PROTECTIVE DISCRIMINATION: JUDICIAL APPROACHES

PART – A

5.1 Judicial Approach towards Protective Discrimination of Scheduled Castes and Scheduled Tribes.

In India the role of Judiciary protecting the interest of Scheduled Castes and Scheduled Tribes by delivering the judgments is not satisfactory in respect of their education, public employment and promotion etc. During the period of 60 years the role of judiciary is very note worthy. It has not ensured cent percent justice to the Scheduled Castes and Scheduled Tribes. Neither the Supreme Court nor the lower Courts have imposed convictions or death sentence, or life imprisonment or rigorous imprisonment against the upper Caste people who have committed atrocities against the Scheduled Castes and Scheduled Tribes. Inspite of the judicial intervention, atrocities, grabbing of land, rape, exploitation, and harassment are going on against them. Our judiciary has to take recognition of these inhuman practices and prevent them so as to provide justice.

Regarding the educational opportunities of the SC and ST members the Supreme Court’s attitude can be seen firstly in Champakam Dorai rajan Vs. State of Madras\(^1\) wherein, the Madras Government had reserved the seats in state medical and engineering colleges for different communities in certain proportion on the basis of religion, race and Caste. This was challenged as unconstitutional and ultra virus to the Constitutional provision. But the Madras Government defended its G.O. order on the ground of article 46 of the Constitution permits the state to promote with special care the educational and economic interests of the weaker section of the people and in particular of the Scheduled Castes and Scheduled Tribes to secure the social justice to them. The Supreme Court struck down the reservation made by the state and held that it was unconstitutional as it classified on the basis of Caste and religion which are prohibitory grounds under Article 15(1) of the Constitution. The above

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\(^1\) AIR 1951 SC 226
observation of Supreme Court clearly indicates that is not completely tilted towards the interest of the members of Scheduled Castes and Scheduled Tribes. The parliament inserted the clause (4) to Article 15 to the Constitution through under 1st Constitution al amendment 1951, under this clause the state is empowered to make any special provisions for the advancement of any socially, educationally backward class of citizens or for the Scheduled Castes and Scheduled Tribes. This is done by the parliament so as to protect the interest of the Scheduled Castes and Scheduled Tribes.

Like wise, in Jagwantkaur Vs. State of Bombay\(^2\) the Government of Bombay issued an order for requisitioning land for the construction of a Scheduled Caste colony. This was challenged as ultravives to equality clause under Article 15 (1). But the state defended that, the state May undertake various measures to promote the interests of the Scheduled Castes and Scheduled Tribes as required under the Constitution. But the Supreme Court held that the order was void under Article 15 (1). The above observation of the Supreme Court Shows that, it is not completely infavour of Scheduled Castes and schedules Tribes. To modify these two decisions and to protect the interest of the Scheduled Castes and Scheduled Tribes.

In Balaji Vs. State of Mysore\(^3\) many professional college candidates filed the writ petitions in the Supreme Court alleging that, for the reservation made by the State Government, they would have been admitted. On the other hand, students with less mark have been admitted. It was violative of Article 15 (1) and 29 (2). The basis adopted for specifying backward classes was irrational; the extent of reservation was so unreasonable that it amounted to a fraud on the Constitution.

The government disputed all these and said that its order was protected by Article 15 (4). It is a special provision which was added to the Constitution in 1951 to secure the preferential treatment to backward classes and Scheduled Castes and Scheduled Tribes. Under Article 15 (4) state authorizes to make

\(^2\) AIR 1952 Bombay 461.
\(^3\) AIR 1963 SC 649.
special provisions for the advancement of socially and educationally backward classes of people.

The Supreme Court further ruled that, the backwardness must be social and educational. Caste is a one indicator, but its role cannot be exaggerated, otherwise, it would perpetuate Caste. Social backwardness is the result of poverty to a large extent; occupations and place of habitation also determine backwardness. Classification between backward and more backward classes made by the government was held to be unconstitutional. According to this criterion, namely 90% of the state population became backward. Reservation of 68 percent was also inconsistent with Article 15 (4) as it was unreasonable. The interest of the weaker sections must be balanced with those of society in general. It is a difficult task but in the guise of making special provision, practically all seats cannot be reserved. Reservation should be less than 50 percent. Finally court concluded that the State Government’s order was a fraud on the Constitutional power conferred under Article 15 (4). In this way Supreme Court was struck down the reservation policy of the State of Mysore, it ignore the Caste is also a class and Caste based reservation.

The view expressed by the Supreme Court Balaji Vs. State of Mysore in relation to 50 percent limit is clearly in consonance of the views of Dr. Ambedkar wherein as he said that the Constitutional reservation benefits given to the Women, Scheduled Castes and Scheduled Tribes should not eat away the rights of the others.

In R. Chitralekha Vs. State of Mysore a question raised before the Supreme Court, whether an order specifying tests other than Caste tests was a valid order? In this case, the Government of Mysore, by an order defined ‘Backward Classes’ and directed that 30% of the seats in professional and technical colleges and institutions shall be reserved for them and 18%, Shall be reserved for Scheduled Castes and Scheduled Tribes. The Supreme court in this regard followed the decision of Balaji’s case, it pointed out that if in a given selection ‘Caste’ is excluded in ascertaining a class with in the meaning of

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4 AIR 1964 SC 1823
Article 15 (4), it does not vitiate the classification if it satisfies the other tests. This shows that the court tried to base the determination of backwardness solely on secular, scientific and rational criterion ignoring the other factors. Justice Subba Rao. J. then presents some reflections about the use of Caste units which compound the ambiguities. The important factor to be noticed in Article 15 (4) is that it does not speak of Castes, but only speaks of classes. The makers of the Constitution intended to take Castes also as units of social and educational backwardness, they would have said. So, though it may be suggested that the wider expression “Classes” is used as there are communities without Castes, if the intention was to equate classes with Castes, nothing prevented the makers of the Constitution to use of the expression “Backward Classes or Castes”. The Juxtaposition of the expression “Backward Classes and Scheduled Castes” in Article 15(4) also leads to a reasonable inference that the expression “Class” is not synonymous with Castes.

In P. Rajendran Vs. State of Madras in this case, the list of backward classes has been specified by Caste. But that does not necessarily mean that Caste was the sole consideration and that persons belonging to these Castes are also not a class of backward citizens. The State Government showed the history of the backward class list starting from 1906. The main test was backwardness of the Caste based on occupation. As the members of the whole Caste were found to be backward, they were put in the list. The list was occasionally amended and updated. Therefore, it must be accepted that though the list showed certain Castes, the members of those Castes were really classes of backward citizens. In this case Supreme Court rules that a Caste could be a class in certain circumstances.

Again in State of Andhra Pradesh Vs. P. Sagar the Andhra Pradesh Government reserved Medical Seats in the Various Colleges on several criteria, like Scheduled Caste, Scheduled Tribe, children of ex-servicemen and displaces goldsmiths and women. 20% of the seats were reserved for backward

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5 AIR 1968 SC 1012
6 AIR 1968 SC 1379
classes in Andhra and Telengana areas. The reservations were challenged on several grounds in the High Court. It dismissed most of them but it ruled that reservation for backward classes were invalid. Therefore, the state government appealed to the Supreme Court. The State Government submitted that a lot of thought was given to the preparation of the list of backward classes and pointed out the meetings conducted by committees appointed to go into the question.

The Supreme Court dismissed the government’s appeal and upheld the High Court judgment quashing the backward classes list. It stressed that Article 15 (1) guaranteed a fundamental right of for-reaching importance. With in certain defined limits an exception has been engrafted upon clause (1) but being an exception the conditions which justify departure must be strictly shown to exist. A mere assertion by the government that it had acted in good faith in listing the backward classes would not be sufficient under Article 15 (4). When a question arises whether a law which primafacie infringes a guaranteed right is valid, the court must decide it on material placed before it. A mere assertion by the government that the rule was made after full consideration of the relevant evidence and was with in the scope of Article 15 (4) would not be sufficient the judgment said.

In this case, reservation was made in favour of Castes, not classes. Therefore it infringed Article 15 (1) the criterion for determining backwardness must not be based solely on religion, race, Caste, sex or place of birth. The backwardness being social and educational must be similar to the backwardness from which Scheduled Castes and Scheduled Tribes suffer.

The formula evolved in Rajendran case had suffered a set back in P. Sagar case and then it was revived by the Supreme Court in State of Andra Pradesh Vs. Balaram. In this case, the Andhra Pradesh backward classes commission in 1970 prepared a list of 92 communities on the basis for Caste and communities. The supreme court reasoned that even if assuming that list is based exclusively on Caste, the report of the commission discloses that entire Caste was socially and educationally backward and therefore their inclusion in

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7 AIR 1972 SC 1375
the list of backward classes is warranted by Article 15 (4). A Caste was also a class of citizens and a Caste as such may be socially and educationally backward reservation for such group was valid.

In **K.S. Jayasree Vs. State of Kerala**\(^8\) the state Government passed an order under which reservation in Medical Colleges for members of socially and educationally backward classes was available only to those who came from families whose annual income was below Rs. 10,000. In this case, the candidate belonged to a backward community, but her family income was above Rs. 10,000. Therefore, her claim to the medical seat was rejected and candidates with lesser marks were admitted, from her own community. This was challenged in the Supreme Court. She argued that the government order was violative of Article 15 (4) of the Constitution. There was no reason to exclude a section of the community only on the basis of income. Income cannot be a criterion, it was argued. The government maintained that Article 15 (4) was not violated because ‘backward’ class was not used in the provision as synonymous with backward Caste. The backwardness must be both social and educational. Caste cannot be the sole criterion.

The Supreme Court upheld the denial of protective discrimination is admission to medical colleges to the families among the backward classes whose income exceeded. It ruled that, in ascertaining social backwardness, Caste cannot be the sole test, backwardness could be the result of poverty, both Caste and poverty should be considered not just one of them. Therefore, economic criterion for eligibility for reservation was held valid.

The question relating to the extent of reservation came before the Supreme Court in **Balaji Vs. State of Mysore**\(^9\) here the Supreme Court intervened with the Scheduled Castes and Scheduled Tribes education reservation policy. In this case the Government of Mysore had issued the order reserving 68% of the seats available for admissions to the medical, engineering and other technical colleges within the state. Out of 68% seats, 28% were

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\(^8\) AIR 1976 SC 2381  
\(^9\) AIR 1963 SC 649
reserved for backward classes, 22% for more backward classes, 15% for Scheduled Castes and 3% for Scheduled Tribes. Only 32% seats were made available for the General category. This Government order was challenged on the basis of social backwardness of the communities to whom the impugned order had been determined in a manner not permissible under Article 15(4). Further it was also challenged that the 68% reservation was excessive and unreasonable in protecting interest of the General Candidates. As a result, the Supreme Court struck down the G.O. order reserving 68% of seats as unconstitutional and ultra virus.

Further the supreme court held that, in the present case had categorized that backward classes on the sole basis of ‘Caste’ is not permitted by Article 15(4). In the first time the Supreme Court fixed 50% reservation as a ceiling limit, beyond which any reservation is made that is ultra virus and invalid.

But it is unfortunate that the age old 50% reservation policy is still being followed in Mandal case etc. Therefore the judiciary should modify its attitude towards Scheduled Castes and Scheduled Tribes by enhancing the percentage from 50% to 68% in all educational institutions and in public employment as the population of Scheduled Castes and Scheduled Tribes has increased substantially.

In case, sufficient number of candidates for the reserved vacancies are not available, can the government carry forward those vacancies to the next year? This question raised before the supreme court in, T. Devadasan Vs. Union of India. In this case, Devadasan was an assistant in the central secretariat. An examination was conducted for promotion to section officer in which he scored high marks. But he could not get promotion because of reservation for SC/ST. Though the reserved vacancies were only 17.7 percent a year, there was a “Carry forward” rule under which unfilled vacancies of the two previous years could be added to the present year. Applying that rule in the present year, 29 out of 45 seats went to SC/STs, that was 64% of the seats. The

10 AIR 1964 SC 179
carry forward rule was therefore challenged before the court as violative of the equality guaranteed in Article 14 and 16 (1) of the Constitution.

The Majority (4:1) on the Constitution bench struck down the carry forward rule. The majority held that Article 14 envisaged equality among equals and not absolute equality. Article 16 (4) provides for reservation for the backward classes who are not adequately represented in the services. But if the reservation was excessive that it practically denied a reasonable opportunity to members of other communities. Further in the judgment stated that, while reserving seats for backward classes, the government should bear in mind the repercussions from year to year. What precise method should be adopted was a matter for the government to consider. But it must strike a reasonable balance between the claims of the backward classes and claims of other employees.

The court held that Article 16 (4) was a proviso or an exception to Article 16 (1). Therefore, a proviso cannot be interpreted to nullify or destroy the main provision. To hold that unlimited reservation could be made under clause (4) would in effect efface the guarantee of equality in clause (1) or at best make it illusory. No provision can be so construed as to destroy another provision in the act, the majority, judgment said. Reservation in excess of 50 percent would be unconstitutional.

However, Justice Subba Rao wrote a dissenting judgment in which he held that Article 16 (4) was independent of Article 16 (1). It grants unlimited power to the government in reservation. The only two conditions are that there must be backward citizens and they are not adequately represented in the services. Just because too many posts go to reserved candidates is no reason to assail the carry forward rule unless “Unreasonable disproportionate” number goes to them. It is inevitable that there would be some deterioration in the standard of service but the provision cannot be held to be bad on that account the dissenting judge said.
Again in **General Manager, S. Rly Vs. Rangachari**\(^{11}\) a question raised before Supreme Court whether benefit of reservation is applicable only for initial appointments or it can be extended to selection posts or promotional posts?

In this case, the southern railway Board declared reservation of selection post in class III of the railway service in favour of SC/ST. This was challenged by a Southern Railway employee in the Madras High Court. The court restrained the railway appealed to the Supreme Court. The affected person argued that Articles 16, 335, 338 and 339 would show that the Constitution drew a clear distinction between SC/ST and other backward classes. Article 16 (4) applied only to reservation at the appointment stage and not at the selection stage. It was also contended that if the railway circular was implemented, he would be reserved to a lower post causing loss to him both financially and in status. The railway argued that Article 16 (4) covered not only SC/ST but all backward communities. But the Supreme Court reversed the High Court decision. The railway circular was not ultra virus. Promotion was included in Article 16 (1) and (2). The Majority judgment stated that the initial appointment was only one of matters relating to employment. The other matters are Salary, periodical increments, terms as to leave gratuity, pension and age of super annuation. All these are “Matters relating to employment”, stated in Article 16 (1).

Matters relating to employment include all matters in relation to employment both prior and subsequent to the employment which is incidental to the employment. The key clause of Article 16 (4) unambiguously indicates that the word “posts” cannot mean excadere posts. The context requires that “Posts” should be deemed to be posts inside services and not outside them.

Even though, this ruling prevailed Supreme for Several years, this has been overruled by the **Mandal Commission Case**\(^{12}\) Consequent to this overruling the parliament brought an amendment to Article 16(4) and inserted

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\(^{11}\) AIR 1962 SC 36

\(^{12}\) AIR 1993 SC 477
clause (A) which says “Nothing in this Article shall prevent the state from making any provision for reservation in matters of promotion of any class or classes of posts in services under the state in favour of Scheduled Castes and Scheduled Tribes which in the opinion of the state are not adequately represented in the services under the state”.

In this case the court struck down the economic criterion for reservation on the ground that Art, 16 (4) does not mention it. The court held that Caste could be used for the purpose of identifying the backward classes. It is submitted that the rejection of economic criterion for determining backwardness will create serious problems in identifying the backward sections among backwards for which the Supreme Court wants jobs to be reserved. In fact, this can only be done on the basis of economic yardsticks.

The judgment of the court in this case has been criticized by an eminent jurist, Nani A. Palkhiwala, on the ground that it will revive Casteism which the Constitution emphatically intended to end. He quotes Dr. Ambedkar’s words who also were opposed to Caste consideration in matters of reservation Dr. Ambedkar Said:-

“Fraternity means a sense of common brother hood of all Indian ..........Castes is anti national; in the first place they bring about separation in social life. They are antinational also because they generate jealousy and antipathy between Caste and Caste. But we must over come all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity – equality and liberty will be no deeper than coats of paint”.

Another question of quantum of reservation comes in for consideration before the Supreme Court in N.M. Thomas Vs. State of Kerala. In this case the State of Kerala, a large number of Government Servants belonging to Scheduled Castes and Scheduled Tribes were unable to get their promotions

13 AIR 1976 SC 490
from lower division clerks to upper division clerks in the registration department. To provide relief to the backward classes of citizens the Government in cooperated rule 13AA under the Kerala State and subordinate service rules 1958 enabling the Government to give exemption for two years to the Scheduled Castes and Scheduled Tribes from passing the necessary tests. As a result of this, 34 out of 51 posts were filled up by the members of the Scheduled Castes and Scheduled Tribes without passing the tests. The petitioner, N.M. Thomas, a lower division clerk was not promoted despite his passing the test. The petitioner questioned the validity of Rule 13 AA as violative of Article 16 (1) and not protected by Article 16 (4) before the High Court of Kerala. The High Court agreed with it and struck down the rule. Therefore, the State Government appealed to the Supreme Court. It argued that Article 16 (1) permitted rational classification.

The Supreme Court upheld the validity of the rule and set aside the High Court judgment. It stated that equality of opportunity should not be confused with absolute equality. Article 16 (1) does not reasonable rules for selection to any employment. Promotion to a selection post is also included in the matters relating to employment. Article 16 (4) provides for reservation for appointed and selection posts. The classification of SC/ST employees separately for allowing them an extended period of two years for passing the special treatment was an integral feature of the service conditions in Kerala. The Judgment Clearly shows that in order to provide adequate representation to Scheduled Castes and Scheduled Tribes, the State can adopt any technique or method to secure Justice to these classes of people.

From the above decision of the Supreme Court evident that, equality can’t be calculated on mathematical basis but it should be on the basis of socio-economic conditions of the people by giving relaxation of two years for the SC and ST employees for passing the departmental examination is perfectly in accordance with the sprit behind the concept of social justice which was very much insisted and emphasized by Dr. Ambedkar.
Again the Supreme Court was confronted with the problem of “Quantum of reservations” to be given to the backward classes including Scheduled Castes and Scheduled Tribes in *Akhil Bharathiya Shosit Karamachari Sangh (Rly) Vs. Union of India*.\(^{14}\) In order to protect the interests of Scheduled Castes and Scheduled Tribes, the parliament brought an amendment to Article 16 (4) and inserted clause (4B) in the year 2000 which came into effect from 9-6-2000. According to this 16 (4B), the state is permitted to consider any unfilled vacancies of a year which are reserved for being filled up that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies of that year.

Justice Chinnappa Reddy also observed that, the rule of 50% laid down in earlier cases was only for the guidance of judges and were not bound by it. But in *K.C. Vasanth Kumar Vs. State of Karnataka*\(^{15}\) the five judges constituting the bench wrote separate opinion trading a path their own. Chandra Chud, C.J. opined that, the present reservation must continue for another 15 years without the means test. The test of economic backwardness ought to of reservations actually reach the deserving sections.

Justice Desai also expressed the view that, the time has come to review the criterion for identifying the backward classes ignoring the Caste label. The only criterion should be economic backwardness. Benefits of reservation have so far been snatched by the creamy layer of the backward Castes. This must be avoided at all costs.

Justice Chinnappa Reddy was of the view that identification of backward classes on the basis of Caste cannot be taken exception to for the reason that in the Indian context Caste is a class. Caste, the learned Judge

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\(^{14}\) AIR 1981 SC 298

\(^{15}\) AIR 1985 SC 1495
observed, if the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person’s Caste. However, he disagreed with the identified a socially, economically, backward classes, the relevant groups should be comparable to Scheduled Castes and Scheduled Tribes in social and educational backwardness.

Justice A.P. Sen was of the opinion that the predominant and only factor for making special provision under Article 15(4) and 16 (4) should be poverty and that Caste should be used only for purpose of identification of groups comparable to the Scheduled Castes and Scheduled Tribes. The reservation should continue till such time as backward classes attain a state of enlightenment.

E.S. Venkataramaiah J. agreed with Chinnappa Reddy J. that identification of backward classes can be made on the basis of Caste. He cited the Constituent Assembly and parliamentary debates in support of his view and he did not agree with the argument of Merit.

The above decisions of the Supreme Court shows that, the doctrine of protective discrimination is Constitution ally permitted in Articles 15 (4), 16(1) and 16 (4) the state can adopt any measures to provide justice to the backward classes including Scheduled Castes and Scheduled Tribes. But it is also clear that no fundamental right to protective discrimination in the sense of imposing an affirmative duty on the state to ensure substantive equality is expressly embodied in the Constitution. Wide discretionary powers are given to the state to make various special provisions to the backward classes including the Scheduled Castes and Scheduled Tribes in such a way that it shall not eat away the benefits conferred to the others in the main provisions of the Constitution.

However, in extra-ordinary situations it may be relaxed in favour of people living in far flung and remote areas of country who because of their peculiar conditions and characteristics need a different treatment. But in doing so the court said extreme caution is to be exercised and a special case in made out. On this point the majority affirmed Balaji and Devadasan cases in which the 50% rule was laid down and over ruled the State of Kerala Vs. N.M.
Thomas and K.C. Vasanth Kumar Vs. state of Karnataka cases. The court relied on the speech of Dr. AMBEDKAR in the Constituent Assembly where he said that “reservation must be confined to a minority of seats”. Article 16 (4) speaks of adequate representation and not proportionate representation. If a member of Scheduled Castes and Scheduled Tribes are selected in the open competition on the basis of merit they should not be counted against the reserved quota. However the rule of 50% shall be applicable to exemptions, concessions or relaxation if any provided to backward classes of citizens under Article 16 (4).

But unfortunately in Indra Sawhney Vs. Union of India\(^\text{16}\) again the Supreme Court insisted on the 50% rule. In this case, the union governments, through its office memorandum, reserved 27% posts for backward classes in Government services on the basis of the recommendations of the Mandal Commission. Soon after, the next Government also issued an office memorandum in which another 10% of posts were reserved for socially and educationally backward classes of higher Castes. The total reservation, including Scheduled Castes and Scheduled Tribes went beyond 50%. The Supreme Court by 6.3 majority held that the reservation made under Article 16 (4) shall not exceed 50%. However, the court also pointed out that under certain exigencies this rule may be slightly relaxed, as India is known for unity in diversities. In this case also, the judiciary has shown its positiveness to effectuate the reservation policy in favour of Scheduled Castes and Scheduled Tribes.

5.1.2 Creamy Layer Concept:

The Supreme Court of India in Mandal Commission case has authoritatively laid down that the affluent part of a backward class called ‘Creamy layer’ has to be excluded from the said class and the benefit Article 16(4) can only be given to the ‘class’, which remains after the exclusion of the

\(^{16}\) AIR 1993 SC 477
‘creamy layer’. In Ashoka Kumar Thakur Vs. State of Bihar\textsuperscript{17} the Supreme Court held that the categories of persons who were excluded from reservation as mentioned in schedule 11 read with section 3 (b) of the Uttar Pradesh Public Service reservation for Scheduled Castes and Scheduled Tribes and other Backward classes Act, 1994 (4 of 1994) are not to be considered as ‘creamy layer’. The court observed that, the creamy layer should be excluded from the reservation as laid down by the Supreme Court in Mandal case. Infact, this concept of creamy layer laid down by the Supreme Court is an innovative method of achieving social justice. This is because of the fact that the benefit of reservation under Articles 15(4) and 16(4) should go to the needy persons and not to the economically forward class among the backward. Therefore, the court struck down the criteria laid down by the state of Bihar and Uttar Pradesh for identifying the ‘Creamy Layer’ and declared them as arbitrary and unreasonable.

Again the Supreme Court intervened with the in respect of single posted reservation for Scheduled Castes and Scheduled Tribes, in Chakradhar Paswan Vs. State of Bihar.\textsuperscript{18}

In this case the state Directorate of Indigenous Medicines, Bihar, initially, there were three classes – I posts i.e., Director of Indigenous Medicines. Deputy Director of Indigenous Medicines, Deputy Directory (Homeopathic) and Deputy Director (Unani). Later the post of Deputy Director (Ayurvedic) had also been added. The post of Director was the highest in the Directorate of Indigenous Medicines as a whole and not of any particular specialty of Indigenous Medicines.

The State Government of Bihar in its circular dated November 8\textsuperscript{th}, 1975, prescribed a 50-point roster to implement the policy of reservation to posts and appointments for members of the backward classes under Article 16(4). It was laid down that, “if in any grade, there is only one vacancy for the first time,

\textsuperscript{17} (1995) 5 SCC 403
\textsuperscript{18} AIR 1988 SC 959
then it will be deemed to be unreserved and for the second time also, if there be only one vacancy, then it will be deemed to be reserved”.

For the purpose of determining the quantum of reservation according to the roster, the Government grouped together all the class – I posts Viz., the posts of Director as well as Deputy Directors and as the post of Director had already been filled up treating it to be unreserved, the second post viz., the Deputy Director (Homeopathic) was treated as reserved. Accordingly, the state public service commission issued advertisement inviting applications from Scheduled Castes for selection to the same posts and ultimately the state government appointed a member of Scheduled Caste to the post of Deputy Director (Homeopathic). Then a writ petition was filed before the High Court of Patna by the general candidates challenging the advertisement issued by the state public service commission and the consequent order of appointment. The High Court quashed the impugned advertisement and the appointment order. An appeal was made to the Supreme Court against the judgment and order of the Patna High Court. The appeal was dismissed by the Supreme Court and it held that; in service jurisprudence, the term ‘Cadre’ has a definite legal connotation. It is not Synonymous with service. It is open to the Government to constitute as Many cadres in any particular service as it may choose according to the administrative convenience and expediency and it cannot be said that, the establishment of the Directorate constituted the formation of a joint cadre of the Director and deputy directors because the posts are not interchangeable and the in incumbents do not perform the same duties or carry the same responsibilities or draw the same pay. The post of the Director and those of the Deputy Directors constitute different cadres of the service. The first vacancy in the cadre of the Deputy Directors was that of the Deputy Director (Homeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. The court also observed that, the whole concept of reservation for application of the 50-point roster is that, there are more than one post and the reservation can be made up to 50%. If there is only one post in the cadre, there can be no reservation with reference to the post either for recruitment at the
initial stage or for filling up a future vacancy in respect of that post. Besides, the court also held that, for implementing the 50 – point roster, isolated and separate posts in different specialties couldn’t be clubbed together. Reservation of posts, by applying the roster, can be made only where there is more than one post. That means, any reservation that comes under article 16(4) presupposes the availability of at least more than one post in that cadre. No reservation could be made under Article 16(4) so as to create a monopoly: otherwise it would render the guarantee of equal opportunity contained in the Article 16 (1) and (2) wholly meaning less and illusory. Therefore, the reservation of the post of Deputy Director (Homeopathic) amounted to 100% reservation, which was impermissible under Article 16(4). As the three posts of Deputy Directors of Homeopathic, Unani and Ayurvedic are distinct and separate as they pertain to different discipline and each one is an isolated post by itself carried in the same cadre, there can be no reservation for a single post in a cadre under Article 16(4) of the Constitution of India.

But, the Supreme Court had taken the different view on the single post reservation in Madhav Vs. union of India.19 In this case, the national savings scheme service, there were various posts but there was only one post of secretary. The Government applied the rule of reservation to that post by rotating the vacancies in accordance with the 40 – point roster. When point no 4 vacancy in that post, reserved for Scheduled Tribe, was filled by promoting the Scheduled Tribe candidate from the post below, such promotion was set aside by the Central Administrative Tribunal on the ground that the post of secretary being a single point post, granting of reservation was unconstitutional. An appeal was made to the Supreme Court by the Government Wherein the court observed that reservation could be provided even to the isolated posts on the basis of rotation. Extensions of reservation in such cases are not unconstitutional.

The court also observed that, appointment to an office or post under the state is one of the means to render socio-economic justice. Article 16 (4A)

19 AIR 1997 SC 332
introduced in the Constitution of India in 1995 has resuscitated the objectives of the preamble and Articles 46 and 335 of the Constitution of India to enable the SCs & STs employees to improve excellence in higher echelons of service and a source of equality of opportunity in the matter of social and economic status. As a consequence, parliament has removed the lacuna pointed out by the Supreme Court in Indra Sawhney Case. Thus, the legal position settled by the Supreme Court in Rangachari case has been restored and held that reservation of appointment by promotion would be available to the members of the Scheduled Castes and schedule Tribes as per 50% quota maintained in Indra Sawhney Case. The court observed that, if the Government has applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and filled up by the candidates belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16 (1) for the Constitution. Therefore, it was observed that the roster point no.4 in the vacancy of the secretary reserved for the Scheduled Tribes was valid and Constitutional.

But in Post-Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association,20 in this case Supreme Court held that, there cannot be any reservation in a single post cadre either directly or by device of rotation of roster point. Such total exclusion of general members of the public and cent percent reservation for the backward classes is not permissible under Articles 16 (1) and 16 (4A) of the Constitution. In making reservation for backward classes the state cannot ignore the fundamental rights of the rest of the citizens.

In this case, petition filed by the post Graduate Institution of Medical Education and Research, Chandigarh Seeking a direction to validate the Constitutionality of reservation in a single post cadre in view of the conflicting decisions of the court. The court held that Article 14, 15 and 16 including Article 16 (4) and 16 (4A) should be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable

20 AIR 1998 SC 1767
opportunities for reserved classes and also for other members of the community who did not belong to the reserved category. Such a view has been indicated in the decision of the court in Balaji and Indra Sawhney cases, the same view has been indicating that only a limited reservation not exceeding 50% is permissible. The court added that Article 15 (4) and that the reservation under both Articles should not exceed 50% limit. The court said that the doctrine of equality of opportunity in clause (1) of Article 16 had to be reconciled in favour of the backward classes under Article 16 (4) in such a manner that the later while serving the cause of the backward classes shall not unreasonably encroach upon the field of equality.

Further, the Supreme Court ruled that, until there is plurality of posts in a cadre, the question of reservation by whatever means and even with the device of rotation of the roaster in a single post cadre, is bound to create 100 percent reservation of such a post whenever such reservation is implemented. But this view is not proper and reasonable to secure social Justice, which is a well settled principle, that preamble is part of the Constitution.

5.1.2 Abolition of Untouchability:

Article 17 of the Indian Constitution abolishes “Untouchability” and forbids its practices in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law. Historically the untouchability is a product of the Hindu Caste System according to which particular section amongst the Hindus had been looked down as untouchables by the other sections of the society. Where some sections of the society were denied some privileges, they were prevented from entering into temples, public places, restaurants, tanks, wells, educational institutions and socially they were boycotted in their villages by the Caste Hindus. Therefore, the Constitution al framers objectively incorporated a provision to eradicate untouchability and to provide equal status to them along with the Caste Hindu.
‘Untouchability’ is neither defined in the Constitution nor in the act. The Mysore High Court has interpreted that the term is not to be understand in its literal or grammatical sense but to be understand as the ‘Practice as it had developed historically’ in this country.

The Supreme Court some extent attempted to eradicate the untouchability through some decisions. In State of Karnataka Vs. Appu Balu Ingale, the respondents were tried for offences under sections 4 and 7 of the Protection of Civil Rights Act 1955 and convicted and sentenced to undergo simple imprisonment for one month and a fine of Rs. 100 each. The charge against the respondents was that they restrained the complaint party by show of force from taking water from newly dug up bore well (tube well) on the ground that they were untouchables. The High Court acquitted them. The Supreme Court upheld the conviction. The court held that the object of Article 17 and the Act is to liberate the society from blind and ritualistic adherence and traditional belief which has lost all legal or normal bases. It seeks to establish new ideas for society’s equality to the Scheduled Castes at par with general public, absence of disabilities, restrictions or prohibitions on grounds of Caste.

In Asiad Project Workers Case, the Supreme Court has held that the fundamental right under Article 17 is available against private individuals and it is the Constitution al duties of the state to take necessary steps see that these fundamental rights are not violated. It should be noted that Article 15 (2) also helps in the eradication of untouchability. Thus on the grounds of untouchability no person can be denied access to shops, public restaurants, hotels and places of entertainment or the use of wells, tanks bathing ghats, road and places of public resort maintained wholly or partly out of the state funds or dedicated to the use of general public.

Article 17 is one of the important provisions included in the Constitution of India for the complete removal of age-old social practice of ‘Untouchability’ from the Hindu Social Order. The Constitution makers deliberately included

21 AIR 1993 SC 1126
22 AIR 1982 SC 1473
this provision to provide equal status to the Scheduled Castes and Scheduled Tribes Vis-à-vis, the Caste Hindus and to establish an egalitarian society. Therefore, the Constitution of India under Article 35 has empowered the parliament to make suitable enactments to punish those individuals and institutions who infringe the fundamental rights guaranteed under Article 15 and 17 of the Constitution. The concept of untouchability and its eradication as contemplated under the Constitution of India and various enactments relating to it have been discussed in the previous chapter.

5.1.3 Protection of Life And Personal Liberty Under Article 21:

One of the important rights guaranteed in the Constitution of India by the Constitution al framers is ‘Right to life and personal Liberty’ of an individual under Article 21. This Article says that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. This Article provides the two rights namely right to life and personal liberty to all persons against the executive and legislative actions. But under this Article a persons life and personal liberty can be deprived through the procedure prescribed by law but, procedure should not be unjust, unfair and unreasonable.

The Supreme Court of India, in several cases, has interpreted the word ‘right to life and personal liberty’. In the first time, the Supreme Court in A.K. Goplan Vs. State of Madras,\(^\text{23}\) interpreted the term personal liberty and observed that, the word ‘Personal liberty was confined only to freedom from arrest, detention of physical restraint. It also observed that, the term personal liberty confined or limited to freedom from punitive and preventive detention. Again the question of interpreting the word ‘Personal liberty’. Came up before the Supreme Court in Kharak Singh Vs. State of Uttar Pradesh.\(^\text{24}\) In this case, Kharak Singh had been charged in dacoit case but was released as there was no evidence against him. Under U.P. Police regulations, the police opened

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\(^{23}\) AIR 1950 SC 27
\(^{24}\) AIR 1963 1295
a history sheet for him and he was kept under police surveillance which included secret picketing of his house by the police, domiciliary visits at nights and verification of his movements and activities. ‘Domiciliary Visits’ mean visits by the police in the night to the private house for the purpose of making sure that the suspect is staying home or whether he has gone out. This regulation was challenged by the movement guaranteed in Article 19 (1) (d) and in Article 21. The Supreme Court held that, the domiciliary visits of the policemen were an invasion on the petitioner’s personal liberty and an unauthorized intrusion into a person’s home and the disturbance caused to him is the violation of the personal liberty of the individual. Therefore, the police regulation authorizing domiciliary visits was plainly violative of Article 21 as there was no law on which it could be justified and it must be struck down as unconstitutional.

Again, the Supreme Court interpreted the term ‘right to life’ in Francis Coralie Vs. Union Territory of Delhi. In this case the court opined that, right to live is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world, but it also includes the right to live is not restricted to mere animal existence, but it is more than just physical survival. It includes, the right to live with human dignity, and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing our views in diverse forms, freely moving about and mixing with fellow human beings.

In this case the validity of the provisions of the COFEPOSA which provided that a defense can have interview with his lawyer only after obtaining prior permission of the District Magistrate and that too, in the presence of the custom officer and permitted interview of the family members only once in the month, were challenged on the ground that they were arbitrary and unreasonable and violative of Articles 14 and 21. The court held that the provisions of the COFEPOSA which permitted only one interview in a month

25 AIR 1981 SC 746
to detune with members of his family were violative of Articles 14 and 21 unconstitutional and void. The word “personal liberty” in Article 21 is of the widest amplitude and it includes the “right to socialize” with members of family and friends, subjects of course, to any valid prison regulations which must be reasonable and non arbitrary. The provision which restricts the interview only to once in a month is unreasonable and arbitrary particularly when a detenue stands on a higher footing than an under-trial prisoner or a convict. A detenue must be permitted to have at least two interviews in a week with relatives and friends with the prior permission of the District Magistrate. On the same reasoning the provisions regarding permission to have interview with a legal lawyer was also held to be unconstitutional because it would cause great hardship and inconvenience to the lawyer who could have to apply to the District Magistrate well in advance and the time fixed the District Magistrate might not be suitable to the lawyer. More over, the interview must be taken in the presence of a custom officer and if he did not for any reason attend the interview as had happened on several occasions the interview could not be held at all and the lawyer would have to go back with out meeting the detenue and the entire procedure would have to be repeated again for applying to the District Magistrate. Thus this requirement renders the right to consult a legal advisor illusory. The right to detenue to consult a legal advisor of his choice for any purpose including securing release from preventive detention is included in the right to live with human dignity and is also part of personal liberty and cannot be interfered with except in accordance with reasonable fair and just procedure established by a valid law.

5.1.3.1 Right to Life and Its Basic Necessities:

1. Right to Livelihood:

Article 21 of the Constitution of India guarantees the most fundamental of all rights, namely, the ‘Right to Life’. This is the fundamental on which the super structures of other rights are built. In Bandhu Mukti Morcha Vs. Union
of India,\textsuperscript{26} the Supreme Court held that, “It is the fundamental right of everyone in this country to live with human dignity, free from exploitation. The right to live with human dignity derives its life breath from the Directive Principles of state of policy, particularly Articles 39 (e) and (f) 41 and 42 of the Constitution. Though the human dignity must include, protection of health and strength of workers, tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and conditions of freedom and dignity, educational facilities, just and humane conditions of work.

In \textit{people union for Democratic Rights Vs. Union of India}, \textsuperscript{27} the Supreme Court held that, non payment of minimum wages to the workers employed in various Asiad projects in Delhi was a denial to them of their right to live with basic human dignity and violation of Article 21 of the Constitution of India. The court also held that the rights and benefits conferred on the workmen employed by a contractor under various labour laws are clearly intended to ensure basic human dignity to workmen and if the workmen are deprived of any benefits that would clearly be a violation of Article 21, and non-implementation by the private contractors and non enforcement by the state authorities of the provisions of various labour laws violated the fundamental right of workers to live with human dignity.

This decision has heralded a new legal revolution. It has clothed millions of workers in factories, fields, mines, and projects sites with human dignity. They had fundamental right to maximum wages, drinking water, shelter crèches, medical aid and safety in the respective occupations covered by the various welfare legislations.

For the first time, the Supreme Court gave a wider meaning to the expression ‘right to life’ in \textit{Olga Tellies Vs. Bombay Municipal Corporation},\textsuperscript{28} popularly known as the ‘pavement dwellers case’ a five Judge bench of the court has ruled that the word ‘Life in Article 21 includes the ‘right to livelihood’ also. The court said; it does not mean merely that life

\textsuperscript{26} AIR 1984 SC 802  
\textsuperscript{27} AIR 1982 SC 1473  
\textsuperscript{28} AIR 1986 SC 180 (1985) 3 SCC 545
cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the Constitutional right to life the easiest ways of depriving a person of his right to life would be to deprive him of his means of livelihood. In view of the fact that Article 39 (a) and 41 require the state to secure to the citizen an adequate means of livelihood and the right to work, it would be sheer pendentary to exclude the right to livelihood from the content of the right to life”. Therefore, when a person is deprived of his right to livelihood except according to just and fair procedure established by law, he can challenge such deprivation as it offends his right to life.

In Neeraja Chaudhari Vs. State of Madya Pradesh.\textsuperscript{29} the supreme court, through justice Bhagawati, has observed that it is not enough merely to identify and release bonded labourers but it is more important that they must be rehabilitated because without rehabilitation they would be driven to poverty, helplessness and despair thus into serfdom once again. This is the plainest requirement of Article 21 that the bonded labourers must be identified and released and suitably rehabilitated. The act has been enacted pursuant to the directive principles of state policy with a view to ensure basic human dignity to the bonded labourers and any failure of action on the part of the state in implementing the provisions of this legislation would be the clearest violation of Article 21 of the Constitution.

State of Himachal Pradesh Vs. Umed Ram.\textsuperscript{30} In this case, some Scheduled Caste members in Shimla district of Himachal Pradesh sent a letter petition to the High Court alleging that the construction of a road connecting their villages were prevented by persons from other villages in collusion with the authorities. They complained that in the absence of road, they had to claim

\textsuperscript{29} AIR 1984 SC 1099

\textsuperscript{30} AIR 1986 SC 847
five miles of a hill to reach the nearest town, those too carrying heavy loads on their backs. They pleaded that democracy was meaningless to them under these circumstances, when they had no access to the outside world. Their right to dignified life (Article 21) and the right to move freely (Article 19) were violated in the context of Article 38 (2) which enjoined the executive to minimize equalities in income, facilities and opportunities among citizens living in different parts of the country.

In its reply the State Government narrated the steps it had taken to build the road. The road could not be completed due to lack of funds, it said. The High Court directed the PWD to proceed with the construction of the road and complete it within the financial years. It also asked the PWD engineer to make an application to the government to sanction the required fund and the government was requested to consider the demand favorably. The court asked the PWD engineer to report to it at the next hearing the progress of the road building. At this stage, the state government appealed to the Supreme Court objecting to the High Court directions. It challenged the High Court’s power to direct it to allot funds to the project. Funds were allotted by the legislature in financial budgets annually. The executive decides the priorities. The court cannot interfere in the field assigned to the legislature and the executive, it was argued in the Supreme Court.

The Supreme Court stated that the High Court had not exceeded its power in passing the orders. The High Court, in essence, had only asked the executive to bring to the notice of the legislature whether some reallocation was feasible in the sanctioned funds for roads, leaving the priorities to the discretion of the competent authorities. “The High Court has served its high purpose of dreaming attention to the public need and indicated a feasible course of action. Nothing further need to the done by the High Court in this matter”.

The court observed that, the right to life in Article 21 “embraces not only physical existence of life but also the quality of life for residents of hilly areas, access to road is access to life itself.” By interpreting the expression right to livelihood also’, in this case Scheduled Castes that were living in the hilly
region of Himachal Pradesh had no access to road to earn their daily bread, which affected their livelihood.

2. Right to Shelter:

In a civilized society, every individual requires ‘Shelter’ to have a decent and dignified life. Therefore, the Supreme Court in several cases has observed that ‘right to shelter’ is an integral part of ‘right to life’ under Article 21 of the Constitution. This can observe in Chameli Singh Vs. State of Uttar Pradesh.\(^{31}\) The Supreme Court observes that the right to shelter is a fundamental right under Article 21 of the Constitution. In any organized society, the right to live as a human being is not ensured by meeting only the animal needs of a man. It is secured only when he is assured of all facilities to benefit himself. Right to live guarantee in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and convention or under the Constitution of India cannot be exercised without the basic human rights. Shelter for human being, therefore, is not a mere protection of his life and limb. It is home where he had opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter includes adequate living peace, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civil amenities like roads etc., so has to have easy access to his daily avocation. The right to shelter, does not mean a mere right to a roof over one’s head but right to all the infrastructure necessary to enable them to live and develop as a human being. In view of the importance of the right to shelter, the mandate of the Constitution and the obligation under the Universal Declaration of Human Rights, the court held that it is the duty of the state of provides housing facilities to Scheduled Castes and Scheduled Tribes, to enable them to come into the mainstream of national life.

\(^{31}\) (1996) 2 SCC 549
In Ahmedabad Municipal Corporation Vs. Nawabkhan Gulab Khan\textsuperscript{32} the supreme court interpreted that, shelter is an aspect of right to life and it is the duty of the state to provide adequate facilities and opportunities to the pavement dwellers for the erection of shelter over their heads to make the ‘right to life’ meaningful, effective and fruitful. The court also observed that though no person has a right to encroach and erect structure or otherwise on foot paths, public streets of any other place reserved for public purpose, it is the Constitutional duty of the state to provide necessary facilities to them to carry on their business for their livelihood. The deprivation of ‘right to life’ in that context would not only denude life of effective content and meaningfulness, but it would make life miserable and impossible to live. The Supreme Court concluded that, without provide necessary facilities; the state removing of pavement dwellers from footpaths of public streets would be violation of the right to life under Article 21 of the Constitution. It is one of the important right, which go to make life meaningful and dignified is the right to medical aid and health. To the any person refuse to give medical treatment within in time it is violation of Article 21 of the Constitution. The Supreme Court has observed that in Paramand Katara Vs. Union of India.\textsuperscript{33} In this case, the human rights activist filed the petition before the Supreme Court, on the basis of a report entitled ‘Law helps the injured to die’ published in the Hindustan Times. In that report it was alleged that a scooterist was knocked down by a speeding car. Seeing him profusely bleeding a person who was on the road picked up the injured and took him to the nearest hospital. The doctor refused to attend and asked him to take him to another hospital located some 20 km away authorized to handle medico-legal cases. The man carried the victim to the hospital and before he could reach there the victim succumbed to his injuries.

The court held that it is the professional obligation of all doctors, whether government or private to extend medical aid to the injured,

\textsuperscript{32} (1997) 11 SCC 121
\textsuperscript{33} AIR 1989 SC 2039
immediately, to preserve life without waiting for legal formalities to be complied with by the police under criminal procedure code. Article 21 of the Constitution casts the obligation on the state to preserve life. No law or state action can intervene to delay the discharge of this paramount obligation of the members of the medical profession.

The court directed that in order to make every one aware of this position the decision of the court must be published in all journal reporting decisions of this court and adequate publicity highlighting these aspects should be given by the national Media. The medical council must send copies of this judgment to every medical colleges affiliated to it. This is a very significant ruling of the court. It is submitted that if this decision of a court is followed in its true spirit it would help in saving the lives of many citizens who die in accidents because no immediate medical aid is given by the doctors on the ground that they are not authorized to treat medico legal cases. Let us hope that all doctors (Government or private) of this country should follow these rulings of the court earnestly.

In **Consumer Education and Research Centre Vs. Union of India.**\(^{34}\) Supreme Court observed that ‘right to medical aid and health, is an integral part of Article 21 of the Constitution. In this case, the workers who were working in the asbestos industry were affected by asbestosis and became prone to lung cancer and related ailments. Under these facts, the court held that, ‘right to life’ under Article 21 includes right to health and medical care. It further observed that, the state, be it union or state government or an industry, whether public or private is obligated to take all actions which will promote health, strength, and vigour of the workmen during and after service. The ‘right to life’ with human dignity encompasses with in its fold, some of the finer facets of human civilization, which makes life worth living.

In order to make the life of the workmen meaningful, the Supreme Court laid down the following guidelines to be followed by the asbestos industries in India.

\(^{34}\) (1995) 3 SCC 42
a. All asbestos industries must take health insurance of workers employed in industry.
b. Every worker suffering from occupational health hazards would be entitled for compensation of Rs. 1 lakh;
c. All asbestos industries must maintain the health record of every worker up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of the employment which ever is later.
d. “Membrane filter test” to detect asbestos fiber should be adopted by all the factories on par with metalliferous Mine Regulations 1961 and Vienna convention.
e. All the factories whether covered by the Employees state Insurance Act, or Workmen’s Compensation Act. Or other wise should insure health coverage to every worker.

3. Right to Education:

For the First time the Supreme Court observed in Mohini Jain Vs. State of Karnataka\(^{35}\) popularly known as “Capitation fee case”. In this case the court held that, the right to education is a fundamental right under Article 21 of the Constitution, which cannot be denied to a citizen by charging higher fee known as the capitation fee. The right to education flows directly from right to life. In this case a writ petition filed by Miss. Mohini Jain of meerut, Uttar Pradesh challenging the validity of the notification issued by the Government of Karnataka under Karnataka Educational Institutional (Prohibition of Capitation Fee) Act, 1984 which was passed to regulate the capitation fee collected by the private medical college in the state.

The petitioner, Miss. Mohini Jain was denied admission to medical college as she refused to pay the tuition fee of Rs. 60,000 per annum as per the notification. Justice Kuldip Singh and R.N. Sahai observed that right to education at all level (including professional education like medicine and

\(^{35}\) (1992) 3 SCC 666
engineering) is a fundamental right of citizen under Article 21 of the Constitution and charging exorbitant capitation fee makes the availability of education beyond the reach of poor people. The right to education is concomitant to the fundamental rights enshrined under part-III of the Constitution. Therefore, in order to have meaningful and dignified life, education is a must and inevitable.

In UnniKrishnan Vs. State of Andhra Pradesh\textsuperscript{36} the Supreme court was asked to examine the correctness of the decision given by the court in Mohini Jain’s case. The petitioners running Medical and Engineering colleges in the state of Andra Pradesh, Karnataka, Maharastra and Tamil Nadu contended that if Mohini Jain decision is correct and followed by the respective state Government they will have to close down their colleges. The five judge bench by 3-2 majority partly agreed with the Mohini Jain decision and held that right to education is a fundamental right under Article 21 of the Constitution as it directly flows from right to life. But as regards its content the court partly overruled the Mohini Jain’s case and held that the right to free education is available only to children until they complete the age of 14 years, but after that the obligation of the state to provide education is subject to the limits of its economic capacity and development.

The obligations created by Articles 41, 45 and 46 can be discharged by the state either establishing its own institutions or by aiding, recognizing or granting affiliation to private institutions. Private educational institutions are a necessity in the present day context. Mohini Jain’s case was not right in holding that charging of any amount must be described as capitation fee. Saying so amounts to imposing an impossible condition. It is not possible for the private educational institutions to survive if they charge fee prescribed by government institutions. The private sections sector should be involved and encouraged in the field of education. But they must be allowed to do so under strict regulatory controls in order to prevent private education. The charging of the permitted fees by the private educational institutions which is bound to

\textsuperscript{36} (1993), 1 SCC 645
higher than charged by in similar government institutions cannot itself be characterized as capitation fee. The majority, accordingly held that admission to all recognized private educational institutions particularly medical and engineering shall be based on merit, but 50 percent of seats in all professional colleges be filled by candidates prepared to pay a higher fee. The court held that there shall be no quota reserved for the Management or for any family, Caste or community which may have established such college. The criteria of eligibility and all other conditions shall be the same in respect of both “free seats” and “Payment Seats”, the only distinction shall be requirement of higher fee by payment students. The court evolved a scheme which would provide more opportunities to meritorious students who are unable to pay higher fee prescribed by Government for such colleges.

5.1.4. Judicial Remedies:

The Constitutional makers having incorporated the various fundamental Rights have also provided for an effective judicial remedy for the enforcement of these rights under Article 32 of the Constitution to the Supreme Court and under Article 226 to the High Court. Whenever there is violation of any fundamental rights can seek the judicial remedy through filing the writs under these provisions.

Article 32 of the Constitution 32 (1) gives the right to move the Supreme Court by “ appropriate Proceedings” for the enforcement of the fundamental rights conferred by part III of the Constitution. Article 32 (2) confers the power on the Supreme Court to issue appropriate directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights conferred under part III of the Constitution. Article 226 of the Constitution gives the same powers to the High Court of the states.
The importance of the Article 32 has been given in the Bandu Mukti Morcha Vs. Union of India. In this case, the Supreme Court was informed through a letter that bonded labour was in existence in stone-quarries in Faridabad district of the state of Haryana. And in the letter petitioners prayed that a writ be issued for proper implementation of the various provisions of the Constitution and Statutes with a view to ending the misery, suffering and helplessness of these labourers and release of bonded labourers. The court treated the letter as a writ-petition and appointed a commission consisting of two advocates to visit these stone quarries and make an enquiry and report to the court about the existence of bonded labourers, later on commission submit its report to the court.

After received the report court observed that, state is bound to ensure the observance of the labour legislation enacted for securing the workmen a like of human dignity and inaction part of the state in implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21. Further, the court directed the government to setright the inhuman living condition of the bonded labourers without filling objections whenever a writ or public interest litigation is filed regarding the bonded labour.

In this case, Justice Bhagwati explained the nature and purpose of public interest litigation as follows:

“Public interest litigation is not in the nature of adversary litigation but it is challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the significant tune of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an accession to examine whether the poor and the down trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the

37 AIR, 1984, SC 803
community. When the court entertains the public interest litigation, it does not do so in a caviling spirit or in a controversial mood or with a view to filling at executive authority or seeking to usurp it, but its attempt is only to endure observance of social and economic programmes framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights. Which is also the Constitutional obligation of the executive, the court is thus merely assisting in the realization of the Constitutional objective”.

Through the public interest litigation cases, the Supreme Court has emerged as a defender and champion of the weaker sections. Today, bonded labourers, slum or pavement dwellers, ill treatment prisoners, exploited women, Scheduled Castes and Scheduled Tribes, victims of police atrocities, economically backward classes etc., can approach the Supreme Court and High Courts for securing their human rights. Besides the new method of public interest litigation has created the awareness of the public regarding the social justice, dignity of human life.

In **State of Himachal Pradesh Vs. Umed Ram Sharma**\(^{38}\) some poor Scheduled Caste members write a letter to the chief justice of High Court complaining that, the state governments the construction of road connecting their villages were prevented by person from other villages in collusion with the authorities. In the absence of road they had to claim five miles of a hill to reach the nearest town. Their right to move and dignified life is violated under Article 19 and 21 of the Constitution respectively. Due to the pressure of the other villagers lack of fund of the government the road could not completed, they said. The High Court ordered the state government that completes the construction of road with in financial year. The state government at this stage approached the Supreme Court consider the ‘locus standi’ of the residents of the hilly area to approach the court and treating a right of access to road as right to life.

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\(^{38}\) AIR 1986 SC 847
From the above illustrations can come to that, the Constitutional remedies inserted in the Constitution of India under Article 32 and 226 protects the interest of the weaker sections of the society. In this regard, Ambedkar words are very worth that is “If I was asked to name any particular Article in this Constitution as the most important- an Article without which this Constitution would be nullity – I could not refer to any other Article except this one... “Article 32 is the very soul of the Constitution and the very heart of it”.

Again, the supreme court of India was confronted with the question whether state can acquire a land belonging to private persons for the purpose of a Scheduled Caste welfare scheme? This question was affirmatively answered by the court in state of Tamil Nadu Vs. Ananthi Ammal. In this, case, the impugned legislation passed by the Tamil Nadu Assembly i.e., the Tamil Nadu Acquisition of land for Scheduled Caste welfare scheme Act, 1978 was challenged by the petitioner in the High Court of Tamil Nadu. Under this Act, section 3 defines, A Scheduled Caste welfare scheme for constructing, extending, or improving any dwelling house for Scheduled Castes for providing any pathway’s leading to such dwelling house, burial or burning ground or providing any other amenities for the benefit of Scheduled Castes. Section 4(1) confers powers to District collector to acquire land if he is satisfied that for the purpose of Scheduled Caste scheme, it is necessary to acquire any land, he may acquire the land by publishing in the District Gazette a notice to the effect that he has decided to acquire the land in pursuance of this section. Section 4(2) says, before publishing a notice under sub-sec(1), the District collector or any officer so authorized may be interested in such land, to show cause why it should not be acquired. Besides, section, 20 of the above act states that the provisions of the Land Acquisition Act, 1894 save as provided in the said act shall cease to apply to any land which is required for the purpose specified in section 4(1) of the Tamil Nadu Acquisition of land for Scheduled Castes welfare scheme Act, 1978.

39 AIR 1995 SC 2114
The petitioner challenged the state law in the High Court of Madras regarding the absolute power conferred to the District Collector to give his decision on the question of acquisition of land without enquiry. It was also contended that, no enquiry into the value of land was provided for under the act. But the State’s contention was that to give effect to the directive principles of state policy mentioned under Article 46 of the Constitution, such acquisition of land was made. Having heard the contentions of both the petitioner and the respondent state, the High Court Struck down the whole act as unconstitutional as it did not enjoy the protection of Articles 31 C or 31 A and violation Article 14, 19 and 300-A of the Constitution. After words an appeal was made to the Supreme Court by the state on the ground that the act was protected by Article 31A. The Supreme Court upheld the whole Act except the provisions in section 11 for the payment of compensation by installment. The court observed that, after the amount has been determined, the prescribed authority shall tender payment of the amount to the persons entitled there to and shall pay it to them in a lump-sum. It also observed that the rest of section 11(1) is ultra virus to the Constitution.

The court rejected each of the contentions of the land owners with reasons. It also rejected the comparison of the State act with the Land Acquisition Act (Central Act). The court observed that, the power conferred to the District collector was held to be reasonable and non-arbitrary. Besides the computation of market value of the land vender the state law was considered by the court as unfair and unreasonable. This case is an important one where the Supreme Court upheld the validity of the state law as it was enacted to promote the economic interest of Scheduled Castes and Scheduled Tribes and other weaker sections of the society as provided under Article 46 of the Constitution.

It is clear from the above cases that, the state can make special provision for the advancement of any socially and educationally backward classes of Scheduled Castes and Scheduled Tribes in the form of reservation. But the reservation made for the advancement of these people shall not eat away or cease the opportunities of the general categories. One of the measures initiated
by the Government to give effect to the provision under Article 46 of the Constitution is the enactment of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

In **M. Nagaraj Vs. Union of India**\(^{40}\) a five judge bench comprising has unanimously held that the Constitutional Amendments by which Articles 16 (4A) and 16 (4B) have been inserted flow from Article 16(4) and do not alter the basic structure of Article 16(A). The petitioners have challenged the Constitutional validity of the Constitution 85th Amendment which retrospectively provided reservation in promotion as violative of the principle of basic structure of the Constitution as laid by the supreme court in Keshwanand Bharti Vs. State of Kerala. They also said that by providing reservation in promotion with consequential seniority would impair efficiency in administration as provided in Article 335 of the Constitution. Thus the main issue before the court was whether the impugned Constitutional Amendments (77\(^{th}\) Amendment, 81\(^{st}\) Amendment and 82\(^{nd}\) Amendment) violate the principle of basic structure and thereby obliterate the Constitutional limitation requirements laid down by this principle on the power of parliament. Thus the main issue in the present case concerned was the “extent of reservation”.

The Supreme Court held that the above Constitutional amendments providing reservation are enabling provisions and do not alter the structure of Article 16 (4). They retain the controlling factors namely backwardness and inadequacy of representation which enables the states to provide for reservation keeping in mind the overall efficiency of the state administration under Article 335. These amendments are confined only to Scheduled Castes and Scheduled Tribes. They do not obliterate Constitutional requirements, namely, ceiling limit of 50% (Quantitative limitation), the concept of Creamy layer (Qualitative exclusion), the sub-classification between OBC and Scheduled Castes and Scheduled Tribes, the concept of post based roster with in built concept of replacement.

\(^{40}\) AIR 2007 SC 71
The impugned amendments are not Constitutional limitations. Obliteration of these rule do not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the state from taking cognizance of the compelling interests of backward classes in the society. Clause (4) of Article 16 refers to affirmative action by way of reservation under which the Government is free to provide reservation is satisfied on the basis of quantifiable data that backward classes are inadequately represented in the service. Therefore, in every case where the states decide to provide reservation there must be two circumstances namely, “backwardness” and “inadequacy of representation”. These limitations have not been removed by the impugned amendments do not alter the structure of Articles 14, 15 and 16. The parameters mentioned in Article 16 (4) are retained. These amendments do not change the identity of the Constitution.

In E.V. Chinnaiah Vs. State of Andhra Pradesh, 41 the main question before the court was whether sub classification or Micro-classification of Scheduled Castes for purpose of reservation is violative of Article 14 of the Constitution or not ? The state of Andhra Pradesh by an ordinance the A.P.S.C (Rationalization of Reservation) Ordinance, 2000 which became an act subsequently, divided the 57 Castes enumerated in the presidential list into four groups based on their interest backwardness and fixed separate quotas in reservation for each of these groups. Thus, the 15 percent reservation for backward classes in the state in educational institutions and services of the State under Articles 15(4) and 16 (4) of the Constitution for Scheduled Castes were apportioned amongst the four groups in the following manner, i.e., group A-1 percent, Group B-7 percent, Group C-6 percent, and Group D-1 percent.

The Supreme Court held that such sub classification is violative of Article 14 of the Constitution and liable to be struck down. Referring to the Constituent Assembly Debates and Article 341 the Court observed that the Constitution provided for only one list of Scheduled Castes to be prepared by the president with the limited power of inclusion and exclusion by parliament.

41 (2005) 1 Scc 394.
The court rejected the argument that in Indra Shawney case the Supreme Court had permitted sub-classification of other backward communities as backward and more backward based on their comparative development, therefore, sub-classification amongst the class enumerated in the list of Scheduled Castes is permissible in law.

The court rightly pointed out that in Indra Shawney it was specifically held that sub-division of backward classes is not applicable to Scheduled Castes and Scheduled Tribes. If the object is to take affirmative action in favour of a class which is socially and educationally backward the state’s function is to decide by law as to what extent reservation should be made for them in state services and is obtaining admissions in educational institutions, such class cannot be sub-divided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to their members of the same class. Mini classification based on Micro-distinctions is opposed to our egalitarian faith and only substantial or straightforward classification plainly promoting relevant goods can have Constitutional validity.

Again the Supreme Court has attempted to answer about 25 raging questions on India’s pursuit of affirmative action in higher educational institutions. In recent times, the Supreme Court has not delivered as complicated judgment in *Ashoka Kumar Thakur Vs Union of India*42, widely known as the mandal II case. The (five judges) Bench was disposing of certain public interest petitions challenging the Constitutionality of 93rd Constitution Amendment Act, enacted in 2005 inserting Article 15 (5) to the Constitution. This new provision enables the state to make any special provision, by law for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in connection with their admission to educational institutions, including private educational institutions, whether aided or unaided by the state, except minority educational institutions. The petitioners had also challenged the validity of the

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42 (2008) 6 SCC 1
central Educational Institutions (Reservation in Admission) Act, 2006 which provides for reservation in admission to certain central government run educational institutions for students belonging to the Scheduled Castes/Scheduled Tribes and OBC categories.

Chief justice K.G. Balkrishnan delivered the main judgment, which was followed by concurrent opinions from Justice R.V. Raveendran and Justice Arijit Pasayat. Justice Dalveer Bhandari delivered a partially dissenting opinion.

After this, the chief justice read out a summary of the findings of the court so that, as he put it, “there is no confusion”, He said:

The 93rd Constitution Amendment Act, inserting Article 15 (5) does not violate the basic structure so far as it relates to aided educational institutions. As far as private unaided educational institutions are concerned four out of five judges have left the question open, in the absence of challenge by such institutions while Justice Dalveer Bhandari has held that it is violative of the basic structure. The Central Educational Institutions (Reservation in Admission) Act, 2006 is Constitution ally valid subject to the exclusion of creamy layer. The quantum of 27 percent reservation for OBC is not illegal. The 2006 Act is not illegal merely because a time – limit is not prescribed for reservation. There should be a review of the lists of Socially and Educationally backward classes (SEBCs) every five years.

The arguments before the Bench began on August 7, 2007 and ended on November 1, 2007. The petitioners included anti-reservation movements such as, the youth for equality, the All India. Equality forum, The Citizens for Equality, The Resident Doctor’s Association (of the All India Institute of Medical Sciences) P.V. Indrasen, former Director of the Indian Institute of Technology, Chennai, author Shiva Khera, and Ashoka Kumar Thakur, the main petitioner, a supreme court lawyer. The petitioners had senior advocates and leading Constitution al lawyers – Fali S. Nariman, K.K. Venugopal, Rajeev Dhavan, Harish Salve and P.P. Rao as their counsel.
The respondents, the Union of India, was represented by Solicitor – General G.E. Vahanvati and Additional Solicitor–General, Gopal Subramanium, Senior lawyers K. Parasaran and Rakesh Dwivedi represented Tamil Nadu and Bihar; former law Minister Ram jet Malani and senior advocate Ravi Varma Kumar represented the Rashtriya Janata Dal and the Pattali Makkal Katchi respectively. Eminent lawyer Indira Jaising argued for the Andra Pradesh government.

One of the remarkable aspects of this case was that all the five judges disagreed with the basic premise of the respondents counsel that the goal of the Constitution is not a Casteless society as the respondents claimed Castes constitute a social reality. Maintaining that Casteless society was the ultimate objective, the petitioners counsel argued that quota was a temporary measure to uplift the backward classes and bring them on a par with non-backward sections of society so that Caste distinctions would be obliterated in due course.

The chief justice answered this convincingly by suggesting that the validity of Constitutional amendment and a plenary legislation have to be decided purely as questions of Constitutional law. Therefore, he rejected the plea that the amendment and law were based on vote-bank politics as legally unacceptable.

Rajeev Dhavan, counsel for the All India Equality forum, argued that the historic discrimination was not a valid criterion of determining the beneficiaries for affirmative action, that correct approach was to look at the continuing wrong and not past discrimination and that the quotas should not be a punishment for the non-reserved category resulting in reverse discrimination. He argued that the Doctrine of Equality is adversely affected by giving a wide and untrammeled enabling power to parliament, which may affect the rights of the non-OBCs the Scheduled Castes and Scheduled Tribes.

K. Parasaran argued that education and economic well being of an individual would provide him or her status in the society. When a large number of OBCs, Scheduled Castes and Scheduled Tribes get educated better and get into parliament, legislative assemblies, public employment, and professions
and into other walks of public life, the attitude that they are inferior will disappear. This will promote fraternity, assuming the dignity of the individual and the unity and integrity of the nation, as envisaged in the preamble to the Constitution. He observed that it was for the first time certain special provisions were being made in favour of the SEBCs, the SCs and the STs for reservation of seats in Central Educational Institutions after 56 years of the Constitution coming into force. He suggested that over a period of time, depending on the result of the measures taken and improvements in the status and educational advancement of the SCs the STs and the SEBCs the matter could always be reviewed. The Act could not be struck down at its commencement on the grounds that no time limit for its operation has been fixed, he said. All the five judges accepted his contention as reasonable.

Another counsel for the petitioners, P.P. Rao, Contended that special provisions can only be made up to the matriculation stage. Parasaran explained that if this plea was accepted, it would result in higher education being the privilege of the higher classes and distort the concept of social advancement of the downtrodden and negate the goal envisaged in the preamble. The five judges unanimous reject the P.P. Rao’s submission and marked an implicit recognition of parasaran’s view.

PART – B:

Judicial approach towards ‘Protective Discrimination’ of women

Indian Judiciary has applied the principle of social justice in some areas like, dealing with stridhan, divorce and proprietary rights for women and has also appreciated the protective discrimination in favour of women. Whenever necessary, the Supreme Court has not failed to warn the union Government as well as state Governments of their responsibility towards women’s rights which must not be trampled upon. It is proved from number of judgments pronounced by Supreme Court which can be termed as stepping stones towards the
promotion of women’s right in socio-economic and political environment. A few of them are worth mentioning here.

The decision of the court reveals that in the earlier phase the Indian courts relied heavily on the American decisions and allowed discrimination against women on the ground of sex. In Mrs. Raghubans Vs. state of Punjob and others, where in Hon’ble Justice Sandhawlia again relied heavily on the decisions of Supreme Court of United States and held the anti-Constitutional order of Governor making women ineligible to posts in men’s jail on the ground of non-suitability of women to hold these posts as valid relying on the American Judicial Philosophy, the court held that classification on the grounds of sex is permissible provided that classification is the result of other consideration besides the fact that the persons belonging to that cast are of a particular sex.

However, there is witnessed a sea-change in the judicial attitude after 1972. In a famous case of Walter Alfered Baid Vs. Union of India and others44, the court held that, unlike Article 14, Art 16(2) does not permit any classification which is solely based on any of the differential such as sex, which is specifically mentioned in clause (2) except in so far as it may be saved by clause (3) clause (4) and clause (5) of that Article. The principle carried out in this case was that discrimination on the ground of sex violates, Article 16(2) and is unconstitutional.

Further, the Supreme Court developed a great deal of sensitivity towards the welfare of Indian women during the last two decades. In C.B. Muthamma case45, the supreme court gave an eye opener judgment upholding the spirit of equality between man and woman and declared that the provision in India Foreign Services Rules, 1961 requiring a female employee to obtain the permission of the government in writing before her marriage is solemnized and denied right to be appointed on the ground that candidate is a married woman are discriminating against women. The Hon’ble court, very lucidly, summed up

43 AIR 1972 P&H 117
44 AIR 1976 Delhi 302
45 AIR 1979 SC 1868
the factual position of the Indian women in the following heart-moving words: “At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other thing being equal, stands on no words footing. Thus Misogynous posture is a hang over of the masculine culture of manacling the weaker sex of getting how our struggle for national freedom is individual so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis half of Indians humanity, our woman is sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of parliament makes rules part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender party is inevitable.

In Randhir Singh Vs. Union of India, the Supreme Court while considering Article 39 (d) of the Constitution under directive principles of state policy. Observed that, equal pay for equal work is not a mere demagogic slogan. But it is Constitution al goal capable of attaining through Constitution al remedies by enforcement of Constitution al rights. Petitioner asserts, that, Article 39 (d) of the Constitution proclaims, as a directive principle, the Constitution al goal of ‘equal pay for equal work for both men and women. Article 14 and 19 guarantee respectively the fundamental rights to equality before the law and equality of opportunity in the matter of public employment and Article 32 provides the remedy for the enforcement of the fundamental rights. So the petitioner has invoked the jurisdiction of this court under Article 32 and has asked us to direct the respondents to give him his due, the same as they have given others like him. True, he is the merest microbe in the mighty organism of the state; a little cloy in a giant wheel. But the glory of our Constitution is that is enables him to directly approach the highest court in the land for redress. It is a matter of no little pride and satisfaction to us that he has done so. Hither to the equality clauses of the Constitution, as other articles of the Constitution guaranteeing fundamental and other rights were most often invoked by the privileged classes for their protection and advancement and for

46 (1982) 1 SCC 618
a fair and satisfactory distribution of the buttered loaves amongst themselves. Now, thanks to the rising social and political consciousness and the expectations roused as a consequence and the forward looking posture of this court, the under privileged also are clamoring for their rights and are seeking the intervention of the court with touching faith and confidence in the court.

Similarly, the court has again endeavored to uphold the dignity of Indian woman in Air India Vs. Nergesh Meerza\textsuperscript{47}. The court opined that having taken the Air Hostess in service and after utilizing her service for four years and now to terminate her service by the management if she becomes pregnant, amounts to compelling poor Air Hostess not to have any children and thus interfere with and divert the ordinary course of human nature. The court further held that: the termination of the services of an Air Hostess under such circumstances is not only callous and cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorrent to the nation of civilized society. Apart from being grossly unethical it smacks of a deep rooted sense of our utter selfishness at the cost of human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is therefore, clearly violation of Article 14.

In Dattareya Motiram More Vs. State of Bombay\textsuperscript{48} the court endeavored to uphold the validity of certain provision of Bombay municipal Boroughs Act, 1925 which provided for the reservation of seats for women in the elections to the Jalgon Municipality. The court was held that “as a result of joint operation of Articles 15(1) and 15(3) the state could discriminate in favour of women against men, but may not discriminate in favour of men against women.

Again in the Sheela barse Vs. State of Maharastra\textsuperscript{49}, the Supreme Court gave detailed instruction to concern authorities for providing security and safety in police lockup and particularly to women suspects. Female suspects

\textsuperscript{47} A.I.R. 1981 S.C. 1829
\textsuperscript{48} A.I.R. 1953 Bombay, 311
\textsuperscript{49} A.I.R. 1983 S.C. 378
should be kept in separate police lock ups and not in the same in which male accused are detained and should be guarded by female constables. The court directed the I.G. prisons and State Board of Legal Aid Advice Committee to provide legal assistance to the poor and indigent accused (Male and Female) whether they are under-trial or convicted prisoners. In this way the Supreme Court protected the women interest specially.

Under Article 32 of the Constitution of India gives the enormous power to the Supreme Court. Under this Article Supreme Court has power to issue order to the Government to award the compensation, this can observed in the *Saheli Vs. Commissioner of Police* 50. In this case, writ petition was filed by the women’s and civil rights organization known as Saheli on behalf of the mother of the victim. A boy aged 9 years had died because of beating by the police officer, the court directed the Government to pay Rs. 75,000/- as compensation to mother of victim who died because of beating by police officer.

Again, in *T. Sudhakar Reddy Vs. Government of Andra Pradesh* 51 the Supreme Court has upheld the Constitution al validity of proviso to section 3 (1) (a) of the Andra Pradesh Co-operative Societies Act 1964 and of the rules 22 (c) and 22A (3) (a) framed the render relying upon the mandate of Article 15 (3). The proviso read with the said rules provided for nomination of two women members by the Registrar to the managing committee of the co-operative Societies with a right to vote and to take part in the meetings of the committee. The court upheld the validity of this provision on the ground that Article 15 (3) of the Constitution permitted the making of special provision for women.

The concept of protective discrimination in favour of women can seen in the *Nilabati Behara Vs. State of Orissa* 52. In this case, the deceased age about 22 years was taken into police custody by Assistant Sub-Inspector of Police in connection with the Investigation of an offence of theft in a village and detained at the police out post. He was hand cuffed, tied and kept in

50 A.I.R. 1990 S.C. 513
51 (1993) Supp (4 439
52 (1993 2 SCC 746
custody in the police station. His mother went to the police station with food for him which he ate. The accused police constable and other persons were present at the police out post that night. The petitioner on the next morning came to know that the dead body of her son was lying on the rail track.

The police reached the spot and took away the dead body. The mother of the deceased sent a letter to the Supreme Court alleging custodial death of her son. The court treated the letter as a writ petition under Article 32 and impleaded the state of Orissa, Assistant sub Inspector and the concerned constable as respondents in the petition. On the basis of evidence of the doctor who conducted post mortem examination and the report of Forensic Science Laboratory, the court held that the deceased had died in the police custody. The state was directed to compensate Rs. 1,50,000 to the mother of the deceased and a further sum of Rs. 10,000 as costs to the Supreme Court legal aid committee.

Again, the Supreme Court has given the directions to the Government to award the compensation to rape victims in Delhi Domestic Working Women’s Forum Vs. Union of India53, the petitioner Delhi Domestic working women’s forum has been filed the petition. Under Article 32 of the Indian Constitution to expose the pathetic plight of four domestic servants who were raped by seven army personnel in a running train while traveling by the Muri Express from Ranchi to Delhi. The victims were helpless tribal women belonging state of Bihar. The court observed that the complainants are handed roughly and are not give such attention as is warranted and the victims are humiliated by the police. The court has ordered that the complaints should be provided with legal representation. The advocates for the victims shall be appointed by the court and in all rape trails anonymity of the victim must be maintained. The court has pointed out that certain defects in the criminal law relating to rape and it has laid down certain guidelines for trial of rape cases. The Supreme Court has given directions to the National Commission for women to frame schemes for compensation and rehabilitation to ensure justice.

53 (1995) 1 SCC 14
to the rape victims. Thereafter, the union government is asked to take necessary steps to implement such schemes at the earliest. The court said that interim compensation to rape victims may be awarded. The court asked the government to set up “Criminal Injuries Compensation Board” to pay compensation to rape victims.

Provision providing for reservation of seats for women in local bodies of in educational institutions is valid. The Supreme Court has recently held in the case of Government of Andhra Pradesh Vs. P.B. Vijay Kumar\(^54\), that the services by Andhra Pradesh Government to Women Candidates is valid. The Division bench of Supreme Court emphatically declared that the power conferred upon the state by Article 15 (3) is wide enough to cover the entire range of state activity including employment under the state. Thus making special provisions for women in respect of employment of posts under the state is an integral part of Article 15 (3). This power conferred under Article 15 (3) is not whittled down in any manner by Article 16.

In Madhu Kishwar Vs. State of Bihar\(^55\) the Supreme Court observed that half of the Indian Population too is women. Women have always been discriminated against and have suffered and are suffering discrimination in silence”. It is further observed that, “self sacrifice and self-denial are their inability and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Even today Indian society is totally male dominated and biased against the female gender. This results in all sorts of exploitation and discriminatory practices. Therefore should not discriminate on the basis of sex.

Again in C. Masilamani Mudaliar Vs. Idol of Sri. Swaminathaswami\(^56\) the Supreme Court has high light the right of women in India to eliminate gender –based discrimination, particularly in respect of property so as to attain economic empowerment. “It is seen that if after the Constitution came into force, the right to equality and dignity of person

\(^{54}\) AIR 1995 SC 1648  
\(^{55}\) (1996) 5 SCC 1480  
\(^{56}\) AIR 1996 SC 1697
enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on ground only of social status of gender, removed the pre existing impediments that stood in the way of female or weaker segments of the society.

In Valsama Paul Vs. Cochin University\(^ {57}\), the supreme court of India has observed that human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are for natural development social and family stability and growth cultural, social, and economical. All forms of discrimination on grounds of gender are violative of fundamental freedom and human rights. Conventions for elimination of all forms of discrimination against women (CEDAW) was ratified by the U.N. on 18.12.1979 and the Govt. of India had verified as an active participant, on 19.6.1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country.

Providing for reservation of seats for women in employments is valid. In K.P. Prabhakaran Vs. Union of India\(^ {58}\) the Supreme Court upheld the decision enquiry cum reservation clerks in reservation offices in metro politan cities of Madras, Bombay, Calcutta and Delhi exclusively for women and the further decision that the reservation offices in the said Metropolitan cities should constitute a seniority unit separate from the rest of the cadre of Enquiry-cum-Reservation clerks. Thus making special provisions for women in respect of employment or post under the state is an integral part of Article 15 (3) of the

\(^{57}\) (1996) SC P 545-563  
\(^{58}\) (1997) 11 SCC 638
Constitution. Article 15 (3) empowers the state to make special provision for them.

One of the evils of the modern society is the sexual harassment caused to the women particularly the working women by their male counterpart and other members of the society. There is no law in India which is adequate to combat the evil of the sexual harassment. In a public interest litigation (PIL) filed before the supreme court recently, the court has emphasized the need for an effective legislation in India to curb sexual harassment of working women. In *Vishaka Vs. State of Rajasthan*[^59] a Division Bench of Supreme Court speaking through chief justice J.S. Verma laid down number of guidelines to remedy the legislative vacuum. The court has defined, having regard to the definition of “Women Rights” in section 2 (d) of the Protection Of Human Rights Act, 1993, “sexual harassment” as including any unwelcome sexually determined behaviour like, physical contact and advances, a demand or request for sexual favours, sexually coloured, remarked, showing pornography and any other unwelcome physical, verbal or nonverbal conduct of sexual nature. Supreme Court further emphasized that Gender equality includes protection from sexual harassment and right to work with dignity, Which is a universally recognized basic human right.

In *Gaurav Jain Vs. Union of India*[^60] in this case, Gaurav Jain a public spirited advocate, filed a public interest petition seeking appropriate directions to the Government for the improvement of the plight of prostitutes, fallen women and their children. He was inspired by reading an Article entitled “A red light trap”, “Society gives no chance to prostitutes offspring” published in India To day dated July 11, 1988. The Supreme Court has issued a number of directions.

In this case supreme court further held that “it is the duty of the state and all voluntary non-government organizations and public spirited person to come to their aid to retrieve them from prosecution, rehabilitate them with a helping

[^59]: AIR 1997 SC 3014
[^60]: AIR 1997 SC 3021
hand to lead a life with dignity of person, self employment through provisions of education, financial support, developed marketing facilities as some of major avenues in this behalf. Marriage is another important object to give them real security. Acceptance of women by the family is also another important input to re-kindled the faith of self respect and self-confidence. Housing, legal aid, free counseling assistance and all other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red light area contaminated with fool atmosphere. Law is a social engineer. The courts are part of social steering by way of judicial review, judicial statesmanship is required to help regaining social order and stability. Interpretation is effective armoury in its bow to steer clear the social malady; economic re-organization as effective instruments remove disunity and prevent frustration of the disadvantaged, deprived and demand social segments and restore their faith in the efficacy of law and pragmatic direction to pave a way for social stability, peace and order. This process sustains faith of the people in rule of law and the democracy becomes a useful means to the common man to realize his meaningful right to life guaranteed by Article 21.

Even for the purpose of arrest of the women procedure should be followed. In the Naga People’s Movement of Human Rights Vs. Union of India61 the writ petitions were filed under Article 32 of the Constitution in which the validity of the Central act and State act as well as the notifications issued under the said enactments declaring disturbed areas in the state of Assam, Manipuri and Tripura, were challenged. Allegations were made regarding infringement of human rights by personal of armed forces in exercise of the powers conferred by the Central act. The notifications regarding declaration of disturbed areas had ceased to operate. The only question that survived for consideration in these writ petitions was about the validity of the provisions of the Central act and the State act.

The Supreme Court held that the instructions in the form of “DOS and Don’ts” to which reference has been made by the learned Attorney General

61 (1998) 2 SCC 109
have to be treated as binding and a serious note should be taken of violation for
the instructions and the persons found responsible for such violation should be
punished under the Army Act 1950. While considering the submission
assailing the validity of clause (a) to (d) of sections 4 and 5, context reference
was made to the order date 4-7-1991 passed by the supreme court Editor,
Boodhbar Vs. Union of India, where in after taking note of the list of “DOS
and Don’ts referred to above, the following direction was given.

“The Army officers while effecting the arrest of woman or making
search of woman or in searching the place in the actual occupancy of a female
shall follow the procedure meant for the police officers as contemplated under
the various provision of the code of criminal procedure, namely the provision
to sub-section (3) of section 100 and proviso to sub-section 160 of the code”.

The safeguards against an arbitrary exercise of powers conferred under
sections 4 and 5 as well as the said directions should be suitably amended to
bring them in conformity with the guidelines contained in the decision of the
Supreme Court.

In order that the people may feel assured that there is an effective check
against misuse or abuse of the powers conferred under the Central act should
be thoroughly inquired into and if it is found that there is substance in the
allegation, the victim should be suitably compensated by the state and the
requisite sanction under section 6 of the Central act should be granted for
instruction of prosecution and a civil suit or other proceeding against the person
or persons responsible for such violation.

In the light of the above discussion the supreme court concluded that
while exercising the powers conferred under section 4 (a) of the Central act, the
officer in the armed forces shall use minimal force required for effective action
against the person or persons acting in contravention of the prohibitory order.

A person arrested and taken into custody in exercise of the powers under
section 4(c) of the Central act should be handed over to the officer in charge of
the nearest police station with least possible delay so that he can be produced
before the nearest Magistrate within 24 hours of such arrest excluding the time taken for journey from the place of arrest to the court of the magistrate.

In Apparel Export Promotion Council Vs. A.K. Chopra62. In this case the respondent who was working as a private secretary to the Chairman of the Apparel Exports promotion council, tried to molest a women employee of the council. The departmental authorities, keeping in view the fact that the actions of the respondent were considered to be subversive of good discipline and to conducive to proper working in the appellant organization, where there were a number of female employees took action against the respondent to remove him service. Aggrieved by the order of removal from service, the respondent filed a departmental appeal before the staff committee and thereafter a writ petition to the High Court. But the High Court dismissed the petition and it concluded that since the respondent had not actually molested the women. Only tried to assault her and had not manage” to make any physical contact with her a case of his removal from service was not made out. Against this decision case appealed to the Supreme Court.

The Supreme Court held that, the observation made by the High Court to the effect that since the respondent did not actually molest but only tried to molest her and therefore his removal from service was not warranted, rebel against realism and lose their sanctity and credibility. Reduction of punishment in a case like this is bound to have a demoralizing effect on the women employees and is a retrograde step. The court held that the impugned order of the High Court is set aside and the punishment as imposed by the Disciplinary Authority and upheld by the Departmental Appellate Authority of removal of the respondent from service if upheld and restored.

In Municipal Corporation of Delhi Vs. Female Workers and others63 in this case female workers engaged by the Municipal Corporation of Delhi raised demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that their services

62 (1999) 1 SCC 759
63 (2000) 3 SCC 224
were to regularized and therefore they were not entitled to any maternity leave. Their case was espoused by the Delhi Municipal Workers. Union and consequently the following question was referred by the secretary Delhi Administration to the Industrial tribunal for adjudication was whether the female workers on muster you should be given any maternity benefit? And if so, what directions are necessary in this regard?

The Supreme Court held that the provisions of the act would indicate that they are wholly in consonance with the directive principles of state policy as set out in Article 39 and in other Articles, especially Article 42. A women employee at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the fetuses. It is for this reason that it is provided in the act that she would entitled to maternity leave for certain periods prior to and after delivery. The Supreme Court further scanned the different provisions of the act but did not find anything contained in the act which entitled only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis.

The Supreme Court further held that a just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties their avocation and the place where they work they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomenon in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The maternity Benefit Act, 1961 aims to provide all these facilities to working women in dignified manner so that she may over come the state of mother hood honourably, peaceably undeterred by
the fear of being victimized for forced absence during the pre or post natal period.

The Supreme Court has given the preference to women in the case of **Vijay Lakshmi Vs. Punjab University and others**. In this case, a woman for being appointed as a principal of the Government College for girls was challenged as being violative of Article 14, 15, 16 of the Constitution of India. The Supreme Court for policy decision of classification, straight away referred to the decision rendered by the Apex court in **State of Jammu and Kashmir Vs. Triloki Nath Kosha**. Where in the court observe that the discrimination is the essence of classifications and does violence to the Constitution al guarantee of equality only if it rests on an unreasonable basis, and it was for the respondents to establish that classification was unreasonable and be rational nexus with its purported object. Further, court dealing with the right to equality that, equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment. Since the Constitution al code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially with in same class. The court referred to the decision in **Air India Vs. Nergesh Meerza**, which profound the right of equality under Article 14 after considering various decisions.

The Supreme Court also referred to **Dattaraya Motiram more Vs. State of Bombay**, which provisions of the Bombay Municipal Boroughs Act, 1925 which reserved seats for women in the election were challenged on the ground that they offended Articles 14, 15 and 16 of the Constitution. That contention was negative by the court and explaining the scope for Article 15, the court ( Chagla, C.J.) observed that it must always be borne in mind that the discrimination which is only on one of the grounds mentioned in Article 15 (1).

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64 (2003) SCC 440  
65 (1974) 1 SCC 19  
66 (1981) 4 SCC 335  
67 AIR 1953 Bom 311
It there is a discrimination in favour of a particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or in other words, the classification is on the ground of sex is permissible provided that classification is the result of other considerations besides the fact that the persons belonging to that class are a particular sex.

The supreme court held that in view of the aforesaid established law interpreting Article 14 to 16, Rules 5 and 8 of the Punjab University Calendar, Vol. III providing for appointment of a lady principal in a women’s college or a lady teacher their in cannot be held to be violative either of Article 14 or Article 16 of the Constitution, because the classification is reasonable and it has a nexus with the object sought to be achieved. In addition, the State Government is empowered to make such special provisions under Article 15 (3) of the Constitution. This power is not restricted in any manner by Article 16.

In Central Enquiry into Health and Allied themes (CEHAT) and others Vs. Union of India and others\(^68\), Supreme Court observed that in Indian Society, discrimination against girl child still prevails, which may be because of prevailing the uncontrolled dowry system, as there is no change in the mindset or also because of insufficient education and tradition of women being confined to household activities, Sex selection Sex determination further adds to this adversity. Today advanced technology it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth girl child sex determination and thereafter abortion is evident from the 2001 census figures which reveal greater decline in sex ratio in the 0-6 age group in states like Haryana, Punjab, Maharastra and Gujarat, which are economically better off.

For controlling the situation the parliament enacted the pre-natal Diagnostic Techniques Act, 1994. The preamble, inter alia, provides that the object of the act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters

\(^{68}\) (2003) 8 SCC 398
connected therewith or incidental there to. It is apparent that the PNDT Act is not implemented by the central Government or by the state Governments. Hence, the petitioners are required to approach this court under Article 32 of the Constitution of India.

The Supreme Court observed that prima facie it appears that despite the PNDT Act being enacted by the parliament that neither the state Governments nor the parliament has taken appropriate actions for its implementation. Directions were issued on the basis of various provisions for the proper implementation of the PNDT Act. Some counsels pointed out that even though the Genetic counseling centre, Genetic laboratories or Genetic Clinics are not registered, no action is taken as provide under section 23 of the act. But only, a warning is issued. The Supreme Court further held that those centers which are not registered are required to be prosecuted by the authorities under the provisions of the act and there is no question of issue of warning and to permit them to continue their illegal activities.

It is to be stated that the appropriate authorities or any officer of the central or the State Government authorized in this behalf is required to file complaint under section 28 of the act for prosecuting the offenders. Further, wherever at district level appropriate authorities are appointed, they must carry out the necessary survey of clinics and take appropriate action in case of non-registration or non compliance of the statutory provisions including the rules. Appropriate authorities are into only empowered to take criminal action, but to search and seize documents, records, objects etc., of unregistered bodies under section 30 of the act.

5.3 Conclusion

From the discussion of the aforesaid cases can come to the conclusion that, the Indian judiciary is not completely in favour of Scheduled Castes and Scheduled Tribes. It is not much positive judicial activism has taken place. Even after 60 years of independence, the problems of Scheduled Castes and Scheduled Tribes have not been solved. All organs of the state like, legislature,
executive and especially judiciary should promptly work for the upliftment of the Scheduled Castes and Scheduled Tribes to achieve the Constitutional mandate of protective discrimination.

So far as, the women is concerned the Indian Judiciary plays the very important role. Especially the Supreme Court and the High Courts protectors of Constitutional and legal rights of women, by the way of delivering several judgments. In relation to women, Indian judiciary shows the much positive judicial activism. It is very helpful, in order to avoid the Gender discrimination or Gender inequality.

The ideology of the Dr. Ambedkar has very much influenced the Indian Judiciary the basis of this ideology the Supreme Court of India declared that Directive principles of state policy are enforceable with the fundamental rights. The court observed that the fundamental rights and directive principles are supplementary and complimentary to each other and that the provisions in part III should be interpreted having regard to the preamble and the directive principles of the state policy. Indian Judiciary has interpreted the relevancy of the Fundamental Rights on the basis of directive principles of state policy. However Dr. Ambedkar has imposed the pious duty on the future governments to implement the provisions of directive principles to secure social justice to all sections of the Society.