COMMITTEE ON THE WELFARE OF SCHEDULED CASTES AND SCHEDULED TRIBES

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(THIRTEENTH LOK SABHA)

SECOND REPORT

MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS
(DEPARTMENT OF JUSTICE)

Representation of Scheduled Castes and Scheduled Tribes in Judiciary with special reference to the appointment in Supreme Court and High Courts

LOK SABHA SECRETARIAT
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Chapter I
Introductory Background

1.1 "The administration of law and justice is intimately linked with the social philosophy of the judiciary and the social philosophy cannot be entirely separated from the social origins of those who dispense justice."

1.2 It is now universally admitted that social composition of the higher judiciary, which is visualised as an "arm of the social revolution", is of crucial importance in the administration of justice in any country. The social composition of judiciary inevitably affects and influences its judgements. The judges are not super-human beings. Howsoever objective and fair they may try to be in their decisions or interpretation of law on any socio-economic issue, they cannot but be influenced by many considerations. Nearly a hundred years ago, the US President Roosevelt said: "The decisions of the courts on economic and social questions depend upon their economic and social philosophy." A judge's mind is not "a mechanical legal slot machine". His judgement is influenced at least unconsciously by his likes and dislikes, prejudices and predilections, his entire philosophy of life. In the atmosphere of the ongoing social struggles in the country, the resultant bitterness cannot leave the judges without being influenced in their judgements as to the right or wrong of the struggles. Being members of the struggling communities they are bound to be partisan, because they share the sentiments and prejudices of their communities. In the words of Justice O.Chnnappa Reddy, "The Court belongs to a class…when the class consciousness takes over". As observed by the former Chief Justice of India P.N.Bhagwati, since judges are drawn from the class of well-to-do lawyers, they unwittingly develop certain biases. The members of the judiciary have so far been drawn from the very section of society which is infected by ancient prejudices and is dominated by notions of gradations in life. The internal limitation of class-interests of such judges does not allow them full play of their intellectual honesty and integrity in their decisions. Their judgements very often betray a mindset more useful to the governing class than to the servile class. Such judges can have little understanding of the living forces operating in the servile classes and no sympathy for any real measure designed to raise their dignity and progress. As an eminent former Supreme Court Judge (Justice Desai) correctly observed: "Our judiciary has retained its traditional blindfold on its eyes and thereby ignored perceived realities." It is naïve to believe that in the present state of affairs in our society justice is done to those who are outside the ruling fold.

1.3 The judiciary should, therefore, be so composed as to reflect the socio-economic realities of the nations' life. It is in this context that the recent observations of our President have assumed great significance. He correctly said: "It is a matter of importance that in the judiciary all major regions and sections of the society are represented to the extent possible consistent with requirements of merit and the high standards maintained by the judiciary. The arguments is not that judiciary should follow some sort of proportional representation." What he has said is nothing but "a reiteration of the mandate of the Constitution and the

social philosophy contained in its Preamble." The unseemly controversy raised over such innocuous suggestions of the President was not only unfortunate but also quite significant in the context of the fact that the present reservation-free judicial system has proved to be very unsatisfactory if judged by the state of affairs of the dispensation of justice. The President's suggestion is totally in tune with the constitutional objectives as well as the declared policy of all governments and political parties. It is patently unfair to raise a bogey of Presidential activism or plea for Mandalisation of the higher judiciary. Viewed in the right perspective, the President's suggestion should have been seen as a deep concern for justice to the weaker sections and for an honest attempt to rectify a fault.

1.4 There is very little disagreement among the people over the falling credibility of our judiciary. According to some case studies, in the selection and appointment of judges of the Supreme Court some attention has been given to regional allocation and religious background in order to preserve a semblance of representative framework. But social background was never a consideration for the composition of the higher judiciary, obviously under the false view of its being communal representation. In fact, there is no dearth of evidence of the fact that communal bias has been visible in the judiciary upto the highest level. Communal bias is a necessary consequence of the social system we are living under. It's a premise which is recognized even by the Criminal Procedure Code. There are specific provisions in the Cr.P.C. showing the possibility of communal bias in the judiciary. The existence of communal bias in the issues of a communal character cannot, therefore, be ruled out. In such a situation, there is no escape from accepting the principle of equitable representation of all major social groups in the judiciary also for which there is absolutely no bar in our Constitution. It has become inevitable in the deteriorating situation created over the last 50 years since Independence. In the name of autonomy of the judiciary attempts have been made to create an Imperium in Imperio which is not the intention of the Constitution. It is high time for the Parliament to enact a Judiciary Act spelling out the governing principles of the proper functioning of the Judiciary, specially the Supreme Court and the High Courts.

1.5 Judicial pronouncements made so far regarding the rights and interests of the weaker sections of society like the Scheduled Castes and Scheduled Tribes constituted a most confusing medley of opinion which settles little and unsettles much. High Courts have generally tended to apply restrictive criteria for the reservation policy for such people. So far as the Supreme Court is concerned, there were different phases of its attitude towards the constitutional provisions for reservations. There is no doubt that the Supreme Court through a series of landmark judgements in relation to social justice has shaped the course of our national life. Although there was not much of uniformity in the Apex Court's decisions, it laid down certain rules or laws of reservation which were being followed over a period of more than four decades. But this Court's judgements right from the Mandal Case of 1992 upto its latest two judgements delivered on 10.8.99 and 6.9.99 have practically wiped out whatever law was in force since the adoption of the constitution. The Mandal judgement has clearly exposed the disturbing fact that the Apex Court does not respect its own previous judgements and can easily unsettle the settled case laws. "Every time this court over-rules its

previous decisions, the confidence of the public in the soundness of the decision of this Court is bound to be shaken." There is, therefore, a dire need to apply the well-known principle of stare decisis into our jurisprudence. As a result of the propositions of law laid down by the Supreme Court over a period of more than four decades on the various aspects of reservation policy, certain situations crystallised and became a part of the social psyche over a long period. To unsettle them at a later stage is bound to create avoidable problems. But that is exactly what has been done by the Supreme Court judgements first in the Mandal case (1992) and then in two more cases in 1999. According to the principle of stare decisis, whether the court's interpretation of law is right or wrong is not a matter of moment, for the simple reason that a large number of people have acted upon the interpretation as being the correct law, have incurred obligations, have secured rights, and then to say that all these obligations and rights are founded upon a mistaken view of the law would be to unsettle the social equilibrium. In such a situation the courts take the attitude: "Let the wrong continue." Our Supreme Court has obviously disregarded this basic principle in the aforesaid cases which are of vital importance to the entire backward classes in this country. The Court has also not stated in any of these cases the "compelling circumstances or reasons" that forced it to reverse the previous judgements of the same Court which were favourable to the policy of affirmative action for the Scheduled Castes & Tribes.

1.6 Referring to the present state of affairs in the country, Justice P.B. Sawant has observed in his judgement in the Mandal case that: "… all aspects of life are controlled, directed and regulated mostly to suit the sectional interests of a small section of the society which numerically do not exceed 10% of the total population of the country. This has resulted in the concentration of the executive power in the hands of a select social group. It is naïve to believe that the administration is carried on impartially, that the sectional interests are subordinated to the interests of the country and that justice is done to those who are outside the ruling fold". He further adds that the lower castes and classes constitute the overwhelming majority of no less than 75% of the population. In such a situation, when the Supreme Court is harping on priority of "national interest" above social or other interests and on the "merit alone" criterion in its rulings on reservation policy for backward classes, specially since the Mandal case, one can legitimately ask: how can 10% of the population represent the "national interest" and is not the so-called merit the result of the cumulative advantages on social educational and economic fronts enjoyed by a select social group? The Supreme Court which is the nation's last court of appeal, cannot afford to appear unjust in its own domain. But unfortunately that seems to have happened over the years. Judges have, of course, the power, though not the right, to ignore the mandate of a statute and render judgements despite it.

1.7 Judges from the elite group may find it their filial duty to defend a system established by their forefathers, even at the cost of truth and universal values. The necessity of upholding the system by which they know they stand to profit becomes their limitation or inhibition. How can such judges claim to have a right

to sit in judgement over the issue of the rights of the backward classes? The judiciary, must, therefore, have members who have first hand knowledge and experience of the problems of the backward classes and have personal interest or sense of involvement in solving them through dispensation of justice. What is needed is empathy and not mere sympathy.

1.8 To argue that only those with merit have found a berth in the judiciary is specious. This presupposes that those from the weaker sections do not have enough merit. There is no scientific basis for such a view which can be held only by an incorrigible bigot. The country needs more judges at all levels from different social backgrounds and groups. The spirit of the Constitution should be followed in all fields including the judiciary.

1.9 There is one more aspect of the courts' attitude which is note worthy. The Supreme Court's opinion (which is nothing but an obiter dictum) in para 112 of the majority judgement on the Mandal case to the effect that the Government should consider and specify certain services and posts (actually mentioned by the court) to which the rule of reservation shall not apply is highly enigmatic, if not provocative. After much of sweet haranguing on the concepts of merit, efficiency and competence and the conclusion that reservations are not anti-meritarian, it is a mystery how the Apex court could come up with such a contradictory suggestion that merit alone should count for employment in the specified services and posts. Have they not violated their own principles that "there must be some material upon which the opinion is formed" and that the constitutional questions must not be decided in vacuum? It appears that the Court's direction to the Government is intended to give validity to a June 1992 judgement of Mr. Justice Katzu of the Allahabad High Court which was not only immediately condemned by three former judges of the same court as illegal and unconstitutional but later also described as wrong by a number of constitutional law experts, The Supreme Court's obiter dictum (later reiterated in its another judgement) in such a vital matter without any basis of facts before them, cannot but be considered as suspect by a vast majority of the people. It is absolutely irrational to withhold the policy of reservation from some areas altogether as has been done so far in respect of defence services, judiciary, etc. There is nothing in the Constitution to support such action by the Government or to permit the judiciary to suggest such a policy.

1.10 The present set-up of our judiciary is obviously neither sympathetic nor unbiased to the cause of the backward classes and the bureaucracy is quick to implement anti-Dalit decisions of the courts. The representation of the vast majority of these people in the country is still so abysmally poor even after 50 years since the adoption of the Constitution that this state of affairs can no longer be allowed to continue.

1.11 The Committee feel that a firm policy of reservation is the only remedy. The Government in practice has, however, adopted the policy of "Running with the hare and hunting with the hounds" in regard to the question of implementing the reservation policy. This stance of the Government must change. The Committee, therefore, recommend that the constitution may be amended suitably to include judiciary wing of the State within the ambit of the reservation and simultaneously a judicial Act may be enacted to spell out the governing principles

of the proposed functioning of the judiciary especially the Supreme Court and High Courts.

Chapter II

Constitutional Safeguards

2.1 Reservation is one of the measures adopted by the Constitution to remedy the continuing evil effects of prior inequalities stemming from past discriminations. Its basic objective is to lift the limitation on access to equal opportunities in the matter of public employment, education, etc., and thereby remove the manifest imbalance in the representation in public services for the backward classes of citizens, specially the Scheduled Castes and Scheduled Tribes.

2.2 The relevant Articles of the Constitution which govern the entire reservation set-up are the following: -

> Article 15(4): "Nothing in this article or clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."
> Article 16(4): "Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not adequately represented in the services under the State".
> Article 16(4A): "Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of SCs/STs which in the opinion of the State, are not adequately represented in the services under the State."
> Article 46: "The State shall promote with special care the educational and economic interest of 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."
> Article 335: "The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State".

2.3 Under the Constitution of India, there are three organs of the State, namely, the Executive, the Legislature and the Judiciary. Against this constitutional background, the Government has provided for reservation for members of Scheduled Castes and Scheduled Tribes in services of the Union and the States, including appointments in the Public Sector Undertakings, Statutory and Semi-Government Bodies. Similarly, Articles 243(d), 330 and 332 of the Constitution have incorporated the concept of reservation for Scheduled Castes and Scheduled Tribes in the Panchayats, the House of the People and the

Legislative Assemblies of the States respectively. However, no such specific arrangement has been made in respect of the Judiciary.

(b) Appointment of Supreme Court & High Court Judges

2.4 As regards the appointment of High Court Judges and various judicial services under them for which the Commissioner for Scheduled Castes and Scheduled Tribes in his various Annual Reports had been emphasising the need for making the constitutional provisions for reservation for Scheduled Castes and Scheduled Tribes, the Committee were informed that appointment of Judges of the High Courts are made in terms of Article 217 of the Constitution which does not provide for reservation for any caste or class of persons. Appointments of Judges of the Supreme Court and High Courts are made under Articles 124 and 217 respectively which do not provide for reservation for any caste or class of persons. It has been stated that in view of the high principle of "Judicial Independence" enshrined in the Constitution of India, reservation for appointment of judges at the Supreme Court and High Courts has to be regulated as per constitutional provision. The Government has, however, addressed letters to the Chief Ministers of all the States and the Chief Justices of all the High Courts from time to time in the years 1980, 1984, 1986, 1988, 1990 and 1997 requesting them to locate persons from the Bar belonging inter-alia to Scheduled Castes and Scheduled Tribes who are suitable for appointment as High Court Judges.

2.5 In reply to a question whether or not the appointments of Judges of the Supreme Court and High Courts are covered under "services and posts in connection with the affairs of the Union or of a State" or "the services under the State", as expressly stated in Articles 335 and 16(4), the Committee were informed that the question of reservation in appointment of Judges in the Supreme Court and High Courts has been debated in and outside the Parliament. This question was raised in the Lok Sabha on 8.6.98 and the House was assured that the matter would be referred to the Law Commission. The matter has since been examined in consultation with the Law Commission who have opined as below:

> "So far as the appointment of High Court Judges is concerned there can be no question of providing reservation. Appointment of High Court Judges is governed by provisions of the Constitution and the Constitution does not provide for any such reservations. These are constitutional posts and as such beyond the purview of the legislative power of the Parliament/States Legislature. Even otherwise, it would be highly inappropriate and inadvisable to provide any reservations in the matter of appointment of High Court and Supreme Court Judges."

2.6 The Committee were informed that the matter had also been examined by the Attorney General of India in 1983, who opined that the constitutional scheme did not permit making of reservations for the Scheduled Castes and Scheduled Tribes in the appointment of judges of the High Courts and the Supreme Court of India.

2.7 With reference to SC/ST Commissioner's suggestion in his report (1978-79) for making a Presidential reference to the Apex Court to decide whether appointment of judges is outside the purview of the provisions of Articles 16(4) and 335 and whether judicial wing of the State could be excluded from the definition of the "State" given in Article 12 of the Constitution, the Committee were informed that since High Court falls within the category of "State" within the meaning of Article 12 of Part III of the Constitution, when Chief Justice of a High Court makes appointment of officers and servants under Article 229 such appointments are within the meaning of "State". Therefore, Articles 14-16 do apply to the Chief Justice as in the case of Governor of the State.

2.8 During the evidence, the representative of the Ministry of Law, Justice and Company Affairs stated: -

> "……the relevant articles relating to High Court Judges and Supreme Court Judges do not provide for any reservation……In the case of elections to the Parliament and to the State Legislatures, there is a specific provision for reservation in favour of Scheduled Castes and Scheduled Tribes. These provisions are contained in Articles 330 and 332. While giving the constitutional status to Panchayats and Municipalities ….. specific provisions were inserted for reservation in favour of these classes in the Constitution itself.
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> "The newly inserted Article 243(d) provides for reservation of seats in favour of SCs/STs in the elections to the Municipalities. As regards Panchayats also, a specific provision has been made in Article 243(d) for reservation of seats in favour of SCs/STs. These provisions clearly indicate that wherever there was an intention to make reservation, a specific provision was made in the Constitution itself. Judiciary is also a separate institution. It enjoys a constitutional position like the Members of Parliament or Members of the State Legislatures. They also hold constitutional positions. As regards reservation in Judiciary, there is no specific provision. But, now the question is whether a constitutional amendment is required for this purpose or whether reservation can be possible without that."
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> The Ministry's representative further added:
> "The Supreme Court has concluded (in the case of the Government of Andhra Pradesh Vs Vijaya Kumar – AIR 1995) that Article 15(4) which deals with the Scheduled Castes, Scheduled Tribes and Other Backward Classes is wider than Article 16(4). It [15(4)] is an Article which has to be read with other provisions of the Constitution where there is no reservation. So, a view may be taken that now because of the changed circumstances, it is possible for the Government to make reservation for Scheduled Castes and Scheduled Tribes in the matter of appointments of High Court and Supreme Court Judges. This can be done by an executive order or by law also. But this is not free from doubt…….if you want to

provide for reservation it is safe to amend the Constitution. Otherwise, it will be a debatable thing and it will lead to controversy."

When pressed further, he clarified that clause (4) of Article 15 has to be read harmoniously with Articles 124 and 217 which provide for the appointment of the judges of the Supreme Court and High Courts. It cannot be said that the provision of Art. 15(4) would not apply to the appointment of judges of the Supreme Court and High Courts.

2.9 When asked about his reaction to the Law Secretary's opinion, the Home Secretary stated:

"……this is both a legal and political question. It is not purely legal. It is also political. If there is a political commitment to that yes, this Article 15(4) is the instrument by which we will achieve it, then legal opinion can be sought. We can consult the jurists. The Committee can consult or ask the Government to consult from the point of view of jurists…. But the fact remains that during the last 50 years, Article 15(4) has not helped us to achieve this objective. This point has to be kept in view."

The Home Secretary further added that the other way of looking at it is to change the present system of recruitment under the Constitution. One option is to set up a National Judicial Commission. The other view is that "we should also have an All India Judicial Service so that when you provide for induction to the High Courts, a bigger number of High Court judges will come from the All India Judicial Service which of course will have reservation because that is the scheme of things. It will follow the constitutional provision of the services because that is an All India constituted service". The law makers are to decide the percentage of all judges to come from the All India Judicial Service both for the High Courts and the Supreme Court, and that will serve the purpose.

2.10 In a post-evidence note furnished by the Department of Legal Affairs, it has been further clarified that Articles 14, 15 and 16 deal with different aspects of the fundamental rights to equality. Article 15(3) enables the State to make a special provision for women and children. Similar provision is contained in Article 15(4) as regards socially and educationally backward classes or Scheduled Castes and Scheduled Tribes which enables the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The Supreme Court also in Government of Andhra Pradesh Vs P.B.Vijaya Kumar (AIR 1995 SC 1648) held that making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3), that is, it would also include the power to make reservations of posts and appointments for women. The Court further observed that this power conferred under Article 15(3) is not wittled down in any way by Article 16(4). In the same way, the special provisions contemplated for socially and educationally backward classes or

Scheduled Castes and Scheduled Tribes under Article 15(4) would also include the power to make reservations of appointments of posts other than the posts or appointments contemplated in Article 16(4). Hence, the scope of Article 15(4) is wider than Article 16(4) in as much as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of socially and educationally backward classes, Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely reservation of appointments/posts. Keeping in mind the above judgement of the Supreme Court, Articles 124 and 217 have to be read harmoniously with Article 15(4), i.e., Article 15(4) of the Constitution has to be read with Articles 124 and 217 of the Constitution, particularly when Articles 124 and 217 do not specifically prohibit making of any reservation for Scheduled Castes and Scheduled Tribes in the matter of appointments of judges in the Supreme Court and High Courts. Thus, it cannot be said that the said provision contained in Articles 15(4) would not apply to the appointment of judges as contemplated under Articles 124 and 217 of the Constitution. This power conferred under Article 15(4) is not wittled down in any manner by Articles 124 and 217.

2.11 The Committee note that as per opinions expressed by the Law Commission and a former Attorney General of India, the constitutional scheme did not permit making of reservation for Scheduled Castes and Scheduled Tribes in the appointment of the judges of the High Courts and the Supreme Court. It is not understandable how the Government could accept such a view as final or decisive on such a vital matter. The Committee were also informed that since High Court falls within the category of "State" within the meaning of Article 12 of Part-III of the Constitution of India, when Chief Justice of a High Court makes appointments of officers and servants under Article 229, such appointments are within the meaning of "State". Therefore, Articles 14-16 do apply to the Chief Justice as in the case of the Governor of the State. But this explanation does not answer the Committee's query as to how could the judicial wing of the Government be excluded from the definition of State in Article 12.

2.12 The Committee also note the clarifications given by the Ministry of Law, Justice and Company Affairs in regard to the question of reservation in judiciary. It has been stated that although there is no specific provision for reservation in judiciary, the question now is whether a constitutional amendment is required for this purpose or whether reservation can be possible without that. Referring to the Supreme Court judgement in the case of Government of Andhra Pradesh Vs. P.B.Vijay Kumar (AIR 1995 SC 1648), the Law Secretary has clarified that clause (4) of Article 15 has to be read harmoniously with Articles 124 and 217 which provide for the appointment of the judges of the Supreme Court and High Courts. It cannot be said that the provision of Article 15(4) would not apply to the appointment of judges of the Supreme Court and High Courts. The Committee, therefore recommend that in view of the changed circumstances, the Government should make reservation for Scheduled Castes and Scheduled Tribes

in the matter of appointments of High Court and Supreme Court judges, if need be, by amending the Constitution.

2.13 The Committee further note that the Home Secretary also more or less concurred with the view of the Law Secretary. He stated that if there is a political commitment to that, Article 15(4) is the instrument by which this objective can be achieved, then legal opinion can be sought. He, however, mentioned the fact that during the last 50 years Article 15(4) has not helped us to achieve this objective. He suggested two alternative courses of action to get over the difficulty. One option is to set up a National Judicial Commission, and the other is to constitute an All India Judicial Service with a legislative provision governing its recruitment method and placement.

2.14 The Committee are of the firm opinion that there is no legal and constitutional bar for providing reservation in the judiciary. What is apparently lacking is the political will and sincerity to do the needful. The provision of Article 15(4), as interpreted by the Supreme Court should be applied to the appointment of Supreme Court and High Court judges without any further loss of time. To facilitate this process the Committee, therefore, recommend that an All India Judicial Service should be constituted forthwith on the pattern of the I.A.S. etc., which was mooted long back and now recommended again by the First National Judicial Pay Commission in its Report and necessary legislation for proper placement of the personnel from this Service at various levels of the higher judiciary should also be simultaneously enacted.

2.15 Regarding the Memorandum on the Procedure adopted for appointment of the Chief Justice of India and of judges of the Supreme Court, the Committee could not appreciate the plea of confidentiality of the Memorandum for not furnishing it initially. It was, of course, made available later on the Committee's insistence. The Committee also desire that the existing procedure for appointment should be suitably amended or substituted in the light of the recommendations of the Committee.

2.16 Regarding the system of appointment of judges in various High Courts the Committee were informed that Article 217(1) of the Constitution of India provides that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India and the Governor of the State. In the case of appointment of Judges other than the Chief Justice, the Chief Justice of High Court is also required to be consulted.

2.17 While any of the above mentioned constitutional authorities could make recommendation, generally the Chief Justice of a High Court used to make recommendations for filling up vacancies of Judges in that High Court. The Union Minster for Law and Justice used to consult the Chief Justice of India after receiving / obtaining the views of the Chief Minister and the Governor of the State concerned. Thereafter the Minister used to make his recommendations to the Prime Minster and the President. The appointment approved by the President was then notified after obtaining the certificate of date of birth and the medical

certificate. The Judge used to function in the High Court after making and subscribing an oath of affirmation according to the form set out for the purpose in the Third Schedule of the Constitution.

2.18 The scheme of appointment prescribed in the Constitution and followed by the concerned authorities was examined by a nine-judges bench of the Supreme Court in Writ Petition (Civil) No. 1303 of 1987 – Supreme Court Advocates-on-Record Association & Anr. Vs. Union of India with Writ petition (Civil) No. 156 of 1993 S.P.Gupta Vs Union of India. In its majority judgement delivered on October 6, 1993, the Supreme Court enlarged the scope and extent of consultation envisaged in the Constitution and directed that the proposal for appointment of a judge of a High Court shall be initiated by the Chief Justice of the High Court. It was held that the opinion of the Chief Justice of the High Court for making recommendation for appointment of Judges must be formed after ascertaining the views of at least two senior-most judges of the High Court. Views of the Chief Minister and Governor of the concerned State would be obtained as usual. It was also provided that the Chief Justice of India, in forming his opinion on the proposal, would be expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. Thus, the scheme of appointment outlined by the Supreme Court is being followed after the aforesaid Judgement.

(c) Strength of Supreme Court & High Court Judges

2.19 As regards the total number of posts of judges in each of the High Courts and in the Supreme Court and the number of Scheduled Castes and Scheduled Tribes among them, the following statement was furnished to the Committee: -

2.20 The information available upto 1-5-1998 confirms the Committee's apprehension about a very sad state of affairs in the matter of representation of Scheduled Castes and Scheduled Tribes in the higher judiciary. The Committee is surprised to see that out of 481 High Court judges only 15 Scheduled Castes and 5 Scheduled Tribes were in position as on 1.5.1998. The representation of Scheduled Castes and Scheduled Tribes in the judgeship of the Supreme Court was nil on that date. In a participatory democracy appointment of the Scheduled Castes and Scheduled Tribes to the Supreme Court and High Courts is also necessary to ensure their participation in the administration of justice. The attitude of some High Court Registries in refusing to furnish the information on the plea of not disclosing the caste identity is astounding. When the Committee asked for comment on the above observation, the Ministry of Law, Justice and Company Affairs in their post evidence note have stated that the observation of the Committee has been noted and the Department of Justice does not have any comments to offer. The Committee find that it is abundantly clear that the Scheduled Castes and Scheduled Tribes have dismal representation in the judiciary, other equally more important wing of the State either on the administrative side or on the judicial side. Judges take oath that they uphold the

Constitution and the laws. But the Supreme Court, and a few High Courts by claiming above the Constitution, practice untouchability and are disobeying the Constitution with regard to Article 16(4) and 16(4A).

2.21 The Committee note that the Ministry of Law, Justice and Company Affairs have requested a number of times the Chief Ministers and Chief Justices of High Courts to recommend the names of suitable Scheduled Caste and Scheduled Tribe advocates for appointment as Judges of the High Courts. On the other side of the coin, the Committee are surprised to note that out of 481 High Court judges only 15 were from Scheduled Castes and 5 from Scheduled Tribes in position as on 1.5.98 and none was in the Judgeship of the Supreme Court. The Committee are also astonished to note that there has been not only no reservation for Scheduled Castes and Scheduled Tribes in the appointment of officers and staff of the Supreme Court but also no recruitment rules have been finalised during the last 50 years. The Committee are pained to note that the Ministry of Law, Justice and Company Affairs have stated that they have merely noted the Committee's observation. The Committee, therefore, recommend that the Government should take concrete and positive steps, if need be, by amending Articles 217 and 124 of the Constitution to give adequate representation to Scheduled Castes and Scheduled Tribes in the Judgeship of High Courts and Supreme Court as well as in the appointment of officers and staff in their establishments as per prescribed percentage i.e. 15% for Scheduled Castes and 7.5% for Scheduled Tribes.

(d) Reservation Provision in Establishment of courts

2.22 The Committee were informed that according to the 15th Report of the Commissioner for SCs/STs for the year 1965-66, the question of reservation in the higher judiciary was examined in consultation with the Government and it was found that there was nothing to prevent the Supreme Court and High Courts from framing their own rules of recruitment providing for reservation of vacancies in favour of members of Scheduled Caste and Scheduled Tribe communities in accordance with the provisions of Articles 16(4) and 335 of the Constitution. Accordingly, the Ministry of Home Affairs had suggested to the Supreme Court the need for framing of suitable rules to provide reservation for the Scheduled Castes and Scheduled Tribes in the establishment of Supreme Court. The State Governments were also requested to persuade the High Courts to make reservations in their services on the basis of the reservations in the State services.

2.23 The Committee were also informed that the State Governments/UTs were intimated in the year 1976 that the provision of reservation for SCs and STs in the case of subordinate judicial services in States is applicable under Artciles 234 and 309 of the Constitution. Such a rule for reservation in the case of higher judicial services (i.e., District Judges & equivalent) can be made under Article 309 of the Constitution. Again in the year 1980 the Department of Justice reminded the Registrars of all High Courts that the position in regard to the employment of SCs and STs in the services of and under the High Courts was not satisfactory.

2.24 It was further stated that the position at present is that, most of the High Courts have made provisions regarding reservation for SCs and STs in the services under them by framing suitable rules of recruitment. The Supreme Court has informed that the Chief Justice of India always considers the claims of Scheduled Caste and Scheduled Tribe candidates in the mater of appointments under the Supreme Court, keeping in view the special nature of jobs and consequential requirements of the Court for efficient functioning of the Registry. When asked for the number of Scheduled Caste and Scheduled Tribe offices and staff at present serving in the Supreme Court, its Registry stated that the information was "not readily available". It was also intimated that framing of codified rules regarding recruitment of officers and staff of the Supreme Court has not been finalised so far.

2.25 It was also stated that appointments to other judicial posts (generally referred to as subordinate judiciary) is the exclusive jurisdiction of the States under Articles 233 and 234 of the Constitution. Whether reservation should be provided in the matter of appointments to the subordinate judiciary is a matter to be determined by the concerned State Governments in consultation with the High Courts.

2.26 The Committee note that the Ministry of Home Affairs had suggested to the Registrar of Supreme Court the need for framing suitable rules to provide reservation for SCs and STs in the Establishment of Supreme Court. Similarly, the State Governments were also requested to persuade the High Courts to make reservations in their services on the basis of the reservation in the State services. The Committee also note that in the year 1976, the State Government/UTs were intimated that the reservation for SCs and STS in case of subordinate judicial services in States is applicable under Articles 234 and 309 of the Constitution. Such rule of reservation in case of higher judicial services can be made under Article 309 of the Constitution.

2.27 The Committee further note that at present, majority of the High Courts have made provisions for reservation in services for SCs and STs under them by framing suitable rules of recruitment. However, no such rules have so far been made by the Supreme Court. The whole attitude of the Supreme Court is very surprising. Its Registry has intimated that the requisite information regarding representation of SCs and STs is not available with that office. Such secrecy or suppression of information is highly undesirable which is also a proof of non-observance of reservation. It has been repeatedly stated that the Chief Justice of India always considers the claims of Scheduled Castes and Scheduled Tribes in the matter of appointments in the Registry, but when the Committee wants the number of SCs and STs at present serving the Supreme Court, the reply comes that the information is not readily available. It is a very sad commentary on the functioning of the Country's Apex Court. It is further noted that there has been not only no reservation for SCs and STs in the appointments of officers and staff of the Supreme Court but framing of codified rules regarding their recruitment has

also not been finalised during the last half century. How can the weaker sections of the society have any faith left in such a Court. The Committee are, therefore, of the view that when the Supreme Court is receiving the salaries from the Consolidated Fund of India for its staff, it is a condition that the Chief Justice and the companion judges of the Supreme Court as well as High Courts should also implement reservation in recruitment and promotion of the officers and servants at various levels at the prescribed percentage and the backlog vacancies in the categories of Scheduled Castes and Scheduled Tribes must be filled up by conducting special recruitment drive.

2.28 Statements showing the percentages of reservation provided in Judicial Services in States/Union Territories were stated to be as under:-

2.29 When the Committee wanted to have clarification on the uneven policy followed by the various High Courts in regard to reservation in employment for SCs and STs in their establishments and whether this question was ever discussed at the Chief Justices' Conference held periodically, the Ministry of Law, Justice and Company Affairs in their post-evidence reply have stated that the agenda of the conference is finalised by the Supreme Court and the Department of Justice has no role to play. They have further stated that as per information available with them, the question of reservation in employment of SCs/STs in the establishments of High Courts has not been discussed in the Chief Justices' Conference held during the last eight years. However, the information in this regard was not supplied by the Supreme Court of India.

2.30 The information in regard to total number of Judicial Officers and percentage of Scheduled Castes and Scheduled Tribes among them serving in each State/Union Territory as supplied by the Ministry is given below:-

2.31 It is evident from the above statement that out of 18 High Courts information is available with regard to 11 High courts only. An birds's eye view of the above figures reveals that representation of Scheduled Castes and Scheduled Tribes in the cadre of Judicial Officers is negligible. The Committee, therefore, recommend that concerted and serious efforts must be made by the concerned High Courts to fulfil the prescribed level of reservation in the cadre of Judicial Officers in each State/Union Territory.

(e) Staff Strength in the Establishments of High Courts

2.32 On being enquired about figures of actual representation and percentages of SCs & STs in the total number of officers and staff separately for Subordinate Judicial Services, Higher Judicial Services and Ministerial Service for each State, the Ministry of Law, Justice and Company Affair in their post-evidence reply have stated that primarily the Subordinate Judicial Services and Higher Judicial Services are the concern of the respective State Government and its High Court. The control of the Ministerial service in the establishment of the High Court is the exclusive domain of each High Court. The information in respect of actual

representation of SCs and STs in various High Courts' establishments is as under:-

2.33 From the information furnished, the Committee find that the said information relates to only total number of employees and the number of SCs and STs among them and not according to categories as asked for. However, two of the High Courts, namely Allahabad and Delhi, have not furnished any information at all in this regard which cannot be expected fromthese esteemed organisations. The Committee also observe that the representation of SCs and STs employees in the estalbishment of various High Courts is deplorable. The Committee desire that full information relating to officers and gradewise details in respect of serice-wise employees of all the High Courts with the break-up of SCs and STs therein should be made available to the Committee at an early date.

2.34 With regard to the question whether all the High Courts have adopted and implemented the rules of reservation in direct recruitment and promotions of SCs and STs in various services, the Committee were informed that out of the eighteen High Courts.Sixteen High Courts have informed that the rules of reservation for SCs/STs in recruitment to various services in the High Court are in vogue. The Bombay High Court is yet to adopt the reservation rules.

2.35 The Delhi High Court has informed as follows:

> " Article 229 of the Constitution of India gives unfettered power to the Chief Justice of a High Court in the matter of appointment of officers and the servants on the establishments of the High Court. The power of appointment vested in the Chief Justice cannot be abridged by the Legislature. The unequivocal purpose and obvious intention behind this article is that the Chief Justice is the Supreme authority and there can be no interference by the executive except to the limited extent as provided for in the proviso to the article. The provison requires that the rules made by the Chief Justice, so far as they relate to salaries etc. requires the approval of the Government. But the rules relating to conditions of service in general having nothing to do with salaries etc., need not be sent to the Governor for approval.
>
> The employees of the High Court are taken out of the purview of Article 309 of the Constitution. Thus, the rules/instructions issued by the Government relating to reservation for SCs/STs do not strictly apply to the High Court. These may only be looked at as a matter of guidance. However, having regard to the specialised nature of duties of the staff of this Court and consistently with the efficiency of administration, the claims of SCs/STs candidates are being given due consideration."

2.36 When the Committee expressed its displeasure at the Delhi High Court's interpretation of Articles 229 and 309 and sought clarification on it, the Ministry of Law, Justice and Company Affairs (Department of Justice) in their post-evidence note have stated that they have no comments to offer in this regard.

2.37 The attitude of the High Court of Delhi is highly objectionable in the matter of interpretation of Article 229 regarding recruitment of officers and staff

of the court. They have talked of unfettered power of the Chief Justice, who has been cited as the supreme authority in this regard, as if he is above the Constitution whereas they are controlled and bound by the Constitution and Article 16(4) and 16(4A) are equally applicable to them. It has been asserted that the employees of the High Court are taken out of the purview of Article 309 of the Constitution. The Committee takes a serious view of all such utterances. The Bombay High Court is yet to adopt the reservation rules after half a century of working of the Constitution. What a sad commentary on the judiciary who are supposed to oversee the working of the Constitution regarding affirmative action for the weaker sections of society. The appointment of the officers and servants of the High Courts is an appointment to a office or a post under the State and the salaries are paid from the Consolidated Fund of India. Therefore, the Chief Justice and his companion judges are bound to apply reservation.

2.38 The Committee note that the Bombay High Court has not yet adopted reservation rules and Delhi High Court stated that employees of the High Court are taken out of the purview of Article 309 of the Constitution. Thus, instructions issued by the Government relating to reservation for SCs/STs do not apply to that High Court. The Committee also note with dismay that the Ministry of Law, Justice and Company Affairs have no comments to offer. The Committee, therefore, recommend that suitable instructions may be issued and if need be, the Constitution may be amended to bring Courts under the purview of the reservation orders in respect of officers and staff working in their establishments so that the under privileged strata of the society also get their due share in the judicial system as well. The Committee further recommend that the State Governments require to be directed to amend, if not already existing, the service rules of the staff of the subordinate Courts providing reservation to the Scheduled Castes and Scheduled Tribes proportional to the population in the respective States in the direct recruitment as well as promotions at all levels in promotion. Equally Article 229 and Article 146 should be amended directing the High Court and the Supreme Court to apply reservation in recruitment and promotion of the officers and servants of the respective courts at all the levels.

2.39 The Committee were informed that the Bombay High Court has not so far accepted/started implementation of the reservation for SCs/STs and its recruitment rules also do not provide for reservation for any post. The Ministry of Law, Justice and Company Affairs in their post-evidence note have stated that the Bombay High Court has informed that the reservation policy has not been adopted by the High Court by way of prescription in the form of any rules, although they follow the reservation policy in spirit only at the stage of recruitment. The Bombay High Court has also informed that there are a total number of 116 Class I officers actually working in the High Court, out of whom 4 officers belong to Scheduled Castes and one officer belongs to the Scheduled Tribes. There are 329 class II officers working in the High Court, out of whom 17 officers belong to Scheduled Castes and one belongs to the Scheduled Tribes. There are in all 1021 Class III employees working in the High Court, out of whom 84 employees belong to Scheduled Castes and 5 employees belong to Scheduled Tribes. Of the

705 Class IV employees actually working in the High Court, 133 employees belong to the Scheduled Castes and 16 belong to the Scheduled Tribes.

2.40. The Committee were further informed that in Madras and Rajasthan High Courts also no reservation has been made for SCs and STs in case of gazetted and promotional posts. The Ministry of Law, Justice and Company Affairs in their post evidence reply have stated that the then Minister of Law, Justice and Company Affairs vide letter dated 24.2.1999 requested the Chief Justices of Madras and Rajathan High Courts to consider the matter relating to reservation for Scheduled Caste/Scheduled Tribe candidates in case of direct appointments and promotional posts in the establishment, of the High Courts. The replies from both the High Courts were still awaited. In this connection examples of Allahabad, Andhra Pradesh, Kerala, Punjab and Haryana, Patna and Madhya Pradesh High Courts can be cited for not having made any provisions for reservation in promotion.

2.41 The Committee note that mere provision of reservation in recruitment will not yield any good results because the intention, sincerity and zeal of the implementing authority is the deciding factor which the Committee feel is absent in most of the High Courts and at other levels of judiciary. The Committee feel that the crux of the problem is that neither the Government have ever considered this problem nor made any efforts to resolve it. The Committee, therefore recommend that the Government must look into this aspect and amend the Constitution, if necessary, to give due representation to Scheduled Castes and Scheduled Tribes in the Judiciary as well as in their establishments.

2.42 The Committee have noted that as regards cases involving reservation issues, even where the Government is a party, the Government advocates have taken least interest in defending the Government policy, and Scheduled Caste/Scheduled Tribe persons find difficult to get good advocates to defend their cases because of their limited resources and organisation and when considering this deplorable position the Commissioner for SCs & STs had to urge the Department of Personnel and Administrative Reforms in 1978-79 to make itself an active party in court cases involving reservation questions so that the Government view could be projected in the affidavits filed in the courts. It was stated by the Ministry of Law, Justice & Company Affairs that the observation of the Committee have been brought to the notice of all Ministries of the Government of India for remedial action.

2.43 The Committee were informed by the Ministry of Personnel, Public Grievances & Pensions that during the course of hearing in the Indira Sawhney case, the Counsel who appeared for the Union of India had raised a preliminary objection to the consideration of the question of reservation in promotion of SCs/STs. Overruling this objection, the Supreme Court ruled that reference to the larger bench was made with a view to "finally settle the legal position related to reservation." The Government has also made provision for free Legal aid which can be availed by persons of the weaker sections of the society.

2.44 The Committee were also informed that the Ministry of Social Justice & Empowerment, the nodal Department for SCs/STs had no comments to offer in this regard.

2.45 The Committee note that as per suggestion made by the Commissioner for SCs and STs to the then Deptt. of Personnel and Administrative Reforms in 1978-79 to make itself an active party in court cases involving reservation questions so that the Government view could be projected correctly and the interests of SCs and STs are well protected, the Ministry of Law, Justice and Company Affairs have stated that the same has been brought to the notice of all Ministries of the Government of India for remedial action. The Committee would like to have copy of such instructions and would urge the Government to see that in future, cases involving reservation aspects are defended with keen interest by well qualified and experienced advocates preferably from Scheduled Caste and Scheduled Tribe communities which alone will boost the faith of these communities in the Government,

2.46 With regard to a proposal made by the Commissioner for Scheduled Castes and Scheduled Tribes more than a decade ago for setting up of an independent National Judicial Commission, the Committee were informed that the Law Commission of India, in its 121st Report regarding "A New Forum for Judicial Appointments," had recommended the constitution of a National Judicial Service Commission for recommending appointment of Judges in the High Courts and the Supreme Court. The appointments of Judges of the Supreme Court and the High Courts are made in accordance with Articles 124 and 217 of the Constitution of India respectively

2.47 The Ministry has further stated that one of the items of the National Agenda for Governance is to set up a National Judicial Commission to make recommendations for Judicial appointments in the Supreme Court and the High Courts and to draw up a code of ethics for the judiciary. This matter is under examination.

2.48 The Committee note that a proposal for setting up of a National Judicial Commission was made by the Commissioner for Scheduled Castes and Scheduled Tribes more than a decade ago, which had also been reiterated by the Law Commission of India in its 121st Report. The Committee regret to note that the matter is still under examination by the Government. The Committee, therefore, strongly recommend that a National Judicial Commission be set up early to deal with the appointment, transfer and administration of the judges of the High Courts and Supreme Court. This should be supplemented by constituting an All India Judicial Service.

2.49 In regard to the Committee's query about the oldest outstanding issue which could not be finalised for nearly 30 years till 1980 regarding implementation of the National Reservation Policy for SCs and STs in the

services under the constitutional authorities and statutory bodies, and the question whether the Government was aware that according to legal opinion on the issue, the expression "in connection with the affairs of the Union or a State" appearing in Article 335 of the Constitution does cover the legislative and judicial wings of the State (i.e., all constitutional authorities and statutory bodies), the reply of the Government is highly evasive. The Ministry of Law, Justice and Company Affairs in their post evidence reply have stated that the work relating to Welfare of SCs and STs earlier handled by the Ministry of Home Affairs, is now being dealt with by the Ministry of Social Justice and Empowerment. Information in this regard was called for from the concerned Ministry/Department. In this context, the Ministry of Social Justice and Empowerment have no comments to offer and the Department of Personnel and Training have informed that they "are not able to locate any such instructions of October, 1980" on the scope of Article 338 of the Constitution and that the Brochure on Reservation for the SCs and STs (8th Edition) also does not contain any such instruction issued by the Ministry of Home Affairs.

2.50 The Committee have, however, been able to get from other sources a copy of the Home Ministry's instructions issued on 4th October, 1980 (vide Annexure I). It has been finally clarified therein that the special authority created render Article 338 of the Constitution is empowered to investigate all matters relating to safeguards for SCs and STs working under the authorities/bodies created under the Constitution (many of which challenged the constitutional responsibility of the special authority over a long period of time), and to report thereon to the President, and "it is not open to anybody to object to the laying of such reports" before Parliament. The earlier doubts/reservations about a vital matter were thus finally resolved.

2.51 The Committee find the attitude of the Government as astounding in regard to an outstanding issue of vital importance which took about 30 years for a final decision in 1980 and then again forgetting about it since then and now pleading the inability of even tracing the Government instructions of 1980. When the Committee could get a copy of the Government instructions of October 1980 from other sources, it is surprising that the concerned Ministry/Department have failed to locate any such instructions. The Officer Memorandum issued in this regard on 4th October, 1980 (as reproduced in Annexure to this report) shows that it was sent to all Ministries/Deptts. For bringing the clarification to the notice of the authorities/bodies created under the Constitution. Twenty years have passed since then and the Government is oblivious even of its existence, and the Committees' query about any assessment made of the actual working of the aforesaid decision in practice by the concerned authorities/bodies has remained unanswered. The Committee would, therefore, urge upon the Government to take immediate steps to fix responsibility on person or persons for such grave lapse and award appropriate punishment. The action taken in the matter along with full information on the unanswered query should be communicated early to the Committee.

2.52 In regard to the question whether the All India Judges' Association ever considered the matter of reservation of Scheduled Castes and Scheduled Tribes as per the constitutional provisions, the Ministry of Law, Justice and Company Affairs stated that they were not aware whether that Association had ever considered the question of implementation of the reservation policy. That shows that the Judges have never been concerned about, the constitutional objectives of bringing about social change. The Committee would like the Ministry to communicate its displeasure over this state of affairs.

2.53 The Committee note that with regard to remedy under the Constitution, the High Courts are capable of issuing writs and directions for the protection of certain fundamental rights of the Scheduled Castes and Scheduled Tribes. But this has rarely been invoked or applied to ensure justice for these people. The courts have failed in coming to the rescue of these deprived sections of the society. As a classic example of how the judicial administration has not been helpful in providing justice to Scheduled Castes & Scheduled Tribes, mention may be made to the handling of a Special Leave for appeal filed by the Union Government in 1978 against an Allahabad High Court's adverse judgement of 1977 in J.C. Malik's case regarding reservation for Scheduled Castes and Scheduled Tribes. The Supreme Court passed an interim order in September, 1984 allowing conditional promotions in accordance with the High Court Judgement. No action was taken on the Government's 1985 petition for vacating/variation of the interim orders of relief, with the result that various High Courts and CATs in the country also passed similar interim orders of relief, and the Government orders on reservation could not be implemented for a very long time. Ultimately, the Supreme Court delivered an adverse judgement only in July, 1995, after a period of 17 years. The Ministry of Railways have confirmed these facts. They have also admitted that the implementation of reservation policies of the Government on Railways during this period was in utter confusion resulting in a great loss to the interests of the Scheduled Caste/Scheduled Tribe employees. It has been stated in the Ministry's reply: "It is also very debatable and questionable approach that in R.K. Sabharwal case the Hon'ble Supreme Court has approved the judgement of Allahabad High Court without mentioning the argument put forth by the then learned Additional Solicitor General." It was also disclosed that the then Railways Minister & Minister of State continuously requested the then Minister of Law & Justice for engaging the Attorney General/Solicitor General in the case of J.C. Malik because they felt no counsel other than attorney General/Solicitor General would be in a position to project the case properly before the Supreme Court. The Ministry of Legal Affairs agreed to this request. But at the final stage of the appearing of the case, neither Attorney General nor the Solicitor General appeared before the Court. The Committee find all these facts very disturbing and strongly urge upon the Government to take urgent steps to protect the constitutional rights of Scheduled Castes & Scheduled Tribes.

KARIYA MUNDA
CHAIRMAN
COMMITTEE ON THE WELFARE
OF SCHEDULED CASTES AND
SCHEDULED TRIBES

NEW DELHI
March, 2000
Phalguna, 1921(Saka)