DYNAMICS OF RESERVATION POLICY: TOWARDS A MORE INCLUSIVE SOCIAL ORDER

Virendra Kumar[*]

"The claim to equality before the law is, in substantial sense, the most fundamental of the rights of man. … It is the starting point of all other liberties."

- K.G. Balakrishnan, CJI in *Ashok Kumar Thakur* (2008)
[Citing Judge Launterpacht of the International Court of Justice, *An International Bill of Rights of the Man* (1945)]

I Introduction

THE ISSUE of reservation policy came into focus recently with the passing of the Constitution (Ninety-Third Amendment) Act, 2005 and enactment of the Central Educational Institutions (Reservation in Admission) Act of 2006 (No. 5 of 2007),[1] introducing reservation of seats for the other backward classes (OBCs) /socially and educationally backward classes (SEBCs) of citizens to the extent of 27%.[2] The constitutional validity of both the 93rd constitutional amendment and the law enacted there under, namely the Act of 2007, were challenged before the Supreme Court in number of writ petitions. Since the emotive issue of reservation directly or indirectly impinges upon the interest of 'millions of citizens of this country,' for its final determination, the matter came up before the constitution bench of five judges of the Supreme Court in *Ashok Kumar Thakur* v. *Union of*

* LL.M., S.J.D. (Toronto, Canada), UGC Emeritus Fellow in Law (2002-2004), Former Professor & Chairman, Department of Laws, Dean, Faculty of Law & Fellow, Panjab University, Chandigarh. The author sincerely appreciates the most willing offer made by one of his very distinguished former students, Hemant Jain, LL.M., to peruse the manuscript and save him from committing serious errors.

1. Hereinafter simply cited as the Act 5 of 2007.

2. Reservation to the extent of 27% is premised on the basis that 52% of the population belongs to OBCs, but there is no supportable data for this 'proposition.' In fact, different commissions at different points of time have given different figures. Apparently, it must have been assumed that in any case their population is not less than the percentage for which reservation is provided.

India & Ors.[3] In this case for the resolution of the conflict, the Supreme Court was assisted by the "country's finest legal minds,"[4] who not only argued the case in person for both sides before the constitution bench but also made "voluminous written submissions."[5] This eventually led the constitution bench of the Supreme Court to write as many as four different, but concurring, judgments running into as many as 272 pages with 624 paragraphs in print! With varying degrees of emphasis. They hold that the 93rd Amendment and also the Act of 2007 are constitutionally valid, albeit with certain caveats. The concurrence on most of the counts is by 'authority of reason,' but in certain respects by 'reason of authority'![6]

A perusal of *Ashok Kumar Thakur*, with distinct nuances of four different judgments, reviewing the whole gamut of law, including the leading judicial decisions of the apex court hitherto available on the subject of reservation, provides a thought-provoking study. It reveals certain features that should be of immense interest to all those who are engaged in the task of restructuring a better inclusive social order. This paper deals with three features, which have been identified as – judicial resilience for accommodating legislative intent in the matter of reservations; reservation as a dynamic social phenomenon; and reservation as a strategy for inclusive social order. To this is finally added 'some leftover and lingering issues' by way of conclusion.

II Judicial resilience for accommodating legislative intent

No inherent conflict between the legislature and the judiciary

There is a natural 'tension' between the two wings of the state, namely, the legislature and the judiciary, because both derive their existence and

3. 2008(5) SCALE, per K.G. Balakrishnan CJI and Arijit Pasayat, C.K. Thakker, R.V. Raveendran, and Dalveer Bhandari JJ. (Hereinafter simply cited as *Ashok Kumar Thakur*) Initially, a bench of two judges heard these writ petitions. "Considering the constitutional importance of these questions [raised in those petitions], all those writ petitions were referred to a Constitution Bench," per Balakrishnan CJI, at 57 (para 23).

4. See, *id.* at 205 (para 347) and 237 (para 479), per Dalveer Bhandari J.

5. Written submissions running into 300 pages were made by senior advocates Harish Salve, K.K. Venugopal, P.P. Rao, Rajeev Dhavan, F.S. Nariman, K. Parasaran, G.E. Vahanvati, Solicitor General of India, and Gopal Subramanium, Additional Solicitor General of India.

6. This is true in respect of the opinion of Bhandari J, who agreed on certain counts in deference to the decision of larger bench in *Indra Sawhney* v. *Union of India and Ors.* [1992 Suppl. 3 SCC 215 (Known as *Indra Sawhney I , decided by* 9-Judge bench of the Supreme Court].

respective operational areas from one and the same source – the Constitution of India. It is indeed true that the legislature, the so-called properly law-making body, is entrusted to make law in order to fulfil the promised goals that are reflected in the various provisions of the Constitution. However, once the enacted law is challenged, the role of judiciary begins, inasmuch as it is the function of the judiciary to find out whether the legislative intent and enactment are in conformity with the constitutional goals. It is indeed true that in this respect under article 141 of the Constitution, the pronouncement of the Supreme Court is the law of the land.[7] Otherwise also, in terms of article 12 the judiciary comes within the ambit of the definition of 'state' and thereby obligated to make law, "though interstitially."[8] Thus, there is no inherent conflict between the two independent organs of the state: both contribute distinctly in restructuring the society in their own way by operating within the constitutionally demarcated areas. This is shown in *Ashok Kumar Thakur*[9] in respect of reservation policy by extensively reviewing the decisions of the apex court.

In *Champakam Dorairajan*,[10] for instance, the Supreme Court struck down the classification made in the communal G.O of the then State of Madras. The G.O. was founded on the basis of religion and castes and was struck down on the ground that it opposed to the Constitution and was in violation of the fundamental rights guaranteed to the citizens. The court held that article 46[11] cannot override the provisions of article 29(2),[12] because the directive principles of state policy were then taken as subsidiary to fundamental rights. This decision led to the first amendment of the Constitution by which clause (4) was added to article 15, empowering the state to make any special provision for the advancement of any socially and

7. The law declared by the Supreme Court shall be binding on all courts throughout the territory of India.

8. See *Ashok Kumar Thakur*, per K.G. Balakrishnan, CJI, at 90 (para 117), citing Mathew, J. in *State of Kerala and Anr.* v. *N.M. Thomas and Ors*., [1976(2) SCC 310], who held in his concurring judgment that in order to give equality of opportunity for employment to the members of scheduled castes and scheduled tribes, the court is also bound by the directive principle embodied in Art. 46 inasmuch the same way as the legislature.

9. See, per K.G. Balakrishnan CJI, at 87 (para 108).

10. *The State of Madras* v. *Champakam Dorairajan*, (1951) SCR 525.

11. Art. 46 enjoins the state to promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and scheduled tribes, and shall protect them from social injustice and all forms of exploitation.

12. Art. 29(2) expressly guarantees fundamental right to every citizen by stipulating that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds of religion, race, caste, language or any f them.

educationally backward classes of citizens or for the scheduled castes and the scheduled tribes despite the prohibition contained either in article 15 itself or in clause (2) of article 29.

Since then the constitutional history of India is replete with instances, particularly in the realm of reservation policy, wherein the judicial interpretation of the existing constitutional provisions led to their formal amendment by the Parliament in order to bring them in line with, what is conceived to be, the basic philosophy of the Constitution of India.[13] The apex court clearly recognises this well entrenched principle in *Ashok Kumar Thakur*[14] that the Parliament, expressing the will of the people, may enact amendments of the Constitution to override a judgment of the Supreme Court, subject only to the condition that it cannot alter the basic structure of the Constitution.[15] In other words, in any given situation, whether reservation is desirable or not, it is essentially a matter of 'public policy' to be adopted by the state, and not by the courts.[16] The courts are to examine only whether the state in the formulation and implementation of that policy has observed the relevant constitutional "parameters."[17]

Judicial accommodation of legislative intent

The 93rd constitutional amendment, which was challenged before the Supreme Court in *Ashok Kumar Thakur*, introduced a new clause (5) in article 15, which provides:

> Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission

13. See, for instance, the Constitution (Seventy-seventh Amendment) Act, 1995, overriding *Indra Sawhney* v. *Union of India and Ors.* 1992 Suppl. 3 SCC 215 (Known as *Indra Sawhney No.* 1) by adding Art. 16(4-A), the Constitution (Eighty-first Amendment) Act, 2000, overruling further *Indra Sawhney No. 1* by adding Art. 16(4-B), the Constitution (Eighty-second Amendment) Act, 2000, overruling *S. Vinod Kumar and Another* v. *Union of India and Another*, (1996) 6 SCC 580 by amending Art. 335, the Constitution (Eighty-fifth Amendment) Act, 2001, overruling *Virpal Singh Chauhann* v. *Ajit Singh (I*) by [(1995) 6 SCC 684, by amending Art. 16(4-A).

14. *Ashok Kumar Thakur* at 246 (para 512), per Bhandari J.

15. See generally, Virendra Kumar, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance "From *Kesavananda Bharati* (1973) to *I.R. Coelho* (2007)" 49 *JILI* 365-39 (2007).

16. See *Ashok Kumar Thakur* at 175 (para 294), per Pasayat J citing *M. Nagraj and Ors.* v. *Union of India,*(2006) 8 SCC 212.

17. Say, the guiding principles mentioned in Arts. 16(4) and 16(4-A). *Ibid.*

to the educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

To give effect to the provisions of this new clause (5), the Parliament enacted Act 5 of 2007, which makes provision for reservation of 15% seats for the scheduled castes, 7 and 1/2 % for the scheduled tribes, and 27% for other backward classes in central educational institutions.[18]

The avowed purpose of the 93rd constitutional amendment and the law enacted there under was to overcome the impediment caused by the 11-judge bench decision of the Supreme Court in *T. M .A. Pai Foundation*.[19] In this case, the majority, by overruling the earlier 5-judge bench decision of the Supreme Court in *Unni Krishna*,[20] held that all citizens have the fundamental right to establish and administer educational institutions under article 19(1)(g), and the term 'occupation' in this article comprehends the establishment and running of educational institutions, and the state regulation of admissions in such institutions would not be regarded as an unreasonable restriction on the fundamental right to carry on business under article 19(6) of the Constitution.[21] However, the un-aided educational institutions were clearly and completely kept outside the intervention of the state under article 19(6). This is evident from the subsequent decision of the Supreme Court in *P.A. Inamdar*,[22] which had explained the ambit of *T.M.A. Pai Foundation* and held that as regards unaided educational institutions, the

18. S. 3 of the Act 5 of 2007 provides the extent and the manner in which the proportion-percentage is made: "The reservation of seats in admission and its extent in a Central Educational Institution shall be provided in the following manner, namely:

(i) out of the annual permitted strength in each branch of study or faculty, fifteen per cent shall be reserved for the Scheduled Castes;

(ii) out of the annual permitted strength in each branch of study or faculty, seven and a half per cent seats shall be reserved for the Scheduled Tribes;

(iii) out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes."

19. *T. M .A. Pai Foundation and Others* v. *State of Karnataka and Others*, JT 2002 (9) SC 25: 2002(8) SCC 481.

20. *Unni Krishnan, J.P. and Others* v. *State of Andhra Pradesh and Others*, 1993(1) SCC 645. In this case, the Constitution bench of five judges of the Supreme Court held that the right to establish educational institutions can neither be a trade or business, nor can it be a profession within the meaning of Art. 19(1)(g) of the Constitution.

21. See, for critical analysis, Virendra Kumar "Minorities' Rights to Run Educational Institutions: *T.M.A. Pai Foundation* in Perspective," 45 *JILI* 200-238 (2003).

22. *P.A. Inamdar and Others* v. *State of Maharashtra and Others*, (2005) 6 SCC 537.

state has no control and such institutions are free to admit students of their own choice.[23] It is this limitation on the power of the state, which was sought to be removed by the Parliament through the 93rd Amendment Act of the Constitution. This is clearly borne out by the appended statement of objects and reasons:

> At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.
>
> To promote the educational advancement of the socially and educationally backward classes of citizens, i.e., the OBCs or the Scheduled Castes and Scheduled Tribes in Matters of admission of students belonging to these categories in unaided educational institutions other than the minority educational institutions referred to Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable the Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

In this background the "fundamental question" arose in *Ashok Kumar Thakur* was whether clause (5) inserted by the 93rd constitutional amendment and the Act 5 of 2007 enacted by the Parliament in pursuance of that amendment are in consonance with "the other provisions of the Constitution," or whether their "impact runs contrary to the Constitutional aim of achieving a casteless and classless society."[24] The constitution bench of the Supreme Court, in their ultimate analysis, upheld the new amendment as constitutional and not in violation of the basic structure of the Constitution. In doing so, however, the court showed remarkable resilience in accommodating the 'intent of the Parliament' as far as possible by using both, what we may term as, 'judicial craftsmanship' and 'judicial statesmanship'. This may be instanced as under.

Constitutionality of article 15(5) on the touchstone of basic structure doctrine

For upholding the 93rd Amendment of the Constitution on the basis of basic structure doctrine, the Supreme Court applied a two-fold plan of action. The *first* plan is by '*expounding*' and also, in a way, '*expanding*' the ambit of the doctrine, which is discernible in the eloquent observation

23. See *Ashok Kumar Thakur* at 85 (para 100), per Balakrishnan, CJI.
24. *Id*. at 205 (para 348), per Bhandari, J.

made by Balakrishnan, CJI:[25]

> The basic structure of the Constitution is to be taken as a *larger principle* on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the Fundamental Rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the Basic Structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are large numbers of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. *The Constitution itself sets out principles for an expanding future* and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.

The purpose of this observation, cited in full, is to show, how the court proposes to apply basic structure doctrine in the instant case. In its opinion, the 'larger principle' implicit in this testing-doctrine should be applied by keeping in view the 'expanding future,' envisaging 'the various changes that may take place in human affairs.' The court also invoked the cardinal principle of considering the Preamble of the Constitution as "the guiding star" and the "Directive Principles of State Policy as the 'Book of Interpretation'," and observed that the Preamble embodies the hopes and aspirations of the people, and the directive principles set out the proximate grounds in the governance of the country.[26] This approach apparently has prepared the court's mind to consider and positively accept the import of newly inserted clause (5) of article 15 in relation to other fundamental rights.

The *second* plan of action involves the consideration of the ambit of reservation under new clause (5) of article 15. This clause as it stands empowers the state to make reservations in respect of both state-maintained or aided and unaided educational institutions. The 11-judge bench decision in *T.M.A. Pai Foundation* as explained in *P.A. Inamdar* clearly and categorically excludes un-aided educational institutions from the ambit of

25. *Id.* at 82 (para 92). Emphasis added.
26. *Id*. at 84 (para 96).

state power for the purpose of reservation of any seats.[27] In this predicament, the court held article 15(5) as perfectly constitutional and not in violation of basic structure of the constitution, *but only with respect to state maintained or aided educational institutions*. The majority court excluded un-aided private educational institutions from consideration by simply saying that that was not the issue before them and thus "left open to be decided in an appropriate case."[28]

Constitutionality of article 15(5) vis-à-vis article 15(4)

A plain reading of article 15(4) reveals that the state is empowered to make special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes despite the prohibition contained in article 15 and clause (2) of article 29.[29] Against this express *inclusion* of article 29(2) within the ambit of article 15(4), newly inserted clause (5) of article 15 expressly *excludes* clause (2) of article 29 from its operation. This seemingly makes the two clauses 'mutually contradictory,' resulting into constitutional invalidity of the newly inserted clause (5). The Supreme Court saves the legislative intent expressed in article 15(5) by invoking the various rules of statutory construction. "Provisions of the Constitution have to be read harmoniously and no part can be treated to be redundant."[30] "In our considered view both the provisions operate in different areas though there may be some amount of overlapping but that does not in any way lead to the conclusion that Article 15(5) takes away what is provided in Article 15(4)."[31] A statute "must be construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*, that is, a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties."[32] "A statute is designed to be workable and the interpretation

27. See, *supra*.

28. See *Ashok Kumar Thakur* at 272 (Order by Court). Bhandari J has, however, considered the issue and held that the 93rd constitutional amendment "is not constitutionally valid *so far as private un-aided educational institutions* are concerned," *Ibid.* He distinguishes aided from un-aided institutions by observing that an institution is "subject to greater regulation when one relies on Government funding," *id.* at 247 (para 513). However, the situation is different in case of those "who set off on their own and refuse Government money," *Ibid.* See also, *id*. at 246 (paras 509-510).

29. See *supra* note 12.

30. *Ashok Kumar Thakur* at 178 (para 299), per Pasayat J.

31. *Ibid.*

32. *Id.* at 178 (para 300), citing *Broom's Legal Maxims* (10th ed.) at 361; *Craies on Statutes* (7th ed.) at 95; and *Maxwell on Statutes* (11th ed.).

thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable."[33] "The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used."[34] "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."[35] The basic thrust of the Supreme Court is that the newly inserted clause (5) of article 15 should be read harmoniously with the existing clause (4), and it should not be assumed "that Parliament had given with one hand what it took away with the other."[36]

Constitutionality of the legislative enactment, namely the Act 5 of 2007

The Central Educational Institutions (Reservation in Admission) Act of 2006 (No. 5 of 2007) was passed pursuant to article 15(5) in order to reserve seats, *inter alia*, for other backward classes (OBCs) in central educational institutions. OBCs, as defined under the Act, means "the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government."[37] But the central government has hitherto neither determined the class or classes of citizens who are entitled to get reservation of seats in central educational institutions, nor has laid down any standard or criterion for determining the status of OBCs for admission purposes. This is certainly a very serious lacuna. In court's view, "before carrying out Constitutional Amendments the Union of India must clearly target its beneficiaries."[38] It is erroneous to make the law first and "thereafter target the law's beneficiaries."[39]

33. *Id.* at 178 (para 301) citing *Whitney* v. *IRS*, 1926 AC 37, at 52, referred to in *CIT* v. *S. Teja Singh*, AIR 1959 SC 352 and *Gursahai Saigal* v. *CIT*, AIR 1963 SC 1062.

34. *Id.* at 178 (para 302), citing *Salmon* v. *Duncombe* (1886) 11 AC 627 at 634; *Curtis* v. *Stovin*, (1889) 22 QBD 513, referred to in *S. Teja Singh*, *supra*.

35. *Id.* at 178 (para 303), citing *Nokes* v. *Doncaster Amalgamated Collieries* [(1940) 3 All ER 549, referred to in *Pye* v. *Minister for Lands for NSW*, [(1954) 3 All ER 514. This principle was reiterated by the Supreme Court in *Mohan Kumar Singhania* v. *Union of India*, 1992 Supp. (1) SCC 594.

36. *Id.* at 178 (para 113).

37. S. 2(g) of the Act 5 of 2007.

38. *Ashok Kumar Thakur* at 208 (para 360), per Bhandari, J.

39. *Ibid.*

In the absence of any criterion for identifying OBCs either under article 15(5) or under the Act 5 of 2007, the Supreme Court, in its attempt *to save the legislative enactment from the vice of unconstitutionality* and thereby accommodating legislative intent, invoked the rules of statutory construction, which require it to focus on the legitimate purposes of the enactment. Words of a statute, the court emphasized, "must be construed with some imagination of the purposes which lie behind them."[40] Courts are "not entitled to usurp legislative function under the disguise of interpretation."[41] They must avoid "the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted."[42] Moreover, an intention to produce an unreasonable result "is not to be imputed to a statute if there is some other construction available."[43]

Following this prescription, the court desired the government to use the "post-Sawhney I criteria as a template," for determining OBCs and thereby also excluding the 'creamy layers' from OBCs.[44] This led the court to identify the beneficiaries of reservation for admission purposes on the analogy of office memorandum issued by the Government of India on September 8, 1993, for providing reservation for backward classes to the extent of 27% for making appointments.[45]

The O.M. spells out the groups of exclusion from which some workable principle could be abstracted.[46] However, while doing so, the court

40. *Id.* at 172 (para 288), per Pasayat J, citing Judge Learned Hand in *Lenigh Valley Coal Co.* v. *Yensavage*, 218 FR 547, whose view was reiterated in *Union of India and Others* v. *Filip Tiago De Gama of Veden Vasco De Gama*, AIR 1990 SC 981.

41. *Id.* at 172 (para 289), *D.R. Venkatchalam and Others* v. *Dy. Transport Commissioner and Others*, AIR 1977 SC 842.

42. *Ibid.*

43. *Id.* 173 (para 291), citing Danackwerts, L.J. in *Artemiou* v. *Procopiou* (1966 1 QB 878.

44. *Ashok Kumar Thakur* at 216 (para 400), per Bhandari J.

45. *Id.* at 103 (para 154), per Balakrishnan CJI. In fact earlier, the Government of India had issued an Office Memorandum on 13.8. 1990, reserving 27% of government posts to socially and educationally backward classes of citizens. This memorandum did not provide for the exclusion of creamy layer. Writing for majority, Reddy J held that even though O.M. was silent on the issue of creamy layer, nevertheless, he excluded the creamy layer. This only means that O.M. could not be effectuated until the creamy layer was excluded. See, *id.* at 212 (para 380), per Bhandari J.

46. The schedule appended to O.M. of 1993 excludes 'creamy layer' in which income, certain government posts, occupation and land holdings are taken into account for the purpose of exclusion. Bhandari J wanted to make the exclusion schedule still more comprehensive by including the children of former and sitting MPs and MLAs. See, *id.* at 223 (para 403).

introduced a caveat by observing that the same principle "need *not* be strictly followed in case of reservation envisaged under article 15(5) of the Constitution."[47] Besides, since section 2(g) of the Act 5 of 2007 does not define backward class by excluding 'creamy layer' from its ambit, it "must be *deemed* to have been such backward class by applying the principle of exclusion of 'creamy layer'."[48]

The Supreme Court, thus, excluded 'creamy layer' that was impliedly included both by virtue of 93rd constitutional amendment and the Act 5 of 2007 passed there under. As such, therefore, both were enacted clearly in violation of the principle of equality – the core value enshrined in articles 14, 15(1) and 16(1) of the Constitution.[49] But nevertheless, the Supreme Court upheld both of them as constitutional. This objective has been achieved by the Supreme Court by applying the doctrine of severability *of its own*. On this count, Bhandari, J. stated:[50]

> Technically speaking, *I am severing the implied inclusion of the cream layer for two reasons*. First, a nine-Judge Bench in *Sawhney I* severed a similar provision wherein the creamy layer was not expressly included, upholding the rest of the O.M.'s reservation scheme. Second, because the Parliament must have known that *Sawhney I* had excluded the creamy layer, it seems likely that the Parliament also realized that this Court may do the same.[51]

In support of the same initiative, he has further added that it is never easy to say what the Parliament would have done had it known that part of its amendment would be severed.[52] Nevertheless, he found it hard to imagine that Parliament would have said, 'if the creamy is excluded, the rest of the OBCs should be denied reservation in education.'[53] "It seems unlikely", he

47. *Ibid.* Emphasis added.

48. *Id.* at 103 (para 155), per Balakrishnan CJI. Emphasis added.

49. See, *id.* at 214 (para 391), per Bhandari J: "As it stands, the Amendment and Act serve one purpose: they provide a windfall of seats to the rich and powerful amongst the OBCs. It is unreasonable to classify rich and poor OBCs as a single entry. … this violates the Article 14 right to equality."

50. *Id.* at 215 (para 398). It is a windfall of seats to the rich and powerful amongst the OBCs. It is unreasonable to classify rich and poor OBCs as a single entry. … this violates the Article 14 right to equality."

51. Emphasis added. In support of this initiative, Bhandari J after the perusal of the Parliamentary Debates on the incorporation of new clause (5) to Art. 15 of the Constitution, states that had the Parliament insisted on creamy layer inclusion, it could have said as much in the text of Art. 15(5). Instead, the Parliament left the text of Art. 15(5) silent on the issue, delegating the issue of OBC identification to the executive n S. 2(g) of the Reservation Act. *Ibid.*

52. *Id.* at 215-216 (para 399).

53. *Ibid.*

has reasoned, "that it would have been an all-or-nothing proposition for the Parliament, when the very goal of the impugned legislation of promoting OBC educational advancement does depend on creamy layer inclusion".[54] For these reasons, he severed or excluded the implied inclusion of the creamy layer, and thereby saved the enactments from being unconstitutional.

Challenge to legislative enactment on ground of excessive delegation

In the light of the well-established principle in *Indra Sawhney I*, the Supreme Court recognises the inherent power of the various instrumentalities of the state to make necessary provision for reservation in the light of their 'compelling needs', instead of insisting that only the Parliament or legislature can do so. Such a provision can be made by the executive also. "Local bodies," "statutory Corporations," and other bodies falling under article 12 of the Constitution are themselves "competent to make such provision, if so advised."[55] Since the method or procedure for identification of backwardness has not been provided either by the Constitution or by the law, the whole matter "must be left to the authority" appointed by the state.[56] Such an authority "can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it" by the court.[57] If the adopted approach is "fair and adequate," "the court has no say in the matter."[58] This is how the challenge to excessive delegation of power is met, which, in turn, enabled the court to upheld the enactment as perfectly constitutional.

III Reservation as a dynamic social phenomenon

Once upon a time the whole notion of reservation was conceived of as a one-time legislative measure, an exception to the principle of equality, and that too for a limited defined period under the Constitution. However, over the years as one worked with the Constitution and attempted to realize the democratic ideals based upon justice, liberty, equality, fraternity assuring the dignity of the individual and unity and integrity of the nation, the whole complexion of the concept of reservation policy has undergone a sea-change. Instead of a static concept, in the author's view, it has become a dynamic social phenomenon. One may cull out the following features that have provided it exquisite dynamic character.

54. *Ibid.*
55. *Id.* at 179 (para 309).
56. *Id.* at 180 (para 309).
57. *Ibid.*
58. *Id.* at 185 (para 319).

Reservation as an integral part of the principle of equality

Article 14 provides the principle of equality in its most comprehensive, generic, sense; whereas articles 15 and 16 are restatements of the same principle with some specific perspective. Article 16 specifically ensures equality of opportunity in matters of public employment; the provisions of article 15 prohibit discrimination generally only on grounds of religion, race, caste, sex, place of birth or any of them.

Strictly construed, article 15 is intended to achieve the ultimate goal of 'casteless and classless' society. However, soon after the inauguration of the Constitution in 1950, the very same framers of the Constitution "acted quickly to permit reservation for SC/ST/SEBCs, vide the first amendment to the Constitution."[59] "In doing so, *they deviated from their own goal*," so that "the casteless society would have to wait."[60] Since the first amendment introducing clause (4) to article 15 of the Constitution had been upheld by the 9-judge bench of the Supreme Court in *Indra Sawhney I*, the 5-judge bench of the Supreme Court in *Ashok Kumar Thakur* is "bound" by that decision "to a certain degree on this point."[61] An expression to this reluctant acceptance is found in the observation of Bhandari, J, while examining the constitutionality of Act 5 of 2007: "I have no choice but to uphold the impugned legislation by which the Government may still identify SEBCs, in part, by using caste."[62]

The reason for seeming 'reluctance' is that any 'reservation' runs contrary to the principle of equality, even if such a provision is made in pursuance of the directive contained in article 38 of the Constitution, which obligates the state to strive for social justice and to minimize the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities. This view was premised on reading that "Articles 16(4) and 15(4) are *exceptions* to Articles 16(1) and 15(1) respectively."[63] However, this restricted view of treating reservations as merely "exceptions" was abandoned in later decisions of the apex court. For this reversal, Balakrishnan, CJI, on the authority of the 7-judge bench decision in *State*

59. *Id.* at 252 (para 541), per Bhandari J.

60. *Ibid.* (Emphasis in original)

61. *Ibid.*

62. *Ibid.*

63. *Id.* at 107 (para 171) Emphasis added, per Balakrishanan CJI, citing *The General Manager Southern Railways* v. *Rangachari,* 1962(2) SCR 586 at 607 and *M.R. Balaji* v. *State of Mysore*, 1963 Supp. 1 SCR 439 at 455. See also for the similar view, *Triloki Nath* v. *State of Jammu and Kashmir and Others (II)*, 1969(1) SCR 103 at 104 and *T. Devadasan* v. *Union of India and Another*, 1964(4) SCR 680, Subba Rao J (dissenting).

of Kerala v. *N.M. Thomas*,[64] holds that "Articles 15(4) and 16(4) are *not exceptions* to Articles 15(1) and 16(1) respectively."[65] These are truly "independent enabling provisions."[66] By extending the same logic to article 15(5), Balakrishnan, CJI said: "Article 15(5) also to be taken as an enabling provision to carry out certain constitutional mandate and thus it is constitutionally valid."[67]

The plea for freeing reservation under clause (4) from the control of clause (1) of articles 15 [or freeing clause (4) from clause (1) of article 16] is perhaps best expounded earlier by Subba Rao, J in his dissenting opinion in *T. Devadasan* when he observed:[68]

> The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred hereunder is not limited in any way by the main provision but falls outside it. *It has not really carved out an exception, but has preserved a power untrammeled by the other provisions of the Article*.

Thus, clause (4) [and now also clause (5) on the same analogy], as pithily observed by Raveendran, J, "is neither an exception nor a proviso to clause (1) of Article 15."[69]

After making clause (4) quite independent of clause (1) of article 15, the next step is to seek its co-relation with clause (1) of article 15. This relationship has been provided again by the 7-judge bench decision in *N.M. Thomas* when it is observed that clause (4) to article 16 "is an explanation containing an exhaustive and exclusive provision regarding reservation which is *one of the forms of classification*."[70] The same logic applies to reservation under clause (4) of article 15 *vis-à-vis* article 15(1).

The principle of equality can be implemented only on the basis of reasonable classification, which envisages that like should be treated alike. In other words, equals should be treated equally, and un-equals unequally "if the doctrine of equality which is the corner-stone of our Constitution is to be duly implemented."[71] On this principle, if the reservation under clause (4) or (5) of article 15 is made for the socially and educationally backward

64. 1976(2) SCC 310 (7-judge bench of the Supreme Court).
65. *Ashok Kumar Thakur* at 107 (para 170). Emphasis added.
66. *Id.* at 85 (para 100).
67. *Ibid.*
68. Cited by Balakrishnan, CJI in *Ashok Kumar Thakur* at 107 (para 169). Emphasis added
69. *Id.* at 200-2001 (para 335).
70. *Id.*, citing Fazal Ali, J in *N.M. Thomas*. Emphasis added.
71. *Id.* at 108 (para 171), citing *K.C. Vasanth Kumar*.

class of citizens, it is certainly a reservation on the basis of 'backwardness', which admittedly is the rational basis of classification under article 15(1) [or article 14] of the Constitution. Articles 14, 15 and 16 allow, for "affirmative action" for promoting "egalitarian equality," and for this purpose, "the State may classify citizens into groups, giving preferential treatment to one over another."[72] Raveendran, J expounds this *inter se* relationship between clause (4)/clause (5) and clause (1) of article 15 by stating: "Clause (4) has been considered to be an instance of classification inherent in clause (1) and an emphatic restatement of the principle implicit in clause (1) of Article 15."[73]

This stance is further reinforced by Raveendran, J through interpretative process by showing how the non obstante clause contained in clauses (3), (4) and (5) are to be construed in relation to clauses (1) and (2) of article 15:[74]

> Clauses (1) and (2) of Article15 bar discrimination.[75] … Clauses (3) to (5) enable the State to make special provisions in specified areas. The words, 'Nothing in this article,' occurring in clauses (3), (4) and (5), therefore, refer to Clauses (1) and (2) of Article 15. When clause (4) starts with those words, it does not obviously refer to clause (3). Similarly when clause (5) starts with those words, it does not refer to clauses (3) and (4). Clauses (3), (4) and (5) of Article15 are not to be read as being in conflict with each other, or prevailing over each other. Nor does an exception made under clause (5) operate as an exception under clause (4). While clauses (4) and (5) may operate independently, they have to be read harmoniously.

The issue on this count seems to be clinched when the Supreme Court through *Indra Sawhney I* [para 859(2)(c)] held that "Reservations [through

72. *Id.* at 208 (para 359), per Bhandari J.

73. *Id.* at 201 (para 336), citing *N.M. Thomas, K.C. Vasanth Kumar*, and *Indra Sawhney I*. See also, *id.* at 179 (para 309), per Pasayat J citing *Indra Sawhney I* [para 859(2)(a)]: "Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1)."

74. *Ibid.*

75. Clause (1) contains a prohibition that state shall not discriminate against any citizen on grounds only on religion, caste, sex or birth. Clause (2) declares that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainments, or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

quotas] can also be provided under clause (1) of Article 16."[76]

Apart from the linkage of reservation under clause (4) or (5) with the principle of equality under clauses (1) and (2) of article 15 by itself being the basis of reasonable classification, the provisions of article 15 were envisaged to be subsumed by those article 14 of the Constitution. To this effect, Pasayat, J has abstracted a couple of passages from the decision of the Supreme Court in *Anwar Ali Sarkar*,[77] which expound the ambit of article 14. The expressions 'equality before the law' and 'equal protection of the law' under article 14 of the Constitution are not "just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present."[78] "They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes."[79] Thus, the Supreme Court sums up the underlying philosophy in functional terms by observing:[80]

> What I am concerned to see is not whether there is absolute equality in any academic sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as a sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the 'legal precepts which are actually recognized and applied in tribunals of a given time and place' but 'the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticize, them.

The purpose of citing this extensive quote by the Supreme Court in *Ashok Kumar Thakur* with utmost approval indicates that while examining the issue of reservation under the Act 5 of 2007 read with article 15(5) of

76. See, *id.* at 180 (para 309), cited by Pasayat J.
77. *State of West Bengal* v. *Anwar Ali Sarkar*, 1952 SCR 284 (paras 99 and 100).
78. *Ashok Kumar Thakur* at 123 (para 207).
79. *Ibid*.
80. *Ibid*. From *Anwar Ali Sarkar* (para 100).

the Constitution, the court should bear in mind the wider connotation of the principle of equality under article 14, which truly brings those "who are disadvantaged to the level where they no longer continue to be disadvantaged."[81] "The necessary ingredients of equality essentially involve equalization of un-equals."[82] This implies that from a functional perspective, the concept of equality bears at least two things: one, the goal of equality, which is also termed as 'formal equality;'[83] two, the process of 'equalization', that is, the process of realizing the goal of equality, also termed as 'proportional equality.'[84] In the case of the latter, "the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy."[85] "Egalitarian equality is," thus, "proportional equality."[86]

The functional perspective of article 14 reveals that the "ultimate objective of the principle of equality is to bring people to a particular level so that there can be equality of opportunity."[87] This can be done by keeping in view "the justice and redress principles" as provided, say, under clauses (4) and (5) of article 15. "There should not be mere equality in law but equality in fact,"[88] is the thrust of the modern political theory. This theory, "which acknowledges the obligation of government under Part IV of the Constitution to provide jobs, medical care, old age pension, etc., extends to human rights and imposes an affirmative obligation to promote equality and liberty."[89] While framing legislation, the state must take into account "the private inequalities of wealth, of education and other circumstances."[90] Such a view is gaining momentum in modern constitutional law.[91] Resultantly, "the equality code" of articles 14, 15 and 16 have become the "equity code" under the Constitution,[92] in which 'equality' is promoted

81. *Id.* at 136 (para 237), per Pasayat J.
82. *Id.* at 136 (para 239), per Pasayat J.
83. *Id.* at 176 (para 294) citing *Nagaraj* (para 102) per Pasayat J.
84. *Ibid.*
85. *Ibid.*
86. *Ibid.*
87. *Id.* at 136 (para 238), per Pasayat J.
88. *Ibid.*
89. *Id.* at 170 (para 282), citing *N.M. Thomas*.
90. *Id.* at 171 (para 282).
91. *Ibid.* In *N.M. Thomas*, the Supreme Court, after analyzing the impact of the decisions of American courts, stated that in today's world "the sense that government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of dominant forces in Constitutional law."
92. *Id.* at 175 (para 294), per Pasayat J, citing *Nagaraj* (para 102). The Supreme Court has used both the expressions – 'code of equality' and 'code of equity' – as synonyms. In the author's view, however, the former expression connotes 'equality in law', whereas the latter expression implies 'equality in fact'.

through 'equity.'[93] This makes clause (5) of article 15 as an 'integral part' of the principle of equality contained in articles 15(1) and 14, instead of being merely an 'exception' to it. Given this slant, reservation provision ceases to be a 'temporary' or 'transitory' measure;[94] it becomes only a means to an end, the end being equality of all "in fact', and not merely 'equality in law' in abstraction.

Developing basis of reservation through the inclusion of 'economic factor' within the ambit of SEBCs

Under the Act 5 of 2007, the reservations can be made in the matters of admission to the educational institutions for the scheduled castes, scheduled tribes and other backward classes (OBCs) of citizens. Here OBCs means "the class or classes of citizens who are socially and educationally backward and are so determined by the Central Government."[95] In fact, to make reservations for the socially and educationally backward classes (SEBCs) of citizens are the mandate of newly inserted clause (5) of article 15 of the Constitution. However, the crucial question is, 'how to identify or determine the beneficiaries of reservation,' or simply, who are SEBCs? Hitherto, no such determination has been done by the government as envisaged by the said statute.[96] Nor is there any standard, method or procedure for their identification either in the Constitution or in any statutory instrument. In existence, there is no such thing as a "standard or model procedure."[97] The whole matter of identification of constitutional beneficiaries has been left to the executive branch of the state or its appointees, of course subject to the court's control of arbitrariness. "It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate and so long as the approach adopted by it is fair and adequate, the court has no say in the matter."[98]

As a practical measure, the designated authority may begin from somewhere, say, with some group, class or section. It may well "begin with

93. It is in this sense, part III and part IV of the Constitution together constitute "the core of our Constitution and combine to form its conscience." See *Ashok Kumar Thakur* at 177 (para 295), citing *Minerva Mill Ltd* .v. *Union of India*, (1980) 3 SCC 625, per Pasayat J.

94. Initially, reservation was to last only "for ten years" and that too as "a necessary evil." See *Ashok Kumar Thakur* at 252 (para 542), per Bhandari J. See also at 205 (para 345): "Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability."

95. S. 2(g) of the Act 5 of 2007.

96. See *Ashok Kumar Thakur* at 166 (para 271).

97. *Id.* at 185 (para 319).

98. *Ibid.*

castes which represent explicit identifiable social classes or groupings."[99] But this does not mean that 'caste' alone itself becomes the determinant of backwardness without doing anything more. Nine-judge bench of the Supreme Court in *Indra Sawhney I* has clearly and categorically held that "only caste" cannot be the basis of reservation.[100] However, it would be entirely a different matter when a caste becomes a class if it met the criteria laid down for determining backwardness.

The constitutionally sanctioned basis for reservation is socially and educationally backward 'classes of citizens,' and not merely 'castes of citizens.' There are at least three reasons for using 'class', instead of 'caste', as the basis for reservation. One, the caste system is not a characteristic feature of all communities belonging to different religions:[101] it is the peculiar feature amongst those who practise Hinduism. Two, there is hierarchy of castes among Hindus on the basis of pollution-purity principle, and, therefore, all castes cannot be placed on the same footing. Three, all members of one and the same caste are not equally socially and educationally backward and, therefore, all members cannot be placed on the same pedestal for the purpose of determining backwardness without pruning.[102] Moreover, if 'caste' alone is taken as the basis for conferring reservation benefits, it would weaken the secular character as proclaimed in the Preamble to the Constitution, and eventually, "instead of casteless and classless India, we would be left with caste-ridden society."[103] It is for this reason, Mahatama Gandhi, the Father of Nation, detested caste system. "The caste system as we know is an anachronism," he said. "It must go if both Hinduism and India are to live and grow from day to day," he added further.[104] The founding fathers of our Constitution spoke in the same strain. Jawaharlal Nehru stated unreservedly that "no one should be left in

99. *Id.* at 186 (320).

100. *Id.*at 149 (para 251), citing *Indra Sawhney* v. *Union of India*, (1996) 6 SCC 506 [known as *Indra Sawhney II*]. See also at 173 (para 294): "Classification on the basis of castes in the long run has tendency of inherently becoming pernicious."

101. For instance, caste is unknown to Muslims, Christians, Parsis, and Jews, see, *id.* at 145 (para 248), per Pasayat J citing *N.M. Thomas*.

102. See, id. at 144 (para 248).

103. *Id.* at 207 (para 354), per Bhandari, J. However, it needs to be borne in mind that 'classless and casteless society' envisages a society in which there will be no differentiation only on the basis of 'caste' or 'class'. This is the perspective reflected in Art. 38(2), which enjoins upon the state to minimize the inequality 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.

104. Cited by Bhandari J at 206 (para 350).

any doubt that the future Indian society was to be casteless and classless."[105] B.R. Ambedkar likewise called the caste system "anti-national."[106] Thus, a 'caste' may be and quite often is a social 'class' in India,[107] but thereby it does not become backward *ipso facto* for the purpose of reservation. For that purpose it is required to meet certain given indices of backwardness. Inclusion of castes in the list of backward classes, therefore, cannot be mechanical.[108]

The expression, 'socially *and* educationally backward classes of citizens', seemingly identifies *two* independent determinants of backwardness, 'social' and 'educational.' If either condition goes unmet, "one cannot qualify for the benefit of reservation as SEBC."[109] However, a little reflection and scrutiny would reveal that 'social backwardness' is of a wider import, inasmuch as it tends to include educational backwardness as well. "If one is socially advanced, he cannot be socially and educationally backward,"[110] observed Bhandari, J. "He who is socially forward is likely to be educationally forward as well."[111] However, what about the converse situation? Could we say with the same emphasis that one who is educationally forward is also socially advanced? Bhandari, J. seems to answer this question in the affirmative when he denies the benefit of reservation in college admission for post-graduate studies to a person belonging to the category of OBCs if he is already a graduate.[112] This position appears to be a bit harsh, because *as such* it tends to exclude all those from the benefit of post-graduate education despite the fact that they belong to 'backward classes'. For instance, if they are economically poor, they deserve to be considered for the benefit of reservation even if they managed to come up somehow or the other to the level of graduation. In fact, the economic factor is implicit in 'social backwardness.' This is borne out of the exposition given to the expression 'socially and educationally backwardness' during the debate in Parliament on the first amendment bill, introducing clause (4) to article 15, which commends the state to make special provisions for the advancement of SEBCs of citizens.[113] While participating in the debate, Jawaharlal Nehru said: "'Socially' is a much wider word including

105. *Ibid.*
106. *Ibid.*
107. *Id.* at 180 (para 309).
108. *Id.* at 149 (para 251).
109. *Id.* at 212 (para 378).
110. *Ibid.*
111. *Ibid.*
112. *Ibid.*
113. See Parliamentary Debates on First Amendment Bill, 1.6. 1951 at 9830, cited by Bhandari J in *Ashok Kumar Thakur* at 209 (para 365).

many things and certainly including economically."[114] Nehru even offered an explanation by adding that the term SEBCs implicitly included 'economic backwardness', but the same was not included specifically only for the sake of consistency with the phraseology used in article 340: "Therefore, I felt that 'socially and educationally' really cover the ground [to include economically] and at the same time you bring out a phrase used in another part of the Constitution in a slightly similar context."[115] Bhandari, J reinforces this stance by observing: "Had it not been for a desire to achieve symmetry in drafting, 'economically' would have been included."[116] Raveendran J puts it perceptively this widened perspective of reservation by stating: "Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people."[117]

The association of economic factor in the process of identification of backwardness either among the castes (as in the case of scheduled castes, wherein caste becomes a class) or among the classes of citizens is extremely helpful in another way. It is advantageous to the class as a whole. A 'class' within the meaning of SEBCs of citizens means a kind of homogenous group, sharing certain relevant attributes that would enable them to bear the label of 'socially and economically backward class.' However, if it so happens, which is not quite unusual, that some of the members in that class are far too advanced (which in the context necessarily means economically and may also mean educationally), the connecting thread of backwardness between them and the remaining class snaps. Such persons most obviously would be misfits in that class. In this context a pertinent question arises: 'Just only because of the fewer affluent in a class, should the whole class be deprived of the constitutional benefits?' Raveendran J provides an answer by saying that after excluding them alone would that class be a compact class.[118] "While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4)."[119]

Thus, the implicit inclusion of 'economic' factor within the ambit of SEBCs of citizens provides a dynamic dimension to reservation policy inasmuch as it provides the much wider coverage of population than merely stay put to the confines of caste-moulds.

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114. *Ibid.*
115. *Ibid.*
116. *Ibid.*
117. *Id.* at 203-204 (para 343).
118. *Id.* at 204 (para 343), citing *Indra Sawhney I.*
119. *Ibid.*

Periodic review of reservation policy and exclusion of 'creamy layers'

The state is specifically directed to make '*special provision*, by law, for the *advancement* of any socially and educationally backward classes of citizens or for the scheduled castes or the scheduled tribes.' This is the common command under clause (4) and the newly inserted clause (5) of article 15. The meaning of this mandate for making 'special provision' is clear and specific: it is for the 'advancement' of those who have been identified as 'backward'. For fructifying this objective, it is incumbent upon the state to go on reviewing periodically whether or not the special provision of reservation is yielding the desired result. Such a periodic review would provide an opportunity to the state, one, "to rectify distortions arising out of particular facets of the reservation policy;"[120] two, to exclude the beneficiaries of reservation who have ceased to be backward, and instead of them (on their exclusion) pass on the benefits of reservation to the next incumbents from the backward class. There is yet a third related benefit of the periodical review: it would afford an opportunity "to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations."[121] Thus, we see that periodical review is an integral part of the reservation policy, and not something that falls outside the constitutional domain. Absence of periodic review would amount to freezing the backwardness.[122]

In the judicial discourse, the exclusion of beneficiaries of reservation, who have ceased to be backward; that is, who have become 'forward' or 'advanced,' are termed as the 'creamy layers' of the backward classes of citizens. The Mandal Commission set up in 1979 with a mandate to identify the SEBCs admitted the existence of 'creamy layer' amongst backward castes. It also confirmed that the benefits of reservation have hitherto gone primarily to the relatively more advanced castes amongst the notified backward classes.[123] Nevertheless, realizing that the pace of reforms being

120. *Id.* at 181 (para 310), per Pasayat J, citing *Vasanth Kumar.*

121. *Ibid.*

122. According to Bhandari J, review of reservations should be undertaken every five years "in order to ensure that creamy layer criteria take changing circumstances into account." *Id*. at 223 (para 402). Pasayat J seems to fix the duration of 10 years, see *id*. at 136 (para 240).

123. See, *id*. at 145 (para 248), citing an instance of usurpation of reservation benefits by the upper crust of the members of SCs amongst the Sikhs in Punjab, the Supreme Court Judge recalled in *N.M. Thomas*: "I came across a petition for special leave to appeal against the decision of Punjab and Haryana High Court in which reservation of 2.5 % for admission to medical and engineering colleges in favour of Majhabi Sikhs was challenged by none other than the upper crust of the members of the SCs amongst Sikhs in Punjab, proving that the labelled weak exploit the really weaker."

"slow", it saw it expedient to "start with the more advance of the backward."[124] However, with the passing of more than a couple of decades since then, the scenario is much different with the awakening of new social and political consciousness. Now the non-exclusion of 'creamy layers' has become the subject of sharp criticism. This issue was judicially determined conclusively by the 9-judge bench of the Supreme Court in *Indra Sawhney I* by holding clearly that exclusion of creamy layers is perfectly just and constitutional. Despite this 'authoritative' judicial precedent, one of the critical issues raised before the 5-judge constitution bench in *Ashok Kumar Thakur* was, 'whether creamy layer is to be excluded from SEBCs in the light of the 93rd constitutional amendment and the Act 5 of 2007 there under.' The constitution bench has devoted considerable space and time to determine this issue.[125]

The constitutional history of 'creamy layers' reveals that the union government and also the state governments were extremely reluctant to agree to the exclusion of 'creamy layer.'[126] On this count, the apex court through its judgments in *Indra Sawhney I* and *Indra Sawhney II*, after critically examining the constitutional desirability of exclusion of 'creamy layer', virtually told the government that there was no way out but to accept to the exclusion of the 'creamy layer' of the designated OBCs for the purpose of conferring the constitutional benefit of reservation.[127] In *Ashok*

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124. *Report of the Backward Classes Commission*, First Part, Vols. 1-2, 1980, at 37, 62 (paras 8.13 and 13.7), cited by Bhandari J, *id.* at 215 (para 396).

125. See, for instance, *id.* at 96-98 (paras 143-152), per Balakrishnan CJI at 215-223 (paras 398-403), per Bhandari J.

126. Krishna Iyer J ventured to offer an explanation in *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India and Others*, (1981) 1 SCC 246 (para 92): "May be, some of the forward lines of the backward classes" have "their electoral muscle qua caste" so strong as "scares way even radical parties from talking secularism to them." "We are not concerned with that dubious brand." "In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps, social and economic, by constructive projects." Cited by Bhandari J in *Ashok Kumar Thakur* at 213 (para 384).

127. The 9-judge bench of the Supreme Court directed the union government that it's office memorandum of 13.8.1990 and 25.9. 1991 "shall be implemented only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M." [See *Indra Sawhney I* (para 793), cited by Pasayat J in *Ashok Kumar Thakur* at 148 (249)] In other words, the implementation of the said O.M. was expressly made "subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise," and all this was required to be done within "four month" from the date of the judgment. The government, it seems, slept over the directive as it was not willing to agree to the proposition of exclusion. In this predicament, the matter again came up before the apex court on 20.3.1995. [See *Indra Sawhney I* (para 3), cited by Pasayat J in *Ashok Kumar Thakur* at 148 (250)] Finding that the State of Kerala had not

Kumar Thakur the government still wanted to overcome this impediment by arguing that the concept of exclusion of 'creamy layer' was developed in the context of OBCs for the purpose of reservation of jobs under article 16(4), and that, by analogy, the same concept or principle should not apply for reservations in educational institutions.[128] One of the subtle arguments put forth was that the exclusion of creamy layer would only perpetuate caste inequalities, inasmuch as that would enable the advanced castes to eliminate any challenge or competition to their leadership in the professions and services, and thereby they would gain by eliminating all possible beneficiaries of reservation in the name of creamy layer especially in the institution of higher learning.[129] In other words, the position of a student getting admission to an institution of higher learning was totally different and could never be compared to that of backward class person to get a job by virtue of reservation.[130] In support of this stand, it was further argued on behalf of the government that exclusion of 'creamy layer' would create a situation in which enough qualified candidates to fill 27% of seats reserved to OBCs would not be available.[131] This argument was found to be factually wrong.[132] The Supreme Court has discounted these arguments and held that all these reasons are equally applicable to the reservation or any special action contemplated under article 15(4) and article 15(5),[133] for it is "inconceivable that a person who belongs to the creamy layer is socially

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taken any steps, the apex court issued notice to show cause why action should not be taken for non-compliance of its order. Again the matter came up on 10.7.1995. Even on that date no report of compliance was submitted to the court; instead an affidavit sworn by the chief secretary to the state was handed over explaining the circumstances why the implementation of the judgment was delayed. In the circumstances, out of sheer exhaustion and having regard to the fact that the constitutionality of the Kerala Act 16 of 1995 was pending disposal before the apex court, it decided to get information regarding 'creamy layer' issue through a high level committee. Accordingly, the Supreme Court advised the Chief Justice of the Kerala High Court to appoint a retired judge of the high court to be the chairman of the high level committee who would induct not more than 4 members from various walks of life to identify the 'creamy layer' among 'the designated other backward classes' in Kerala State in the light of the ruling of the Supreme Court in *Mandal* case and forward the report to Supreme Court within 3 months from the date of the receipt of that order.

128. See *Ashok Kumar Thakur* at 96 (para 144).

129. *Id.* at 96 (para 145).

130. *Ibid.*

131. See, *id.* at 208 (para 361).

132. See, *id.* at 208 (para 361), per Bhandari J. It was also pleaded that exclusion would cause "shortage of candidates [amongst the SEBC] who can afford to pay for higher education." Such a plea was counteracted by saying: "This argument harms rather than helps the Government" *Id.* at 208 (para 360).

133. *Id.* at 98 (paras 150 and 152), per Balakrishnan CJI.

and educationally backward."[134] By acting on the constitutional premise, the court observed: "The object of the special constitutional provisions is not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole."[135] "Hence taking out the forwards from among the backward classes is not only permissible but obligatory under the Constitution," said the Supreme Court.[136] "If the creamy layer is not excluded, the identification of SEBC will not be complete and any SEBC without the exclusion of 'creamy layer' may not be in accordance with article 15(1) of the Constitution."[137] Without exclusion, it would also mean that SEBC is made purely on the basis of caste, which is constitutionally impermissible.[138]

Non-exclusion of 'creamy layer violates the principle of equality in two principal ways. If one continues to confer reservation benefits on 'creamy layers', on the one hand that would amount to 'treating equals unequally' vis-à-vis persons belong to 'forward' or 'advanced' class; on the other hand, to rank them with the rest of backward classes would amount to 'treating 'un-equals equally.'[139] Thus, non-exclusion of 'creamy layer' leads to "perverting" the very objective of special constitutional provisions.[140] It discourages the beneficiaries to stand at their own feet and compete with the forward classes as equal citizens.[141] Non-exclusion would also keep the backward class 'in perpetual backwardness' as if by saying: 'Once a backward class is always a backward class.' The resultant impact of non-exclusion has been put forward as an aphorism by Bhandari, J: "Creamy layer inclusion robs the poor and gives to the rich."[142]

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134. *Id.* at 157 (para 256), per Pasayat J. "The backward status vanishes when somebody becomes part of the creamy layer." *Ibid.*

135. *Id.* at 146 (para 249), citing Indra *Sawhney I* (para 520), per Pasayat J.

136. *Ibid.*

137. *Id.* at 98 (para 152), per Balakrishnan CJI. Echo against continued inclusion of creamy layer was also heard in Parliament when the Act 5 of 2007 was being debated; see *Parliamentary Debates*, 21.12 2005, see, *id.* at 214 (para 390), cited by Bhandari J. The Report of the Oversight Committee of the Government of India also stated that non-exclusion of creamy layer would result in placing the "poorest among the OBCs" at a disadvantage, *id.* at 214, 215 (paras 388 and 389).

138. *Id.* at 97 (para 149), per Balakrishnan CJI.

139. *Id.* at 98 (para 152), per Balakrishnan CJI. See also, *id.* at 204 (para 344), per Raveendran J.

140. *Ibid.*

141. *Id.* at 145 (para 249).

142. For this summation, he has culled the following judicial precedents: *N.M. Thomas*, *supra*, para 124 (7-judge bench); *K.C. Vasanth Kumar and Another* v. *State of Karnataka*, 1985 (Supp.) SCC 714, para 2, 24 and 28 (5-judge bench); *Sawhney I, supra*, paras 520, 793 and 859(3)(d) (9-judge bench); *Ashok Kumar*

Realizing the constitutional imperative of 'creamy layer exclusion' for upholding the paramount principle of equality,[143] the Supreme Court sealed the possibility of inclusion of creamy layer even in future by resorting to the amendment of the Constitution. Such an amendment will be "totally illegal" and violate "the basic structure of the Constitution."[144] Inclusion of creamy layer, therefore, "cannot be allowed to be perpetuated even by constitutional amendment."[145]

Thus, by reading the identification of the 'creamy layer' into the whole gamut of reservation policy, the Supreme Court has provided a dynamic dimension to the concept of reservation. How? 'Creamy layer' is a measure of 'equality', which operates only on the principle of classification, envisaging that like should be treated alike.[146] It keeps on separating the 'alikes' from 'non-alikes' or 'forwards'/ 'advanced' from amongst the 'backwards'. 'Creamy layer' is, thus, a criterion, which results from the application of indices applied for differentiating 'backwards' from 'non-backwards'/'forwards'. In this respect 'poverty' is perhaps the most critical and composite index that includes economic and educational backwardness, and, thereby social backwardness.[147] Looked from this perspective, 'creamy layer' instantly determines who falls within the ambit of SEBCs and who falls outside it.[148] In this way, determination of 'creamy layer' itself becomes

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Thakur v. *State of Bihar and Others,* (1995) 5 SCC 403, paras 3, 17 and 18 (2-judge bench); *Sawhney II*, *supra*, paras 8-10, 27, 48 and 65-66 (3-judge bench); *Nagaraj*, *supra*, paras 120-124 (5-judge bench); *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1, paras 31, and 49-54 (2-judge bench). See, *id.* at 212 (paras 382 and 383). See also, *id.* at 142 (para 247), per Pasayat J., citing *N.M. Thomas* Non-exclusion of creamy layer means "keeping the weakest among the weak always weak," and "leaving the fortunate layers to consume the whole cake."

143. See *Ashok Kumar Thakur* at 150 (para 251), per Pasayat J, laying down that non-exclusion of creamy layer will be a clear violation of Art. 14 and 16(1) of the Constitution inasmuch as 'equals' (forwards and creamy layer of backwards) cannot be treated 'unequally', citing *Indra Sawhney II* (para 27).

144. *Id.* at 151, 152 (paras 251 and 252), per Pasayat J, citing *Indra Sawhney II* (para 65) and *Nagaraj* (para 80).

145. *Ibid.*

146. *Id.* 206 (para 352), per Bhandari J: "The principle of creamy layer emanates from the broad doctrine of equality itself."

147. See, *id.* at 96-98 (paras 143-152), per Balakrishnan CJI. Still, the basis of exclusion "should not merely be economic unless, of course, the economic advancement is so high that it necessarily means social advancement." *Id*. at 147 (para 249). The income criterion is relative to place of work – urban or rural; in relation to agricultural, it might be determined on the basis of land holding, *id*. at 148 (para 249).

148. Any further distinction between 'more backward' and 'backward' is an "illusion," and for this no constitutional exercise is called for. See, *id.* at 146 (para 249), per Pasayat J., citing *Indra Sawhney I* (para 629).

a 'process', in which 'creamy layer' measures the efficacy of 'special provision,' termed as 'equity provision' or simply 'the provision of reservation'. In other words, the emergence of 'creamy layer' by itself becomes a functional index of reservation policy, showing how many of the backwards have been truly benefited from the special provision of reservation; how many of them have gained sufficient means to develop their capacities to compete with others in every field.[149] In fact, the emerging number of creamy layers of backward classes over the years, though they may be still fewer rather than many, is an answer to the critics who say that since there is no decrease in the number of castes enjoying reservation benefits, the reservation policy is a failure.[150]

IV Reservation as a strategy for inclusive social order

In this respect there are at least three major concerns that come to the fore. The first and foremost is, why do we need 'inclusive social order?' If this need is considered imperative for promoting the interest of the society as a whole, the second concern would be to locate the persons who should be the beneficiaries of reservation for purposes of 'inclusion'. After having identified the beneficiaries of reservation, the third concern would be to determine the extent of that reservation.

Imperatives of 'inclusive social order'

The move towards inclusive social order is considered beneficial for the society as a whole. It makes the society fraternal. 'Fraternity' is one of the most cherished objectives enshrined in the Preamble of the Constitution. Fraternity promotes a sense of common brotherhood of all Indians and of India being one. To bring about and inculcate this feeling of commonness is all the more imperative in the Indian society, because the social order here is typically characterised by 'stratification' and 'caste differentiations,' based upon 'ascribed', 'pollution-purity', principle. The stratified social situation is compounded further by extreme socio-economic disparities and community differences. All such differentiating and dividing factors

149. Even a cursory survey is made in relation to families in various castes considered to be socially and educationally backward, it would unmistakably show that the benefits of reservations have been cornered by the top layers of the backward classes. Though such beneficiaries need to be excluded, nevertheless it proves that the reservation policy is not without positive gains. See, *id.* at145, 146 (para 248 and 249).

150. For this concern, see *id.* at 136 (para 236): Since there has been no exclusion of any backward class from the list of BCs, does it mean that backwardness has increased instead of decreasing?

are "deeply engrained into everyday social relations."[151] In fact, in the Constituent Assembly, Dr. Ambedkar stated most candidly and as a matter-of-fact:[152]

> We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we a society in which there are some who have immense wealth as against many who live in abject poverty.

Although encouraging developmental changes have taken place after India's Independence, and any discrimination only on grounds of caste is constitutionally prohibited, nevertheless "considerations along the ascriptive lines still remain important markers, both at the public and private domains."[153] Not that the people belonging to lowly castes are not aware that they are being suppressed and subjected to all sorts of undue disadvantages, yet they have suffered silently "for generations for fear of offending the privileged strata."[154]

For orderly, peaceful and progressive living, the participation of all the segments of society, including the backward classes of citizens, is highly desiderated. This is in the interest of all. There are at least two principal advantages of the 'inclusive social order'. One, it would instantly augment the pool of 'human resource development'. Through the special provision of reservation of seats, the hitherto backward classes of citizens, with 'divergent histories' and occupying 'different positions in the economic and social structure of society', would be enabled to unfold their suppressed potentials, and thereby add to 'the pool of social assets for general good.' Here the reasoning is similar to the one which is adduced for the inclusion of 'women', labelled as the 'weaker section' of society, in the various

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151. Abstracted from an 'interesting article', by some un-named author, dealing with affirmative action, cited by Pasayat J, *id.* at 154 (para 253).

152. See, *id*. at 52 (para 3), per Balakrishnan, CJI.

153. *Ibid.* For instance, despite the legislative encouragement to inter-caste marriages, such a move is violently resisted under the traditional inertia simply on the basis of their ascriptive status. See the author's comment on the Supreme Court decision in *Lata Singh* v. *State of UP* (per Ashok Bhan and Markandey, JJ.) in XLII *ASIL* 345-372 (2006). In this case, the apex court eventually issued a judicial directive to all concerned in the administration of justice to protect the parties to inter-caste marriages. Likewise, the elections to various legislative bodies are still fought on castes lines, see author's article: "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies" 47 *JILI* 135-157 (2005).

154. *Ibid.*

legislative bodies by providing for their representation at least to the extent of one-third. With their participation, 'the social pool of talent' will naturally be augmented.

In this respect, the reservation is not to be construed as a measure of 'charity' or giving 'doles'. "Reservations are only meant to create a measure of confidence and dignity among those who didn't dare dream of an alternative life."[155] Of course, for realizing this objective, the state is duty-bound to make massive investments for providing quality education that would equip the beneficiary of reservation with 'socially valuable skills', which would enable them to produce the same results as are produced by the privileged ones.[156] Thus, it is not enough to say that all institutions of higher learning are open to all. Instead, one should say, that all persons should be enabled to qualify and compete for admission to all institutions of higher learning. This 'enablement' does not mean that any person through reservation should be given admission irrespective of all considerations. In reality, reservation works at two levels: pre-reservation and post-reservation. At pre-reservation level, it is insured that the beneficiary of reservation has acquired the basic minimum qualification required for a particular course. In order to bring him up to that level, he should be compensated for his historic limitations by providing him all such assistance as required to come up to that level.[157] After having reached that minimum level, post-reservation benefit would entail further assistance that would fructify his participation and competition with the privileged ones according to his inherent capacity. In turn, this would eventually enable the beneficiary of reservation to contribute significantly to the pool of 'social assets.' This is what we mean by, converting 'equality in law' into 'equality in fact,' the true purport of the principle of equality.

Another advantage of 'inclusive social order' is that it results in increasing "set of resemblances," which in turn promotes, what is tersely termed as, "inter-subjectivity" amongst the members of the community "in their everyday lives."[158] "In this process, fraternal values of citizenship gain materiality and fulfilment."[159] "It should be recognized that fraternity

155. *Id.* at 153 (para 253), per Pasayat J, citing from an article by some un-named author.

156. *Ibid.*

157. Reservation does not preclude the granting of other concessions and facilities for the eradication of poverty, which is the ultimate result of inequalities, and which is the immediate cause and effect of backwardness. Such concessions may be by way of elementary education, scholarships for higher education and other financial support. See, *id.* at 159 (para 258). Per Pasayat J, citing *Indra Sawhnewy I* (para 323).

158. *Ibid.*

159. *Ibid.*

can only come about through a basic set of resemblances between citizens."[160] Here 'resemblances' in functional terms does not mean dilution of diversities, but only bringing the backwards to the level of others in terms of acquisition of 'socially valuable skills' that enables them to have their own identity and independent existence as a part-taker in the social process.

The significant service of the 'inclusive social order' is summed up by observing that "society will progressively acquire a higher strike rate with the policy of affirmative action by reaching out to those [SEBCs] who have thus far fallen outside the ambit."[161] With their inclusion, "the society has now a larger wealth of talents in a variety of fields and specialities than it had before."[162]

Claimants to 'inclusive social order' through reservation

Clause (5) of article 15 envisages three categories of claimants to make the social order more inclusive: those who belong to the scheduled castes, the scheduled tribes, and the socially and educationally backward classes of citizens. There is not much difficulty about the inclusion of SCs and STs, because they stood clearly identified by virtue of being ex-untouchables and *advasis*, who encountered blatant adverse discrimination for centuries only on grounds of their birth. Here in these cases, reservation was not merely on grounds of their caste or tribe, but because such identified castes and tribes carried with them 'historical disprivileges *and* economic backwardness,' and the relationship between them is 'statistically very strong'. For this singular reason, certain castes or tribes, or certain parts or groups within certain castes or tribes, could be taken as ready references for identifying the beneficiaries of reservation.[163]

The problem, however, arises about the identification of other socially and educationally backward classes of citizens for granting the benefit of reservation, which is indeed a very special measure "intended to redress backwardness of a higher degree."[164] It is, therefore, to be invoked very

160. *Ibid.*

161. *Ibid.*

162. *Ibid.*

163. Art. 34 1 empower the President, by public notification, to specify "the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to the Scheduled Castes in relation to that State or Union territory, as the case may be." Similar provision is made in relation to scheduled tribes under Art 342. See also *Ashok Kumar Thakur* at 92 (para 121).

164. *Ashok Kumar Thakur* at 158 (para 258). It is to be invoked very sparingly, because it the "very antithesis of free and open selection," and it amounts to "discriminatory exclusion of the disfavoured classes of meritorious candidates."

sparingly, because it is the "very antithesis of free and open selection" and it amounts to "discriminatory exclusion of the disfavoured classes of meritorious candidates."[165]

In pursuance of article 340 of the Constitution, which empowers the President to appoint a commission to investigate the conditions of SEBCs, the Kalelkar Commission was set up in 1955, but it could not come to any satisfactory conclusion about who should legitimately be considered as OBCs. The Mandal Commission came into existence in 1980. It recommended a long list of 3,743 backward castes on the basis of social, economic and educational backwardness for the conferment of reservation benefits. Implementation of those recommendations in 1990 by the then central government led by Prime Minister V.P. Singh by reserving seats in educational institutions and government jobs to the tune of 29 per cent in addition to the reservations for SCs and STs raised 'a furore of protests' all over the country. The most generally perceived grievance was that the Mandal Commission's recommendations did not really care for creating 'equality of opportunity' inasmuch as those were to be used 'to bring about a balance of power on the calculus of caste.'[166]

However, the judicial exposition of the expression, 'socially and educationally backward classes' of citizens under articles 15(4) and 15(5), reveals that the term 'class' is not synonym or equivalent to the term 'caste,'[167] and, therefore, any classification made *only* on the basis of caste would violate articles 15(1) and 15 (4).[168] Though it would be a different

165. *Ibid.*

166. Such a perception was based upon two factors: one, very many castes identified as OBCs are really powerful and dominant in rural India; two, identification on the basis of castes would make Indian society still more stratified. See *Ashok Kumar Thakur* at 155 (para 253).

167. There is a debate amongst the leading social anthropologists on this count. Some sociologists argue that both the terms 'caste' and 'class' are interchangeable, Lowie and Kimball Young, for instance; whereas some others, like North, hold that the difference between the two is that of degrees of rigidity – castes are more rigid than classes. Caste is hereditary (Charles Horton Cooley), hierarchical (Ghurye), unchangeable (MacIver), and, therefore, rigid; class is 'open' and changeable and not by birth, and, therefore, flexible. A 'caste' may become a 'class', say, when a rich Brahamin employs a poor Brahamin, implying thereby that that within a single caste group there may be some classes or groups of people to whom good fortune has brought more dignity, social influence and social esteem than it has to others, see *id.* at 95 (para 135). Conversely, a class also becomes caste when it becomes "rigorously closed", "hereditary" or 'Hierarchal' in terms of enjoying certain privileges or advantages over others in society, see, *id.* at 94 (para 130).

168. See, *id.* at 89-90 (para 116), per Balakrishnan CJI, citing *State of Uttar Pradesh and Others* v. *Pradip Tandon and Others*, (1975) 1 SCC 267. See also, *id.* at 144 (para 248), per Pasayat J., citing *N.M. Thomas*: If caste is made the sole

position in cases where certain castes or certain groups in a caste could be treated as classes if they were economically backward as well, because 'poverty' is the single most 'culprit-cause' and 'the dominant characteristic' of all backwardness, including social and educational.[169] For instance, in *Indra Sawhney I,* while examining the validity of the 'Backward Class List' prepared by the Mandal Commission, Jeevan Reddy J, speaking for the majority, held that in certain cases, caste alone could be the criterion for determining SEBC, because "the members of those castes are really classes of educationally and socially backward citizens."[170] This means, that the caste factor has not become totally redundant even today in certain cases.[171] For the affirmation of this proposition, Balakrishnan CJI cites the observation from *Indra Sawhney I* (para 779):[172]

> Lowlier the occupation, lowlier is the social standing of the class in the graded hierarchy. In rural India, occupation nexus is true even today. A few members may have gone to cities or even abroad but when they return they do, barring a few exceptions, go into the same fold again. It does not matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed for the purpose of marriage, death and all other social functions, it is his social class the caste that is relevant.

Thus, in the Indian set up, caste is still considered "the basic unit of social stratification."[173] It continues to be autonomous in several social matters. The practice of endogamy, which permits marriage amongst members of a particular caste only, is still rampant. Segregation on the basis of caste is still prevalent.[174] Inter-dining is prohibited in some castes.

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determinant of SEBC that would amount to "legitimise and perpetuate caste system." Moreover, caste system is unknown to Muslims, Christians, Parsis and Jews, and, therefore caste criterion "would not furnish a reliable yardstick to identify socially and educationally backward group," *id.* at 145 (para 248). Likewise, the term 'class' is not be construed *merely* in terms of 'religion.' See, *id.* at 89 (para 114), citing *Triloki Nath Tiku* v. *State of J & K (I)*, (1967) 2 SCR 265, in which the apex court negated the plea that inadequate representation of Muslims in state services could be the decisive factor for determining the backwardness of a section of citizens. The court directed the state to collect further material to substantiate 'backwardness' of Muslims in the state.

169. See *id.* at 90 (para 119), citing *K.C. Vasanth Kumar*, *supra*.

170. See, *id.* at 91-92 (para 120), per Balakrishnan CJI.

171. See, *id.* at 92 (para 123), per Balakrishnan CJI.

172. *Id.* at 92-93 (para 123).

173. *Id.* at 93 (para 124), per Balakrishnan CJI.

174. See, *The Tribune* 26.12.2008, flashing the news that in Madurai, Dalits entered the village temple after a decade only with the help of district officials by defying the ban imposed by upper castes.

Sometimes, the caste factor 'restricts occupational choice as well.'[175] Such caste rules providing 'internal autonomy', that is having its own code in certain matters, have nothing to do with the individual merit or his capacity. Nevertheless, traditional caste characteristics are undergoing changes. Traditional occupation, for instance, is no more considered an essential feature of caste. The feature that still makes the caste distinctive in character is its internal autonomy, having its own code and close-knit social control.

Bearing in mind the differentiation and impingement of 'caste' and 'class' for the purpose of expounding the constitutional ambit of 'SEBCs of citizens,' the Supreme Court found that the criterion adopted by the Mandal Commission for identifying the beneficiaries of reservation in terms of selection of 'castes' out of the number of castes is not arbitrary. The selection was made after holding 'public hearings,' and on the basis of detailed data with regard to social, educational and economic conditions, collected through elaborate questionnaire prepared by the Commission and the responses received to it. The methodology adopted unmistakably shows that determination of SEBCs was not done solely on the basis of caste, and, therefore, not violative of article 15(1) of the Constitution.[176] For applying this methodology pragmatically, the following steps are envisaged:[177]

> First, mark out various occupations which on the lower level in many cases amongst Hindus would be their caste itself, as in the case of *Bhangis* (ex-untouchables), *Telis, Chamars*, etc
>
> Second, find out their social acceptability and educational standard. A person carrying on scavenging becomes an untouchable, whereas others who were as low in the social strata as untouchables became a depressed class.
>
> Third, weigh them in the balance of economic condition. The economic criteria or means-test should be applied since poverty is the prime cause of all backwardness, as it generates social and economic backwardness.

The result would be backward class of citizens needing genuine protective umbrella. In the application of this criterion, the court has cautioned that mere educational or social backwardness would not have been sufficient as it would unduly enlarge the field, thus frustrating the very purpose of the reservation policy. The backwardness should be "traditional."[178]

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175. *Ashok Kumar Thakur* at 93 (para 124).
176. *Id.* at 95-96 (paras 140-142), per Balsakrishnan CJI.
177. *Id.* at 92 (para 121), citing *Indra Sawhney I.*
178. *Ibid.*

Extent of 'inclusion' through reservation

The limits of reservation policy is determined by, what is termed as, "the boundaries of the width of the power."[179] The 'width of power' envisages limitation in the form of 'numerical benchmark,' that is, the ceiling-limit of below 50%, and the limitations that are somewhat abstract and conceptual in nature, and yet identifiable and measurable through "quantifiable data."[180] The latter limitations, called the "controlling factors," include 'the compelling reason of social and educational backwardness', 'exclusion of creamy layer,' 'inadequacy of representation,' and 'desirability of open competition' and 'the overall administrative efficiency.'[181]

In *M.R. Balaji*,[182] the Supreme Court, by majority, held that 'speaking generally and in broad sense,' a special provision of reservation should be less than 50%. How much less than 50% would, however, depend upon the relevant factors and prevailing circumstances in each case. The issue of laying down the outer limit arose in the context of the peculiar circumstances. In this case, the State of Mysore issued an order that all communities except those of brahmins would fall within the definition of socially and educationally backward classes of citizens, scheduled castes and scheduled tribes, and that 75% of the seats in educational institutions were to be reserved for them. Holding that determining who are socially backward is undoubtedly very complex, as it involves the plethora of sociological, social and economic considerations, nevertheless, reservation being a special measure, could exceed in no case beyond the outer limit of less than 50% of the total. While laying down this maximum extent, the court observed *inter alia*: [183]

> A special provision contemplated by Article 15(4) …must be within reasonable limits. The interests of weaker sections of society which are a first charge on the states and the Centres have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad sense, a special provision should be less than 50%....

179. See, *id.* at 152 (para 252), per Pasayat J, citing *Nagaraj* (para 110).
180. See, *id*. at 176 (294), per Pasayat J, citing *Nagaraj* (para 107).
181. See, *Ibid.*
182. See *supra*.
183. *Ashok Kumar Thakur* at 160 (para 259), per Pasayat J, citing *M.R. Balaji*.

Obviously, the outer limit of less than 50% was dictated by the considerations of administrative efficiency as envisaged by article 335 read with article 15(4). The undue elimination of open or general competition would 'materially affect efficiency'. The consideration of 'administrative efficiency' has been emphasized again by the Supreme Court in *K.C. Vasanth Kumar* by stating that reservation "cannot be stretched beyond a particular limit," and in certain cases where "expertise and skill are of essence," "merit alone must be the sole and decisive consideration," and there would be no reservation in those cases.[184] In *Indra Sawhney I* (paras 838, 840), the Supreme Court forcefully reiterated that in certain situations that "call for highest level of intelligence, skill and excellence," there may not be any reservation at all, for that would be inconsistent with 'efficiency of administration' contemplated by Article 335.[185] In the ultimate analysis, we may seek the solution by balancing three variables, namely, equality, equity, and efficiency - equality for the forward classes; equity to the socially and educationally backward classes of citizens, and maintaining the efficiency for the entire system by not going beyond the 'cut-off point.'[186]

Currently a debate is on about the expansion of higher education in India in the context of Act 5 of 2007. The critical issue is how to expand the provision of higher education while at the same time ensuring 'social inclusion and academic excellence.' The concern expressed in the Report of the Oversight Committee on this count is:[187]

> A society which excludes a significant section of its population from access to higher education cannot be said to be providing equality of opportunity. Equally, if academic excellence gets compromised in the process of expansion, it would lose its competitive edge in the emerging knowledge society – an edge which can propel India into a position of global leadership.

For realizing this objective, a three-fold strategy is being adopted at the instance of the Oversight Committee: expansion, inclusion, and

184. *Id.* at 163 (para 260). See also, id. at 171 (para 283), wherein reservation is not allowed in view of "the importance of merit and international importance of universal excellence in super specialties" in postgraduate medical education.

185. See, *id*. at 179 (para 309). S. 4(b) of Act 5 of 2007 itself excludes the provision of reservation in "the institutions of excellence, research institutions, institutions of national and strategic importance specified in the Schedule" appended to the Act.

186. Cf. per Pasayat, J, *id.* at 174 (para 294), citing *Nagaraj* (para 44): "In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards, and efficiency for the entire system."

187. Cited by Pasayat J, see, *id.* at 136-137 (para 241).

excellence. In this strategy, reservations are not pushed through in the name of social equity, regardless of the impact on quality and excellence. Instead, equity provisions (through reservations) are being perceived in a manner that enhances excellence. This is envisaged "by bringing much needed governance related reforms involving institutional, financial and administrative autonomy and process re-engineering in our Higher Educational Governance system."[188] The thrust of the whole strategy is to create 'an upward moving equalization process', where the disabilities are overcome by the hitherto excluded backward sections of the society and the system brings out the best in them.[189] With the proposed massive investment of over eighteen thousand crore of rupees, this opportunity for 'expansion, inclusion and excellence' is considered only the beginning of a larger process, which is to build a knowledge society in India and allow the country to take its rightful place in the comity of nations.

In the 11th Five-Year Plan, the government of India has invested Rs. 2.7 lakh crore, which constitutes 20% of the plan expenditure, on education. This is said to be the highest amount that has ever been invested in education. Sam Pitroda, the Chairman of the National Knowledge Commission, has recently recommended the utilization of national resources for HRD by bridging the disparity in access to education.[190] Such a move is neither unrealistic nor beyond our reach. Other countries that visualize a similar future are said to have planned massive investments in order to enhance both the quality and quantity of higher education and research. As a concrete step in this direction, the Ministry of Human Resource Development (HRD), Government of India, has recently announced a major scholarship scheme for college and university students falling in the category of socially and educationally backward classes of citizens.[191] As many as 82,000 college and university students will be covered from this year onward, half of them girls. The renewal of scholarship from year-to-year would, of course, depend upon 'good conduct and fulfilment of prescribed academic performance.'[192]

188. *Ibid.*

189. *Ibid.*

190. See *The Times of India*, Bangalore, 16.12. 2008, while participating at an education seminar on "Demography, Disparity , Development," organized by the NKC and the All India Management Association in Bangalore on 15.12. 2008.

191. See, *The Tribune* 19.12. 2008, under the heading, "82,000 scholarships for 'non-creamy' students'." The backwardness is being construed as persons whose annual income is below Rs. 4.5 lakh. Earlier ceiling was Rs. 1.5 lakh annually.

192. This is the second central scholarship scheme the government has announced during the year 2008. Earlier in May 2008, the National Means-cum-Merit Scholarship Scheme was announced with the objective of offering one-lakh scholarships to poor secondary-level students.

V Some leftover and lingering issues

The newly inserted article 15(5) by the 93rd Amendment of the Constitution empowers the state to make special reservation provision for the advancement of SEBCs of citizens or for the SCs or the STs in the matter of admission to the educational institutions, including private institutions, whether aided or unaided by the state, other than minority educational institutions covered under article 30(1). The constitution bench of the Supreme Court in *Ashok Kumar Thakur* has upheld the constitutional validity of this new insertion on the touchstone of basic structure doctrine, but only in respect of state maintained or state-aided educational institutions.[193] However, the question was left open by the majority court in respect of private unaided educational institutions, apparently because 'no unaided institution had filed a writ petition.' Although, the issue was very much alive, and Bhandari J, in fact, did deal with the same,[194] yet the majority court avoided answering the question, whether unaided educational institutions should also be subject to reservation. The court could have impleaded any unaided institution, if it so desired by considering it 'necessary to the resolution of the dispute.' But the majority court did not. Perhaps the reason of reluctance was the lingering effect of the *T. M .A. Pai Foundation*, which, by majority, held that subjecting unaided educational institutions to any state control 'is an unreasonable restriction,' not covered by article 19(6).[195] Since it was this limitation on the power of the state, which was sought to be removed by the Parliament through the incorporation of clause (5) to article 15 by the 93rd Amendment of the Constitution, the court should have used this opportunity to clinch the issue instead of deferring it on mere technical surmountable count. In the author's view, however, the distinction between aided and unaided educational institutions for the purpose of reservation through state intervention is invidious, because

193. Bhandari J, it seems, accepted the constitutionality even with respect to aided educational institutions with some reservations. To wit, he says: "I, *compelled by Sawhney I* to hold that impugned legislation passes careful scrutiny with respect to reservation in aided institutions, its implementation is contingent upon the directions given in this opinion," *id.* at 252 (para 540). Emphasis added

194. Bhandari J, however, felt of his own that since "the fate of lakhs of students and thousands of institutions would remain up in the air," he "decided to proceed with this aspect of the matter in the large public interest." *Ashok Kumar Thakur* at 237 (para 480). He eventually held that the 93rd Amendment Act is not constitutionally valid so far as private unaided educational institutions are concerned. See, *id.* at 272 (Final Court Order).

195. The state has no control over unaided educational institutions and such institutions are free to admit students of their own choice. See *Ashok Kumar Thakur* at 85 (para 100), per Balakrishnan CJI.

the most critical support received by an educational institution from the state is not 'financial', but its 'recognition'.[196] If such an invaluable support is availed by both aided and unaided educational institutions alike, there seems to be no reason of exempting the unaided institutions from the ambit of reservation policy. Moreover, once it is realized and unequivocally held that reservation is no more an exception to the principle of equality, but its integral part,[197] there remains no issue of violation of the same principle *vis-à-vis* unaided educational institutions.

Another analogous issue that requires close scrutiny relates to the exemption provided by the 93rd Amendment to the minority educational institutions. Under article 30(1) of the Constitution, minorities have the right to 'establish and administer educational institutions of their choice'. This right to 'establish and administer', *prima facie*, includes all such elements as the right to determine the complexion of courses, the right to admit students, the right to determine students' fee structure, the right to engage teachers, the right to employ administrative staff, and, for that matter, the right to do all the things that are needed to run an educational institution. So long as these things are done by the minorities for the preservation of their 'distinct language, script or culture', through the medium of formal education by observing the modicum of social order, there seems to be full freedom. However, the moment *recognition/affiliation* is sought from the state in respect of such institutions as are providing, say, professional education in the field of engineering or medicine, with or without aid, the issue of exemption from reservation becomes suspect in our view. It violates the principle of equality under article 14, because such educational institutions are not run for the protection of minorities' character. The court, however, seems to have given the benefit of exemption in the instant case, because no petition has been filed before it by "the affected educational institution."[198] It needs to be considered how and in what manner the complexion of minorities' right to management in respect of such recognized/affiliated educational institutions is affected by the reservation policy, which is designed and directed to produce equality through equity.

The last lingering issue relates to the exclusion of 'creamy layers'. On the strength of *Indra Sawhney I*, it has been held that the whole concept of 'creamy layer' is confined only "to Other Backward Classes and has no

196. See generally, author's article, "Minorities' Rights to Run Educational Institutions: *T.M.A. Pai Foundation* in Perspective," 45 *JILI* 200-238 (2003).

197. See, III (a): "Reservation as an integral part of the principle of equality" of the paper.

198. See *Ashok Kumar Thakur* at 88 (para 102), per Balakrishnan CJI.

relevance in the case of Scheduled Tribes and Scheduled Castes."[199] Mainly two reasons are advanced for this proposition. One, SCs and STs "form a single class"; two, exclusion can be made only by Parliament after the President has determined the list of SCs and STs.[200] Non-exclusion of 'creamy layer' in the case of SCs and STs as in relation to OBCs/SEBCs is, in the author's submission, discriminatory and as such violates equality principle, which is impermissible under the Constitution. The principle reasoning on this count is as follows.

The common basis of reservation in the case of SCs, STs and OBCs/ SEBCs is 'backwardness.' In this respect there is no differentiation either in degree or in kind between the SCs and the STs on the one side, and OBCs/SEBCs on the other. The Supreme Court in *Indra Sawhney I* (para 294) has clearly held that in the case of OBCs "[w]hat qualifies for reservation is backwardness which is the result of identified past discrimination and *which is comparable* to that of the Scheduled Castes and the Scheduled Tribes," and that "[r]eservation is a remedial action specially addressed to the ill effects stemming from historical discrimination."[201] This 'backwardness', which merits special reservation, has been termed as "constitutionally recognized backwardness."[202] The sameness of 'backwardness' in the case of OBCs has been emphasized again in *Indra Sawhney I* (para 319): "Reservation should be avoided except in extreme cases of acute backwardness resulting from prior discrimination as in the case of the Scheduled Castes and the Scheduled Tribes and other classes of persons in comparable position," and "[i]n all other cases, preferential treatment short of reservation can be adopted."[203] If the basis are absolutely 'comparable', and each one of them forms a 'single class', then any distinction for the purpose of 'exclusion' is not justified. Moreover, exclusion of creamy layer is 'a judicial construct,' which has been read into the principle of equality as its integral part, and makes the concept of reservation dynamic.[204] Denying the extension or the application of the

199. *Id.* at 68 (para 54). The observations made by the Supreme Court in *Nagaraj* have been termed as *obiter*, see *id*. at 104 (para 159).

200. *Id.* at 68 (para 53, 54, 55). Moreover, any observations to the contrary made in *Nagaraj*, should be treated as obiter.

201. Cited by Pasayat J at 158 (para 258). Historical discrimination refers to the backwardness that emanated from 'ascribed status' that is on the basis of birth, as distinguished from 'achieved status.' See at 145 (para 248), citing the findings of the Research Planning Scheme of Sociologists assisting the Mandal Commission.

202. *Ibid.*

203. *Ibid.*

204. See, Part III "Reservation as a Dynamic Social Phenomenon" of the paper. Cf. per Iyer, J. in *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India and Others*, (1981) SCC 246, para 98: "The argument that there are rich and

exclusion principle to the SCs and the STs, therefore, amounts to saying that in the case of Scheduled Castes or Scheduled Tribes, once a person is identified as backward, he shall always remain backward! It would also imply that reservation policy in the case of SCs and STs is of no functional or material consequence in their cases. In reality this is not the whole truth. In fact, the research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among the *harijans,* "a tiny elite gobbling up the benefits and the darker layers sleeping distances away form the special concessions."[205] "For them," said the Supreme Court, "Articles 46 and 335 remain a 'noble romance,' the bonanza going to the 'higher' *harijans*."[206] In such a case, therefore, exclusion of the 'creamy layer' is the truly the inclusion of the real backward ones, and, it is for this, the Supreme Court has repeatedly emphasized that the government "should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation."[207] If this holding of the Supreme Court has to have any meaning, the exclusion of the creamy layer amongst the SCs and STs is absolutely imperative.

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influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf." Cited in *Ashok Kumar Thakur* at 213 (para 385), per Bhandari J. This approach of leaving the issue of exclusion of creamy layer to the State Administration, in our submission, is no more tenable after *Indra Sawhney I*.

205. *Ashok Kumar Thakur* at 142 (para 27), per Pasayat J, citing *N.M. Thomas* (para 124).

206. *Ibid.*

207. *Id*. at 89 (para 115), per Balakrishnan, CJI, citing *Minor A. Peeriakaruppan* v. *State of Tamil Nadu and Others,* (1971) 1 SCC 38.