimously supported by 23 members, however, adverse comments came from S.S. Ahluwalia on the following presumptions:

1. Indian society treats women as `devis' and has no need of a protective law based on Western concepts. The bill will cause chaos and confusion and against the norms of India (read Hindu) culture and tradition.
2. Since most people do not own property, the bill would benefit only a few educated, urban women who do not wish to fulfil their role as dutiful wives and want to while away their time at kitty parties.

Minister of State for Law, Justice and Company Affairs, H.R. Bharadwaj, endorsed these views and commented: `We cannot insist that a husband must give 50 per cent of his property to his wife. The women's movement in India is different from the West. We cannot really think that women will be better off only by making legal provisions. We will also have to see how the question of property can be settled under diverse personal laws.... There was a suggestion to examine whether a flat allocated to a man under government schemes should be in joint names of husband

and wife. But Income Tax regulations and other problems crop up'. (Rajya Sabha debates dated 12 August 1994, pp.824-26, pp.836-38).

The above arguments go on to prove that when reforms are a setback to the economics of patriarchy, even the legislature adopts a conservative stand and even stalls them by communalising the issue.

On the other hand, in 1994, the Marriage Bill drafted by the Women's Commission with the support of judges and legal scholars was passed. This Bill had distinct communal undertones and tramples over women's rights. The Bill seeks to abolish polygamy by compulsory registration of marriages. For default, it stipulates a fine of Rs.100/- per day for a period of one month and, thereafter, invalidates the marriage. The fact that a large section of our population does not earn Rs.100/- per day is overlooked. The fact that more often than not, the woman would be in need of legal redress and it would be to the husband's advantage not to register the marriage and escape economic liabilities is also ignored. The bill thus has adverse implications for women & children. The Bill does not even protect women's exclusive rights under the ancient system like the Islamic provision of Mehr or the customary Hindu right of `stridhana'. By using the term `spouse', the bill presumes an equality between husband and wife, which does not exist in reality. Situating unequals on an illusory premise of equality will only serve to widen the gulf of inequality.

The Bill will jeopardise the rights of working women who shoulder the burden of maintaining the family. These women will now be compelled to share their meagre resources with their husbands upon divorce on a perverse logic of equality. Since the

bill also provides for irretrievable breakdown of marriage, a husband can, at his whim and fancy, divorce the wife and claim economic benefit. And a woman, who manages her household with her own independent income will be better off if she does not accept to register her marriage.

It is argued further that compulsory registration of marriages is not possible in a country where majority of the population, especially women are illiterate and unaware of their rights; and is also lacking in basic amenities of drinking water, food, employment and so on.

The presumption of marriage under the Indian Evidence Act is better suited to our socio-cultural conditions. If the couple has been living together as husband and wife, and society accepts them as such, the woman is entitled to relief under the Hindu Marriage Act. Stringent punishment and invalidation of non-registered marriages will only lead to increasing state control in peoples personal lives without in any way protecting women.

The state fails to protect women's rights to shelter, maintenance and custody; and protection from violence by administering such a law.

If uniformity is the goal to be attained and aspired for, it should be sought after for the right reason i.e., to counter the multiple patriarchies that Indian society at large is ridden with. Laws should, therefore, not ape a particular personal law or take the best forms of law from various personal laws. This would amount to perpetuating patriarchy, without really reforming it. As has already been seen that personal laws are flawed in that they do not grant women considerable autonomy and access to

resources, and do not grant enough choice to non-believers or dissenters. It is expedient therefore to evolve laws which seek to secure gender justice within a democracy.

The Joint Women's Programme recognises the fact that all these laws treat women differently from men, violating their rights under the Constitution. They have been pressing a movement for change in personal laws since 1978. The JWP recommends the enactment of an Indian Family Law. It envisages a two-fold plan of action: Firstly, to pick from each personal law those sections that are constitutionally correct and provide for gender justice. This process is to be facilitated by representatives of religious leaders, concerned women and staff. The next step would be to put the sections together under the classification of marriage, divorce, custody of children and maintenance, rights and succession and property. Each community is requested to work towards the proposing changes in their own laws and getting it endorsed by their leaders. The main areas of concern are:[42]

i. Registration of all marriages

ii. Divorce be considered as the dissolution of the civil effects of marriage.

iii. Divorce be made possible on equal grounds for both men and women.

iv. Divorce be made possible by mutual consent

v. Equitable matrimonial relief: (a) commonality of property rights, (b) right to the matrimonial home; and (c) increase in maintenance to the aggrieved party, especially women.

vi. Equal right to ancestral property

vii. Equal rights to adoption

viii. Both parents be considered as natural guardians of their children

The JWP also stresses on the importance of holding meetings at every level – village, city and state – to make women and men aware that existing personal laws need to be changed and that it is the responsibility of every citizen to promote the idea and make suggestions on whatever has evolved and prepare the ground for accepting the changed laws. The suggestion is that must be formulated in such a way that the present of a just tradition is recognized. Further, the introduction of a UCC must keep intact this primary and sacred unit of society. It is important that Party politics and vested interests should not be allowed to tamper with the evolution of an Indian Family Law.

The Working Group on Women's Rights has drafted a proposal which seeks to recast the discussion on the UCC in terms of the rights of women as citizens occupying the public sphere, with rights to work, to equal wages, to equality within the family, in a way that it does not compartmentalize the public and private. To this end, they propose three central planks which will enlarge the democratic participation of citizens.

The preparation and institutionalization of a comprehensive package of legislation which would be far wider in its scope than existing laws, including the personal. This package would cover equal rights for women within the family in terms of access to property, guardianship rights, right to the matrimonial home and so on. It would include equal wages for equal work, anti-discriminatory provisions in recruitment, promotions job allocation etc. This must be accompanied by a package of

social security measures which will make women less vulnerable and bolster economic rights in all spheres.

- This law would be applicable to all citizens of India by virtue of their birth or naturalization.
- All citizens would have the right to choose, at any point in their lives, to be governed by personal laws if they so desire. Citizens will also be table to revoke their choice and move back to common laws in a movement of conflict. Further, since the gender just laws will cover an area much wider than the personal laws, only those provisions of the new laws which cover the same areas as personal laws will be revocable.[43]

The freedom of citizens to choose the laws which will govern them ensures democratic principles in the true sense of the term. Gender-just laws will be flexible and open to change on grounds that they are not democratic, secular or gender – just. Since this proposal is tied to the principle of choice it cannot be seen as endangering or violating minority rights. Despite the creation of gender just laws, it is possible that hierarchical, patriarchal relations, discriminatory practices, unequal division of labour might continue to exist; women are vulnerably placed in community and the state. However, it is important that some choice is given to them rather than no choice at all. The principle of reverse optionality creates at one time three kinds of citizens: (a) those governed by gender just laws, (b) those governed by personal laws, (c) those who are caught in a situation of conflict if one party has chosen personal law. It is therefore suggested that in case of the conflict between secular and personal law, the former should prevail. The right to be governed by personal law should prevail. The right to be governed by personal law should be revocable at moments of legal conflict that young women (on whom personal law might be imposed in moments such as

marriage) might be able to express their decision when required to do so. Therefore, the right to gender just laws will not be irretrievably lost.

The existence of gender-just laws alongside personal laws, it is expected, would enable the communities to look inwards and initiate reforms from within. Also, the existence of such laws would prevent the deferral of the ultimate goal of a uniform civil code/equal laws. There would be no need to wait for a politically conducive moment to introduce these laws.

Reform from 'within' has been suggested by Imtiaz Ahmad who feels that it is in keeping with democratic norms that communities be allowed to retain the prerogative of reformation of personal laws. Therefore, despite the nobility of intentions, a secular state cannot take upon itself to promote reform within different communities and were it to do so, its intentions would remain eternally suspect.[44] He therefore suggests two alternative possibilities with regard to the Muslim community. One could be concerned Muslims lobbying for the codification of Muslim personal law. The other course can be to work for piecemeal reform and take up on a priority basis those provisions where the contradiction between the constitutional law and the personal law is severe or the law as understood and applied is clearly in dissonance with the principles of equity, justice and good conscience.

Reform and codification, he insists, should be in keeping with Koranic injunctions, so that laws retain their legitimacy (and acceptability). These provisions should further be seen in the light of the Indian situation and the extent to which they create hardships for different sections of the community.

In the early 1970s, AAA Fyzee had taken note of the shortcomings in Muslim Personal Law and drafted The Muslim Personal Law (Miscellaneous Provisions) Act, which met with little enthusiasm among people of the community. The Act sought to make certain amendments in the Personal Law applicable to Muslims in India. It read as follows:

> Whereas it is expedient to make provision for certain alterations in the personal law applicable to Muslims in India, it is hereby enacted as follows:
>
> 1. This Act may be called the Muslim Personal Law (Miscellaneous Provisions) Act, 1971.
> 2. It extends to all states in the Union of India
> 3. Notwithstanding any law, custom or usage to the contrary
>
> INTERPRETATION: Where a Muslim is governed by a particular school of Islamic Law and the Court is of the opinion that a decision according to that school would be against justice, equity and good conscience, the Court shall have the discretion to apply a rule of law drawn from any of the other schools of Islamic law Sunnite as well as Shiite.
>
> 4. Talaq – Wherever any party to the marriage comes to the Court and proves to the satisfaction of the Court of Conciliation that a single or triple talaq has been pronounced without a reference to the said Court, by the husband on the wife, the Court shall declare the Talaq void and refer the matter for further hearing to itself.
> 5. After hearing both parties and their witnesses, if any, the Court shall declare either that a reconciliation has taken place and in that case no further proceedings shall take place; or
> 6. That for valid reasons submitted by the husband in the Court of Conciliation, the Court shall lay down the conditions for divorce, namely (I) payment of mehr, (ii) payment of compensation for divorce mut'at al-talaq, and (iii) shall order a sum to be paid to the wife by way of alimony till her death or remarriage.
> 7. In making such an order the Court shall take into consideration the financial position of the husband and wife, respectively, the social status of the wife, in particular, and such other

considerations as seem to the Court of Conciliation to be just and proper.

8. Life Interest – Any Muslim may create a life interest in any form of property in favour of a living person, which may terminate on the death of the donnie or donor and thereafter the property may be given absolutely to a person specified who shall be living at the death of the life tenant, but not otherwise.

9. Succession to predeceased heirs:

   i. Where a person dies leaving him surviving children, the inheritance shall be divided so that the descendants of the predeceased children shall receive *per stirpes* the shares that would have come to their ancestors if they had been alive at the same time when the succession opened.
   ii. The distribution shall in such cases be according to the Islamic rule of double share to the male, and a single share to the female.

10. Testamentary capacity of unmarried person – An unmarried person may make a declaration under this Act that as from a certain date he shall be governed by the Indian Succession Act, 1925, in all matters relating to testamentary and intestate succession.

This draft would in his opinion remedy the shortcomings of the existing Muslim personal law in India which is listed as:[45]

1. We are tied down to the interpretations of one specific school of Islamic law;

2. We give little justice to the first wife when the husband marries a second wife without her consent;

3. We give no protection to a wife... from the dreaded rule of triple divorce;

4. Even in the case of a single talaq, we make no proper provision for an innocent wife till she is able to remarry;

5. We have made the law of life interests, a very useful form of gift, very complicated and difficult;

6. We have not provided for the children of predeceased children of the head of the family;

7. We do not allow unmarried persons to bequeath the whole or a substantial portion of their property according to the needs of the case or the wishes of the testator.

The proposed draft while keeping Koranic injunctions in mind, envisioned a greater role for the Court and the law was thus brought within the ambit of judicial scrutiny. It would have also facilitated an easy, transition towards a Common Civil Code by protecting the rights of women and curtailing the preponderance of polygamy among Muslim men. However, it limited the ability of women to inherit property to a considerable extent. The proposed Act could not gather the support of conservative Muslims; however, the effort on part of the members of the Muslim community to modify their law, if not move towards the formulation of a Uniform Civil Code should be commended.

It can be argued that reform from within is again too amorphous and subjective a term as the question of which group among the community will take the lead in initiating reform and lobbying is important. It is also necessary to identify the interests of class and region that such initiatives represent.

Feminist demands of gender-justice, for curbing arbitrary, discriminatory patriarchal personal laws, of granting them the right to choose have encouraged some political parties to view the objective of UCC from the point of view of emancipating women. The CPI, in its National Council's Resolution on UCC in July 1995 recognised that framing of UCC was a problem of social reform in the society rather than being a communal problem. Since multiple personal laws exist in India, the framing of a UCC has to be preceded by reforms in various personal laws and customary laws. UCC can be framed only on the basis of a broad consensus over the

issues and it has to be based on gender equality. Imposition of UCC from above will be counter productive. The consensus for such an agreed code has to emerge through reform movements in various communities and the struggles of women's organizations for complete gender equality.

The AIDWA, in an official statement, mentioned the need for awareness campaigns towards a totally new common and equal law which will guarantee equal rights for women. In the present context, "a suitable climate" can only be created through the strengthening of secular forces and fighting fundamentalists of all communities and countering the compromising opportunism of the government which has moved in the opposite direction of Art.44.

The AIDWA, is, meanwhile, working towards common equal laws in certain key and common areas, like legislation for an equal share in matrimonial property, for compulsory registration of all Indian marriages, for a law against domestic violence and in other important areas where no personal law exists or which require immediate change. This will also be a step towards equal common laws in all spheres.

The ideal of National Integration, which the establishment of a UCC purports to achieve, has now begun to have notorious connotations as it is associated with the assimilative right-wing propaganda of the BJP. The BJP slogan, envisages a code which ensures a uniformity of male privilege and not equal rights for women (Kirti Singh). The BJP contention is also that Hindu laws are more progressive and grant more rights to women, therefore not only are they above the scope of reforms, but

also that the new UCC should be modelled on them. They also embody a suggestion that the UCC would be based on the best laws drawn from each personal law.

Supreme Court judges have championed the case for a Uniform Civil Code more for the purpose of judicial convenience – so that justice can be meted out in consonance with the principles of equity, of respect for human rights, on the basis of 'common sense' and so on. In its absence, judges have resorted to interpreting existing criminal law in keeping with the personal laws and beliefs of minorities, to ensure that these groups do not feel isolated from the state. Uniform Civil Code is desirable also for the ends it is likely to generate. K.M.Munshi has hailed it as ushering in secularism in the country. Mrinal Pande feels that a Uniform Civil Code will curb the arbitrariness of the bureaucracy and limit religion and religious practices to the private sphere.

It would be worthwhile to note the importance of secularism – the cherished ideal of the Indian state at the heart of all debates involving the implementation of a Uniform Civil Code or the continuation of traditional personal laws. Indeed, if the concept of secularism entails equal treatment of all citizens, it would involve equal laws for all irrespective of caste, sex, religion and gender. Viewed in this light, the Supreme Court judgement on Shah Bano seems flawed in the first place as it relies on the interpretation of Koranic injunctions, thereby communalising an issue which could have been looked at solely from the point of view of one involving women's rights.

It is widely held that it was the judicial reading of Islamic law which angered the mullahs who favoured a different interpretation and feared that such a unifying

and homogenizing step would lead to the erosion of (minority) Muslim identity; and in any case objected to a judge's competence to interpret Muslim Law at all.[46]

Similarly, the judicial definition of a `Hindu' (mentioned earlier) and maintaining that polygamy receives Islamic sanction, seeks to communalize issues of rights and equitable treatment while at the same time, serving to label `Muslims' as the political other of Hindus, thus impeding any scope for individual autonomy by necessarily linking his identity with a community.

Needless to say, any state which aims at being secular has to secure to individuals rights which arise from a notion of common good, inherent in the concept of community life. Any secular state must insist that the institutions of governance seek to preserve this singular ideal.

END NOTES

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CHAPTER II

Chapter II

THE MANDAL COMMISSION REPORT AND THE LAW

Indian society is riddled with inequalities – be it of caste, sub-caste, or class. Indeed, being constituted mainly of pluralities, there are diversities in religion, class-structure, occupation and so on, leading to its increased complexity. The Indian Constitution endeavours to achieve social justice by recognizing the fact that unequal relations due to ascribed status do persist in the country. To that end it ensures to the citizens, `equality before the law' or the equal protection of laws in Art.14.

The content of the expression equality before the law' is illustrated in several articles Art.15 states that the state shall not discriminate against any citizen on the grounds of religion, race, caste, sex, place of birth or any of them. Clause (2) of the same article ensures that no citizen is prevented from using shops, public restaurants, hotels and places of public entertainment, wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partially out of State funds or dedicated to the use of general public on these grounds. Clause (3) of Art.15 also enjoins the state to make special provisions for women and children.

Clause (4) holds that:

> Nothing in this article or in clause (2) of Art.29 shall prevent the State from making any special provision for the advancement of any socially or and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes (henceforth, SC/ST).

Article 16 relates to equality of opportunity in matters of public employment. While it confirms the state's concern to ensure equality in this sphere, it also enjoins

the state to check that no person is discriminated against on grounds of religion, race, caste, sex, descent, place of birth, residence and so on. Clause (3) of the Article holds that:

> Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that state or Union territory prior to such employment or appointment.

Clause 4 reads:

> 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.

Finally, according to Clause 5:

> Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

The Constitution also makes a strong commitment towards the removal of social and economic inequalities. In Art.38, the state is obliged to `strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life.

An amendment to the Constitution added that `the State shall, in particular strive to minimize the inequalities in income and endeavour to eliminate inequalities

in status, facilities, and opportunities not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations.

An important directive is contained in Art.46 which says -- `The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the SC & the STs, and shall protect them from social injustice and all forms of exploitation.

Special provisions are made for SCs, STs and the Anglo-Indian community in Part XVI of the Constitution. It also provides for the appointment of a Commission to investigate the conditions of and to recommend appropriate measures by which their difficulties/problems can be solved and their condition alleviated. Art.340 states:

> 340. Appointment of a Commission to investigate the conditions of BCs –
>
> (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour & to make recommendations as to the steps that should be taken by the Union or any state to remove such difficulties and to improve their condition as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made and the order appointing such commission shall define the procedure to be followed by the Commission.

The Commission is further required to investigate matters referred to them and present a report to the President containing re commendations as they deem fit. These recommendation will further, be presented before each House of Parliament along with a memorandum explaining the action tak en thereon.

Art.338 requires that a Commission for the SCs & STs known as the `National Commission for the SCs & STs' be established. This Commission is required to `investigate and monitor all matters relating to the safeguards provided for the SCs & STs under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards'. (Clause 5a). It is further required to look into specific complaints with regard to deprivation of rights and safeguards of the SCs & STs. It is further seen as an important instrument in the planning process as it is required to advise on social and economic development of the SCs & STs and to evaluate their progress. An annual report on the SCs & STs is required to be presented to the President with recommendations s to the measures that should be taken by the State or Union for the protection, welfare and development of the SCs & STs by the Commission. Clause (6) of the Article requires that the President present all such reports by the Commission before each House of Parliament along with a memorandum explaining the action(s) taken or proposed to be taken. Clause (7) holds that in case the report, or any part thereof, relates to any matter involving any State Government, a copy of this report should be forwarded to the Governor of the State who shall, in turn, `cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any recommendations. Clause (10) of the Article brings in socially and educationally backward classes identified by the Government on the basis of the report of the Commission appointed under Art.340 and Anglo-Indians within the purview of the expressions `SCs & STs'. It reads as follows:

> `10. In this article references to the SCs & STs shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under Clause (1) of Art.340 by order specify and also to the Anglo-Indian community.

According to Article 335 `the claims of the members of SCs & STs shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointment to services & posts in connection with the affairs of the Union or of a State.

In keeping with the aforementioned injunctions of the Constitution, this Chapter will dwell on the Recommendations made by the Second Backward Classes Commission popularly known as the Mandal Commission and the decision of the Supreme Court. It will also examine the debates that both the recommendations of the Mandal Report and the Supreme Court judgement raised in some specific areas which redefined state-society relations. This Chapter will also explore to an extent, the philosophy underlying reservations in our country and the extent to which it has been successful. Finally, it shall make an attempt at examining the role of the judiciary as alternatively a reformer and a conservative institution.

I

India's commitment to ensure equality to all her citizens in the face of glaring inequalities and iniquitous relations resulted in the form of Constitutional guarantees which would enable members of all sections to participate equally in public life. Galanter labels these measures as `Compensatory discrimination' as they involve a systematic departure from norms of equality (such as merit, evenhandedness and

indifference to ascriptive characteristics). These departures are justified on several grounds. Such preferential treatment, it is held, may be viewed as an assurance of personal fairness, as a guarantee against the persistence of discrimination in subtle and indirect forms. It is also maintained that such policies will promote integration, use of neglected talent, more equitable distribution and similar benefits. These are what he labels the anti-discrimination theme and the general welfare theme. Added to these, is also the notion of enabling historical reparation or restitution to offset systematic and cumulative deprivations suffered by the lower castes in the past.[1]

The policy of `compensatory discrimination' (positive discrimination, according to the Government and others) involves an array of preferential schemes which prescribe a departure from formal equality for the purpose of favouring specified groups. These beneficiaries are Scheduled Castes who have been designated as such due to their untouchability. Then, there are the Scheduled Tribes who are distinguished by their tribal culture and physical isolation, and many of them reside in specially protected scheduled areas. Finally, there are `Other Backward Classes', which are heterogeneous categories, varying from state to state, comprising largely of castes which are traditionally low in the traditional social hierarchy, but not so low as the SCs and also some non-Hindu communities. They include some tribal and nomadic groups as well as converts to non-Hindu religions from the SCs and in some areas the Denotified Tribes.

These preferences allow reservations which allot or facilitate access to valued positions or resources. This includes reserved seats in the legislature and the bureaucracy, in academic institutions, in the distribution of land allotments, housing

and other scarce resources. They ensure also scholarships loans, health care, legal aid and similar programmes involving expenditure or provision of services. Finally, these distribution schemes are accompanied by efforts to protect the backward classes from being exploited and victimized. Such protective laws include not only the abolition of untouchability but also prohibition of forced labour (Art.23), legislation regulating money lending, providing debt relief and restricting land transfers.

All these efforts aim at improving the lot of the backward classes and bringing them at par with the advantaged sections of society.

The diversity of Indian society had posed a problem in identifying which groups exactly would benefit from the `positive discrimination' schemes championed by the Government of India. While identifying Scheduled Castes and Scheduled Tribes was comparatively simple, it was the composition of Backward Classes that proved to be complicated. The Constituent Assembly debates reveal that the question of backwardness was discussed at length and various attempts at defining backwardness were made.

While K.M. Munshi and others held that backward communities were those which were lagging behind educationally and belonged to the SCs & STs, Ambedkar left it to the government to decide what constituted a backward community. At the same time, he opined that for equality to prevail in the country, there should be a time-bound principle of reservation so that the sections which had been historically deprived of resources and opportunities are able to improve their lot. Dr. Ambedkar, therefore, made a case for the sharing of state power which had hitherto been the monopoly of the upper castes. It was with this goal in view that Clause (4) of Art.16 was conceived.

Subsequently, the Supreme Court rendered two important decisions which involved Art.15 (State of Madras Vs. Champakan Dorairajan) and Art.16 (Venkataraman Vs. State of Madras). The decisions led to the Amendment of Art.15 which inserted Clause (4) `Nothing in this article or in Clause (2) of Art.289 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the SCs & STs.

The Parliament which enacted the Amendment was same as the Constituent Assembly and Ambedkar maintained that `... the backward classes ... are nothing but a collection of certain castes'. He arrived at that conclusion on the premise that no Hindu is born without a caste. `Therefore, in the circumstances of the country, it is impossible to avoid reservation without excluding some people who have got a caste'.

The Supreme Court further, laid down certain principles in due course which were followed when cases relating to Art.15(4) were brought forth. These were:

(1) Clause (4) of Art.15 is a provision or an exception to Clause (1) of Art.15 and to clause (2) of Art.29.

(2) For the purpose of Art.15(4) backwardness must be both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of a class of citizens, it cannot be made the sole and dominant test. Christians, Jains and Muslims do not believe in the caste system; the text of caste cannot be applied to them. Inasmuch as `identification of all backward classes under the impugned order has been made solely on the basis of caste, it is bad.

(3) The reservation made under clause (4) of Art.15 should be reasonable. It should not be such as to defeat or nullify the main rule of equality contained in clause (1). While it is not possible to predicate the exact permissible percentage of reservations, it can be stated in a general and broad way that they should be less than fifty per cent.

(4) A provision under Art.15(4) need not be in the form of legislation; it can be made by an executive order;

(5) The further categorization of backward classes into backward and more backward is not warranted by Art.15(4).

These principles were adopted to ensure certain malpractises that had crept in with regard to social and educational backwardness wherein upper castes were reserving seats in educational institutions on the plea that they were economically and educationally backward. Also, a trend of classifying the backwards into backward and more backward was noticed. The Court was called upon to examine the validity of such trends under Article 32.

The question of representation was not easy to reckon with. The Supreme Court in Devadasan Vs. Union of India was faced with the issue of the validity of the `carry forward' rule, obtaining in Central Secretariat service. This rule stated that if `a sufficient number of candidates considered suitable by the recruiting authorities were not available from the communities among which reservation was prescribed in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as reserved will be added as an additional quota to the number that would be reserved in the following year in the normal course to the extent to which approved candidates are not available in that year against this additional quota a corresponding addition should be made to the number of reserved vacancies in the second following year.

Needless to say, this rule was declared unconstitutional by the Constitutional Bench as it often resulted in more than fifty per cent of seats reserved in a particular year.

Subsequently, in 1964, in another judgement, namely, Chitralekha Vs. State of Mysore, the Supreme Court held that the identification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad, and does not offend Art.15(4).

The Court was also called upon to solve cases which involved the interpretation of what would constitute social and economic backwardness. In 1985, the Supreme Court was called upon to decide Vasanth Kumar and another Vs. State of Karnataka. The five judges constituting the Bench wrote separate opinions. Chandrachud, C.J., recommended the extension of reservation for a further 15 years, but not extending 50 years from the date of commencement of the Constitution. He added that the means test must be applied to ensure that the benefits reach deserving sections. Desai, J. opined that economic criteria should govern all reservations as the time had come to discard all other bases. Chinappa Reddy, J. felt that identification of backward classes on the basis of caste cannot be taken exception to as in the Indian context, caste is a class. Caste, in his view was the indicator of social backwardness and the reference of one's caste would identify one as backward or otherwise. He added further that the identification of SEBCs was a difficult and complex exercise and no universal or rigid tests could be established for the same. Reservations should continue only as long as the BCs attaining a state of enlightenment. Venkataramaiah held that equality of opportunity veered around two dominant principles: (I) the traditional value of equality of opportunity and (ii) the newly appreciated – though not newly conceived – idea of equality of results. Though he did not think that reservations were anti-efficiency or anti-merit, he emphasized that they should not

exceed fifty per cent and that the list of SEBCs and extension of facilities to them should be periodically reviewed.

The need to identify socially and economically backward classes and to have a yardstick by which such tests could be carried out was what the First Backward Classes Commission, popularly the Kaka Kalelkar Commission set out to do. In its report submitted in 1955, the relevant factors to consider while classifying backward classes would be their traditional occupation and profession, the percentage of literacy, or the general educational advancement made by them, the estimated population of the community and the distribution of various communities throughout the state or their concentration in certain areas. The Commission was also of the opinion that the social position occupied by a community in the caste hierarchy and its representation in Government service and the industrial sphere were of vital importance as well.

While it attributed social backwardness to the existing caste system and several undesirable features in existing Hindus. This led to social inequality and also rigidity in the social structure as it was common belief that performance of caste duties would lead to salvation. To combat these ills, it recommended that measures such as legislation on marriage and inheritance laws, liberal use of TV, newspapers and media be used to remove social evils, full assistance be given to promote education; among several others.

Among the causes for educational backwardness, it noted – traditional apathy for education on account of social and environmental conditions or occupational

handicaps; lack of educational institutions in rural areas; poverty; lack of educational aids in the form of scholarships etc., unemployment among the educated and defective educational system which does not train students for appropriate occupations and social profession.

It suggested representation of OBCs in government service (central and states) with a view to increasing the efficiency of the administrative machinery and the role of welfare which administrative services in developing countries have to play with regard to the masses. The suggested percentage of reservation was in proportion to the communities of OBCs. The minimum bases of representation of OBCs would be as follows:

Class I	:	25% of vacancies
Class II	:	$33^{1}/_{3}$ % of vacancies
Class III	:	40% of vacancies
Class IV	:	40% of vacancies

This percentage would be over and above that already conceded by the Government in case of the SCs & STs. It recommended, further, that the adequacy of reservation be reviewed every ten years and the progress made by such backward communities and their status be reviewed every fifteen years.

The report made by the Commission was considered by the Central Government, which apparently was not satisfied with the approach adopted by the Commission in determining the criteria for identifying the backward classes under Art.15(4). The Memorandum of Action appended to the Report of the Commission (as required y Art.340, Clause(3)) while placing it on the table of the Parliament, pointed out that the caste system is the greatest hindrance in the way of our progress towards

arriving at an egalitarian society and that in such a situation the recognition of certain specified castes as backward may serve to maintain and perpetuate the existing distinction on the basis of caste. The Memorandum also found the texts adopted by the Commission for identifying backward classes erroneous. It felt that such identification should be made in a more elaborate and systematic manner.

After 1956, no meaningful action was taken with regard to constituting another Commission for evolving better criteria for identifying BCs. Subsequently on 14 August 1961, the Central Government wrote to all the State Governments saying that 'while the State Governments have the discretion to choose their own criteria for defining backwardness in the view of the Government of India it would be better to apply economic texts than to go by caste. The letter stated further, that

> ...even if the Central Government were to specify under Art.338(3) certain groups of people as belonging to other backward classes, it will still be open to every State Government to draw up its own lists for the purposes of Arts. 15 & 16. As, therefore, the State Governments may adhere to their own lists, any all-India list drawn up by, the Central Government would have no practical utility.

It is interesting to note that the list of BCs drawn up by State governments would not be applicable to Central Services. As a result, several states appointed commissions for identifying the socially and economically backward classes and reserving certain percentage of posts in their favour.

The Second Backward Classes Commission was constituted by a Presidential Order in 1979 under the Chairmanship of B.P. Mandal. The Commission was required:

i. To determine the criteria for defining the SEBCs;

ii. To recommend steps to be taken for the advancement of the SEBCs so identified;

iii. To examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such BCs 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. To present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

The Commission was thus empowered to collect any information as they may consider necessary or relevant in any appropriate manner, from the Union or State governments and the Union Territory administrations or any other authority. For this purpose it could hold its sittings or sub-committee meetings at a time and place determined by the Chairman.

The Commission submitted its report on the 31 December 1980. While acknowledging the errors that the Kaka Kalelkar Commission had made in determining SEBCs, it noted that it had failed to work out objective tests and criteria for the proper classification of SEBCs. The Commission before it, had failed to associate leading sociologists, research organizations and specialized agencies of the country in its activities and not taken any help or suggestions from them. It sought to rectify such errors and procured data and information from various quarters. It also developed a scheme for the identification of Backward Classes. There were 1 such indicators grouped under three broad heads viz., Social, Economic and Educational.

A. SOCIAL

i. Castes/Classes considered as socially backward by others.

ii. Caste/Classes which mainly depend on manual labour for their livelihood.

iii. Castes/Classes where at least 25 per cent females and 10 per cent males above the state average get married at an age below 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas.

iv. Castes/classes where participation of females in work is at least 25 per cent above the state average.

B. EDUCATIONAL

v. Castes/classes where the number of children in the age group of 5-15 years who never attend school is at least 25 per cent above the state average

vi. Castes/classes where the rate of student drop-out in the age group 5-15 years is at least 25 per cent above the state average

vii. Castes/Classes amongst whom the proportion of matriculates is at least 25 per cent below the state average.

C. ECONOMIC

viii Castes/Classes where the average value of family assets is at least 25 per cent below the state average.

ix. Castes/classes where the number of families living in kuccha houses is at least 25 per cent above the state average.

x. Castes/Classes where the source of drinking water is beyond half a kilometer for more than fifty per cent of the households.

xi. Castes/Classes where the number of households having taken consumption loan is at least 25 per cent above the state average.

The Commission noted that there could not be parity as far as the importance of these indicators was concerned in identifying BCs. It therefore gave separate weightage to each. All social `indicators' were given a weightage of three points each, educational `indicators' a weightage of two points each and economic `indicators' a weightage of one point each. The Commission recognized the fact that economic backwardness stemmed from social and educational backwardness and therefore gave importance to those indicators as well.

From the values given to each indicator, the total score aggregated twenty-two. These eleven indicators were applied to all the castes covered by the survey for a particular state. As a result of this application, all castes which had a score of fifty per

cent (i.e., eleven points) above were listed as SEBCs and the rest were treated as 'advanced'.

The Commission further emphasized that this survey had no pretensions to being a piece of academic research. It was conducted by the administrative machinery for the purpose of arriving at a simple criteria for identifying SEBCs (Para 11.27). The Commission adopted a multiple approach for the preparation of comprehensive lists of OBCs for all the States and Union territories. The main sources examined for the preparation of these lists were:

i. Socio-educational field survey;

ii. Census report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes & indigenous tribes);

iii. Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidence as described in Chapter X of this Report; and

iv. Lists of OBCs notified by various State Governments?

The Commission, further adopted a rough yet ready criterion for identifying OBCs among non-Hindu communities – (I) all untouchables converted to any non-Hindu religion, and (ii) such occupational communities which are known by the name of their hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs ought to be treated as SEBCs. The Commission then sought to work out the estimated population of OBCs in the country and arrived at the figure 52 per cent. It is important to note here that as recent systematic caste-based enumeration was unavailable, figures of 1931 were taken as the base. The growth rates among various communities which had more or less remained constant was used to arrive at the percentage that these groups constitute of the total population of the country.

Sl. No.	Group Name	Percentage of Population of Religious Groups etc.
	I. SCs & STs	15.05
A-1	SCs	07.51
A-2	STs	**22.56**
	Total of A	
	II. Non-Hindu Communities	
B-1	Muslims (Other than ST)	11.19 (0.02)*
B-2	Christians (Other than ST)	02.15 (0.44)*
B-3	Sikhs (Other than SC & ST)	01.67 (0.22)*
B-4	Buddhists (Other than ST)	00.67 (0.03)*
B-5	Jains	(0.47)
	Total of B	**16.16**
	III. Forward Hindu Castes & Communities	
C-1	Brahmins	05.52
C-2	Rajputs	03.90
C-3	Marathas	02.21
C-4	Jats	01.00
C-5	Vaishyas-Bania etc.	01.88
C-6	Kayasthas	01.07
C-7	Other forward Hindu Caste groups	02.00
	Total of C	17.58
	Total of A, B & C	**56.30**
	IV. Backward Hindu Caste & Communities	
D.	Remaining Hindu Castes/groups which come in the category of 'Other Backward Classes'	43.07@
	V. Backward non-Hindu Communities	
E.	52 per cent of religious groups under Section B may be treated as OBCs	08.40
F.	The approximate derived population of OBCs including non-Hindu communities (Aggregate of D & E rounded)	52.00

@ This is a derived figure

* Figures in brackets give the population of SC & ST among these non-Hindu communities.

Source: Report of the Second Backward Classes Commission (1980), First Part, p.56.

On the basis of such classification and identification of SEBCs, the Commission made the following recommendations with regard to the quantum and scheme of reservations:

1. Candidates belonging to OBCs recruited on the basis of merit in an open competition should be adjusted against their reservation quota of 27 per cent
2. The above reservation should also be made applicable to promotion quota at all levels
3. Reserved quota remaining unfilled should be carried forward for a period of three years and dereserved thereafter
4. Relaxation in the upper age limit for direct recruitment should be extended to the candidates of OBCs in the same manner as done in the case of SCs & STs.
5. A roster system for each category of posts should be adopted by the authorities concerned in the same manner as presently done in respect of SC & ST candidates.

The Report also recommended several measures to improve the condition of these backward classes. It noted that one must not hasten to conclude that the caste system has weakened. It noted that social mobility had indeed weakened some traditional features of caste, but what caste has lost in the ritual front, it has gained on the political front'. This has also led to some adjustments in the power equation between the high and low castes and thereby accentuated social tensions (Chapter V, para 5.17). To remedy problems arising out of such linkages, the Commission suggested that structural reforms were necessary. This involved a radical transformation of the existing relations of production and the apportioning of surplus land to OBCs.

The Report of the Mandal Commission was put before the Houses of Parliament for consideration in 1982 and 1983. Although most of the members of the

House felt that adequate measures should be taken to alleviate the status of the SEBCs, `the Government was faced with the issue of arriving at a satisfactory definition of BCs and bring about an acceptance of the same by all the States concerned' (R. Venkataraman, then Minster for Defence and Home Affairs). Despite an expressed desire by the House in 1983 to implement some of the recommendations of the Mandal Commission Report, no action was taken until the issuance of the Office Memorandum of 13 August 1990.

The Office Memorandum of 13 August 1990 noted that in keeping with the requirements of a `multiple, undulating', society like ours, it was making some provisions for SEBCs as desired by the MCR. Accordingly it issued the following orders:

i. 27 per cent of the vacancies in civil posts and services under the Government of India shall be reserved for the SEBCs.

ii. The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation shall be issued separately.

iii. Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27 per cent.

iv. The SEBCs would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Government's lists. A list of such castes/communities is being issued Separately.

v. The aforesaid reservation shall take effect from 7 August 1990. However this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

Following widespread protests throughout the country sparked off mainly by the implementation of the MCR, another amended Office Memorandum was issued on 25 September 1991. This Memorandum stated that:

i. Within the 27 per cent of vacancies in civil posts and services under the GOI reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

ii. Ten per cent of the vacancies in civil posts and services under the GOI shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

iii. The criteria for determining the poorer sections of the SEBCs or other economically backward sections of the people who are not covered by any of the existing schemes of reservation are being issued separately.

Dissatisfaction over the orders of the Second Office Memorandum led several people to file Writ Petitions challenging the same. These were heard in the first instance by a Constitution Bench presided over by the then Chief Justice, Sri Ranganath Misra. After some time it was referred to a Special Bench of nine Judges `to finally settle the legal position relating to reservations', as `the several judgements of this Court have not spoken in the same voice on this issue and a final look by a larger Bench in our opinion should settle the law in an authoritative way'.

Accordingly, the questions the Special Bench had to tackle were:

i. Whether Art.16 (4) is an exception to Art.16(1) and would be exhaustive of the right to reservation to posts in services under the State?

ii. What would be the content of the phrase BCs in Art.16(4) of the Constitution; and whether caste by itself could constitute a class; and whether the economic criterion by itself could identify a class for Art.16(4); and whether BCs in Art.16(4) would include Art.46 as well?

iii. If the economic criterion by itself could not constitute a BC under Art.16(4), whether reservation of posts in services under the State based exclusively on economic criteria would be covered by Art.16(1) of the Constitution?

iv. Can the extent of reservation to posts in the services under the State under Art.16(4) or, if permitted under Art.16(1) and Art.16(4) together, exceed 50 per cent of the posts in a cadre or service under the State or exceed fifty per cent of the appointments in a cadre of service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of services under the State.

v. Does Art.16(4) permit the classification of BCs into BCs and Most BCs or permit further classification among them on economic or other consideration?

vi. Whether the making of `any provision' under Art.16(4) `by the state' necessarily involve legislation or whether the same could be done by an executive order?

vii. Whether the extent of Judicial Review would be limited to the identification of BCs and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?

viii Would reservation of appointments `in favour of any BC' be restricted to the initial appointment to the post or would it extend to promotions as well?

It was left to the Court, therefore, to decide the limitations and scope of Art.16 with regard to the provision it was required to make for the SEBCs. The Court had also to define and identify backwardness and decide whether such definition would situate the SEBCs on an equal footing with the SCs & STs. It was also required to enter into the murky debate which pitted reservations against merit and efficiency. In addition to chalking out its own scope of Judicial Review with regard to reservations and identification of BCs it had to judge whether the ten per cent reservation provision as envisaged in the Office Memorandum dated 25 September 1991 for other economically backward sections was permissible in Art.16.

Before pronouncing its judgement, the Supreme Court made a careful study of the cases mentioned earlier in the Chapter and several others wherein the scope of Art.16 was required to be explained and defined. It noted that the questions that they were dealing with were complex social, constitutional and legal ones which could have been settled more satisfactorily through political processes. Instead, the fact that the judiciary was required to address them showed the confidence that people reposed on this institution of the state. It noted the remarks of Sir Anthony Mason once the Chief Justice of Australia:

> Society exhibits more signs of conflict and disagreement today than it did before... Governments have always had the option of leaving questions to be determined by the Courts according to law...There are other reasons, of course...that cause governments to leave decisions to be made by Courts. They are of expedient political character. The community maybe so divided on a particular issue that a government feels that the safe course for it to pursue is to leave the issue to be resolved by the Courts, thereby diminishing the risk it will by alienating significant sections of the community.

He added that:

> ...the people accept the Courts as the appropriate means of resolving disputes when governments decide not to attempt to solve the disputes by the political process.

In the same spirit, judges of the Special Bench of the Indian Supreme Court hoped that the people would remember that `law is not an abstract concept removed from the society it serves, and the Judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality'.

The Court made special reference to the debates in the Constituent Assembly with regard to Article 16 and to cases decided previously. It referred also to a few decisions of the US Supreme Court with regard to some race related programmes. The decisions of the Court were both socially and constitutionally significant.

Socially, it had two important tasks before it. It was required, in the first place to examine the definition of class/caste as discussed in the Constituent Assembly and subsequently, in the judgements of the Supreme Court.

Secondly, it had to relate to the observations of sociologists, legal experts and so on and contextualize the same with the contemporary Indian conditions. On the basis of the above, it concluded that `a caste is nothing but a social class – a socially homogeneous class. It is an occupational grouping, with this difference that its membership is hereditary'. It is further characterized by involuntary membership, endogamy and strict occupational structure, determining social status. Thus `lowlier the occupation, the lowlier, the social structure of the class in the graded hierarchy'. This social class or caste is particularly relevant on occasion of marriage, death and other social functions. The Court noted Ambedkar's statement of caste being an enclosed class and the fact that it was mainly these classes that the Constituent Assembly had in mind while formulating Article 16(4).

The process of urbanization had limited impact in breaking/weakening the caste-occupation nexus. Low occupations resulted in poverty. Although this is not apparent in rural areas, the `caste-occupation-poverty' cycle is an ever present reality in rural India. It noted, after the US Supreme Court decision that if race be the basis of

discrimination – past and present – race must also form the basis of redressal programmes though in our constitutional scheme it is not necessary to go that far!

The Court noted, further, that neither the Constitution nor the law prescribed procedures or method of identification of backward classes and that it was not possible for the Supreme Court to arrive at similar procedures either. It was left to the concerned authority to devise means of identification. A tip was given however to begin identification with castes and then move on to groups, section or classes as Indian society was largely comprised of castes as the largest identifiable social group.

The Supreme Court made an in-depth study of the nature and complexity of non-Hindu society and observed the existence of structures quite similar to castes among them.

The caste system had percolated even the non-Hindu religions – no doubt in varying extents. Particularly, among Christians in Southern India, who were converts from Hinduism, it was being practised with as much rabidity as it was among Hindus. This aspect has been stressed by the Mandal Commission and has also been judicially recognized. Encyclopedia Britannica refers to the existence of castes among Muslims and Christians ... Among Muslims ... a distinction is made between `Ashrafs' (supposed to be descendants of Arab immigrants) and non-Ashrafs (native converts), both having sub-groups...The non-Ashrafs practice caste system (including endogamy) `in a manner close to that of their Hindu counterparts'. It is important to note that in many Indian states in the past as well as in the present, Muslim communities were treated as backward by non-Muslim communities (Paras 83 & 84).[2]

It also stated that it is not necessary for a class to be designated as a backward class that it is situated similarly to the SCs & STs (paras 87 & 88).

Certain standards were laid down for the identification of a caste/class as backward. This identification would not be solely on the economic criteria but on social criteria as well. A class could be designated as backward on the basis of occupation and income without reference to caste.

It was also recommended that BCs be further classified into the Backward and More Backward Classes to ensure that the deserving can avail of the benefits of reservation. It further specified that a creamy layer be identified among Backward Classes and this be excluded from availing benefits prescribed for BCs.

Since the Constitution provided for adequate representation and not proportional representation, it held that reservation should be limited to 50 per cent. Only in extraordinary conditions is relaxation of this rule permitted. The carry-forward rule was rejected and the fifty per cent rule applied each year irrespective of the total strength of class, category, service or cadre, as the case may be. Article 16(4), it was decided, does not envisage provision for reservations in matters of promotion. It would, however, `not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration'. (Paras 100 & 107).

It defined further the role of the executive in matters relating to prescribing reservation, if such bodies deem fit. A legislative action is not necessary for the purpose. It noted that Art.16(4) is not an exception to clause (1) of the same Article. It is however, exhaustive of the subject of reservation for backward classes of citizens.

Although reservations can also be provided under Art.16(1), they have to be adjusted in a manner such that they do not exceed the level of representation prescribed for backward classes. The adequacy of representation of a particular class in services under the State is a matter within the subjective satisfaction of the appropriate State government. There is no particular or special standard of judicial scrutiny applicable to matters arising under Art.16(4).

It struck down, as constitutionally invalid, the order in the Office Memorandum of 25 September 1991 which allowed ten per cent of posts to be reserved in favour of 'other economically backward sections of people who are not covered by any of the existing schemes of reservation'.

Finally, it authorized the Central and State governments to create a permanent mechanism (in the nature of a Commission) for examining the requests for inclusion and complaints of over-inclusion or non-inclusion in the list of OBC and to render advice to the Government which would be binding upon the Government. Where, however the Government does not accept the advice, it must record its reasons therefor.

Both the Supreme Court judgement and the Mandal Commission Report were severely criticized. The criticism to the MCR and the Court's judgement came largely from the section of population which did not stand to gain from the reservation scheme. It was attacked by the Left which felt economic considerations were the sole criterion for assessing backwardness. The former group was supported by the Right Wing BJP and Hindutva forces who saw it as a direct threat to their Hindu vote-bank.

The philosophy underlying reservations in India, it was widely held should be reviewed and revised. It was also alleged that the implementation of the Mandal Commission Report and the judgement supporting it was politically manouvered. The then Prime Minster V.P. Singh, who was responsible for introducing the Report in Parliament, relied for the survival of his government on the allies of the Janata Dal. Amitabh Kundu argues that V.P. Singh realized that the electoral process in the country is based to a large extent on caste politics and many members of the Parliament and the State Legislatures from northern states belong to backward classes.[3] These representatives who feel accountable to their 'constituency' feel handicapped as the administrative channel through which they have to function is composed largely of upper caste members. He, therefore notes that a change in the social (class/caste) composition of the political leadership without a corresponding change in the administrative leadership has necessitated the introduction and implementation of the Mandal Commission Report.

Some, along with Ashok Guha believe that the Mandal Commission Report was designed to benefit and mobilize the support of a small OBC elite.[4] The latter, it is believed, will be able because of its unique status in OBC society, its wealth, its relatively high educational level and its control over caste councils – to persuade or coerce the general impoverished OBC masses to vote as it desires.[5] The OBC upper crust which is viewed as the most significant group of power brokers in the country, would naturally respond favourably towards a policy formulated exclusively for its benefit. It can be added here that reservations for OBCs are limited only to higher educational institutions and since only about 3 per cent of their population completes

higher secondary school or its equivalent and less than seven per cent matriculates, the intended beneficiaries of the Mandal scheme are more than evident.

Guha and Kundu are also quick to note that the 'Mandal myth' (that reservations do indeed achieve social justice) has been readily propagated by interested politicians.[6] But 'Mandal was not a myth maker; he was a magician as well. He demonstrated how an individual or a party could acquire a reputation for egalitarianism at no cost whatsoever.[7] Doing something concrete for the backward masses would be an expensive exercise involving improving of schools, educating women, supplying drinking water and so on. 'Reservations on the other hand, cost nothing. One simply gives the leader of the more numerous community a job by taking it away from somebody more qualified but commanding less political clout — congratulating oneself all the while at one's social consciousness. It also represents a cut-rate or bargain-basement egalitarianism; and like many bargain – basement wares, it is not the genuine article'.[8]

The notion that there should be a caste balance within various occupations is also criticized. Guha argues that a social order in which 27 per cent of all doctors, professors, engineers, lawyers and so on belong to the OBCs is considered to be more 'socially relevant than one in which this proportion is lower. The skills of the professionals concerned and their expertise is now 'socially irrelevant' and their caste has became more important.

An argument that there should be equality of opportunity and hence reservations must be provided to equalize opportunities is countered by Ramaswami

R. Iyer on the ground that what is also needed, in addition, in some provision to the SEBCs to enjoy a share in the power structure. He argues that the power structure necessarily means the political power-structure where the OBCs are doing remarkably well and have even given to the country a new leadership. The bureaucracy, on the other hand, does not constitute a power-structure; even though they have a tendency to become powerful in the absence of a strong political leadership. He further observes that a bureaucracy can increase its power in many ways including blocking and thwarting the will of the political masters; by establishing improper alliances with politicians; by being given too wide a scope for the exercise of discretion in individual cases through the excessive spread and ramifications of governmental activities; and through the related phenomenon of corruption.[9] He adds that a good political leadership must control the bureaucracy. The scope for discretionary decision making by the bureaucrats and politicians can also be reduced by changes in the nature and extent of governmental regulation of the society and the economy. He rejects the question of the representation of caste composition of the society in the bureaucracy, arguing that the bureaucracy and technocracy are the mechanisms through which the government functions; they are not representational but functional institutions.[10] By virtue of such a function, he argues further, that a functional institution is faced with the task of performing its duties efficiently and recruitment should therefore be solely on the basis of the ability of candidates to perform the functions required of them.

This takes us to the `Merit and Efficiency' argument which is often considered to be affected adversely if reservations are expanded to include a broader section of people. It is argued that since any system of job reservations implies the adoption of a

selection principle other than that of the requirements of the job in question (the principle ordinarily being the ability to perform function well); any principle of selection other than that criterion is *ipso facto* a deviation from merit and a non-guarantor of efficiency (not, of course, a guarantor of inefficiency).[11] Ashok Guha goes on to note four ways in which reservations impair efficiency.[12] The immediate effect on the enterprise or organization is the replacement of the more meritorious by the less. The long term repercussions, are however, more devastating. It reduces the incentive to perform as caste matters more than performance resulting in caste wars within organizations which make team-work and harmonious functioning impossible. It hampers and demoralizes also, supervision and management.

The repercussions on efficiency are not limited to the specific enterprises or sectors in which they originate. The loss in efficiency in the public sector impairs the working of the private. In a country like ours, where the public sector controls the 'commanding heights' and has monopoly over the supply of essential infrastructural inputs and also manipulates all the levers of public policy, increased inefficiency in the public sector is bound to reverberate economy-wide, ranging the private sector as well.

Guha goes on to note that since only the government can absorb the beneficiaries of reservations, pressure for the expansion of the increasingly inefficient public sector at the expense of the private is certain. This pressure will increase when reservations are extended to educational institutions which will lead to a large number of unemployed special category graduates. Nepotism, bribery and corruption is likely to be doubled, resulting thereby, in posts and jobs being offered to the unworthy.

Finally, the argument that reservation at the level of employment or university admissions gives the educationally backward the opportunity to improve radically and achieve competitive efficacy levels is falsified. So is the logic behind it which believes that this will result in benefiting both the individual and the caste; will make reservations as a temporary measure of weakening the caste structure more meaningful. Guha calls this the `infant industry argument'.[13] The infant never grows up; and the individual has no incentive to improve since this is unnecessary and the caste has a vested interest in `perpetual infancy' since that would guarantee perpetual reservation. Even if inefficiency and reservations are temporary they would impose a cost on the current generation; and there is no evidence that they serve any social purpose that compensates for this cost. It is recommended that the problem of social and educational backwardness be tackled at the source and cosmetic operations which have indirect consequences and in the ultimate analysis fail to tackle the heart of the problem, should be abandoned.

He adds that the effect of reservations on quality is particularly devastating in an intensely competitive world in which India is locked in a grim struggle for her economic survival. Increased inefficiency as induced by reservations would prove disastrous for the country. It would also accelerate `brain drain' and reduce the prospects of Indian breakthrough in technological and other spheres, and destroy industrial competitiveness. Reservations, in the long run, would thus amount to an economic suicide.[14]

The tendency of the policy of reservations to minimize and finally obliterate caste divisions seems to ring false as does the fact that although introduced as a temporary measure, they are self perpetuating and all encompassing. Reservations, encourage differences on caste basis, the MCR in particular, is based on the traditional Hindu notion of caste which doesn't take into consideration the tendency of Sanskritization as it is considered to be limited in scope and thus views Hindu society as static and unchanging. Reservations, based on ascriptive status confer benefits by virtue of being born into certain families and seem no different from aristocracy.[15]

There is also little force in the argument that reservations seek to correct historical injustices of the past as it is argued that in many areas, the twice born were indeed backward and were not in possession of enough wealth, property or resources. A historical case study of the state of Madras shows that the Brahmins were not necessarily the most wealthy in Tamil society – they were the Mudaliar landowners and the Chettiars. The Brahmins assumed ritual superiority over the others and pursued vocations and professions which came to acquire social respectability such as medicine, law leading to the unconscious assumption of social and cultural superiority by the Brahmins, which was later challenged by others.[16] Brahmins, it should be pointed out, were willing and obliged to work for the rich non-Brahmins as cooks, clerks, accountants, priests and teachers. Although several Brahmins qualified for the ICS/IAS not all of them belonged to the land owning families.

Similarly, a document of AD 1799 takes into consideration pre-British society in a Maharashtra village and decides the castes as follows: Senior group: (1)

Carpenter, (2) Cobbler, (3) Mang, (4) makar. Middle group: (5) potter, (6) barber, (7) Washerman, (8) blacksmith. Junior group: (9) Brahmin priest, (10) non-Brahmin priest (Guran), (11) Goldsmith, and (12) Muslim priest (Maulana).[17]

Caste in pre-British India could change its position in the caste system. Thus, M.N. Srinivas, in Social Change in Modern India observes that although mobility was possible but not easy, it would occur occasionally. He even observes the three ways in which a caste could move up the caste hierarchy viz., any caste assuming political power could advance a claim to being kshatriya; the king could promote or demote a caste in consultation with brahmins; and landowning castes could assume a new ritual status. This trend, he observes continued during British times, though to a limited extent. A brief glimpse into the economic and social condition of the upper castes in relation to the lower castes and the mobility within castes has led observers to conclude that any excessive brooding over historical injustice (as distinguished from a proper awareness of it) is likely to lead not to compensatory discrimination but to retributive injustice. If we let this happen, we shall be building up a new set of dissentions rather than proceeding towards future social harmony.[18]

From yet another angle, the system of Reservation as being a rectification of past injustice can be critiqued. For past, injustice to form the basis of preferential treatment, all communities which have in some way suffered injustice should be accommodated. Further, the benefits thus given as rectification of past injustice, must satisfy the proportionality principle, i.e., compensation should commensurate with the injury suffered. The principle of setting quotas and awarding them on the basis of merit among members of the preferred caste villages the proportionality principle as

no connection can be made out between merit of the members of the preferred caste and the amount or degree of injury or injustice suffered by them.[19]

If past injustice to Dalits and Backward Castes by the twice born, upper castes can be adequate ground for advocating reservations for that category; the present social situation wherein members of the Backward Classes practice discrimination *vis-à-vis* Dalits and others should also be taken into account. It is widely held that the BCs are not, and have not been, in any way oppressed or subjugated. It is also believed that since the BCs have at their disposal adequate economic resources and are in some areas `dominant' castes, they do not suffer the consequences of a low ritual status.

Andre Beteille argues, "They (Dalits) have suffered the kind of psychological and moral injury that justifies their now being treated with special consideration. The castes and communities grouped together as the OBCs have not suffered collectively that kind of injury in either the recent or the distant past".[20] The Backward Castes in Bihar especially the Kurmis and the Jadavs have at their disposal abundant economic wealth in the form of agrarian land and have risen considerably in the economic scale. Their presence is felt not just in the political power structure, but also in the administrative structure of the state. The BCs are instrumental in perpetuating the feudal class structure and in preventing the benefits of reservation to trickle down to the more deserving among them. These sections of the BCs are notorious oppressors of the Dalits.[21] However, the difference between BC landlords and upper caste landlords is marginal. As an example, though there are instances of sexual attacks by BC men on Dalit women, there is nothing like the regular sexual use of Dalit women,

by upper caste men. Kurmi and Jadava landlords have not had anything like the `right of the first night' that upper caste landlords assumed in their areas.[22] If reservations for the BCs have to be championed, it should focus mainly on the declining in the relative status of women within peasant households. Reservation should be modified and the participation of women should be encouraged as a natural bourgeois transition. Further, it is recommended, that the program envisaging reservation for BCs should go beyond and make Dalits the centre of the anti-caste programme. Their status cannot be alleviated through reservation, but by a complete agrarian revolution which would overthrow landlordism and the caste system.

The Mandal Commission Report seems to be highly flawed also in that it provides reservations for the OBCs which in the view of Kameshwar Choudhary is short-cut, soft and sly `reform measure' to cater to the psychological aspirations of that section of the population which constitutes the majority than trigger a process of radical structural change in society. The benefits will be reaped by comparatively advanced sections of the OBCs. The report recognizes the fact that besides material benefits accruing to the family concerned which gets the jobs, the psychological spin off of this phenomenon would be tremendous as the entire community would feel socially elevated. The Commission held that by increasing the representation of the OBCs in government services, we give them an immediate feeling of participation in the governance of the country'.

The economic grounds as specified in the Mandal Commission Report can easily be doctored. There is, in the absence of a credible verification system, the possibility of a flourishing market for fake income certificates, large scale bribery of,

and undue influence on the certifying authorities, preferences for the undeserving rich (who can pay the necessary bribes) at the expense of the deserving poor (who cannot) and a vast increase in the scope of political patronage.

On the basis of a High Court judgement which held that a law which apparently infringes the fundamental rights of the citizens shall be considered void as the lawmakers perception that the same is consistent with the Constitutional guarantees of the citizen is not legitimate; Arun Shourie argues that the Mandal Commission Report did not take the same into cognizance. By way of example he cites:[23]

- He (B.P. Mandal) incorporated wholesale lists that were in States which, on his own telling had little basis.
- He ordered an enormous survey. Professor B.B.M. Roy Burman who headed the team revealed to the *Indian Express* (31 August 1990) that each of the suggestions of the experts was ignored; that instead of the 51 tables suggested by them being used, 31 were used; that the data collected was concealed from the experts; the while experts had concluded that occupation was a better criteria of backwardness, or at best a blend occupation and caste, Mandal plummeted for caste. After that the tampering commenced precisely after a pilot survey in West Bengal showed that only two occupational groups – blacksmiths and potters – could properly be regarded as 'backward', that the weights arrived at by the experts for the different criteria were arbitrarily dumped and another set fabricated; that the Commission has inflated its estimate of the proportion that backwards are of the population by imaginative triple counting and so on.
- Mandal has himself recorded that the survey the Commission conducted, by excluding the experts it now turns out, yielded incredible results, and that therefore the Commission modified them using its own "intimate personal knowledge"; without disclosing the number of cases and the extent to which the results were thus modified.

As a result of such exercise, some practical problems and discrepancies occur. As Biju Patnaik pointed out, with regard to Orissa, the tewnty castes listed as being OBCs are already recognized as SCs. The Commission further lists caste entities which are just surnames, and those are often used by the high castes as well. Some castes are untraceable in the state whereas in West Bengal, no backward castes (as mentioned in the list) can be located. In UP and Bihar, castes listed as backward are in fact, dominant, and domineering.

The Left in India has adopted a somewhat different stand. While it disagrees with the Commission on caste as the basis of identification of Backward Classes, it maintains that merit is socially conditioned and not an individual attribute. The capacity to work efficiently in a given milieu depends largely on the facilities available to an individual at the initial stage. It holds therefore that any form of preferential treatment should be given at the stage of education. Other questions that need to be posed in the parameters of Marxist politics are questions of radical land reforms, industrialization, creationi of more job opportunities and the spread of mass education to show the alternate path rather than adopt the superficial capitalist one. To supplement this, the Left has examined the benefits generated by the system of reservations and concluded that they have been skin deep, resulting in a creamy layers among the BCs. They understand the need for short-term measures and agree with the West Bengal committee to identify OBCs which recommended the identification of occupational groups below the poverty line as backward, for whom comprehensive programmes for economic and development educational advance should be made available. To avoid malpractices which arise from economic status as a criterion for

determining backward classes, the Marxist scholars have suggested a diagnosis of both the basis of caste in the structure of land relations and its super- structural dimensions in politics emphasizing various levels of interaction blind economy, culture and politics. The new political economy has to relate the specific social process with the overall national process without either missing the peculiarities and unevenness in the regional situations on the nature of the developing political economy in India. The emerging power relations in the countryside and their countrywide applications are the focus of the new political economy.[24] Marxists hold further, that varna and jati are both pre-class institutions from the outset and needed no class to precede them and close them up as assumed by Brahminical scholars and after them by Ambedkar.[25] They recommend that to the already four existing, economic criterion for determining backwardness in the MCR the following two should be added from the social indicators:

ii. Castes/Classes which mainly depend on manual labour for their livelihood;

iii. Castes/Classes where participation of women in work is at least 25 per cent above the state average.

Thus, there are three grades of economic backwardness in the caste/class society, the state average evidently applicable to the high and upper middle castes/classes, the second to the other backward castes/classes and the third, not mentioned by the MCR, to the SC/ST.[26] It follows, accordingly, that there are three grades of purchasing power in the caste/class society. The new political economy has to show how the Indian economic crisis is basically due to the caste system. The politico-economic emancipation of the Indian peasantry lies in the annihilation of the

caste system awaiting the peasantry on a purely social basis, and thus paving the way for a socialist revolution.[27]

Yet another view is that offered by Rajni Kothari who attributes the new upsurge of caste to the mindless pursuit by the state of consensus despite pluralities of interests and identities which are undermined on the plea of national integration, national self reliance, sovereignty and so on. This has put the balance between traditional civil society and the modern state in jeopardy – the earlier `fit' between social diversity and democratic institutions, is now disturbed largely due to aggressive social and ideological assertions based on a majoritarian claim of a hypothetical community (claiming to be religion).[28] The state which purported to be multi-religious, multi-ethnic, multi-caste and multi-centred has now been thrown out of gear; becoming in the process more centralized and oppressive especially *vis-à-vis* the oppressed, deprived, weak and marginalized sections of society.

He goes on to observe that this development has led to these communities trying to seek out their even futures on the basis of their identities and numbers. The rise of mobilization based on caste, sub-caste lines reflects their disappointment with the Indian state for failing to end all forms of oppression and discrimination. It also reflects the failure of the Indian government and the ruling masses to understand and recognize the social terrain over which it presides.

These new social movements have also a changed focus of claims and demands. They use caste identity as a means of attaining economic advancement, social status and political power. The Indian plural system which has been there all

along and is inherent to the social terrain, is now being expressed in an upsurge of equity and social justice, not as a result of state policy but as a matter of right, to be sought to be acquired through access to state power.

He concludes on the note that the Nehruvian perspective that guided the post-independence elite towards social change, economic development, modernization, secularism, education and democracy wherein the society would become non-hierarchical, progressive and non-segmental has been challenged. He argues further that democracy gives way to resurfacing of castes and this can provide a basis for a struggle against oppression. Within the social structure of caste, he believes, a variety of new alignments take place which undermine the rigidity of the system – splitting and federating the castes along secular political lines, enabling them to bargain with political parties and adopt organizational forms in keeping with the demands of the latter.

In Kothari's view, therefore, the recent caste upsurge is a natural outcome of the democratic state in which differences and pluralities abound and are encouraged. They affect their disappointment with the State in addressing their demands and in attempting to integrate and homogenize pluralities. Schemes like the Mandal Commission are mere tools which stake a claim to resources to which the BCs deserve a share.

Marc Galanter has made a very useful analysis of the Reservation Scheme in India and has dealt very closely with and also tried to assess the (alleged) costs and

benefits of the same. He comes up with following classification (each benefit is paired with the opposite claim of cost).[29]

ALLEGED BENEFITS &
COST OF POLICY OF COMPENSATORY DISCRIMINATION

1.	REDISTRIBUTION Preferences provide a direct flow of valuable resources to the beneficiaries in larger measure than they would otherwise enjoy	Vs	DIVERSION These resources are enjoyed by a small segment of the intended beneficiaries and do not benefit the group as a whole
2.	REPRESENTATION Preferences provide for participation in decision making by those who effectively represent the interests of the beneficiaries, interests that would otherwise be underrepresented or neglected	Vs	MISREPRESENTATION By creating new interests which diverge from those of the beneficiaries, preferences obstruct accurate representation of their interests
3.	INTEGRATION By affording opportunities for participation and well being, preferences promote feelings of belonging and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups into Indian society.	Vs	ALIENATION By emphasizing the separateness of these groups, preferences reduce their opportunities for (and feeling of) common participation.
4.	ACCEPTANCE Preferences induce in others and awareness that the beneficiary groups are participants in Indian life whose interests and views have to be taken into account and adjusted to.	Vs	REJECTION Preferences frustrate others by what they consider unfair favouritism and educate them to regard the beneficiaries as separate elements who enjoy their own facilities and have no claim on general public facilities.
5.	INTEGRITY Preferences permit forms of action that promote pride, self-respect, sense of achievement, and personal efficacy that enable the beneficiaries to contribute to national development as willing partners	Vs	MANIPULATION Preferences subject these groups to manipulation by others, aggravate their dependency, and undermine their sense of dignity, pride, self-sufficiency and personal efficacy.
6.	INCUBATION By broadening opportunities, preferences stimulate the acquisition of skills and resources needed to compete successfully in open competition.	Vs	OVER-PROTECTION Preferences provide artificial protection which blunts the development of the skills and resources needed to succeed without them.
7.	MOBILIZATION By cultivating talents, providing opportunities and incentives and promoting their awareness and self-consciousness, preferences enhance the capacity of the beneficiary groups to undertake organized collective action.	Vs	ENERVATION By making their dependent, blunting the development of talent, undermining self-respect, preferences lessen the capacity for organized effort on their own behalf.

8	STIMULATION By increasing the visibility of the beneficiary groups, promoting their placement in strategic locations, and emphasizing the national commitment to remedy their condition, preferences serve as a stimulus and catalyst of enlarged efforts for their uplift and inclusion	Vs	SEDATION By projecting an image of comprehensive governmental protection and preferment, preferences, stir the resentment of others, allaying their concern and undermining initiatives for measures on behalf of the beneficiary groups
9	SELF-LIQUIDATION The benefits of preferential treatment are mutually reinforcing and will eventually reader unnecessary any special treatment.	Vs	SELF-PERPETUATION These arrangements created vested interest in their continuation, while discouraging the development skills, resources and attitudes that would enable the beneficiaries to proper without special treatment
10	FAIRNESS Preferences compensate for and help to offset the accumulated disablements resulting from past deprivation of advantages and opportunities	Vs	UNFAIRNESS Preferences place an unfair handicap on individuals who are deprived of opportunities they deserve on merit.
11.	SECULARISM By reducing tangible disparities among groups, directing attention to mundane rather than rival standing, preferences, promote the development of a secular society.	Vs	COMMUNALISM By recognizing and stimulating group identity, preferences perpetrate invidious distinctions, thereby undermining secularism.
12	DEVELOPMENT Preferences contribute to national development by providing incentives, opportunities and resources to utilize neglected talent	Vs	STAGNATION Preferences impede development by misallocation of resources, lowering of morale and incentives and waste of talent

Upon analyses of the compensatory discrimination policies in the light of experience in some areas, Galanter concludes that despite undeniable benefits such as substantial legislative presence and swell of patronage, security, prestige, employment, increase in income, there has been tremendous waste of resources in the process. The spread of benefits has been uneven, and several beneficiaries enjoy a disproportionate share of programme benefits. Reserved seats are instrumental in ensuring a measure of representation in the legislatures and a degree of acceptance in the administration for the depressed classes. At the same time, they enable groups

upon being elected, to participate in multi-group coalitions encouraging relations of reciprocity and interdependence.

However, on the flip side, the SC & STs have to contend with problems of acceptance at the policy making level so that their views are accorded due attention. Being beneficiaries of preferential programmes, they face hostility from other groups, not covered by such programmes who look upon them as usurpers and inflict assaults and atrocities on them. They are also stigmatized by being labeled as ignorant and incompetent. Although such programme encourage SCs/STs to develop a sense of achievement and enlarge their capabilities, it curtails their autonomy to a large extent as they are dependent on outside parties for funds and organizations. This results in accommodating and compliant leaders who have to cater to the interests of the entire constituency (consisting of other members). They fail in the forceful articulation of the interests of their groups.

Against a background of historical lack of concern for the interests of the minorities, there is a continued apathy and disinterest in their affairs, even today, despite preferential treatment. Also, this policy of reservation has encouraged a tendency to absolve others of any responsibility for the betterment of SC & ST on the ground that it is a responsibility of the government.[30]

Compensatory preference involves a delicate combination of self-liquidating and self-perpetuating features. This should involve the discontinuance of reservation to the upper echelon positions, the extension of benefits such as free schooling so as to reduce the net effect of reservations. Judicial requirements of more relevant and

refined selection of beneficiaries and of periodic reassessment and growing use of income cut-offs provide opportunities to restrict the number of beneficiaries.

It has been suggested that to minimize the costs incurred by the scheme of compensatory discrimination, the following measures could be adopted:[31]

(a) Reservation should not involve primarily a reservation of posts;

(b) It should largely consist of special measures of assistance for enhancing the educational levels and the employability of the disadvantaged, and a weighted-comparison system at the point of recruitment, supplemented if necessary by a very limited number of reserved posts;

(c) That in introducing such a system, the impact on efficiency should be kept in mind and should be minimized;

(d) (d) That measures of training and skill-upgrading should continue for the disadvantaged even after recruitment, with perhaps a system of weighted comparison of performance for one promotion after entry;

(e) That such measures should be conceived of as addressed to present and continuing disabilities rather than as a quid pro quo for past injustices, and the dangers of retributive injustice avoided;

(f) A more careful examination is needed before deciding that caste should be the exclusive or main basis for a system of compensatory discrimination;

(g) That administrative measures should be devised to minimize the cases of individual anomaly or the distortions which might result from the system; and

(h) That any such system should be so devised as to be self-liquidating over a period of time.

Despite compensatory policies being rated as being costly and unfair, another problem that seems to loom large is that such schemes stand to undermine the progress toward the national goal of secularism. Further, the Mandal Commission and the Judiciary have both been condemned for viewing Indian society as a

homogeneous one and extending castes even to Muslims and Christians. Conversions to such religions are a means to escape the atrocities caste discrimination tends to generate. Any recognition of the prevalence of caste among such communities negates the purpose intended by the act of conversion and only perpetuates communalism. Extending the list of beneficiaries also runs contrary towards the end of arriving at a caste less society. Galanter has noted that the use of caste groups to identify beneficiaries has been blamed for perpetuation of the caste system, accentuating caste consciousness, injecting caste into politics and generally impeding the development of a secular society in which communal affiliation is ignored in public life.[32]

As early as 1968, Professor Smith had maintained that `the greatest harm (towards secularism) has been done by the attempts of both central and state governments to define economic, social and educational used in terms of caste groups and to extend aid on that basis. Scholarships, economic aid, reserved posts in government, and reserved seats in colleges are extended not only to SCs & STs but to the hundreds of OBCs. This approach has served only to perpetuate and accentuate caste consciousness and has resulted in grave injustices in the many cases in which there is no correlation between caste status and economic need'.[33]

However, it should be noted that despite the durability displayed by the caste system, it has now changed considerably. Relations between castes are increasingly independent and competitive, less inter-dependent and co-operative. `Horizontal' solid unity and organization within caste groups have grown at the expense of `vertical' integration among castes of a region.[34] The concerns of the local endogamous units are transformed as they are linked in wider networks and expressed

through other forms of organization – caste, associations, educational societies, unions, political parties, religious societies. While impeding the goal of secularism by enhancing community feelings the policy of reservations has transformed communal groups into components of a pluralistic society wherein hierarchy is discarded, diversity accommodated. In this sense, it contributes towards the establishment of a secular society.

The accommodation of principles of equality and secularism with the scheme of compensatory discrimination is indeed admirable for the way the text of the Indian Constitution can `...reconcile, harmonize and make work without changing their content, apparently incompatible concepts...Indians can accommodate such apparently conflicting principles by seeing them at different levels of value, or if you will, in compartments not watertight, but sufficiently separate so that a concept can operate freely within its own sphere and hot conflict with another operating in a separate sphere.

With accommodation, concepts and viewpoints although seemingly incompatible stand intact. They are not whittled away by compromise but are worked simultaneously'.[35]

The question as to how secular or conservative the Indian judiciary is when called upon to decide such cases is an important one. The Indian judiciary, like the Indian state is not immune to religious pulls and pressures. Indeed, it is even a participant in determining the shape the outcomes of such forces will assume. The judiciary plays an even more active role because of the existence of different personal

laws for communities and also because of different public laws for religion in matters relating to religious trusts and protective/compensatory discrimination in favour of disadvantaged groups which are determined to an extent, by religion. The Court determines also the nature and boundaries of a particular religion. The Penal Code bears in mind religious sentiments, and electoral laws have abolished religious appeals while campaigning. In all issues the judiciary has had varying positions and has performed different roles be it of the reformer allowing untouchables to enter Hindu temples), the guardian of the Constitution, and the champion of minority rights. Its involvement has not been uniform either – it has kept a principled distance from religious and religious matters, while in other issues it has been directly involved. In still others, it has defined religion and interpreted religious texts while pronouncing judgements.

The Mandal Commission issue can be examined at three levels where it concerns the secular question.

- At the first level, secularism, which implies a separation of religion and politics runs counter to the reservation policy. The goal of Indian society is the replacement of all ascriptive identities by a concept of individual citizenship. The Mandal Commission Report reinforces the category of caste and this obstructs further secularization.
- At another level, the issue is also linked in a big way with Hinduism and internal arrangements concerning Hinduism where caste plays a major role. The BJP and other political parties are opposed to Mandal as in their view the Report seeks to divide Hinduism. They contest Mandal as a threat to Hindutva, the politics of building a Hindu nation, thereby homogenising Indian identity into a Hindu one. Anything threatening Hindutva, threatens their support base.
- A third level can be seen in the problems created within the Muslim community. The demand for caste based reservations among them has not only brought to light divisions within a

> religion purporting to preach egalitarianism, but also incensed the party of Hindutva. They allege that by so doing, the government is creating a separate communal representational system with people coming in through the back door and perpetuating its policy of minority favouritism. This led the BJP and allies to demand the representation of economically backward Hindus who are not covered by any of the 'Protective Discrimination' schemes.

The Government relented to the demand and by the Office Memorandum of 25 September 1991 earmarked 10 per cent of reservation for such a category. The Supreme Court judgement, however, struck down the same in its judgement of Indira Sawhney Vs. The Union of India, as it felt that such a reservation was not required.

The reservation on a purely economic criterion would have been a first step towards the direction of secularism and the secularisation of politics and society. The judiciary's refusal to acknowledge merely economic backwardness as a criterion for allowing reservation to the category concerned, meant that the judiciary was interpreting the law narrowly and correlating social and economic backwardness with caste. It meant that Upper Caste Hindus were necessarily left out of the reservation pattern/package whereby state aid could be given; intensifying the politics of Hindutva.

It brought to light on the other hand, the fact that placating Backward Classes meant carving out a larger vote bank for the part/ies in power, which did not come with the representation of poor/economically backward upper caste Hindus.

The Court cited limiting reservations to fifty per cent as the reasons for striking off ten per cent reservation of backward Hindus. In fact, the Judges realized that a limitation of reservation (as entailed in the Constitution) and the

accommodation of the required ten per cent of upper caste Hindus would, in effect, amount to curtailing the percentage demarcated for the OBCs. Such a step would lead to great dissatisfaction among the OBCs and even, a withdrawal of support to the government on their part.

It can be seen, therefore, that the Judiciary, had the best interests of the parties in power in mind while at the same time, compromising with the secular principle.

The success or failure of the judiciary in ushering social change and in upholding the basic tenets of democracy and secularism and the shaping of the society as a result shall be the purpose of the concluding chapter.

END NOTES

1. Galanter, M., *Law and Society in Modern India*, OUP, 1989, p.185.

2. The prevalence of hierarchical structure within Islam is noted in great detail by Imtiaz Ahmad who maintains that Islamisation serves to reinforce rather than weaken or eliminate caste distinctions. The Koranic verses proclaiming egalitarianism and denouncing all distinctions based on birth and pride of ancestry have remained largely an ideal. The system of local groups with emphasis upon birth and unity of blood which existed in Arab society before the advent of Islam, survived the egalitarian preaching of the Koran. Paradoxically, Prophet Muhammad became the basis of a status system wherein kinship with him came to be regarded as the mark of true nobility. Basing themselves on such rules and principles, the Muslim jurists worked out an elaborate scheme of social grades of birth and descent. For example, an Arab was superior to a non-Arab; amongst Arabs, all Qurayshites were of equal social standing in a class by themselves and all other Arabs were equal irrespective of their tribes...a learned non-Arab was equal to an ignorant Arab, `for the worth of learning is greater than the worth of family...' and so on. Similar structures based on birth and descent existed in Islamic society in India. Over the years however, this rigid hierarchical system weakened and even modified in Islamic society in India. There are four points of difference with the Hindu caste model. The acceptance of the caste principle among Muslims is considerably weak and does not enjoy any sanction or justification in their great traditional religious ideology. Secondly, while both the Hindu and Muslim systems of stratification resemble each other in the pattern of endogamy, a keen sense of pride in birth and descent and a notion of hierarchy, caste among the Muslims has not attained the degree of elaborateness characteristic of the Hindu model. There is an absence of the concept of pollution by the lower castes among Muslims hence social distance is observed on the basis of deference, privilege and descent. Finally, among the Muslims, there is no ritually pure caste like the Brahmins [Imtiaz Ahmad, *Caste and Social Stratification among Muslims in India*, pp.12-15].

3. Kundu, *Economic and Political Weekly*, 10 November 19980, p.2477.

4. Guha, Economic and Political Weekly, 15 December 1990, p.2716.

5. Ibid., p.;2716.

6. Ibid.

7. Ibid.

8. Ibid.

9. Ramaswamy R. Iyer, *Economic & Political Weekly*, 2-9 March 1991, p.496.

10. Ibid.

11. Ibid., p.497.

12. op.cit., 1990 (Guha), p.2718.

13. Ibid.

14. Guha, p.2717.

15. Guha, p.2717.

16. op.cit. Iyer, p.499.

17. P.A. Gavali, eshavekalin Gulamgiriva Asprushyata, pp.84-85, Sharad Patil, *Economic & Political Weekly*, p.2734, 15 December 1990.

18. Op.cit., Iyer, p.500.

19. B.K. Agarwala, *Indian Philosophical Quarterly*, vol.XVII, no.2, April 1990, pp.129-30.

20. *Times of India*, 11 September 1990.

21. DN, *Economic & Political Weekly*, 10 November 1990, p.2470.

22. Ibid.

23. Arun Shourie, Rank 413? So sorry. Rank 41246? But of course...*Indian Express*, *Islamic Quarterly*.

24. Manoranjan Mohanty in Gail Omvedt, (ed.) *Land, Caste and Politics in Indian States*, pp.6-7.

25. Op.cit. Patil, *Economic and Political Weekly*, p.2743.

26. Ibid.

27. Ibid.

28. Kothari in Partha Chatterjee (ed.), *State & Politics*, OUP, Delhi, 1998.

29. Op.cit. Galanter, pp.187-97.

30. Galanter, p.195.

31. Ramaswamy R. Iyer, *Economic & Political Weekly*, 29 March 1991, p.500.

32. Galanter, Marc, *Competing Inequalities*, OUP, 1984, Chapter 4.

33. D.E. Smith, "India as a Secular State" in, Rajeev Bhargava, ed., *Secularism and its Critics*, OUP, Delhi, 1998, p.225.

34. Galanter, p.206.

35. Austin, Granville, *The Indian Constitution : A Cornerstone of a Nation*, Oxford: Clarendon Press, 1966, pp.317-18.

CONCLUDING CHAPTER

Concluding Chapter

One of the ideals the Indian state seeks to espouse is that of secularism. Although there is much divergence over what secularism as defined in the Indian context means, the State through its institutions, has displayed a deep commitment towards a larger secular order wherein all religions enjoy freedom, respect and to an extent support, but do not command obedience or provide goals for policy.

Due to such `space' given to religions by the Modern Legal system, there have been changes in the Hindu religion. At the same time, there has been a clear transformation in the way in which the interests and concerns of the component groups are being accommodated and expressed.[1] While the traditional society has been reordered due to the modern legal system, there has been a tendency towards religious reform on the one hand and a shade of conservatism on the other. In fact, the judiciary often is seen to toe the line of the state executive whether reformist or otherwise. The purpose of this Chapter will be to examine the role of the judiciary in maintaining the overall secular ideal.

Secularism has been variously interpreted. It is seen as implying a severe aloofness from religion, a benign impartiality towards religion, a corrective oversight of it, or a fair and equal indulgence of it.[2] In all these approaches, a separation of religion from public life is envisaged. The secular principle as observed in India, had previously been analyzed precisely in the context of how effectively she succeeded in separating religion from politics. This separation could well be noticed in her laws. The Constitution in Art.25(1) granted the Individual right to freedom -- `Subject to

public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate any religion'. Collective Freedom of Religion was also granted in Art.26 `Subject to public order, morality, and health, every religious denomination or any section thereof shall have the right:

(a) To establish and maintain institutions for religious and charitable purposes;

(b) To manage its own affairs in the matters of religion;

(c) To own and acquire movable and immovable property; and

(d) To administer such property in accordance with law'

By Art.30, minorities, whether religious or linguistic are granted the right to establish and administer educational institutions of their choice. Further, the state, in granting aid to any educational institution shall not discriminate against any such institution on the ground that it is under the management of a minority.

The equal treatment of citizens and right to equality enshrined in the Constitution, further build the blocks of a secular state and a secular society. Non discrimination in the work place, admission to educational institutions and suffrage have also been envisaged. Clearly, then, the concept of secularism is an overarching one involving, the principles of equality, tolerance, autonomy, neutrality and community life.[3] Being so intrinsically associated with the essentials of community life, it would be unfair to attribute it to Western culture or to use Western standards to gauge how secular or otherwise a society is. Indeed, many scholars in the early part of the 60s and the 70s used the Western experience as a measure for accessing the success of Indian secular society. It cannot be denied that the Indian Constitution

framers had in mind a secular framework which was inspired by the West; but it is worth mentioning here, that the concept of secularism was brought in to ensure that India would not be a Hindu counterpart to Pakistan. Also, it was not until the 44th Amendment that the word `secular' was introduced in the Preamble of the Constitution.

Scholars who felt that India was making a departure from the secular ideal by allowing minority communities to practise their own laws in the private sphere and by giving benefits to members of the SC/ST and the OBC by way of employment in government service were silenced on the ground that these were temporary measures towards the ultimate goal of an egalitarian society.

Indeed, the reformist nature of the State cannot be ignored. Towards the first two decades of the Indian legal experience, the judiciary had already undertaken severe measures to reform the society by allowing the entry of Harijans/untouchables in Hindu temples as is seen in the case of Sastri Yagnapurshdasji Vs. Muldas Bhundardas Vaishya. In this case, the Supreme Court of India attempted to define the nature and boundaries of Hinduism. In dong so, it displayed the peculiar relation Indian law has with religion and how the judiciary as an institution is subject to various pulls and even though religion is confined to the personal/private sphere; the judiciary is not immune to pulls and pressures from that direction. This is not merely because of the existence of different personal laws and of benefits given to certain sections by the State due to ascribed status; but also due to different public laws for religion in matters relating to religious trusts, compensatory benefits on religious grounds and so on. The Penal law is extraordinarily solicitous of religious sensibilities

and the electoral law prohibits the use of religion during campaigning. In all these spheres, the Court is required to define the limits and boundaries of each religion. The Temple Entry Act which opened the Hindu temples to the untouchables for worship, sought to ensure that such injustice is not perpetuated by other religious sects of the `Hindu' order on the claim that they do not subscribe to the Hindu tradition.[4] It was in keeping with this eventuality (possibility) that the Court defined Hinduism as a complex, indefinable inclusive aggregation of ways of life.[5]

> We find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may be described as a way of life and nothing more.[6]

In establishing the boundaries of Hinduism, the Court made an analytical study of the Hindu philosophy and found certain broad concepts which could be treated as basic. These include `the acceptance of the Vedas the highest authority in religious and philosophical matters', the `great world rhythm' and `rebirth and pre-existence'. The ultimate goal of humanity, according to this religion, is the release and freedom from the unceasing cycles of births and rebirths...' Though, the means of achieving this release are diverse, the ultimate goal is the same for all Hindus.

Galanter holds that in its judicial pronouncements, the state maintained that the Satsangis are members of the Hindu religion and that they come within the purview of the Act. By making such a pronouncement, the judiciary redefined secularism *vis-à-vis* the state. A secular state, then, propounds a Charter for its religions, it involves a normative view of religion. Certain aspects of what is claimed

to be religion are given recognition, support and encouragement; others are the subject of indifference; finally, some are curtailed and proscribed. Religion, then, is not merely a datum for constitutional law, unaffected by it and independent of it. It is, in part, a product of that law.[7]

The Indian Constitution envisages such a role for the state where reforms will be encouraged and equality achieved. The Constitution attempts a delicate combination of religious freedom in the present with a mandate for active governmental promotion of a transformation of India's religions. Religions are to be divested of their character as sources of legal regulation of family life (Art.44). The Constitution also propounds equality among religions, but, the State's reforming power with respect to Hinduism is more extensive. The law may be used to abolish caste distinctions by inter alia conferring rights of religious participation.[8]

Galanter also distinguishes between two alternative modes for the exercise of the laws `regulative oversight' of religious controls. These are the modes of limitation and intervention. By limitation, is meant to the shaping of religion by promulgating public standards and by defining the field in which those secular public standards shall prevail, overruling conflicting assertions of religious authority. By intervention is meant an attempt to grasp the levers of religious authority and to reformulate the religious tradition from within.[9] Added to this, is the separation-of-powers model of secularism that the law might confine itself to ascertaining and respecting a pre-ordained religious sphere.

These alternative modes are related on two dimensions – first, the superior or overriding character attributed to the legal norms in cases of overlap, conflict and characterization; second, the asserted competence and mastery of the legal specialists

in authoritative exposition of the religious norms. The relationship between the three modes of secular control may be depicted by the table below.[10] It should be emphasized here that Galanter sees the dimensions in question as being in continuation rather than dichotomous, distinctions.

ALTERNATIVE MODES OF SECULAR CONTROL

<table>
<tr><td>External Superiority of Legal norms</td><td colspan="2">Internal Competence of Legal Specialists</td></tr>
<tr><td>HIGH</td><td>LOW</td><td>HIGH</td></tr>
<tr><td rowspan="2">LOW</td><td>Mode of Limitation</td><td>Mode of Intervention</td></tr>
<tr><td>`Separation of Powers' mode</td><td>*</td></tr>
</table>

*The situation of high internal competence of legal specialists in religious norms combined with low external superiority of legal norms is not another form of secularism, but defines a condition that would be called a religious state.

Upon an analysis of the interventionist made as adopted by the Indian Judiciary, Galanter insists that the notion that the public reforms religion according to laws is misconstrued and that legal reforms should be limited to `small' and `lesser' traditions so as to minimize intervention on the part of the judges who have a Western conception of the law and of Hinduism; and, therefore, are not adequately equipped to `reform' a religion on a larger scale. Galanter sees far greater need for social analysis beyond the simple application of legal doctrine or the explication of official policy. As a third party intervener, the judge is not a creature of legal doctrine or an instrument of mainstream politics. While assessing the kind of reforms that judges promulgate, he surmises that

> '... when Court decisions are influential, it is not through doctrinal pronouncements but through the re-channeling of major institutional opportunities and controls and by their liberating effect. The court may provide dissident and progressive (groups) institutional support and with rationalization for their non-traditional behaviour and beliefs.'[11]

Galanter goes on to suggest that judges should not rush in to reform what they do not understand and cannot effect. Apart from protecting the integrity of groups, Galanter is concerned to emphasize that judges do not just declare doctrine but simultaneously create enabling social and legal processes. They create fresh bargaining arenas and help to sustain and change existing ones.

Perhaps the whole controversy surrounding the UCC and the Mandal Commission issue can be viewed in this light. It was precisely this interventionist approach of the judiciary which led to an uproar in the community as it not only created new beneficiaries towards government policies in the latter case; while in the first, it sought to justify a seemingly secular question of rights on communal religious grounds. The political process following thereafter; the assertion of the Hindu Right about a favoured minority appeasement and the Babri Masjid incident were vents via which frustrations of unemployed youth were expressed. Indeed, such trends threatened the very foundations of a secular India which needed to be salvaged and redefined. More importantly, it raised important questions about the judiciary[12] -- whether the judges could be really viewed as third party interveners without taking into account their relationship with the state of which they are a part? Whether judicial institutions, as bargaining arenas are really open-ended? Whether or not the symbolic activism of the judiciary is an important part of their role, as the conceptive ideologists of the State and their Class? These questions led to exploring the role

position and function of the judiciary as part of the State and the political economy within a broader concept of power. To some, the judiciary is a unique bureaucracy within the State. Neither wholly dependent or independent, neither an open-ended bargaining process nor a wholly closed one, the judiciary, its work, its declarations and the use and abuse of its processes is, perhaps best understood after looking at the whole cluster of institutions and processes which form part of the state.[13]

Others, such as Upendra Baxi while acknowledging the achievements of people's movements and the remarkable renaissance of judicial power and process which has made the Supreme Court of India, at long last a Supreme Court for Indians wherein a partnership of the judiciary and the people which has promoted a distinctive Indian vision of justice, for it is in the agony of power that the promise of justice ultimately dwells;[14] recognizes that there are limits to this engagement. He points out that in times of `crisis', it has been widely noticed that in the management of state power, it is ultimately, the people's rights that are eclipsed. He adds also, that limits of judicial activism need to be appreciated especially when the response of politics is its own transformation, as a damage creating, as well as damage restricting enterprise, now placed at the long term service of multinational capital.[15] To supplement the last tendency, he contrasts the handling by the Supreme Court of the Vasudevan and the Union Carbide affairs. `C.S. Vasudevan of Karnataka was incarcerated for about a month by the Supreme Court. In contrast, the Union Carbide Corporation, despite the cancellation of the shameful immunity granted it by the Bhopal settlement, now escapes criminal trial in India by enjoying the status of an `absconder'. At the same time it is seeking to persuade the Supreme Court to reverse the attachment order on its

property passed by the Criminal Court at Bhopal for its non-submission through the indirect device of a trust led by Sir Ian Perumal! The contempt jurisdiction does not extend to Union Carbide, which continues to appear before the Supreme Court in some sort of benami proceedings! Nor does it seem to extend to the Union government for its obscene failure so far to routinely follow up the request for extradition of Warren Anderson and the current management of the Union Carbide. Clearly, the Union Carbide is duty bound to activate all processes of enforcement of judicial orders and its privilege to take some time to process requests for extradition. But this should not be converted into an engagement with infinity!'[16]

The purpose of this example was to reinforce the stand maintained by the first limitation – of the interests of the State eclipsing those of the people at large and the existence of multiple pulls fashioning new alignments and configurations in the society. It also goes on to show that Courts are helpless before the intransigence of executive lawlessness. The executive auto-immunity to the rule of law invigilation by Courts is partly sculpted by judicial self-restraint. Courts allow their own orders to be ignored with impunity by those very functionaries whose duty it is to implement them. It is about time that the judiciary gives exemplary punishment for contempt to incumbent ministers, including the union and state law ministers whose duty it is to uphold judicial orders.

The failure of the Indian state to effectively assist the Judiciary in upholding the law of the land; making it more of an instrument of the state, is attributed to several factors. Independence of the Judiciary, which emerges from a notion of the doctrine of Separation of Powers is not necessarily impeded or hindered in a

traditional society. It would therefore be incorrect to attribute the same solely to the peculiar nature of Indian society where modern laws flourish. These laws have been partly borrowed from the Western experience and have evolved gradually from the colonial experience of the country. Several critics point to the failure of Nehruvian secularism in a traditional polity which failed to envisage the totalizing effect religion had on the masses and consequently, on how separation of religion from politics would in-effect amount to a politics devoid of an ideology. It would follow, in their opinion, that institutions comprising the state, could therefore, not be wholly divorced from religious influences and there would be an interdependence of institutions – with one legitimizing the existence of the other rather than a situation where the system of checks and balances would operate. Such ideas are subscribed to by T.N. Madan and Ashish Nandy who feel that Indian life, views religion as being integral to private and public spheres. Religion is then not merely faith but also ideology and therefore, the State must involve itself in an active dialogue/interaction with it. The Supreme Court decision barring excommunication of citizens is proof of the importance attached to community identity by the people. It is worth noting that while in the West, matters of excommunication would not be within the purview of the state/or its organs, in India, the very act of excommunication would be considered illegal. Clearly, such interventionist moves by the Indian judiciary attempt at performing the important function of social reform. Nehruvian secularism for them, runs into problems as it is too idealistic and does not take into account the importance of the religious factor in matters relating to the state. Nandy argues that Indian secularism can be arrived at by recognizing the elements of tolerance within one's own religion and tradition; while at the same time imputing to other faiths the same spirit of tolerance.

Nehruvian secularism finds another critic in Akeel Bilgrami who maintains that his philosophy had a technical rather than ideological flaw. He attributes the current fundamentalist/communal upsurge to the fact that upon the inception of the Constitution, Secularism was not negotiated. It should have been allowed to emerge from the bottom up with the moderate political voices and assumptions of different communities being brought into negotiating both procedure and substance primarily religion, to the codification of law.

Civil Code emerging thus would have pre-empted a controversy of Uniform Civil Code. By climbing down from its position of starting with secularism with the proclamation that `we do not acknowledge community voices in politics and as secularists we stand for everybody', and instead giving a participatory negotiating voice to the moderate elements in different communities, it would have pre-empted Muslim fears about the idea of a Uniform Civil Code, and Hindu resentment at Nehru's failure to endorse the idea. It could have rather ended with secularism by earning it rather than assuming it as an Archimedian posture.[17] Bilgrami goes on to argue that a refusal to acknowledge the existence of communities and communitarian principles that leads to the failure of democratizing the communal voices in a way that propels the moderate element forward as the most representative and vocal opinion within the communities; and this refusal as a result forces the state to have to continually capitulate to the demands of the loudest, most unrepresentative, reactionary communal elements within the communities on visible public issues, such as to the demands of communal Hindus on the Ayodhya issue, or the demands of communal Muslims on the Muslim Women's Bill; and capitulate much before that,

for instance to the Hindu right on the question of Urdu, and the communal Muslim element on a separate personal code.[18]

Such an alternative substantive secularism, emergent rather than assumed, sees itself as one amongst other doctrines such as Islam and Hinduism; a doctrine that its proponents must persuade all others to agree to as outcome of negotiation. Bilgrami has enough faith that an emergent secularism which transcends religious politics from within, after climbing the ladder of dialectical engagement with religious politics, is in a position to kick the ladder away. Such a secularism is likely to have a greater hold on the people as not only does it acknowledge the inseparability of religion and politics from the very beginning, but also because it does not shun a realistic appreciation of the entrenched facts of modern political life.[19]

The liberal state is thus envisioned as being able to provide a field of force of internal reasons addressing different communitarian perspectives from within their own substantive commitments and unsettling them into awareness of their own eternal inconsistencies so as to eventually provide for a common secular outcome each on different internal grounds.[20] Such a secular outcome is a product of non-neutral reasons arising from within the different substantive value economies of a multi-cultural society.

Such a society would have possibly avoided a situation wherein communal demands are placed in the forefront and religious appeals are made to communities during elections. It would have avoided, also, the charge levelled by the Hindu right of minority favouritism who base their demands for a UCC on a communal model

which involves an equalization of male privileges. It would avoid the weakening of the state apparatus which succumb to such demands and pressures; and leads finally to the erosion of the chief values governing community life.

By way of example, the Supreme Court did not consider Manohar Joshi's pledge to establish the first Hindu state in Maharashtra in an election meeting as a threat to the secular principle or unconstitutional. Instead, it declared that a mere statement that the first Hindu state will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion, but the expression, at best of such a hope". The Supreme Court has, on another occasion, used the terms `Hindutva' and `Hinduism' almost interchangeably despite the recent communal connotations attached to the former term has begun to imply. In a judgement in Ramesh Yeshwant Prabhoo's case the Court held that "considering then the terms Hindutva and Hinduism as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism proceeds from an improper appreciation and perception of the true meaning of these expressions..."

Not only do the above examples reflect the violation of the principle and spirit of the Constitution, but also throw light on the conservative bias of the judiciary and a widespread confusion on questions involving secularism, pluralism, communalism and an appeal to religion.

In fact, this confusion and the failure of the Courts to successfully identify what constituted the use of religion during elections can be noticed in the cases it had to administer in the 60s and 70s. In Shubh Nath Vs. Ram Narain,[21] the electoral scene

was the tribal area of Bihar, where the appellant, a member of the Ho tribe was allotted the symbol of a rooster. The rooster among the tribe, though not a religious symbol, but used as a sacrificial symbol for curing diseases. The question before the Court was whether the use of appeal from a sacrificial bird amounted to appeal to religion. The Court by a majority opinion held that the appeal was symbolic. It meant that voting for the rooster would please the deities and failure to vote would displease them. Invoking the deities amounted to appeal in the name of religion.

Justice Subbarao, in his dissent drew a distinction between canvassing on the ground of religion and using myths to allegorize the cause of the Candidate. However, the difference between appeal to mythology and appeal to religious symbols wears thin since mythology can be effectively used to reinforce solidarity.

The dissenting view of Justice Subbarao influenced subsequent cases on similar issues. In 1965, Raman Bhai Vs. Dabhi a dispute over the use of a symbol of star drawing on the changing of pole star allotted to a candidate sponsored by the right reactionary Swatantra party. Though the qualities of Dhruva the pole star was listed as eternal, firm, guide, determined and devoted to religion, the judge Mudholkar held that Dhruva could not be given any divinity. He made a distinction between worship and reverence on the one hand and worship and religion on the other and held that Dhruva was revered but not as godhead. Holding that `worship of mortals is so common...in our country...no one can attach religious significance to it' and that such worship was motivated by fear of authority or by hope of reward, Mudholkar distinguished between secular and religious matters.

The link between religion and community has become the bone of contention in the legal past. The identity and community building function of religion became the chief problem when the BJP and its allies unleashed their election propaganda appealing to the element of Hindutva. They argue that the Congress champions a brand of pseudo-secularism which involved unabashed minority appeasement at the cost of the Indian national identity. These appeals were widely used in state elections but the High Court made a few observations in Damodar Tatyaba Vs. Vamanrao Mahadik. The Court held that speeches made by persons who were actually not candidates/contesting elections would be judged as corrupt depending on the overall effect and impression and emphasis on word and manners of the speakers. Thus according to the Judges, although the sentence `Garva se kaho hum Hindu hain' by itself would be quite innocuous, implying the rich culture and heritage and implying at the same time its virtues of tolerance, love and acceptance of all other races and religion; the same sentence could change its context depending on the manner in which and time at which it is said and emphasized.[22]

In the opinion of V.S. Rekhi, this observation of the Court highlights its obsession with the distinction between the religious and the profane. In his opinion, the Representation of People's Act, 1952, which bars religious appeals made by candidates by Sec.123 (3), involves a deep question. It seeks to address whether an appeal to religion includes an appeal to the identity building structure of religion.[23] A popular school of thought seeks to investigate the question of whether ethnic identities based on language and religion should be permitted to influence elections despite religious appeals[24]

Rekhi goes on to outline the causes behind the failure of the Court to rise to the need of making an operational success of the prohibition of the use of religion . He notes certain shortcomings in the doctrinal level which involve the Court's reliance on the distinction between the sacred and the profane without noting the role of religion in society. He argues further that the Court has preferred to stress the individual liberty dimension of religion in view of the constitutional commitment to the freedom of the individual in matters of conscience guaranteed by Art.25 of the Constitution of India. The preference for individual liberty has contributed to the neglect of communitarian values serviced by religion.[25]

Rekhi also points out that the judges in all these cases have adopted a reaction typical of the Indian elite. He quotes Krishna Iyer `to declare oneself an offspring of a religious renegade is not to appeal to religion. It is unlikely because it does not socially pay'. The masses do not feel quite this way. Mrs. Gandhi, despite her marriage to a Parsi could still gather Brahmin support as `she still had Brahmin blood in her veins'.[26]

Further, the assertion of Supreme Court judges that the Hindu have given up personal law in favour of a Uniform Civil Code is challenged on the ground that the separate status of Hindu personal laws has in general survived.[27] The issue of UCC should be distinguished from the fact that the Hindu laws were reformed after Independence, particularly during 1955 and 1956 and they were a result of political movements within the communities. Reforms in Hindu laws made polygamy illegal – this was not a result of some `uniform' code being imposed on Hindus while Muslims

were exempted from the same. It did not result in making other Hindu laws inoperative. Amartya Sen adds that several provisions were introduced within Hindu laws, but the domain of personal laws continues to be substantial. The demand for secularism for him is one for symmetric political treatment of religious communities, and its acceptance still leaves open many other questions, particularly dealing with the choice between the forms symmetry can legitimately take.[28] Balanced political treatment can be achieved in rather disparate ways and the path taken does make a difference. An understanding of secularism and symmetry must essentially take into consideration other contrasts that divide the country – class, gender, language, location and so on. The delicate issue of arriving at a balance between individual freedom and group autonomy should also be addressed.

Another real difference between achieving symmetry through the sum-total of collective intolerance of the different communities, rather than through the union of their respective tolerances should also be recognized. The question of the form symmetric treatment should take, therefore, remains unanswered.

Before addressing the question of symmetry and arriving at a brand of secularism which is ideal and ensures that justice shall prevail; one must take into account the fact that in a multi-ethnic society such as ours, inequalities are bound to exist. These inequalities extend to castes, gender, race, class and so on. The state, in dealing with its citizens, must be neutral, or at least, purport to be so. Also, in order that minorities are treated fairly, the state is justified in allowing them benefits and privileges. The State thus, changes/alters its position *vis-à-vis* religion from involvement to principled distance. However, there does not exist patronage of any

religion. Such a secularism is contextual and involves active participation on part of the state and the communities existing therein, who envisage an achievement of a common good through participatory democracy. This leads to the forging of new identities, a transformation of identities through a long process of deliberation and negotiation. This form of secularism addresses all differences and tries to bridge the gaps and divisions that exist in society by granting rights to minorities and protecting them; by violating bigotry and encouraging tolerance among its people and finally, by consolidating the notion and the space of common good[29] that exists.

While we have the model of a secular society before us, we must also serve to strengthen our institutions, which will reinforce the notion of rights and build on the common good. Such a step would involve activism in all spheres, not merely the judiciary as human rights and human futures should be the concern of all sectors and institutions. A society such as ours which is faced with the contradiction and complexity of globalization, liberalization and structural adjustment in the developing realities in the new world order must endeavour to preserve its secular tradition by ensuring that its law is upheld and that the judiciary does not follow an erratic course.

Weak institutions serve to heighten the insecurities of both majority and minority communities. The national Hindu reaction in 1981 to the conversion of a few untouchable to Islam; the killing in Assam of more than a thousand Muslims during the 1983 state elections; the terms of Rajiv Gandhi's settlement in 1985 of the Assam regional agitation, which deprived some Muslim immigrants of their citizenship and others of the right to vote for ten years; the reopening by the order of a local court of the Ram Janmabhoomi temple at Ayodhya are some of the incidents which have

compounded Muslim insecurity. The Shah Bano judgement also brought to light the fact that almost eighty million Muslims are disadvantaged in terms of literacy, education, jobs and business opportunities. It reaffirmed the perception that their lack of economic development as a community inevitably weakened them in the political arena.[30]

Similarly the Mandal Commission issue incensed the youth and led to a communal upsurge which was necessarily upper caste and majoritarian. The verdict on the Mandal Commission Report was a legitimization of caste as a basis of a political organization. The BJP, which tried to project an idyllic notion of an undifferentiated Hindu society, retaliated by raking up the Ram Janmabhoomi issue. By making ritual backward status a political attribute, V.P. Singh's government questioned the underlying logic of participation in the quasi-religious ceremonies associated with the movement.[31]

Mulayam Singh Yadav, in fact, made this direct link and equated the opposition to the Ram Janmabhoomi agitation with support for the new reservations policy.

For the BJP, VP Singh has launched a frontal attack on the very assumption of nationalism which, if unchecked, can result in politically acute fragmentation. The importance given to the caste factor is likely to perpetuate rather than obliterate caste boundaries and caste groups.

Indeed, the social justice that the reservation policy seeks to achieve has been defeated due to a miscalculation on the part of both the judiciary and the State. For the

crucial factor underlying immolation and students' agitation was growing competition and a stagnant job market.

The judiciary, as the guardian of the Indian Constitution, should be able to gauge the needs of the times and whether or not the state and society are in a position to fulfil such requirements as are required in the path to progress and development. If the judiciary legitimizes and subscribes to the populism prevalent in our political system, it will be defeating the very basis of its foundations and for the healthy development of a just, fair and equitable legal system.

The Secular State in India in which a high level of religiosity exists, poses several problems before the Executive, Legislature and the Judiciary. The framework governing the limits of a secular state and its relation with religion is itself problematic. A problem arises also because culture is appropriated by religion leading thereby, to a tension and struggle between institutions which purport to be secular. The fine line between culture and religion is so difficult to manage, that Courts are seen to issue conflicting decisions and even give religious justification for judicial pronouncements. The decision in Shah Bano's case is an instance where the Court felt obliged to offer religious order that the Muslim community did not feel that the judgement was far removed from what their culture/religious tradition prescribed. The state is thus faced with a situation wherein distinguishing the religious from the cultural becomes as dangerous as playing with fire and the state has to make allocations to keep `cultures' alive. This can be seen in state sponsored trips to Amarnath and Mecca for Hindus and Muslims respectively. Pilgrimage becomes a concern for the state. Similarly, a High Court decision in Calcutta to ban loudspeakers

created a furore among the Muslim community who felt that their right to `Azan'[32] was being attached. Thus a matter which involves a secular issue – relating to noise pollution becomes linked with religion due to insecurities.

Such decisions/issues do not threaten the secular nature of institutions in general or the judiciary in particular. Instead, they go on to show that the need of the hour is that the Judiciary adopt a firm stand. Compromises made due to the importance of culture does not undermine the secular nature of the State. Nor does it necessarily reflect its conservative nature. Instead, as Professor Bhambhri puts it, it is a case of `tightrope dancing' within political structures.

Finally, the question of whether the Supreme Court/Judiciary acts as Court of the People or whether it serves to maintain the status quo as part of the state apparatus needs to be answered.

The Court in spite of its reformist ideas and pronouncements, is for all practical purposes, part of the state apparatus. This can be seen in the following ways:

- It's reluctance to review the Muslim Women's (Protection of Rights on Divorce) Bill and to solve cases on the issue of rights, justice, equity; and bring in instead questions demanding religious reference.
- Its failure to reform the Compensatory Discrimination policy by bringing in an `economically backward' category within the scheme of reservations.
- The occasional conservative rhetoric adopted by the Courts and the view that majority of Indians have reforms themselves and the Muslims have not yet accepted any reform is in become with the current tendency of the State to usher in a UCC in stage.
- Its brand of secularism is an erratic one, varying on the one hand from indifference to principled distance to reform and

> intervention. Accordingly, it is often seen to subscribe to the state-sponsored population – which often amounts to a compromise on the secular ideal.

Needless to say, the judiciary in so doing, influences political processes and movements significantly. State sponsored populism creates a section of beneficiaries and a section that does not stand to gain in any way. The latter group seeks redress via the judicial system. The Court, being the legitimiser, has the interests of the State in view as the politics of population demands cooperation of all organs of the State. However, the occasional reformist character of the judiciary leads one to surmise that notions of justice, equity and social welfare are respected as is the concern for reform in a traditional society.

Judges are themselves believes of a personal social philosophy which gets reflected in a very subtle manner in their judgements. This is the reason that the finality of a judgement is reached only when a Chief Justice constitutes a Special Bench of 8-9 judges; otherwise, all judgements, past or present get questioned.

END NOTES

1. Galanter, Marc, 1989, *Law & Society in Modern India*, OUP, 1989, p.237.

2. Ibid.

3. The notion of community life is necessarily contained in the secular ideal as it is when different individuals live together, that the question of toleration, of good-neighbourliness, autonomy and so on come into play and need to be practised. For a discussion see Rajeev Bhargava's `What is Secularism For?" in Rajeev Bhargava, ed., *Secularism & and its Critics*, OUP, New Delhi, 1998.

4. The earlier Central untouchability (Offences) Act of 1955 had this flaw that it preserved certain denominational prerogatives.

5. Galanter, op.cit., p.242.

6. AIR, 1966, SC at 1128.

7. Galanter, op.cit., p.250.

8. Ibid.

9. Ibid.

10. See Galanter, ibid., p.251.

11. Ibid.

12. Rajeev Dhawan, Introduction in Galanter, op.cit., 1989, p.ixii

13. Upendra Baxi, Power & Social Action, Seminar, vol.437, January 1996.

14. Ibid.

15. Ibid.

16. Ibid.

17. Akeel Bilgrami, in Rajeev Bhargava, (ed.), *Secularism and its Critics,* OUP, Delhi, 1998, pp.399-40.

18. Ibid.

19. Ibid., p.401.

20. Ibid., p.411.

21. AIR, 1960, SC 148.

22. AIR 1991, Bombay 373.

23. V.S. Rekhi, "Religion, Politics and Law", in Robert D. Baird (ed.), *Religion and Law in Independent India*, Manohar, New Delhi, 1993, p.197.

24. Rudolph & Rudolph, *In Pursuit of Lakshmi*, Chicago, 1987; Larson, "Mandal Mandir & Masjid", in R.D. Baird (ed.).

25. Op.cit., Rekhi, p.198.

26. Ibid., p.191.

27. Amatya Sen, "Secularism and its discontents" in Rajeev Bhargava, op.cit., 1998, p.464.

28. Ibid., p.484.

29. Rajeev Bhargava, "What is Secularism For"? in Rajeev Bhargava, ed., *Secularism and its Critics*, Oxford University Press, 1998.

30. G.J. Larson, *Mandal, Mandir & Masjid*, "The Citizen as an Endangered Species in Independent India", in R.D. Baird, ed., *Religion & Law* in *Independent India*, Manohar, New Delhi, 1993.

31. Swapan Dasgupta, "Mandal Commission Controversy", *Islamic Quarterly*, *Times of India*, 18 September 1991.

32. See, *Times of India*, 19 July 1998.

[1]Galanter, 1989, *Law & Society in Modern India*, p.237.

[2] Ibid.

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[9] Ibid.

[10] See Galanter, ibid., p.251.

[11] Ibid.

[12] Rajeev Dhawan, p.ixii in Galanter's Law & Society in Modern India.

[13] Upendra Baxi, Power & Social Action, Seminar, January 1996.

[14] Ibid.

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[16] Ibid.

[17] Akeel Bilgrami, in Rajeev Bhargava, (ed.), *Secularism and its Critics*, OUP, Delhi, 1998. pp.399-40.

[18] Ibid.

[19] Ibid., p.401.

[20] Ibid., p.411.

[21] AIR, 1960, SC 148.

[22] AIR 1991, Bombay 373.

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[26] Ibid., p.191.

[27] Amatya Sen, p.464.

[28] Ibid., p.484.

[29] Rajeev Bhargava, "What is Secularism For"? in Rajeev Bhargava, ed., *Secularism and its Critics*, Oxford University Press, 1998.

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[31] Swapan Dasgupta, "Mandal Commission Controversy", *Islamic Quarterly, Times of India*, 18 September 1991.

[32] See, *Times of India*, 19 July 1998.

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APPENDICES

Appendix-I

OF THE MAINTENANCE OF WIVES AND CHILDREN

(1) Order for maintenance of wives and children.

If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

Enforcement order.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whgole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing:

Provided, further, that no warrant shall be issued for the recovery ofd any amount due under this section unless applicatgion be made to the Court to levy such amount within a period of one year from the date on which it bacame due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she resuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of a summons-case:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any orders so made may be set aside for good cause shown on application made with three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

COMMENT:- This section gives effect to the natural and fundamental duty of a man to maintain his wife and children so long as they are unable to maintain themselves. Its provisions apply and are enforceable whatever may be the personal law by which the persons concerned are governed. The object of this section is to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or fater able to maintain them. This section has nothing to do with conjugal rights but deals with maintenance only. A wife cannot therefore claim to live separate maintenance. It only provides a speedy remedy against starvation for a deserted wife or child. It provides for a summary procedure which does not cover entirely the same ground as the civil liability of a husband or father under his personal law to maintain his wife or child. When substantial issues of civil law are raised between the parties their remedy lies only to the civil Court.

A wife or a child has two remedies available for securing maintenance. The first is a suit in a civil Court, in which a decree may be obtained for an amount commensurate with the status or means of the party liable. Even arrears of past maintenance can be recovered. The maintenance can be made a charge on the property. The decree can be enforced against his property in case of his death. The second remedy is a proceeding under this section. It is a cumulative remedy. This remedy is open to a wife or child either legitimate or illegitimate. The mere existence of a decree of a civil Court awarding maintenance to a wife does not oust the jurisdiction

of a Magistrate to make an order under this section on the applications of the wife. The Magistrate, however, in such a case, should make it clear in his order that anything paid under the decree of the civil Court would be taken into account against anything which he may order to be paid.

The section providesa speedy remedy and a summary mode, for enforcing the order. The amount of maintenance is limited to Rs.100 per month, and the order spends itself on the death of the party charged. The amount can be levied as if it were a fine. The order can be nullified: (1) if the wife is living in adultery, or (2) if she without sufficient reason refuses to live with her husband, or (3) if the parties are living separately by mutual consent.

The right to receive maintenance is a purely personal right created by an order of a criminal Court; there is no charge created on property by the order for maintenance, and the maintenance cannot, therefore, be held to be alienable property.

The allowance may be payable from the date of the order or even from the date of the application, but can in no case go beyond it.

Scope:- This section does not cease to operate when the relationship of marriage or paternity is denied. It is competent to the Magistrate to allow an issue on the question to be raised and decide it.

1. '*Any person*':-

The Words "any person" include a Hindu not divided from his father. This section does not contemplate proceedings against a whole family merely because the husband against whom the proceedings are taken is to member of a joint Hindu family. Though the Magistrate mayconsider what is the property of the family, in considering what sum he should award the wife for maintenance, the order should be passed against the husband himself and not against the joint family. An order made under this section can be enforced against a person even if he resides outside the jurisdiction of the Court.

2. '*Sufficient means*':-

This expression is not confined to pecuniary resources, and a mere denial by an able-bodied man of sufficiency of means is not conclusive proof of want of sufficient means. Whether a person has 'sufficient means' must be determined upon a consideration of the circumsatances disclosed in each case.

3. '*Neglects or refuses to maintain*':-

A neglect or refusal to maintain the wife may be by words or by conduct. It may be express or implied. Once it is proved that a husband or father has refused or neglected to maintain his wife or childre, an offer by him to maintain them in the future is not sufficient of itself to debar a Magistrate from making an order for their maintenance, nor an offer to maintain them in a separate house.

'Maintenance' means appropriate food, clothing, and lodging. The Rangoon High Court has held that 'maintenance' must include the minimum amount of education for a child which the conventions of the country call for. In a civilised state a human child cannot be maintained simply by providing it with clothing and food. In the present state of society the mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience. The Chief Court of Sind has taken a similar view.

4. '*Wife*':-

The applicant must be shown to be the wife of the person from whom she claims maintenance. The section applies only to an abandoned wife and not the abandoned mistress.

The right of a wife and of children to be maintained by the husband and by the actual father is a statutory right, and the duty is created by express enactment independent of the personal law. Hence, a *mutta* (temporary) wife can claim maintenance from her husband. Illegitimate children born of an adulterous intercourse by a married woman can recover maintenance from the putative father. The wife is not bound to accept the offer by the husband to provide her with a separate residence; though if she leaves her husband's roof without justifying cause she is entitled to no relief.

The wife of a Jain, who becomes a Sadhu, does not lose her status as his wife and the husband by becoming a Sandhu is not in law excused from maintaining his wife. It is open to him to prove that by reason of the vows he has taken he is incapable of holding any property or of earning any money without incurring serious consequences to himself. Similarly, a Burmese Buddhist monk is amenable to the provisions of this section notwithstanding the fact that he has adopted the yellow robe. It makes no difference whether he does or does not enter the priesthood to avoid the responsibilities as a father. If there is a bona fide re-union between husband and wife the order of maintenance is vacted.

The order for maintenance ceases to operate as soon as the wife is divorced by her husband, though it remains effective so long as the divorced wife is in her iddat under Muhammadan law. This perssonal law of Muhammadans is not abrogated by this section. The plea of divorce can, however, be urged only when the wife applies to recover arrears of maintenance.

5. *`Child'*:-

The word "child" is not defined in this Code or in the General Clauses Act, 1897. The Madras, the Calcutta and the Rangoon High Courts have held that in the absence of any definition the word `child' means a person who has not reached full age, which, under the Indian Majority Act, is eighteen years, and who is incompetent to enter into any contract or to enforce any claim under the law. The Bombay High Court has differed from this view and held that the word `child' is used with reference to the father, and has no qualification of age-the only qualification being that the child must be unable to maintain itself. The word is not confined to a child who is under the age of majority. A Mahomedan divorced his wife who had two children, a boy aged fourteen years and a girl aged twenty-one. On the application by the wife to recover maintenance for the two children, it was held that the father was bound to maintain them as the section was not confined to children who were under the age of majority.

The basis of an application of the maintenance of a child is the paternity of the child irrespective of its legitimacy or illegtimacy. A woman may be of bad character and yet to entitled to an order for maintenance of her illegitimate child if she proves that the man against whom she proceeds was the father of the child. Similarly an unchaste wife is entitled to maintenance for her husband's child. An adoptive father is not liable to pay maintenance to his adopted child. A divorced wife entitled to the custody of her children can recover their maintenance. A father is bound to maintain his child even though the child is living with its mother who refuses to return to her husband under a decree for restitution of conjugal rights. When the custody of a child is worngfully withheld from its father, who is its legal guardian, he cannot be called upon to pay for its maintenance.

6. *`Unable to maintain itself'*:-

The phrase means "unable to earn a livelihood for itself", that is to say, a complete livelihood, such as an adult person might earn, without depending on any other person.

The maintenance allowed to a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered.

7. *`Or such child'*:-

Power is given to make an order for maintenance of the wife "or such child". Therefore an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the section which says that if such am application is made on behalf of the wife an application shall not lie on behalf of the child.

The word `child' is used with reference to the father, and has no qualification of age-the only qualification being that the child must be unable to maintain itself. The word is not confined to a child who is under the age of majority.

8. *`Monthly rate'*:-

The rate awarded should be determinate and fixed. It is not permissible to make an order for maintenance at a progressively increasing rate. The rate may, if necessary, be altered from time to time under the following section. It must refer to a money payment only.

9. *`In the whole'*:-

The words "in the whole" mean that only a sum of money not exceeding Rs.100 should be ordered to be paid and no other payment, either in the shape of fees or medical expenses, etc., should be ordered to be paid nor can the Magistratge order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing, or so much for medical expenses and so on, that words "in the whole" have been put into the section. The Magistrate can only order one sum not exceeding Rs.100 to be paid for the wife and for each of the children unable to maintain itself. Every wife and every legitimate child and every illegitimate child and every illegtimate child could be awarded maintenance up to Rs.100 provided the husband or the father has the means to pay the amounts.

Sub-section (3):- It is necessary, before the order can be enforced by a sentence of imprisonment, that it should be made out that the non-payment of maintenance was the result of wilful neligence on the part of the defendant. A sentence of imprisonment can, therefore, be passed only after there has been wilful neglect to comply with the order, followed by an unsuccessful process of distraint. The imprisonment that is ordered is not a punishment for punishment for contempt of the Court's order, but it is for the unpaid portion of the maintenance.

10. *`Sufficient cause'*:-

An order of adjudication of the husband as an insolvent does not, in itself, amount to rebuttal of an allegation that the insolvent has failed "without sufficient cause" to comply with the order.

11. *`Imprisonment for a term which may extend to one month'*:-

According to the Madras and the Calcutta High Courts the imprisonment in default of payment of maintenance awarded is not limited to one month. The mazimum that can be imposed is one month for each month's arrear; and, if there is a balance representing the arrears of a portion of a month, a further term of a month's impisonment may be imposed for such arrear. The Allahabad High Court has adopted the view. There is a decision of the Bombay High Court holding that a maximum sentence of one month's imprisonment only can be passed for non-payment of all accumulated arrears. The Bombay decision cannot be regarded as sound law owing to change in the wording of the section in the Code of 1882.

A person who has undergone a sentence of imprisonment on account of his failure to pay certain arrears cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears.

*Proviso 1-12. `Offers to maintain his wife'*:- It is open to the husband to offer to maintain his wife; he cannot be compelled to maintain her `as his wife'. If the Legislature had meant that the offer was to be one to live with the woman as his wife, it would have used those words. The wife cannot objhect to live in the house on the ground that the husband has married a second wife.

Proviso 2-13. `One year from the date on which it became due':- The proviso is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to pile up until their recovery would become a hardship or an impossibility. It is not intended for the benefit of the person against whom an order for maintenance is made to evade payment by preventing the service of process on him. Where, therefore, the wife applied on July 18, 1933, for four months imaintenance ending June, 1933, and the case had to be closed as the husband could not be found, and she then applied on May 31, 1934, for fifteen months' maintenance in arreard, it was held that the applicaiton lay.

Sub-section (4)-14. `Living in adultery':-The term "adultery' is used in the popular sense of the term, viz. breach of the matrimonial tie by either party. It does not mean a single act of adultery. It refers to a course of conduct and means something more than a single lapse from virtue. It is not necessary that the wife should live in the house of the adulterer. The words "living in adultery" are merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by "living in adultery". The fact that the wife had once an illegitimate child is not enough to disqualify her if she led a chaste and respectable life for some two years before the application; but where she has been guilty of adultery with a low caste man, which leads to her expulsion from caste, she is not entitled to maintenance.

The Bombay High Court has held that where an order for maintenance is cancelled on account of the wife living in adultery, such cancellation extinguishes not only her future right of maintenance but also the arrears of ther past maintenance. The Calcutta High Court is of the opinion that an order of cancellation of maintenance takes effect from the date of the order and has no retrospective operation. It cannot affect the arrears due up to the date of the order.

*sub-section (5)-15. `Mutual consent'*:- `Mutual consent' means a consent on the part of the husband and wife to live apart no matter what the circumstances may be.

*Sub-section (6)*k:- Where the evidence on which the order is passed is ot taken in the presence of the husband or father, and his personal attendance is not dispensed with the order must be set aside as the direction in this sub-section is peremptory. A Presidency Magistrate is not bound to record evidence in a proceeding under this section.

Sub-section (8) :- The words "or is" indicate that a Magistrate is competent to entertain an application for maintenance against a person who works for gain with the territorial jurisdiciton of such Magistrate although he may not have a permanent residence within such jurisdiction.

The proper court to take cognizance of the complaint of the wife is the Court within the jurisdiction of which the husband resides. The Allahabad High Court has held that a wife who is living apart from her husband for a good cause may institute an application for maintenance in the district in which she resides.

The word "reside" connotes some sort of permanent intention to stay at a particular place and a mere causual visit to a place other than the one where a person has a fixed home, will not be sufficient. In the case of persons who have a fixed residence, a visit to another place for however long a period,k so long as it is casual, will not confer jurisdiction. Where, however, the parties have no home of any sort and are moving about from place to place each place where they so live would be their home for the time being; the sole test being whether a party has *animus manendi* or an intention to stay for an indefinite period, at one place, and if he has such an intention, then alone can he be said to reside there.

The word `reside' means to live or to have a dwelling place or an abode and is not equivalent to something in the nature of having a domicile in a particular place or having place as the places of origin or the place where the family used to live.

16. `*Last resided*':- The term "resided" includes a temporary residence and is not to be confined to permanent residence.

The mere hiring or purchase of a residential building by a person at a place, when he was actually in employment at another place, does not confer jurisdiction on the Magistrate at the place where the building is hired to entertain a petition against that person under this section.

Duration of order:- An order once passed remains in force until it is either cancelled under s. 488(5) or modified under s. 489. The mere factr that a wife has returned to live with her husband will not bring the order to an end automatically, though it would suspend the operation for the period during which she lived with ther husband. On her separating from him again, she can enforce it.

Insolvency of husband:- An order of discharge shall not release an insolvent husband from liability under an order for maintenance passed under this section; s.45 (1) (d) of the Presidency-towns Insolvency Act (III of 1909); s. 44(1) (d) of the Provincial Insolvency Act (V of 1920). A protection order, under s. 25 of the Presidency-towns Insolvency Act (1909) does not protect the insolvent against the special statutory power of committal given to a Court under this section to enforce an order to pay maintenance by levying the amount as fine and sentencing the defaulter to suffer imprisonment. A Magistrate who has passed a sentence of imprisonment cannot cancel the sentence merely because an insolvency Court issues an order of protection. Neither the protection order nor the adjudication order can be conclusive on this point.

Death of respondent:- A claim for arrears of maintenance abates on the death of the respondent and cannot be enforced thereafter against his estate.

Civil suit:- An order passed under this section is no bar to a suit for maintenance in a civil Court.

Jurisdiction of criminal Court :- A decree for maintenance passed by a civil Court, which cannot be enforced on account of insolvency of the husband, is no bar to proceedings under this section. Similarly an agreement between the husband and wife to pay the wife maintenance, enforceable in a civil Court, does not outst the jurisdiction of a criminal Court. Anything short of a decree entitling the wife to maintenance is not sufficient to oust such jurisdiction.

Where a compromise between a husband and wife covers matters outside the purview of this section an order for maintenance cannot be passed by a criminal Court.

489. *Alternation in allowance* (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit; Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

Comment :- Where once an order for maintenance is passed under the foregoing section, the amount can be increased or decreased by change of circumstances of the person receiving, or of the person paying, the amount. The order can relate back to the date of the application. It can be cancelled if it is superseded by a civil Court decree, or if the parties have arrived at a compromise.

1. `*Change in the circumstances*':- The phrase refers to a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed. "Change" would include death of the child or the birth of another, and also the fact that the child has grown older. Virtually all the High Courts have held that a valid divorce is "a change in the circumstances".

2. `*Alteration in the allowance* :- According to the Allahabad High Court, alteration refers to a power to alter the amount, and not to a total discontinuance thereof. But, according to the Madras High Court, the reduction of the maintenance to nothing would also come within the meaning of the word "alteration". An alteration in the amount of the order for maintenance could be a reduction of it to nothing.

Sub-section (2):- Where a suit for restitution of conjugal rights is brought not with a view to take the wife back, but to evade the payment of maintenance, or the husband fail to comply with the conditions of the decree, e.g. fails to provide a separate accommodation for his wife as required by the decree for restitution, the Magistrate is justified in refusing to cancel the order of maintenance. A decree for restitution of conjugal rights obtained from a civil Court does not necessarily put an end to an order for maintenance previously passed under this section. It is within the discertion of the Magistrate to cancel or vary the order if need be, but the discretion must be exercised judicially. Before cancelling or varying the order he is entitled, and indeed bound, to satisfy himself that the applicant is bona fide prepared to give effect to the decree of the civil Court and that he is prepared to offer the wife a home which she ought to accept.

490. *Enforcement of order of maintenance* :- A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order amy be enforced by any Magistrate in any place where the person against whom it is made may be, on such Mgistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

COMMENT:- The Madras High Court has held that where an application has been made to a Magistrate to enforce an order for maintenance he is not bound to enforce the order if the defendant proves that the claim for maintenance has been released. But the Allahabad High Court has taken a different view.

'*Any place*':- The expression includes a place outside the jurisdiction of the Magistrate who passed the order. This section was revised in 1973 enlarging the scope of law to include the righ of elderly parents unable to seek maintenance from children with sufficient means.

THE HINDU MARRIAGE ACT, 1955

S2 *Applicability of the Act*:

(1) This act applies:

(a) To any person who is a Hindu by religion in any of its forms or developments, including a Veerashaiva, a Lingayat or a follower of Brahmo, Prarthana or Arya Samaj;
(b) To any person who is Buddhist, Jaina or Sikh by religion, and
(c) To any other person domiciled in the territories to which this act extends who is not a Muslim, Christian, Parsi or Jew by religion...

S5 *Conditions of a Hindu Marriage*

A marriage may be solemnized between any two Hindus if the following conditions are fulfilled, namely –
(1) neither party has a spouse living at the time of the marriage.

S 7 *Ceremonies for a Hindu Marriage*:

(1) A Hindu marriage may be solemnized in accordance with customary rites and ceremonies of either party thereto;
(2) Where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire) the marriage becomes complete and binding wen the seventh step is taken;

S8 *Registration of Hindu Marriages*

For the purpose of facilitating the proof of Hindu marriages, the state government may make rules providing the parties to any such marriage may have particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose;

S11 *Void Marriages*

Any marriage solemnized after the commencement of this act shall be null and void and...if it contravenes clauses (1)...of S5

S17 *Punishment for Bigamy*

Any marriage between two Hindus solemnized after the commencement of this act is void if at the date of such marriage either party had a husband or wife living and the provisions of S 494 and 495 of the Indian Penal Code shall apply accordingly.

INDIAN PENAL CODE

Chapter XX – Of Offences Relating to Marriage

S 494: Marrying again during lifetime of husband or wife: Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall all be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

THE INDIAN EVIDENCE ACT, 1872

S50 Opinion on relationship when relevant: When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge on the subject is a relevant fact.

Provided that such opinion shall be sufficient to prove marriage proceedings under the Indian Divorce Act, 1869, or in prosecutions under Section 494, 495, 497 or 498 of the Indian Penal Code, 1860.

Appendix-III

THE MANDAL COMMISSION RECOMMENDATIONS

The Second Backward Classes Commission (19078-1980) (Chairman: Bindeshwari Prasad Mandal)

SUMMARY OF THE REPORT

CHAPTER I. The First Backward Classes Commission

The First Backward Classes Commission was set up on 29 January 1953 and it submitted its report on 31 March 1955. On the basis of criteria evolved by it, the Commission listed 2,399 castes as socially and educationally backward. It recommended various welfare measures for OBCs including reservation in government services and educational institutions.

The Central Government did not accept the recommendations of the Commission on the ground that it had not applied any objective tests for identifying Backward Classes. Five out of the 11 Members of the Commission had given notes of dissent. The government felt that the Commission had classified a very large section of the population as backward and if special assistance had to be extended to all these people, 'the really needy will be swapped by the multitude'. The Government was also opposed to the adoption of caste as one of the criteria for backwardness and preferred the application of economic tests.

As Article 340 of the Constitution speaks of 'socially and educationally backward classes', the application of economic tests' for their identification seems to be misconceived.

CHAPTER II. *Status of OBCs in Some States*

It is for nearly 100 years that Provincial Governments in India have been implementing special programmes for the welfare of depressed and backward classes. Madras Government took the lead by framing Grant-in-Aid Code in 1885 to regulate financial aid to educational institutions for backward classes students. Mysore State was the next to follow and, by now, all the southern states are implementing fairly comprehensive programmes for OBCs. As on dated 16 states and two Union territories are providing special assistance of varying degrees to other backward classes. Ten State Governments are doing so on the basis of recommendations made by Backward Classes Commissions specially set up by them in this behalf and the others are doing in an ad hoc manner.

Special concessions like reservation of jobs in government employment and seats in educational institutions, financial assistance, subsidised educational facilities, etc., are being given by several State Governments to OBCs. Southern states have done much more work in this connection as compared to the rest of the country. Karnataka has reserved 48 per cent of all government jobs for OBC candidates in addition to 18 per cent for SCs and STs. In the case of Tamil Nadu, these figures stand at 50 per cent and 18 per cent respectively.

CHAPTER III. *Methodology and Data Base*

One serious defect noticed by the Government in the report of the First Backward Classes Commission was that it had not formulated any objective criteria for classifying other backward classes (OBCs). The need for field surveys and formulation of objective tests has also been repeatedly emphasized by the Supreme Court in several cases. In view of this, the Commission has taken special care to tap a number of independent sources for the collection of primary data. Some of the important measures taken in this connection were: seminar of sociologists on social backwardness; issue of three sets of questionnaires to State Governments, Central Government and the public; extensive touring of the country by the Commission; taking the evidence of legislators, eminent public men, sociologists, etc., undertaking a country-wide socio-educational survey; preparation of reports on some important issues by specialized agencies; analysis of census data, etc.

By adopting this multilateral approach the Commission was able to cast its net far and wide and prepared a very firm and dependable data base for its Report.

CHAPTER IV. *Social Backwardness and Caste*

Castes are the building bricks of the Hindu social structure. They have kept Hindu society divided in a hierarchical order for centuries. This has resulted in a close linkages between the caste ranking of a person and his social, educational and economic status.

This manner of stratification of society gave the higher castes deep-rooted vested interests in perpetuation of the system. The priestly castes evolved an elaborate and subtle scheme of scripture, ritual and mythology and perpetuate their supremacy and hold the lower castes in bondage for ages. Most of our *Sastras* uphold the fourfold *Varna* system and, because of this religious sanction, the caste system has lasted longer than most other social institutions based on inequality and inequity.

In view of the permanent stratification of society in hierarchical caste order, members of lower castes have always suffered from discrimination in all walks of life and this has resulted in their social, educational and economic backwardness. In India, therefore, the low ritual caste status of a person has a direct bearing on his social backwardness.

CHAPTER V. *Social Dynamics of Caste*

The caste system has been able to survive over the centuries because of its inherent resilience and its ability to adjust itself to the ever changing social reality. The traditional view of the caste system, as contained in Chapter IV, is based more on Hindu *Sastras* than the actual state of social reality. Moreover, caste restrictions have loosened considerably as a result of the rule of law introduced by the British, urbanization, industrialization, spread of mass education and, above all, the introduction of adult franchise after Independence. But all the above changes mark only shift of emphasis and not any material alteration in the basic structure of caste.

It is generally agreed that whereas certain caste taboos have weakened as a result of the above changes, the importance of casteism in Indian politics is on the increase. This, perhaps, was inevitable. The caste system provided the political leadership with readymade channels of communication and mobilization and, in view of this, the importance of caste was bound to increase in Indian politics. As Rajni Kothari has observed, 'those in India who complain of "casteism" in politics are really looking for a sort of politics which has no basis in society'.

The pace of social mobility is no doubt increasing and some traditional features of the caste system have inevitably weakened. But what caste has lost on the ritual front, it has more than gained on the political front. In view of this it will be unrealistic to assume that the institution of caste will wither away in the foreseeable future.

CHAPTER VI. *Social Justice, Merit and Privilege*

Equality before the law is a basic Fundamental Right guaranteed under Article 14 of the Constitution. But the principle of 'equality' is a double-edged weapon. It places the strong and the handicapped on the same footing in the race of life. It is a dictum of social justice that there is equality only among equals. To treat unequals as equals is to perpetuate inequality. The humaneness of a society is determined by the degrees of protection it provides to its weaker, handicapped and less gifted members.

'Equality of opportunity' and 'equality of treatment' places the weak and the strong on par and, to that extent, it amounts to denial of social justice. In fact, it is 'equality of results' which is the acid test of society's egalitarian pretensions. In a highly unequal society like ours, it is only by giving special protection and privileges to the underprivileged section of society that we can enable the weak to resist exploitation by the strong.

It was in views of these considerations that our Constitution-makers made special provisions under Articles 15(4), 16(4) and 46 etc., to protect the interests of SCs, STs, and OBCs. Some people consider provisions like reservation of posts for backward classes, etc., as a violation of their Fundamental Right and denial of meritorious person's legitimate due. In fact, 'merit' itself is largely a product of favourable environmental privileges and higher rating in an examination does not necessarily reflect higher intrinsic worth of the examinee. Children of socially and educationally backward parents coming from rural background cannot compete on an equal footing with children from well-to-do homes. In view of this, 'merit' and 'equality' should be viewed in proper perspective and the element of privilege should be duly recognized and discounted for when 'unequals' are made to run the same race.

CHAPTER VII. *Social Justice, Constitution and the Law*

The element of conflict between the Fundamental rights and the Directive Principles of State Policy has been the subject-matter of numerous Parliamentary debates and judicial pronouncements. In pursuance of Articles 15(4) and 16(4) a number of State Governments made reservations in government services and educational institutions for OBCs and several petitions were filed before the High Courts and the Supreme Court against such orders. Gradually a sizeable body of case law has grown on the subject and a gist of it is given below.

Caste is an important factor in the identification of other backward classes among Hindu communities. Backwardness must be both social and educational and not either social or educational. Caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). The aggregate reservation of posts under article 15(4) should be less than 50 per cent. Objective criteria should be evolved on the basis of field survey, etc., for identifying OBCs.

CHAPTER VIII. *North-South Comparison of OBC Welfare*

Southern states have done much more for the welfare of other backward classes (OBCs) than northern states. Moreover, in the South the whole operation was conducted quite smoothly whereas in the North even modest welfare measures for OBCs have given rise to sharp resistance. The Commission approached the Tata Institute of Social Sciences, Bombay to prepare a comparative study of the four states of Tamil Nadu, Karnataka, Bihar and Uttar Pradesh, so as to have better appreciation of this phenomenon.

The Tata Institute study formulated a number of hypotheses in this regard. They are: The reservation scheme had a much longer history in the South; forward castes were more divided among themselves in the South; OBCs were not getting along very well with SCs/STs in the North and thus divided the backward classes movement; backward classes were more politicized in the South; reservation scheme was introduced too suddenly in the North; the capacity of backward classes to retaliate depends upon their numbers, political consciousness, dominance and perceived lack of alternative opportunities; more rapid expansion of the tertiary sector gave an opening to the forward castes in the South which was not available to the same extent in the North, etc.

The Tata Institute study supports the above hypotheses by citing a number of examples and historical developments in the four states under consideration.

CHAPTER IX. *Evidence by Central and State Governments*

Two sets of questionnaires were circulated to all State Governments, Union territories and Ministries and Departments of the Central Government for eliciting information on various aspects of our inquiry. These questionnaires were designed to obtain a comparative picture of the status of backward classes in various states, steps taken for their welfare, the views of various government agencies on the question of social and educational backwardness and any useful suggestions regarding the Commission's terms of reference.

Most of the State Governments favoured caste as an important criterion for determining social and educational backwardness. Some states preferred economic criterion and some a combination of caste and means test. Eighteen State Governments and Union territories have taken special steps for the welfare of other backward classes, though there is wide variation in the quantum of assistance provided by them. For instance, reservation in government services for OBCs ranges from 50 per cent in the case of Karnataka and Tamil Nadu and 5 per cent in Punjab to nil in the case of Rajasthan, Orissa, Delhi, etc. Representation of OBCs in local bodies, State Public Service Commission, High Courts, etc., is also negligible. Social discrimination still practised against OBCs. There are a number of castes and communities which are treated as untouchables though they have not been included in the list of scheduled castes. All the State Governments which have launched programmes for the welfare of backward classes have to fund the same from their own resources as no separate Plan allocation is made by the Centre for this purpose.

Most states have reported loss of employment by village artisans owing to the introduction of machines, change in consumption patterns, etc.

From the information supplied by the Central Government Ministries and Departments it is seen that other backward classes constitute 12.55 per cent of the total number of government employees, whereas their aggregate population is 52 per cent. Their representation in Class I jobs is only 4.69 per cent i.e., less than one-tenth of their proportion to the country's total population.

CHAPTER X *Evidence by the Public*

Nearly two-thirds of the respondents to our questionnaire for the general public felt that no material changes have taken place in the country" caste structure since Independence. Regarding the criterion for identifying backwardness, nearly three-fourths of the respondents favoured caste. More than three-fourths of the respondents also complained of various disabilities suffered by backward classes and many felt that no concrete steps have been taken to remove them. They wanted job reservation quotas to be enhanced and more educational concessions to be given to the children of OBC. Ameliorative measures suggested for OBCs were: reservation in government employment and educational institutions; grant of interest-free loans, free distribution of agricultural land and house sites, etc.

In their evidence before the Commission, Members of the Sixth and Seventh Lok Sabha also expressed views similar to those summarised above. Some MPs warned against malicious propaganda being carried on by vested interests to create conflict between OBCs and SCs and STs. As some stated that the Commission should adopt those criteria for determining backwardness which have been tested before the Courts. They also suggested that the lists of OBCs prepared by State Governments and accepted by the Courts should be adopted by the Commission in toto.

During the Commission's tour of various states, a large number of representations were received for including particular castes in the list of OBCs. Most of the other respondents expressed similar views on the criterion for identifying backward classes and measures to be taken for their uplift as already indicated above.

CHAPTER XI. *Socio-Educational Field Survey – Criteria of Backwardness*

A country-wide socio-educational survey covering 405 out of 407 districts was conducted with the help of the Bureau of Economics and Statistics of various states from February to June 1980. Voluminous data gathered from the Survey were computerised and 31 primary tables were generated from these data in respect of each state and Union territory. On the basis of these tables, 11 indicators or criteria for social and educational backwardness were derived and they were grouped under three broad heads, i.e., social, Educational and Economic. In view of their relative importance, 3 points were assigned to each one of the Social Indicators, 2 to Educational Indicators and 1 to Economic Indicators. This added up to a total score of 22 points. All these 11 indicators were applied to each one of the castes covered by the Survey in each state. Castes obtaining a minimum score of 11 points on this scale were listed as socially and educationally backward.

CHAPTER XII. *Identification of OBCs*

A large number of castes were identified as backward in each state as a result of the Socio-Educational Survey. As this survey covered only two villages and one urban block per district, a large number of castes were naturally left out. Moreover, in some cases, the size of the sample was so small that the results were not dependable.

In view of this, two supplementary approaches were adopted to prepare complete lists of OBCs for each state. First, a state-wise list of the 11 groups of primitive tribes, exterior castes, criminal tribes etc., contained in the Registrar General of India's compilation of 1961 were culled and included in the Commission's list of OBCs. This was done as the social and educational status of these castes and communities was more or less akin to scheduled castes and scheduled tribes. Secondarily, based on the public evidence and personal knowledge of the Members of the Commission, state-wise lists of those OBCs were drawn up which could not be covered by the socio-educational survey.

It was a result of this three-pronged approach that state lists of OBCs (Volume III) were prepared.

From the results of the field survey it was seen that some of the well-known OBCs which were also include in the lists of backward classes notified by various State Governments were not ranked as 'backward' in the survey. This is unavoidable in any sociological survey based on statistical methods. Such aberrations were corrected in the light of the other field evidence available with the Commission.

The set of eleven Indicators (criteria), being caste-based, could not be applied to non-Hindu communities. In view of this a separate set of three criteria was evolved for the identification of non-Hindu backward communities.

On the basis of the available census data, the population of Hindu and non-Hindu OBCs was estimated to be 52 per cent of the total population of India. This is in addition to the population of scheduled castes and scheduled tribes, which amounts 22.5 per cent.

CHAPTER XIII. *Recommendations*

Reservation for SCs and STs is in proportion to their population, i.e., 22.5 per cent. But as there is a legal obligation to keep reservation under Articles 15(4) and 16(4) of the Constitution below 50 per cent, the Commission recommends a reservation of 27 per cent for OBCs. This reservation should apply to all government services as well as technical and professional institutions, both in the Centre and the States.

Special educational facilities designed at upgrading the cultural environment of the students should be created in a phased manner in selected areas containing high concentration of OBCs. Special emphasis should be placed on vocational training. Separate coaching facilities should be provided in technical and professional institutions to OBC students to enable them to catch up with students from open quota.

Special programmes for upgrading the skills of village artisans should be prepared and subsidised loans from financial institutions granted to them for setting up small-scale industries. To promote the participation of OBCs in the industrial and business life of the country, a separate network of financial and technical institutions should be created by all State Governments.

Under the existing scheme of production relations, backward Classes comprising mainly small landholders, tenants, agricultural labour, village artisans, etc., are heavily dependent on the rich peasantry for their sustenance. In view of this, OBCs continue to remain in mental and material bondage of the dominant castes and classes. Unless these production relations are radically altered through structural changes and progressive land reforms implemented rigorously all over the country, OBCs will never become truly independent. In view of this, highest priority should be given to radical land reforms by all the states.

At present no Central assistance is available to any state for implementing any welfare measures for other backward classes. Several State Governments expressed their helplessness in undertaking more purposeful development programmes for backward classes in view of lack of resources. It is, therefore recommended that welfare programmes specially designed for OBCs should be financed by the Central Government in the same manner and to the same extent as done in the case of SCs and STs.

Appendix-IV

Relevant Constitutional and Statutory Provisions

Constitution of India
(1950)

Article 17 *Abolition of Untouchability* -- 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.

Article 25 *Freedom of Conscience and free profession, practice and propagation of religion.* (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –

(a) regulating of restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina, or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26 *Freedom to manage religious affairs* – Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

The [Central] Untouchability)Offences) Act, 1955

No. 22 of 1955

Section 3 *Punishment for enforcing religious disabilities* – whoever on the ground of 'untouchability' prevents any person –

(a) from entering any place of public worship which is open to other persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person; or

(b) from worshipping or offering prayers or performing any religious service in any place of public worship, or bathing in, or using the waters of, any secret tank, well, spring or water-course, in the same manner and to the same extent as is permission to other persons professing the same religion, or belonging to the same religious denomination or any section thereof, of such person;

shall be punishable with imprisonment which may extent to six months, or with fine which may extent to five hundred rupees, or with both.

Explanation – For the purposes of this section...persons professing the Buddhist, Sikh, or Jaina religion or persons professing the Hindu religion in any of its forms or developments including Virashaivas, Lingayats, Adivasis, followers of Brahmo, Pararthana, Arya Samaj and the Swaminarayan Sampraday shall be deemed to be Hindus.

The Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956
No.31 of 1956

Section 2 *Definition* – In this Act, unless the context otherwise requires, (a) 'place of public worship' means a place, whether a temple or by any other name called, to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus, Jains, Sikhs or Buddhists or any section or class thereof, for the performance of any religious service or for offering prayers therein; and includes all lands and subsidiary shrines appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped, or are used for bathing or for worship; (b) 'section' or 'class' of Hindus includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever of Hindus.

Section 3 *Throwing open of Hindu temples to all classes and sections of Hindus* – Notwithstanding any custom, usage or law for the time being in force, or the decree or order of a court, or anything contained in any instrument, to the contrary, every place of public worship which is open to Hindus generally, or to any section or class there, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers threat, or performing any religious service therein, in the like manner and to like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform.