CHAPTER – 4
Equality versus Protective Discriminations under the Constitution of India

4:1 'Equality' in general under the Indian Constitution :

India is a democratic country with composite population having a number of groups based on religion, language, caste or backwardness such as the Scheduled Caste, Scheduled Tribes, Anglo Indians, Muslims, Parsis, Sikhs, Indian Christians etc. The Constitution of India was drafted in the mid-twentieth century which is a unique document with rich fund of human experience, wisdom, heritage and traditions in the area of governmental process in order to fashion a system suited to the political, mixed social and economic conditions in India.

The Constitution of India is considered to be the most lengthiest, elaborate and detailed document and the most longest organic laws in the world. Firstly, our Constitution deals with the organization and structure of Central Government as well as of states. Secondly, Constitution of India had adopted federal structure and unlike other federal Constitutions, it has provided detailed norms regarding the Centre-State relationship. Thirdly, the framing fathers of the Constitution has reduced in writing many unwritten conventions of the British Constitution such as collective responsibility of the ministers, parliamentary privileges etc. Fourthly, most importantly, to remove mutual distrust and equality among unequals and different communities and groups in India, inclusion of detailed provisions of fundamental rights, some directive principles of state policy and some safeguards to
Minorities, Scheduled Castes and Schedules Tribes and Backward Classes were considered necessary.

Besides all the Constitutional provisions the 'Preamble' of the Constitution of India firstly declares India a sovereign, socialist, secular and democratic republic country. It gives security of justice in all aspects i.e. social, economic and political liberty of thought and expression, belief and faith and worship, equality of status and opportunity. Above all, the Constitution extends its security to the limit of assuring dignity of the individual as well as promoting unity and integrity of the country as a whole. Thus from theoretical and mechanical perspective, the Constitution of India is a complete document for promoting unity, equality and integrity among the inhabitants of India.

A thorough study of the Constitution of India reveals the fact that 'Equality' is one of the magnificent corner-stones of Indian democracy. The concept of equality does not mean absolute equality among human beings which is physically not possible to achieve. It is a concept implying absence of any special privilege by reason of birth, creed or the like in favour of any individual and also the equal subject of all individuals and classes to the ordinary law of the land. In the words of Dr. Jennings "Equality before the law means that among the equals, the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of
full age and understanding without distinction of race, religion, wealth, social status or political influence".\(^1\)

The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution. The guarantee of equality before the law is an aspect of what Dicey calls the rule of law in England. It means that no man is above the law and that every person, whatever be his rank or conditions, is subject to the jurisdiction of ordinary courts. Professor Dicey gave three meanings of Rule of Law thus –

1. **Absence of Arbitrary power or Supremacy of the law:**
   It means the absolute Supremacy of law as opposed to the arbitrary power of the Government.

2. **Equality before the law:**
   It means subjection of all classes to the ordinary law of the land administered by ordinary law courts. This means that no one is above the law.

3. **The Constitution is the result of the ordinary law of the land:**
   It means that the source of the right of individuals is not the written Constitution but the rules as defined and enforced by courts.

Here it is to be mentioned that the first and second aspect of Dicey’s concept of Rule of law apply to Indian system, but the third

\(^1\) Jennings – Law of the Constitution, P-49 (3rd ED.)
principle does not apply to Indian system as the source of rights of individual is the Constitution of India. The Constitution prominently undertook that the polity to be governed by the system of Rule of Law. Every provision therein testifies it. The 'Rule of Law' in its preaching and practice, operates as a vehicle to reach the democratic community to the constitutional goal. And they are numerous. Few of them are Justice-Socio, Economic, Polito, Liberty, Equality and Fraternity. The democratic community has pledged to accomplish these ideals through the Rule of Law. Rule of Law commands the people to be governed in accordance with the rule laid down by the law. As explained by Justice K. Subba Rao, Rule of Law is a potent instrument to achieve 'Social Justice'. The Rule of Law does not envisage the rule of any law. The law must be in conformity with the constitutional scheme and object.

The Constitution of India guarantees the Right to Equality and Articles 14 to 18 constitute this right of equality. Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons. Article 14 uses two expressions, 'equality before law' and 'equal protection of the law'. The first expression equality before law is of English origin and the second expression has been taken from the American Constitution. Both these expressions aim at establishing what is called 'equality of status' in the Preamble of the Constitution. Both these two expressions may seem to be identical, but they do not convey the same meaning. Equality before law is a negative concept implying the absence of any special privilege in favour of individuals and the equal subject of all classes to the ordinary law. Equal protection of law is a positive concept implying
equality of treatment in equal circumstances. However one dominant idea common to both the expressions is that of equal justice.

The Rule of Law embodied in Art. 14 is a basic feature of the Indian Constitution and hence it can not be destroyed even by an amendment of the Constitution under Art. 368 of the Constitution of India.

Thus Article 14 which contains the principle of equality outlaws discriminations in a general way and guarantees equality before law to all persons. But in view of certain amount of indefiniteness attach to the general principle of equality under Art. 14, some separate provisions to cover specific discriminatory situations have been made by the subsequent Articles. Thus Art. 15 prohibits discriminations against on such specific grounds as religion, race, caste, sex or place of birth. Art. 16 guarantees to the citizen of India equality of opportunity in matters of public employment. Art. 17 abolishes untouchability and Art. 18 abolishes titles, other than a military or academic distinction. Thus in this series of Constitutional provisions which portraits the concept of Equality within it, Art. 14 is the most significant. Art. 14 is the genus, while Articles 15 and 16 are the species. Articles 14, 15 and 16 are constituents of a single code of constitutional guarantees supplementing each other.

A. Equality before law and Protective Discriminations :

Article 14 prescribes Equality before law. But the fact that all persons are not equal by nature, attainment or circumstances and
therefore, a mechanical equality before the law may result in injustice. Thus, the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances or conditions.*2 The varying needs of different classes or sections of people require differential treatment. Art 14 thus means that “equals should be treated alike”, but it does not mean that “Unequals ought to be treated equally”. On the other hand, where persons or groups of persons are not situated equally, to treat them as equals would itself be violative of Art. 14 as this would itself result in inequality. This leads to classification among different groups of persons and differentiation between such classes. Accordingly to apply the principle of Equality in a practical manner, the courts have evolved the principle that if the law in questions is based on rational classification it is not regarded as discriminatory.*3 So technically it may be called as Protective Discrimination to provide equality in true sense to those who are unequals among the equals by some way or other.

Another facet of ‘Equality before law’ is that the “state should offer equal status and opportunity to all its citizens, as envisaged in the Preamble of our Constitution”. This facet is specifically dealt with in Articles 15 (1) and 16 (1). But there may be denial of equal opportunity outside Art 15 (1)*4 on ground other than those specified

* 2 Chiranjee Lal- vs- Union of India AIR 1951 SC 41 : 1950 SCR 869
* 3 Ashutosh Gupta- vs- State Rajasthan (2002) 4 SCC 34
* 4 Art. 15 (1) prohibits the state from discriminating against citizens on grounds only of religion, race, sex, caste, place of birth or any of them.
in that Article and matters other than employment to which Art 16 (1)*5 is confined. Such denial offends against the genus of Art. 14 of which Articles 15 and 16 only constitute species.

The right guaranteed in clause (1) of Art. 15 is conferred on a citizen as an individual and is available against his being subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen generally. The expression ‘discriminate against’ according to the Concise Oxford Dictionary means “select for unfavourable treatment”. Discrimination in this sense involves an element of prejudice. If prejudice is disclosed and is based on any of the grounds mentioned in Art 15 the law must be struck down as being violative of the Constitutional provisions. The Supreme Court in Nain Sukh Das-vs- State of U.P.*6 invalidated an Act of the State Legislature which provided for elections on the basis of separate electorates for members of different religious communities. The Supreme Court invalidated a notification under the Police Act which in imposing the compulsory levy on the inhabitants of a certain locality had exempted all Harijans and Muslim residents.*7 The court has also invalidated a law that prohibited employment of women in any part of premises where liquor was served because it made sex-based discrimination.*8

* 5 Art. 16 (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state
* 6 AIR 1953, SC 384
* 7 State of Rajasthan —vs- Pratap Singh, AIR 1960, SC 1208
* 8 Anuj Garg-vs- Hotel Assn. of India (2008) 3 SCC 1
The residents of Madhya Bharat were exempted from payment of a capitation fee for admission to the State Medical College, while the non-residents were required to pay the same. The Supreme Court negativated the plea of discrimination by the non-residents under Art. 15 (1) because the ground of exemption was 'residence' and not 'place of birth'. Residence and place of birth are two distinct concepts with different connotations. Art 15 (1) prohibits discrimination on the basis of place of birth, but not residence.*9 And in the instant case, classification on the basis of 'residence' was held reasonable. Education is a state subject. A state spends money on the upkeep of educational institutions. Therefore, there is nothing wrong in the state if it so orders the educational system that some advantage ensures for the benefit of the state. Thus the justification for the classification on the basis of residence rested on the assumption that the residents of the state would serve the need of the people of the state after becoming doctors. Hence, we can explain this situation as one kind of protective discrimination with affirmative action to support the principle of equality embodied in Art 14. Article 15 (1) is an extension of Art. 14 and Art. 15 expresses particular application of the general principle of equality as in Art. 14

Again, Art. 14 and Art 16 (1) are closely inter connected. Article 16 (1) takes its roots from Art. 14. Article 16 (1) particularizes the generality of Art 14 and identifies in a Constitutional sense, 'equality of opportunity' in matters of employment under the state. In comparison, Art 16 deals with a very limited subject, viz, public employment. On the

* 9 D.P. Joshi -vs- Madhya Bharat AIR 1955, SC 334
other hand, the scope of Art 15 (1) is much wider as it covers the entire range of state activities.

As under Art. 14, so under Art. 16 equality can not be a mathematical equality. Reasonable classification is permissible for various purposes relating to employment. Equality of opportunity of employment means selection. Equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent classes. Those who are similarly circumstanced are entitled to equal treatment. The equality guaranteed by Art 16 (1) takes within its fold all stages of service. The expression 'matters relating to employment' in Art 16 (1) is not restricted only to the initial stage of appointment, the expression 'appointment to an office' in Art 16 (1) does not mean merely the initial appointment. Article 16 (1) includes all matters in relation to employment both prior and subsequent, to the employment which are incidental to the employment or which form part of the terms and conditions of such employment such as salary, periodical increments, leave, promotion, fixation of seniority, gratuity, pension, superannuation and even termination of employment. Thus, finally both the two Articles, Art. 15 (1) and Art. 16 (1) postulates the extension of the general principle of 'Equality before law' as one part of Art. 14.

Equality before law or equal justice is an aspect of social justice, the salvation of the very weak and down trodden and the methodology for leveling them up to a real, not formal, equality being
the accent. In a spacious sense 'equal opportunity' for members of a hierarchical society makes sense only if it is a strategy by which the underprivileged have environmental facilities for developing their full human potential. This consummation is accomplished only when the utterly depressed groups can claim a fair share in public life and economic activity including employment under the state or when a classless and casteless society blossoms as a result of positive state action. To help the lagging social segments, by special care, is a step towards and not against a larger and stabler equality.*10

It was held that the concept of equality before law contemplates minimizing inequalities in income and eliminating inequalities in status, facilities and opportunities not only among individuals, but also amongst groups of people securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interest of the weaker sections of the people including in particular SCs and STs and to protect them from social injustice and all forms of exploitation.*11

Equality before law is a dynamic concept having many facets. One facet- the most acknowledged one- is that there shall be no privileged person or class and none shall be above law. A facet is an obligation upon the state to bring about through the machinery of 'law', a non equal society envisaged by the 'Preamble' and Part IV of our

*11 Indra Sawhney-vs- Union of India AIR 1993 SC 477, 1992 (Supp. 3) SCC 217
Constitution. Because equality before law can be predicted meaningfully only in an equal society i.e. a society contemplated by Art. 38.\footnote{12} Equality contemplated by Art. 14 and other cognate Articles including Art 15 (1), 16 (1), 29 (2) and 38 (2) of the Constitution is secured not only when equals are treated equally, but also when unequals are treated unequally.

Conversely when unequals are treated equally, the mandate of equality before law is breached. To bring about equality among unequals, it is necessary to adopt positive measures to abolish inequality. The equalizing measures will have to use the same tools by which inequality was introduced and perpetuated.\footnote{13} In the same case another learned Judge held that though 'equal protection' clause prohibits the state from making unreasonable discrimination in providing preferences and facilities for any section of its people, nonetheless it requires the state to provide substantially equal opportunities to those placed unequally.

Earlier, the Supreme Court of India was of the opinion in some cases that the guarantee of equality in Art. 14 simply means the absence of discrimination, but in later cases, the Court has come to hold that in order that the equality of opportunity may reach Backward Classes and the minority, the state must take affirmative action by giving them a "preferential treatment or protective discrimination"\footnote{14}

\footnote{12} Sri Sri Nivasa Theatre-vs- Govt. of T.N. AIR 1992 SCC 999 (1992) 2 SCC 643
\footnote{13} Indra Sawhney-vs- Union of India AIR 1993 SC 477
\footnote{14} St. Stephens College –vs- University of Delhi AIR 1992, SCC 558
and taking positive measures to reduce inequality. Thus, affirmative action of the state needs protective discrimination to ensure and provide equality before law in true sense of the term.

To make equality a living reality for large masses of people, those who are unequal can not be treated by identical standards. It may be equality in law, but it would certainly not be of real equality. The state must resort to compensatory state action for the purpose of making people who are factually unequal in their wealth, education, social environment and equal in specified areas. It is necessary to take into account de-facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons in order to bring real equality. Such affirmative action though apparently discriminatory is calculated to produce equality as a broader basis by eliminating de-facto inequalities and placing the weaker sections of the community at par with the stronger and more powerful sections, so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full of his natural endowments of physique, of character and of intelligence.*15

Hence, from the above analysis it can be ascertained that to prove equality before law in true sense of the term, some sort of preferential treatment or protective discrimination is required to equalize the

*15 Pradeep Jain-vs-Union of India, AIR 1984, SC 1420 (1984)3 SCC 654
unequals in our society where people are factually unequal in some way or other. So, protective discrimination is a facet of equality before law.

B. Equal Protection of the Laws and Protective Discrimination:

The second expression, 'the equal protection of the laws' is corollary of the first one i.e. 'equality before law' and is based on the last clause of section 1 of the 14th Amendment to the American Constitution which directs that state shall not deny to any person within its jurisdiction the equal protection of laws.

The primary and immediate object behind the 14th Amendment was no doubt to protect the Negros from racial discrimination. But in course of time it came to be applied to protect any individual or class of persons from invidious discrimination because the guarantee of equal protection is not confined to members of any race, but to 'any person'.

It has been said that 'the equal protection of the laws' is a pledge of protection or guarantee of equal laws. The two expressions are simultaneously used in Art. 7*16 of the Universal Declaration of Human Rights which might have influenced the formulation of Art. 14 of the Constitution of India.

In the context of Equality, equal protection means the absence of any arbitrary discrimination by the laws themselves or in

*16 Art 7 the United Nations Declaration of Human Rights says -"All are equal before the law and are entitled without any discrimination to equal protection of the law"
their administration. No one should be favoured and none should be placed under any disadvantage, in circumstances that do not admit of any reasonable justification for a different treatment. Thus 'equal protection of the laws' implies in another sense equality in equal circumstances. The guarantee is aimed against undue favour and individual or class privilege on the one hand and a hostile discrimination or the oppression of equality on the other.

In Constitutional Law of India by H.M. SEEMRVAI,*17 what is meant by equal protection of laws is answered thus "If all men are created equal and remained equal throughout their lives, thus the same laws would apply to all men." But we know that men are not equal (socially, educationally, economically etc.) and consequently a right conferred on persons that they shall not be denied 'the equal protection of the laws', can not mean the protection of the same laws for all. It is here that the doctrine of classification steps in and gives content and significance to the guarantee of the equal protection of the laws. Accordingly, such doctrine must mean the protection of equal laws for all persons similarly situated.

The expression 'equal protection of the laws' is now being read as a positive obligation on the state to ensure equal protection of the laws by bringing in necessary social and economic changes, so that everyone may enjoy equal protection of the laws and nobody is denied

* 17 4th Edn, Vol-I P- 439)
such protection. If the state leaves the existing inequalities untouched by the laws, it fails in its duty of providing equal protection of its laws to all persons.∗18

The right of equality of treatment applies only to equals and not unequals. Art. 14 has inbuilt flexibility and it also permits different treatment to unequals as it only prohibits discrimination amongst the equals. Conferment of special benefits or protection of rights to a particular group of citizens for rational reasons is envisaged under Art. 14 and it is implicit in the concept of equality.∗19

Equal protection means the right to equal treatment in similar circumstances, both in the privilege conferred and in the liabilities imposed by the laws. The question of discrimination if any, can arise only or between persons who are similarly, if not identically situated. The guarantee of equal protection under Art. 14 embraces the entire realm of 'state action'. It would extend not only when an individual is discriminated against in the matter of exercise of his right or in the matter of imposing liabilities upon him, but also of granting privilege etc. In all these cases, the principle is the same, namely that there should be no discrimination between one person and another if as regards the subject matter of the legislation, their position is the same. All persons in similar circumstance shall be treated alike both in privileges and liabilities imposed. The classification should not be

arbitrary, it should be reasonable and it should be based on qualities and characteristics that have rational relation to the object of legislation.

In a dissenting judgment by Justice Mathew in BENNET*20 it was held that traditional doctrine that the court is only concerned to make men equal who are really unequal has undergone radical change in recent years. Therefore, the crucial question today, as regards Art. 14, is whether the command implicit in it constitute merely a ban on the creation of inequalities by the state or a command as well to eliminate inequalities existing without any contribution there to by the state also. The above view is now accepted and it is held that equal protection requires affirmative action by the state towards unequals by providing facilities and opportunities. It was held that concept of equality before law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only among individuals, but also amongst groups of people securing adequate means of livelihood to the citizens and to promote with special care the educational and economic interest of the weaker sections of the people, including in particular the Schedules Caste and Scheduled Tribes and to protect them from social injustice and all forms of exploitation. It was held equality postulates not merely legal equality but also real equality. It is a positive act and to make equality a reality, state is under an obligation to undertake affirmative action. It was further reiterated that though ‘equal protection’ clause prohibits the state from making unreasonable discrimination in providing preferences and

* 20 Coleman & Co-vs- Union of India (1972) 2 SCC 788 AIR 1973 SC 106
facilities for any section of the people, nevertheless it requires the state to afford substantially equal opportunity to those placed unequally. Any legitimate affirmative action rationally and reasonably is in aid to the attainment of equality. To bring about equality among unequals, it is necessary to adopt positive measures to abolish inequality. The equalizing measures will have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalization will not be of the unequals. *21

If follows that the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment. *22 From the very nature of society there should be different laws in different places and the Legislature controls the policy and enacts laws in the best interest of the safety and security of the State. In fact, identical treatment in unequal circumstances would amount to inequality. So, reasonable classification is a necessary evil if society is to progress.

Thus, Article 14 forbids class legislation, but it does not forbid reasonable classification of persons, objects and transactions by the Legislature for the purpose of achieving specific ends. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a

* 21 Indra Sawhney-vs- Union of India 1992 Supp (3) SCC 217 AIR 1993 SC 477
* 22 Chiranjit Lal-vs- Union of India. AIR 1951, SC 41. Kedar Nath-vs- State of West Bengal, AIR 1953, SC 404
large number of persons, all of whom stand in the same relation to the
privileges granted and the persons not so favoured, no reasonable
distinction or substantial difference can be found justifying the inclusion
of one and the exclusion of the other from such privilege. But reasonable
classification is that which is not arbitrary, artificial or evasive and it
must be based on some real and substantial distinction bearing a just and
reasonable relation to the object sought to be achieved by the legislation.
Classification to be reasonable must fulfill the following two conditions.

1) the classification must be founded on an intelligible differentia which
distinguishes persons or things that are grouped together from others left
out of the group, and

2) the differentia must have a rational relation to the object sought to be
achieved by the Act.

The differentia which is the basis of classification and the
object of the Act are two distinct things. What is necessary is that there
must be a nexus between the basis of classification and the object of the
Act which makes the classification.

Thus, the entire problem under the equal protection clause
is one of classification or of drawing lines. The rule of classification is
not a natural and logical corollary of the rule of equality, but the rule of
differentiation is inherent in the concept of equality. Equality means
parity of treatment under parity of conditions. A person of setting up a
grievance of denial of equality treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the different treatment had no reasonable relation to the object sought to be achieved by law. There is no closed category of classification; the extent, range and kind of classification depend on the subject matter of the legislation, the conditions of the country, the economic, the social and political factors at work at a particular time.

It was held that large latitude is allowed to the state for classification upon a reasonable basis and what is reasonable is question of practical details and the court must investigate. A classification made consistent with the socialist goal set out in Preamble and Directive Principles enumerated in Part iv of the Constitution will be valid and a classification which is not in tune with the Constitution is per se unreasonable and can not be permitted.* 23

Thus, in a number of cases the Supreme Court held that the legislature as well as the executive Government, while dealing with diverse problems arising out of an infinite variety of human reactions must have the power of making special laws, to attain a particular object and to achieve that object, it must also have the power of selection or classification of persons and things upon which such laws are to operate.

* 23 Aharn Prakash –vs- State of Haryana, AIR 1986. SC 859
Benaras Hindu University-vs- Rohini Sing AIR 2000 All 265
(i) **Limits of Classification:**

Thought classification is permissible, the rational of classification should be based on empirical data or survey or scientific study and not on assumption as to existence of a state of affairs. Need to generate better employment opportunities to the people of rural backward areas and an affirmative action in this regard is not ruled out, any such action should be within the framework of Constitutional provisions relating equality. The mere assumption that candidates from rural areas are on a lower pedestal or that candidates from cities and towns are on a higher pedestal and candidates from rural areas are comparatively disadvantaged and economically weaker segment was not accepted on the ground that it was not based on any data.*24 It is to be remembered that what is guaranteed by Art. 14 is ‘equal protection’ and that power of classification is only a judicial rider. Hence, the power of classification should not be extended to such a length that it in effect “subverts the precious guarantee of equality”.

Thus, the doctrine of reasonable classification is only a subsidiary rule evolved by Courts to give practical content to the doctrine of equality. Over emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14. The over emphasis on classification would inevitably result in substitution of the doctrine of classification to the doctrine of equality and Preamble of the

---

Constitution which is an integral part of the Constitution. "To over do classification is to undo equality." The idea of similarity or dissimilarity of situations of persons, to justify classification, can not rest merely on differentia which may, by themselves be rational or logical, but depends on whether the differences are relevant to the goals sought to be reached by the law which seeks to classify. The justification for classification must need therefore, to be sought beyond the classification.\textsuperscript{25}

\textbf{ii) Reasonable basis for classification :}

It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis of classification in all cases. As the American Supreme Court has observed –

"The Constitutional formula to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. The Court has never attempted that impossible task." \textsuperscript{26}

In Constitutional Law, it is observed thus: One might say that the principle of equal treatment required individuals to be treated similarly to the extent they are same and treated differently to the extent they are different. But individuals are both the same and different in an infinite variety of respects. For example, although competing applicants are under rule 'a' are different, in that some are men and some are women, they are the same in the sense that tall are persons wishing to work for

\textsuperscript{25} D.D, Basu, Commentary on the Constitution of India, P-1425, 8\textsuperscript{th} edition 2007
\textsuperscript{26} Kotch- vs- Port Pilot Commrs. (1947) 330 US 552
the 'Transit Authority'. On the same principle, our Supreme Court has laid down the above mentioned two test for determining whether a classification is reasonable or not – i.e.

(1) that it was based on intelligible differentia and

(2) the differentia has a rational nexus with the object which the law seeks to achieve.

Thus, as a whole it depends on the object of the legislation in view and whatever has a reasonable relation to the object or purpose of the legislation is a reasonable basis for classification of the objects coming under the purview of the enactment. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Again, the expression ‘Intelligible Differentia’ means difference capable of being understood, a factor that distinguishes different state or class from another which is capable of being understood. Thus, the basis of reasonable classification may be geographical, historical or the classification may be based on the difference in the nature of the persons, trade, calling or occupation or any other object which is sought to be regulated by the legislation.

4.2 Classification authorized by other provisions of the Constitution

Article 14 is a general provision and has to be read subject to other provisions included within the Part III on Fundamental Rights. Hence, equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. For instance,

* 27, Seidman, Sunstein and Karlam, "Constitutional Law" 5th Edn. 2005
(i) Art. 15 (3) enables the state to make special provisions for women and children as they require special treatment on account of their very nature. Hence, any such provision can not be challenged on the ground that it denied equal protection to men.

(ii) Art. 15 (4) authorizes special provision for advancement of Backward Classes. Hence, -

The validity of section 54 (4) of the Representation of the People Act, 1951, can not be challenged on the ground that it confers a double advantage upon the members of the Scheduled Castes and Tribes in that they may be returned to the general seats even though seats have been reserved for them under Articles 330, 332.

(iii) Similarly, reservation of appointments for the Backward Classes or Scheduled Castes does not offend against Art. 14 because it is sanctioned by Art. 16 (4)

It was held Articles 14, 15 and 16 form a group of provisions guaranteeing equality. Such provisions confer a right of equality to each individual citizen. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved.

The content of the expression ‘equality before law’ is illustrated not only by Articles 15 to 18 but also by several Articles in Part IV, in particular, Articles 38, 39, 39-A, 41 and 46. Among others,
the concept of equality before law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only among individuals, but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interest of the weaker section of the society, including in particular the Schedule Caste and Schedule Tribes and to protect them from social injustice and all forms of exploitation. Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is avowed objective.

(iv) Where the Constitution itself makes a classification, the charge of discrimination can not be leveled against such separate treatment. Thus-the special treatment of Government servants in the matter of their tenure {Art. 310 (1)} or an order made by the President under Art, 311 (2), Proviso (c) or the taxation by a state of road transport (Entry 56 list II) can not be challenged as violative of Art. 14.

An attempt at the reconciliation of Art. 14 with the aforesaid Articles of the Constitution which constitute exceptions to the rule of equality embodied in Art.14 has been made by Supreme Court by laying down that the special treatment authorized by these other provisions must be kept within reasonable limits and should not be made so excessive as to render nugatory the general equality professed to the members of all communities by Art. 14. Hence, the special provisions
for the advancement of the Backward classes or Scheduled Castes and Tribes under Art. 15 (4) or the reservation of posts for the Backward Classes under Art. 16 (4) will be unconstitutional because of contravention of Art. 14, if it is carried to an unreasonable extent.

v) The provision for special protection to certain classes in Part XVI of the Constitution of India, i.e. Articles 330 to 342 of this part exclusively deals with the special provisions for safeguarding the interest of Scheduled Castes, Scheduled Tribes, Backward Classes and Linguistic Minorities.

From the above analysis it is crystal clear that in order to uphold the principle of equality and social justice in deed, a sort of affirmative discrimination is must and a necessary evil. Because absolute equality among human beings is not possible to achieve physically and so reasonable classification is necessary if society is to progress. However, in E.P. Royaqppa --vs- State of Tamil Nadu* 28 the Supreme Court has challenged the traditional concept of equality which was based on reasonable classification and has laid down a new concept of equality. Accordingly, now 'Equality' is a dynamic concept with many aspects and dimensions and it can not be cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness.

In Meneka Gandhi-vs- Union of India.* 29 Justice Bhagwati again quoted with approval the new concept of equality

* 28 AIR 1974 SC 555
* 29 AIR 1978 SC 597
pronounced by him in the E.P. Royappa’s case. Article 14 strikes at arbitrariness in the state action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness which pervades Art. 14 like a brooding omnipresence. Thus, according to the new concept of equality, the doctrine of classification “is merely a judicial formula for determining whether the legislative or the executive action is arbitrary and therefore, constitutes a denial of equality.” Art. 14 has rightly activist magnitude and it embodies a guarantee against arbitrariness. The conclusion is that if the action of state is arbitrary it can not be justified even on the basis of doctrine of classification. Where an act is arbitrary, it is implicit in it that it is unequal and therefore violative of Art. 14.

Thus, in some of the earlier cases, the Supreme Court of India understood that the guarantee of Equality in Art. 14 simply means the absence of discrimination, but in the later cases, the court has come to hold that in order that the equality of opportunity may reach the backward classes and the minority, the state must take affirmative action by giving them a ‘preferential treatment’ or ‘protective discrimination’*30 and taking positive measures to reduce inequality. To make equality a living reality for the large masses of people, those who are unequal can not be treated by identical standards. It is necessary to take into account de-facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and

* 30. St. Stephens College-vs- University of Delhi. AIR 1992, SCC 558
economically disadvantaged persons in order to bring real equality. Hence, it is said that 'Protective Discrimination' is a facet of equality under Articles 14, 15 and 16 of the Constitution.

4.3 : Protective Discrimination and some provisions of the Constitution of India.

At the time of independence in 1947, there was widespread inequality whether between the British rulers and their Indian subjects, between the caste Hindus and the untouchables, between men and women or between the princes and the impoverished masses throughout the country. However, there was nothing ambiguous about the arbitrarily hierarchical and socially and economically exploitative caste system that had guided Indian society hitherto. At the bottom of this pyramidal structure lay the masses of economically deprived, politically disabled and socially discriminated Depressed Classes of India. Thus, one of the main concerns of the founding fathers of the Indian Constitution was to create an egalitarian society where in “Justice- social, economic and political prevail and equality of status and of opportunity” are made available to all. It is not therefore surprising to find the spirit of ‘equality’ pervading the provisions of the Constitution. But because of historical reasons certain classes of Indian citizens were known to be suffering from several social and economic disabilities and as they could not effectively enjoy either equality of status or of opportunity, it was thought prudent that for such period as they take for catching up with the rest of the society, the Constitution itself should provide for special treatment to them for certain purposes.
Such classes of Indian citizens are Scheduled Caste, Scheduled Tribes and Backward classes. To offset the accumulated oppression of centuries of deprivation, special constitutional measures were enacted for Scheduled Caste and Scheduled Tribes who had traditionally been the victims of socio-economic oppression. Nevertheless, the Constitution of India reflected the idealism and moral commitment of the founding fathers that in framing the Constitution they sought to establish a democratic secular state based on equal rights for all before the eyes of the law. Article 15 of this document prohibited discrimination on grounds of religion, race, caste, sex, place of birth, while Article 17 abolished untouchability and Articles 330 and 332 ensured reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the people and Legislative Assemblies of the states. Responding to the needs of the hour, the Constituent Assembly members opted for the policy of reservation or ‘Protective Discrimination’ towards the Scheduled Castes, Scheduled Tribes and Other Backward Classes. In order to bring about equality under unequal circumstances, and in seeking to discriminate in favour of those who had been historically discriminated against, a policy of ‘affirmative action’ or ‘protective discrimination’ had been adopted.

‘Affirmative action’ is a phrase that refers to attempts to bring members of unrepresented groups, usually groups that have suffered discrimination, into a higher degree of participation in some beneficial programme. Some affirmative action efforts and includes some kind of preferential treatment.
In Indra Sawhney –vs- Union of India*31, regarding affirmative action it was held that “among others, the concept of equality before the law contemplates minimizing inequalities in income and eliminating inequalities in status, facilities and opportunities not only amongst individuals, but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with “special care the educational and economic interest of the weaker sections of the people, including the Scheduled Caste and Scheduled Tribes and to protect them from social injustice.”

To bring about equality among unequals it is necessary to adopt positive measures to abolish inequality. As such our Constitutional scheme has truly adopted this principles of affirmative action with the covering of protective discrimination. Thus the concept of protective discrimination covers the following categories of person considering their weakness in their socio-economic status and physical structure as well in case of women.

The Constitution of Indian guarantees to all persons the right to equality, but it is not absolute. Because the very concept of equality implies recourse to valid classification for preferences in favour of the disadvantage classes of citizens to improve their conditions, so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens. Thus, the collective reading of the ‘right to equality’ provides special protection to some of the social groups for their development, as they are socially behind i.e.

*31. AIR 1993, SC 477
women and children, Scheduled Caste, Scheduled Tribes and Other Backward Classes. Accordingly these special provisions are being narrated in the Constitution of India under Article 15 and 16 respectively with its subsequent amendments, Art. 46 of Part IV and Part XVI of the same labeled as Protective Discrimination not only by the Courts, but also by the critical analysis.

The three Articles i.e. Art. 14, 15 and 16 together form part of the same constitutional code of guarantee of equality and supplement each other. Art. 14 is the genus while Articles 15 and 16 are species although all of them occupy same field and the doctrine of ‘equality’ embodies in these Articles have many facets and ‘protective discrimination’ is a facet of equality under Articles 14, 15 and 16 of the Constitution.

I) Article 15 and Protective Discrimination:

Article 15 provides for a particular application of the general principle embodied in Article 14. When a law comes within the prohibition of Art. 15 it can not be validated by recourse to Art. 14 by applying the principle of reasonableness of classification. It is when discrimination is based upon the grounds mentioned in Art. 15, the reasonableness of the classification will be tested under Art. 14

A) Article 15 (1) of the Constitution of India:

The first clause of Art. 15 directs the state not to discrimination against a citizens on grounds only of religion, race, caste,
sex or place of birth or any of them. The word ‘discrimination’ means to make an adverse distinction or to distinguish unfavourable from others. If a law makes discrimination on any of the above ground it can be declared invalid.

The scope of this clause is very wide. It is leveled against any state action in relation to the citizens rights, whether political, civil or otherwise.*32 Thus, a provision for communal representation or selection on the basis of separate electorates according to communities offends against this clause and any election held in pursuance of such a law, after the commencement of the Constitution, must be held to be void.*33 Constitutional mandate to the state contained in Art. 15 (1) extends to political as well as other rights and any law providing for election on this basis of separate electorates for members of different religious communities offends this clause.*34 It was further held in that case that a separate electorate for a religious denomination would be obnoxious to the fundamental principles of the Constitution and if a provision is made ‘purely’ on the basis of religious consideration for election of a member that religious group on the basis of a separate electorate, it would be wholly unconstitutional.

Art. 15 (1) can not be invoked unless the discrimination has been made by the ‘state’. The fundamental right conferred by this clause is conferred on a citizens as an individual and is a guarantee against his

* 32 Nain Sakh-vs-State of U.P. AIR 1953, SC 384
* 33 Ibid
* 34 R.C. Pondyal -vs- Union of India. AIR 1993 SC 1804
being subjected to discrimination in the matter of his rights, privilege
and immunities pertaining to him as a citizen generally.

What Art. 15 (1) means is that no person of a particular
religion, caste, sex, etc. shall be treated unfavourably (by the state) when
compared with persons of the religions and castes merely on the ground
that he belongs to a particular religion or caste etc.*35 The significance
of the word 'only' is that other qualifications being equal, the race,
religion etc. of a citizen shall not be ground of preference or disability. It
there is any other ground for the differential treatment besides those
prohibition by the Article, the discrimination will not be
unconstitutional.*36

The Supreme Court has taken the view that personal laws
are immune from being challenged under fundamental rights which do
not touch upon those laws. Personal Laws fall outside the scope of
fundamental Rights. Challenges to the personal laws on the basis of
religious differentiation or on the basis of differentiation between males
and females have not been accepted, where the non statutory law of
adoption was held valid.*37 A law introducing monogamy among
Hindus, but leaving the Muslims free to take more than one wife was
upheld against the charge of discrimination on the ground of 'religion'
only. It was held that the Hindus have been enjoying for long their own

* 35 Champakam-vs-State of Madras, AIR 1951 Mad 190
* 36 Anjali-vs-State of W. Bengal (1952) CWN 801, M.C. Sarma-vs-Punjab
University AIR 1997, P&H 87 Satyendra Kumar Tripathi-vs- State of UP
AIR 2005 AIL. 147
* 37 Sangannagouda-vs-Kalkangouda. AIR 1960 Mys. 147
indigenous system based on Hindu Scriptures, in the same way the Mohammedans were subject to their own personal law.* 38

Thus, in determining whether there has been any discrimination by any legislation ‘only’ on the ground of religion, caste etc. the court has to look into the operation or the effect of the law on the civil rights of the persons to whom it applies. If it operates to the disadvantages of a person solely because of his religion, caste or the like there will be an infringement of the constitutional prohibition however, laudable its object might have been; unless, of course it is authorized by some other provisions of the Constitution.

B. Article 15 (2) of the Constitution of India:

Article 15 (2) is a specific application of the general prohibition contained in Article 15 (1). Article 15 (2) declares that no citizen shall be subjected to any disability, restriction or condition on grounds only of religion, race, caste, place of birth or any of them with regard to – (a) access to shops, public restaurants, hotels and places of public entertainment, or (b) the use of well, thanks, baths, roads and place of public resort, maintained wholly or partly out of state funds or dedicated to the use of the general public.

It is to be noted that while clause (1) of Article 15 prohibits discrimination by the state; clause (2) prohibits both the state and private individuals from making any discrimination.

* 38 Srinivas Iyer-vs- Saraswati AIR 1952 Mad 193
In USA it is firmly established that the Constitutional guarantees are aimed at state action, and that against private action, the remedy, if any, is under the ordinary law and not the Constitution.

C. Article 15 (3) of the Constitution of India and Protective Discrimination:

The need for Article 15 (3) was first discussed when the provision that prevented 'discrimination based on sex' was sought to be removed and this was debated by the Advisory Committee.*39 Sri Alladi was of the view that first the general provision should exist, followed by specific exceptions. A suggestion was made by separate sub-committee that prohibition on discrimination on ground of sex alone should be removed with respect to access to trade, establishments, public restaurants, hotels and the use of wells, tanks etc. However, this was rejected and the suggestion of Sri Alladi was accepted. The modification was then carried out when the clause was redrafted by a few members from the Advisory Committee *40

Justice Frankfurter of the US Supreme Court was strongly in favour of this provision and recommended it to the Constitutional Advisor.*41

Prof. K.T. Shah justified the inclusion of this provision in order to safeguard, project or lead to their betterment in general, so that

---

* 40 Ibid, P-289
* 41 Dr.l Subhash C. Kashyap "The framing of Indias Constitution study" Vol. 5, Edn. P- 187
the long range interest of the country may not suffer. This clause however did not otherwise involve any controversial debates.

The Constitution of India makes specific provision of protective discrimination in favour of women in Art 15 (3). Article 15 (3) recognizes the fact that women in India have been socially and economically handicapped for centuries and as a result there of, they can not fully participate in the socio-economic activities of the nation on a footing of equality. This Article is one of the to exceptions to the general rule laid down in clauses (1) and (2) of Article 15 and Article 14. It says that nothing in Art. 15 shall prevent the state making any special provision for women and children. Women and children require special treatment on account of their very nature. Article 15 (3) empowers the State to make special provision for them.

While including clause (3) to Article 15 the framing fathers might have thought that special treatment of women is justifiable on account of their peculiar social position and dignity in Indian culture as whole. In Yusuf Abdul Aziz-vs State of Bombay*42 section 497of IPC which only punishes man for adultery and exempts the women for punishments even though she may be equally guilty as an abettor was held to be valid since the classification was not based on the ground of sex alone. The provision of free education for children or measure for prevention of their exploitation would also not come within the provision of Article 15 (1). It has been held that Art. 15 (3) provides for

* 42 AIR 1954 SC 321; Revathi-vs- Union of India, AIR 1988 SC 835
only special provisions for the benefit of women and children and does not require that absolutely identical treatment as those enjoyed by males in similar matters must be afforded to them.* 43 Thus the provision of maternity relief for women workers (Art. 42) will not be a contravention of the prohibition against discrimination under clause (1) of Article 15; nor will be the provision of free education for children (Art. 45) or measures for prevention of their exploitation [Art. 39 (f)]. Similarly, the provision of separate accommodation, entrances etc. for women and children at places of public resort will not be a violation of clause (2) of the present Article. The present clause would also justify the regulation or limiting of working hours for women employees even though such regulation was 'not necessary for men'. The reason is that women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical well being becomes an object of public interest and care in order to preserve the strength and vigor of the race".*44

Articles 15 (1) and 15 (2) prevent the state from making any discriminatory law on the ground of gender alone. The Constitution of India is thus characterized by gender equality. It insist on equality of status and negates gender bias. Nevertheless, by virtue of Art 15 (3), the state is permitted, despite Art 15 (1), to make any special provision for women, thus carving out a permissible departure from the rigours of Art 15 (1). The main objective of Art. 15 (3) is to eliminate the socio-economic backwardness of women and to empower them in such a

* 43 Anjali Roy –vs- State of West Bengal AIR 1952 Cal. 825
* 44 Muller-vs- Oregon (1908) 208 us 412
manner as to bring about effective equality but just not literal equality between men and women. Art 15 (3) thus relieves the state from the bondage of Art 15 (1) and enable it to make special provisions to accord socio-economic equality of women.

C.1: Percentage of Reservation of Women:
The ratio of Indra Sawhney-vs- Union of India*45 where an upper limit of 50% was laid down for reservation, is restricted only to reservation under Articles 15 (4) and 16 (4). The Supreme Court in Togoru Sudhakar Reddy-vs-Govt. of Andhra Pradesh*46 upheld reservation of women in Andhra Pradesh Co-operative Societies Act. 1964 which exceeded 50% rule.

It is respectfully submitted such a ratio which was also followed in state of Orissa vs- Sankar Jena*47 by the Orissa High Court and in Abdul Aziz Asad-vs- state of A.P.*48 by the Andhra Pradesh High Court, goes against the ratio of Indra Sawhney-vs- Union of India*49 Indra Sawhney the court held that reservations under Articles 15 (4) and 16 (4) should be restricted to an upper cap of 50% and one of the prime reason for this decision was that merit should not be sacrificed. By allowing reservation greater than 50% for women, the number of seats

* 45 AIR 1993 SC 477
* 47 2006 (1) OLR 657
* 48 AIR 2005 AP 289
* 49 AIR 1993 SC 477
in the open category gets reduced, thus inevitably merit is sacrificed, which a reasonable man of common prudence can not accept.

The Supreme Court has ruled in Government of Andra Pradesh -vs- P.B. Vijay Kumar*50 that under Art. 15 (3), the state may fix a quota for appointment of women in government services. Also, a rule saying that all other things being equal, preference would be given to women to the extent of 30% of the posts was held valid with reference to Art. 15 (3).

It was argued that reservation of posts or appointments for any backward class is permissible under Art. 16 (2), but not for women and so no reservation can be made in favour of women as it would amount to discrimination on the ground of sex in public employment which would be violative of Art. 16 (2). Rejecting this argument, the Supreme Court has ruled that posts can be reserved for women under Art. 15 (3) as it is much wider in scope and covers all state activities. While Art. 15 (1) prohibits the state from making any discrimination inter-alia on the ground of sex alone, by virtue of Art. 15 (3), the state may make special provisions for women. Thus, Art. 15 (3) clearly carves out a permissible departure from the rigours of Art. 15 (1).

The Court has emphasized that an important limb of the concept of gender equality is creating job opportunities for women. Making special provisions for women in respect of employment or posts

* 50 AIR 1995, SC 1648
under the state is an integral part of Art. 15 (3). The expression ‘special provision for women’ means the ‘special provision’ which the state may make to improve women’s participation in all activities under the supervision and control of the state can be in the form of either affirmative action or reservation. Art. 15 (3) includes the power to make reservations for women. Thus, talking about the provision of giving preference to women in the instant case, the court has said that this provision does not make any reservation for women, it amounts to affirmative action. It operates at the initial stage of appointment and when men and women candidates are equally meritorious. Hence, under Art. 15 (3) both reservation and affirmative action are permissible in connection with employment or post under the state. Art. 15 is designed to create an egalitarian society.

There can be classification between male and female for filling up certain posts and such a classification can not be said to be arbitrary or unjustified. Reserving the post of principal in a women’s college or a lady teacher there in a women superintendent in women’s hostel is valid and such a classification is reasonable. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be sought. It was further held if separate college or schools could be established for girls, rule providing for appointment of lady principal also could be justified.*51

* 51 Vijay Laxmi -vs- Punjab University (2003) AIR 2003 SC 3331
In Mohd Abdul Azeez-vs- State of A.P. it was held that reservation 33.50% for women in admission to Post Graduate medical course does not violate Art. 15 (1) or the policy of reservation. Art. 15 (3) enables the legislature to make special provision for women. Affirmative action including by way of reservation is thus enabled by the equality injunction to the Constitution and are protected under Art. 15 (3).

A doubt has been raised whether Art. 15 (3) saves any provision concerning women or saves only such a provision as is in their favour. The better view would appear to be that while the state can make laws containing special provisions for women and children, it should not discriminate against them on the basis of their gender only. This appears to be cumulative effect of Art 15 (1) and Art. 15 (3).

It is to be accepted that clause (3) of Article 15 does not give any indication as to the nature of the special provision which the state is authorized to make. Hence, it may be made in any form provided that does not contravene any other provision of the Constitution.

The object of Article 15 (3) is to strengthen and improve the status of women and insertion of Art. 15 (3) is a recognition of the fact that for centuries, women of India have been socially and economically handicapped. So, from above it is clear that `special provision' for women under the guise of protective discrimination or

* 52 2005 AP 389 (F.B.)
* 53 Govt. of A.P.-vs- P.B. Vijay Kumar AIR 1995 SC 1648
affirmative action is allowed only in the context of social and economic backwardness of this folk, not on the basis of their sex only. It must be related to their disabilities which are peculiar to women.

The Supreme Court has held in Nain Sukh-vs- State of U.P.,*54 that the general prohibition against discrimination in clause (1) of Art. 15 also extends to political rights, so that the reservation of seats or provision of separate representation on the basis of religion, sex etc. would offend against clause (1) of Art. 15. But, the Bombay High Court has upheld the separate representation of women in local bodies, by reason of clause (3) Art. 15.*55 Such discrimination in favour of women would be permissible only if clause (3) could be regarded as co extensive with clause (1). But the use of the word 'women' in just a position of children in clause (3) suggest that the special provisions referred to in clause (3) must be related to such disabilities which are peculiar to women or children.*56 So viewed, clause (3) of Art. 15 would not justify discrimination in favour of women in respect of political rights, for political backwardness is not a condition peculiar to women in India and large sections of the male population are equally backward in this regard. Thus, in the same tune as Dr. D.D. Basu in his commentary on the Constitution of India, one can hold the same view that in the political sphere, women as a class, are under no disabilities or backwardness even in India, is amply demonstrated by the remarkable success of women candidates at all the last General Elections to

* 54 AIR 1953, SC 384
* 55 Dattatraya-vs- State of Bombay, AIR 1953, Bom. 311
Parliament and the state Legislature since 1950. In short, an opinion may be formed that the special treatment that is permissible under clause (3) of Art. 15 must be relatable to some feature or disability which is peculiar to women so as to differentiate them from men as a class.\(^{57}\) It is not possible to exhaust these special features of women, but some of them were mentioned by the American Supreme Court in Muller-vs-Oregon.\(^{58}\), the difference between the two sexes in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labour, dependence of women upon men, in general; the need for maintenance of the home and proper discharge of the maternal functions, including the rearing and education of children for the future well being of the race; economic disparity between a widow and a widower as a class, discrimination in favour of women \(59\) on such grounds exists, more or less, in all civilized countries of the world and is sanctioned by Art. 10.3 of the UN Declaration on Elimination of Discrimination Against Women, 1967.

Thus, there is little doubt that in framing Art. 15 (3), the makers of our Constitution were inspired by American decisions such as Muller-vs-Oregon, and the 'equality' clause in particular was framed in the light of American Constitution.

Therefore, the 'special provisions for women', which extends under Art. 15 (3) to protect reservations in favour of women in political

\(^{57}\) Srinivasan-vs- Padmasini, AIR 1957 MAD 622  
\(^{58}\) Muller-vs- Oregon (1908) 208 US 412  
\(^{59}\) Kahn-vs- Shevin (1947) 416 US 351
matters in some High Court decisions*60 can not be accepted in-toto looking at the history of Indian political scenario where in women political leaders duly represents in the Parliament and State Legislatures as well uptill now. Political right is the individual right equally framed for both the sexes, it neither reflects social inequality nor is necessary to uplift the women economically as a class. The special provision permissible under Art 15 (3) is in connection with employment of posts under the state, either as a reservation or affirmation action of the state concerned for providing them access to develop their skills and empowering them as such.

C.2 : Reservation for Women under Articles 243 D (3) and 243 T (3):

However, it is to be noted that finally the 73rd and 74th Amendment Acts of the Constitution of India, by inserting Articles 243 D(3) and 243T(3)*61 for reservation of seats in a Panchayat and a Municipality respectively has inputted the germ of protective discrimination for women again. Thus, already recognized political

---

* 60 Dattayana-vs- State of Bombay AIR 1953 Bom. 311 Ramachandra-vs- State of Bihar AIR 1966, Pat. 214

* 61 Art. 243 D (3) : Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different Constituencies in a Panchayat.

Art. 243 T (3) : Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different Constituencies in a Municipality.
rights by the Constitution itself has been coloured with the colour of reservation for women specially creating another protective discrimination with the male counter parts of the society. It is sufficient to provide special protection by way of reservation only to uplift the status of women in the persistence of gender prejudices prevailing our Indian society and gender discrimination in deed in the social mores of village life in India.

Most people cheered when the government announced in the last part of 2009 that it would raise the percentage of reserved seats for women in Panchayats and Nagar Palikas or Municipalities from the current one-third to half. Ironically, the state that has led the way in this is Bihar, one that is hardly ever held up as an example. Three years ago, Bihar enhanced the percentage of reserved seats for women to 50 percent.

Now with the rule applying all over India, the number of elected women representatives in Panchayati Raj institutions alone will jump from the current 1,038,989 (2006 data) to an estimated 1,400,000. And to do this Government plans to amend Article 243D of the Constitution which relates to reservation of seats for women.

However, in practice, the participation of women in Panchayats and Municipalities has been a fascinating and flawed story. Fascinating because it has shown that even deprived, illiterate, marginalized women can become competent and concerned elected
representatives. But flawed because the women have to function in a society that will not accept that they can think independently, understand the matter of governance and take responsibility outside the four walls of their homes. They are to sacrifice a lot for the family as home maker. Thus, for every success story there are many more women who front ambitious men.

However, it is true that women have made a difference where they have been trained and educated about their rights and responsibilities. Studies and surveys have established that without such specific input, the majority of elected women would not have been able to function effectively. The Panchayati Raj Ministry also initiated with the National Commission for women a Panchayat Mahila Shakti Abhiyan specifically to inject a level of confidence in women. The Ministry’s report on ‘The state of the Panchayats’ (2006) states that at present many women in Panchayats feel isolated and powerless, particularly because of the persistence of gender prejudices and gender discrimination in the social mores of village life.

Again, apart from prejudices, these women function against the background of the reality of women’s status in the country. Thus, an increase in the number of elected women and special protection by way of reservation alone does not necessarily alter this reality. Take just four indicators that are also used to judge the status of women in the Global Gender Gap Index – economic participation, educational attainment, political empowerment and health and survival. In 2007, India’s overall
ranking was a dismal i.e. 114 out of 128 countries surveyed. Though it is not depressing enough, its ranking in the specific areas is even worse. In economic participation and opportunities for women, it is 122 in rank, in educational attainment it is 116 (41 percent of Indian women in the 15-49 age group have never been to school), in health and survival it is 126 (India's maternal mortality rate is 301 per 1,00,000 live births). Only in political empowerment it score higher at 21, probably thanks to the million and more women elected to Panchayati Raj institutions.*

Against this background, the women who enter politics, mainly because there are seats reserved for them, do so in an environment where they have to struggle between their role as primary care takers of their homes and their responsibilities as elected officials, and where once the reserved seats revert to a general seats as a result of the system of rotation of reserved seats, they inevitably have to step down. A survey initiated by the Panchayati Raj Ministry in 2008 revealed that 89 percent of the women interviewed did not contest a second election and the 11 percent who did so, lost. Nearly half the women said that they felt the work was 'unsuitable' and that they felt incompetent and their spouse discourage them from contesting a second time.

However, the studies and the data bring out two crucial points. One, that even if the number of women elected to office increases because more seats are reserved, these women do not

*62 The Hindu, Sept. 6, 2009 “The other half” by Kalpana Sharma
necessarily continue their participation in politics, partly due to social 
attitude. Secondly, they have to struggle because of lower qualifications, 
the lack of training and the system itself, for instance rotation of seats 
appears to work against the interests of women. Thus, political 
empowerment by way of reservation of seats in the Panchayats and 
Nagar Palikas is not enough to uplift the status of women at the grass 
root level unless actual provision is not adopted for educational 
attainment, adequate health and survival and economic participation by 
them as well.

C. 3 : Women’s Reservation Bill or Proposed 108th Constitution 
Amendment Bill 2008 another example of Protective 
Discrimination : 

One controversial issue that has arisen pursuant to Article 
15 (3) is the Women’s Reservation Bill. The Women Reservation Bill 
contemplates reservation in favour of women at each level of legislative 
decision making, inter-alia providing for the reservation of 33% of the 
seats in the House of the people and state Legislative Assemblies for 
women. So, if it becomes law, it will be a perfect example of a special 
provision pursuant to Article 15 (3)

On 8th March, 2010 the Women’s Reservation Bill was 
introduced in the Rajya Sabha (upper House) of Parliament regarding 33 
percent reservation of women in Lok Sabha and state Legislative 
Assemblies. Thus, this is the Constitution (108) Amendment Bill 2008.
**Highlights of the Bill:**

1. It reserves one-third of Lok Sabha and State assembly seat for women.

2. One-third of SC/ST seats to be reserved for women of those groups.

3. Reservation for women shall cease 15 years after the Act is in place.

4. Reserved seats may be allotted by Parliament on rotation to different Constituencies.

5. Each Lok Sabha and assembly seats will be reserved for women once in a block of three elections.

6. One of the two Lok Sabha seats for Anglo-Indians will be reserved for a women of that community for the first two terms in a block of three elections.

With all the above mentioned objectives the Bill was passed in Rajya Sabha and it will now have to be passed by the Lok Sabha. There is no dead line for that and once it happens, it will be enacted into law. However, there is no reservation for women in the Rajya Sabha and Legislative Councils.

In the violent and rancorous opposition to the Women's Reservation Bill lies the answer to the question on how women will
change politics. For, this resistance springs not merely from the fact that many male legislators will lose their seats in Parliament and state assemblies, nor from the fact that the rotation of seats every five years will ensure that MPs may no longer ‘nurture’ their Constituencies. The real battle may be for political power in the name of women empowerment. So, if the Constitution (108th) Amendment Bill becomes law, then at least 181 women sit in the Lok Sabha and corresponding numbers in the State Assemblies across the country and it will result in a fundamental change in the power dynamics in an arena where it matters the most decision making in the highest echelons of the country.

Not just that, while women will be able to contest in any seat, reserved or unreserved, men will be restricted in any given Lok Sabha or Assembly to trying their luck in only two-thirds of the seats. Over time, women will cross the 33 percent mark, there is no doubt about it.

The question then is: what will women do with this power or will they bring certain measure of discipline and more responsible Parliamentary conduct to the legislatures or does reservation really need to empower our women in the political field and effect our legislative complexion or will they become male clones, as some powerful women such as Indira Gandhi and Margaret Thatcher did or will the larger numbers helps them treat power differently.
The most important aspect of all this is that at the first instance it may be presumed that the presence of more women will ensure greater sensitivity of women issues—equal wages, health, nutrition and education for women and welfare of girl child and other related issues. Of course, even the staunchest supporter of the Bill are not claiming that it will be a panacea for all evils and wonder why they should be judged by higher standards than men. “Why should women be expected to have magic wands?”—asks Rajya Sabha MP and CPI (M) member Brinda Karat. What is important, she says, is that the bill, if enacted, will “address the blatant reality of discrimination against women as far as getting into elected positions is concerned, while changing the cultural stereo typing of women merely as homemakers.”

Interestingly, even those political parties that have opposed the bill are at pains to stress that they are not opposed to reservation for women, what they want is sub-quota’s for SC/ST women, applying the creamy layer principle, but it is against the Constitutional law principle set by the Supreme Judiciary in so many case laws.

As for SC/ST women, they will get a third of the seats reserved for SC/ST—from their current 16 in the present Lok-Sabha, SC/ST women will be guaranteed at least 42 seats once the bill comes into force. The reason why some of the opposition parties like RJD, Mulayam Sing Yadav’s Samajwadi party, Mayawati’s Bahujan Samaj party etc are still demanding a sub-quota for SC/ST women is simple
and no difference from that which prevails in any other party—they do not want to share the current SC/ST quota with the women of these communities. Thus, the reason is purely political.

**Women members in the last five Lok Sabhas—**

<table>
<thead>
<tr>
<th>Lok Sabha</th>
<th>Number of women members</th>
</tr>
</thead>
<tbody>
<tr>
<td>11th</td>
<td>40</td>
</tr>
<tr>
<td>12th</td>
<td>44</td>
</tr>
<tr>
<td>13th</td>
<td>49</td>
</tr>
<tr>
<td>14th</td>
<td>45</td>
</tr>
<tr>
<td>15th</td>
<td>59</td>
</tr>
</tbody>
</table>

So, what the above mentioned data reveals that without any statutory reservation provision, the number of women members in the Lok Sabha is increasing radically. Is not it a sign of the growing tendency of women empowerment in deed? But the question is how exactly will the Women’s Reservation Bill empower our women and effect our legislative complexion? Hope time will prove it, that how far this protective discrimination again will be efficient and adequate to emancipate the women from gender discrimination not only in political, but also in social and economic participation and attainment of education safe health and hygiene as well.

Several India’s earliest women MPs, including Raj Kumari Amrit Kaur, opposed any reservation for women in Parliament. Renuka Ray, a member of the Constituent Assembly opposed reservation for women saying it was an “impediment to our growth and an insult to our very intelligence and capacity.” In India women are being worshiped as
‘Devi’ or ‘Shakti’ means power in Hindu mythology. In Muslim community also women are always respected. Now conservatism in both the two religions are neglected and there are so many statutory laws including personal laws which have tried to remove gender discrimination and the Constitution of India being the Supreme source of such laws. So, now the women are not simply the homemakers, they can take part in all the activities- social, economical, administrative, education and so on, whatever comes to them as per their capabilities and intelligence without reservation. In Civil and Criminal Law also women are being entrusted with special status and protection. So, enough is there for them to empower themselves and to come to the forefront and to compete with the male counterpart in all healthy competitions, whatever it may be.

Our first Prime Minister Pt. Jawaharlal Nehru was of the opinion that “you can tell the condition of a nation by looking at the status of the women.” It is also believed that behind every successful man there is an women. If it is so, then why ‘gender discrimination’ is being more polishing by attempting to enact the Women Reservation Bill in the name of political empowerment. From this one can hold the opinion that women are still weak in all aspects that they need reservation to represent themselves. Because the word ‘reservation’ implies protection for the weak people and who can not go ahead at his own. But there are so many instances in Indian politics like Sorojani Naidu, Indira Gandhi, Bijaylakshmi Pandit, presently Shusma Swaraj, Jayalalitha etc, who had and who are representing Indian women
without any reservation. Thus, reservation in Lok Sabha and Assemblies only will not be a panacea for all evils. Therefore, some creative and adequate solutions are to be found out to emancipate them from the actual bondage of discrimination in respect of social status, economic participation, education attainment and necessary projects are to be taken for their health and vigor, specially in rural areas and then only 'women empowerment' will reach it zenith in proper sense of the term. It is not proper to dangle a carrot of power before the women to divert then from their real problem.

D. Articles 15 (4) and 15 (5) of the Constitution of India and Protective Discrimination:

Article 15 (4) is the provision that permits the state to provide for reservations and other special provisions that benefit SC, ST’s and other socially and educationally backward classes of citizens. Art 15 (4) is an essential at facet of substantial equality. Art. 15 (4) did not form part of the Constitution as it originally stood in 1950. However, an equivalent of the current Article 15 (4) was the subject matter of considerable debate amongst the founding fathers of the Constitution.

The Fundamental Rights Sub-Committee modified an equality clause, framed by Mr. Munshi in his draft on the Fundamental Rights, to read as follows –

“All citizens shall have equal opportunities of receiving educations. Nothing here in contained shall preclude the state from providing special facilities for educationally backward sections of the population.” *63

* 63 B. Shiva Rao “The framing of India’s Constitution” Vol-2, 2005 Edn.- P-125
Moreover, B.N. Rau's Notes on the Fundamental Rights were considered and modified slightly. Based on this modification, it was agreed by the Sub-Committee that the following clause be added as a fundamental Rights.

"The state shall promote with special care the educational and economic interest of the weaker sections society (in particular, of the Scheduled Castes and aboriginal tribes): and shall protect them from social injustice and all forms of exploitation." *64

Prof. K.T. Shah proposed that "or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment" be added to Article 9 (2) as it stood then and with this addition the provision would read:

"Nothing in this article shall prevent the state from making any special provision for women and children or for Schedules Castes or backward tribes, for their advantage safeguard and betterment."

However, Dr. Ambedkar was not in favour of this provision as he took the view that such a provision would result in further seclusion of SC's and ST's resulting in a 'separate but equal' treatment that was not in their interest. But it is ironical that Dr. Ambedkar agreed for the inclusion of a similar provision under Art. 16(4).

* 64 B. Shiva Rao, "The framing of India's Constitution". Vol-2, 2005 Edn. P-345 read with P-136
While this provision was rejected outright by the Constituent Assembly, it was introduced again by way of the First Amendment Act. 1951, by Parliament which constituted of the same members as the Constituent Assembly.

Now Article 15 (4) is regarding some special provision for advancement of Backward classes and it is another exception to clause (1) and (2) of Article 15 and it was added by the Constitution (1st Amendment) Act 1951, as a result of the decision in state of Madras-vs-Champakam Dorairajam. In the instant case the Madras Government had reserved seats in the state Medical and Engineering Colleges for different communities in certain proportions on the basis of religion, race and caste. The state defended the law of the ground that it was enacted with a view to promote the social justice for all sections of the people as required by Article 46 of the Directive Principles of state policy. The Supreme Court held the law void because it classified students on the basis of caste and religion irrespective of merit. The Directive Principles of state policy can not override the Fundamental Rights. Again, in another case an order requisitioning land for the construction of a Harijan Colony was held to be void under Article 15(1) Thus, to modify the effects of these two decisions, Article 15 was amendment by the Constitution (1st Amendment) Act. 1951 and clause (4) was added to it. Under this clause, the state is empowered to make special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes

* 65 AIR 1951 SC 226
* 66 Jagwant Kaur-vs- State of Bombay AIR 1952 Bom. 461
and Scheduled Tribes. It means that if special provisions are made by
the state in favour of the members of these Castes and Tribes, other
citizens shall not be entitled to impeach the validity of such provisions
on the ground that such provisions are discriminatory against them.*67

The object of this clause, added in 1951, is to bring
Articles 15 and 29 in line with Articles 16 (4), 46 and 340 and to make it
constitutional for the sake of reserve seats for backward classes of
citizens, Scheduled Castes and Tribes, other citizens shall not be entitled
to impeach the validity of such provisions on the ground that such
provisions are discriminatory against them.

The principle behind Article 15 (4) is that a preferential
treatment can be given validity when the socially and educationally
backward classes need it. This article enables the state Government to
make provisions for upliftment of Scheduled Caste and Scheduled
Tribes including reservation of seats for admission to educational
institution.*68 Thus, the present clause qualifies the word ‘Backward’ by
the words ‘Socially and educationally.’

Reservation are not to be made on the basis of population
of a particular category and reservation for education is to be made
under Article 15(4) keeping in view the social and educational
backwardness. Under this clause reservation could be permitted not only
for socially and educationally backward classes, but state is empowered

* 67 Lipika Das-vs- State of Meghalaya, AIR 1994, Gauhati-1
* 68 Pammalal Saha-vs- State of Tripura AIR 1999 Gau 148
to do so in respect of students of a particular area under Article 15 (4). But it is to be remembered that when the whole state is socially and educationally backward, the state whole population becomes a class by it self and no reservation in such cases is possible under this Article.*69

**D.1 Who are Socially and Educationally Backward classes:**

The Constitution does not define ‘Backward Classes’. The Scheduled Castes and Scheduled Tribes are no doubt backward classes, but the fact that the Schedules Castes and Tribes are mentioned together with the expression ‘backward classes’ shows that there may be other backward classes of people besides the Schedules Caste and Tribes. Article 340 however, empowers the President to appoint a Commission to investigate conditions of socially and educationally backward classes. On the basis of the report of the Commission, the President may specify who are to be considered as Backward Classes. The decision of the Government is however a justiciable issues and the court can consider whether the classification made by the Government is arbitrary or is based on any intelligible and tangible principle.

Such a Commission was appointed in 1953 (with Kaka Saheb Kalelkar as Chairman) which is also known as First Backward Classes Commission. However, the Commission submitted its report to the Government in March 1955. But the Commission failed to suggest a positive and practicable criteria towards identification of Backward Classes. It condemned the caste system yet it made it a predominant

*69 Tumnyak Etc-vs- State of Arunachal Pradesh AIR 2003 Gau 50*
factor in identification of Backward Classes. It can not be denied that Kaka Saheb Kalelkar Commission Report suffers from grave flaws of methodology and serious internal contradictions. Thus, the test recommended by the Commission appeared to the Government to be too vague and wide to be of much practical value, hence further investigation by the state Government have been authorized to give assistance to the backward classes according to the lists prepared by the state Governments themselves.*70

In Balaji -vs- State of Mysore*71 the Mysore Government issued an order under Art. 15-(4) reserving seats in the Medical and Engineering Colleges in the state as follows: Backward Classes 28%, more Backward Classes 20%, Scheduled Caste and Tribes 18%. Thus, 68% of the seats available in the colleges were reserved and only 32% was made available to the merit pool. The validity of the order was challenged by candidates who had secured more marks than those admitted under the order. Though qualified on merit they had failed to get admission only because of the reason of the Government order. The Court held that sub-classification made by the order between 'backward classes' and 'more backward classes' was not justified under Article 15 (4). The 'Backwardness' as envisaged by Art 15 (4) must be both social and educational and not either social or educational. Though caste may be a relevant factor but it can not be the sole test for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may all be relevant factors to be taken

* 70 Balaji-vs- State of Mysore, AIR 1963 SC 649
* 71 AIR 1963 SC 649, Chitralekha-vs- State of Mysore AIR 1964, SC 1823
Article 15 (4) does not speak of 'castes', but only speaks 'classes', and 'caste; and 'class' are not synonymous. The impugned order, however, proceeds only on the basis of caste without regard to other relevant factors and that is sufficient to render the order invalid. Thus, clause (4) of Article 15 only enables the state of make special and not exclusive provision for the backward classes. The state would not be justified ignoring altogether advancement of the rest of the society in its zeal to promote the welfare of backward classes. National interest would suffer if qualified and competent students were excluded from admission in institutions of higher education. It was held by the Supreme Court that the appointment or recommendations of the Commission under Art. 340 was not a condition precedent for the state to make special provisions for backward classes under Art. 15 (4). In the absence of a definition of the expression in the Constitution, the determination of which classes are 'backward' was left to 'state' as defined in Art. 12. In other words, the state was competent to classify classes of persons as 'backward' by executive or legislative action, so long as that is not determine after investigation by the Commission. But this determination, was not final but is subject to judicial review and the Court can interfere if such classification violated Art 15 (1) or any other provision of the Constitution or on collateral consideration.

Thus, after the enactment of the first Constitutional Amendment in 1951, Balaji was the first case which come up before the Supreme Court.
After Balaji,*72 an order saying that a family whose income was less than Rs. 1,200 per year, and which followed such occupations as agriculture, petty business, inferior services, crafts etc, would be treated as ‘backward’ was declared to be valid in Chitralekha-vs- State of Mysore.*73 Here, two factors- economic condition and profession were taken into account to define backwardness, but caste was ignored for the purpose. The Supreme Court ruled that though caste is a relevant circumstance in ascertaining backwardness of a class, these is nothing to preclude the authority concerned from determining social backwardness of a group of citizens, if it could do so without reference to caste. Identification of backward classes on the basis of occupation-cum-income, without reference to caste is not bad and would not offend Art. 15 (4)

In course of time, the judicial view has undergone some change in this respect and ‘caste’ as a factor to assess backwardness has been given some what more importance than in Balaji. The Supreme Court has taken note of the fact that there are numerous castes in the country which are backward socially and educationally and the state has to protect their interest. A caste is also a ‘class’ of citizens and therefore if entire caste is found to be socially and educationally backward, as a fact, on the basis of relevant data and material, then inclusion of ‘caste’ as such would not violate Art 15 (1).

* 72 MR Balaji-vs- State of Mysore AIR 1963, SC 649
* 73 AIR 1964 SC, 1823 : (1964) 6 SCR 368
On this basis in P. Rajendran-vs-State of Madras*74, the court upheld a Madras order defining backward classes mainly with reference to caste. Looking at the history as to how the list had come to be formulated, the court felt satisfied that caste was not taken as the sole basis of backwardness; the main criterion for inclusion in the list was social and educational backwardness of the castes based on their occupations. Castes were only a compendious indication of the classes of people found to be socially and educationally backward. But if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Art. 15 (1)

Similarly, in S.V. Balaram-vs-State of Andra Pradesh*75 a list prepared by the Backward Classes Commission appointed by the Andhra Government was held valid even though backward classes were enumerated mainly by their caste names because the court found that the Commission had prepared the list after a detailed enquiry and applying several tests like general poverty, occupation, caste and educational backwardness. The court felt satisfied that the Commission had enough material before it to be satisfied that the persons included in the list were really socially and educationally backward.

Again the Supreme Court emphasized in K.S. Jayasree-vs-State of Kerala*76 that social backwardness is the result of caste and

---

* 74 AIR 1968 SC 1012 : (1968) 2 SCR 786
* 75 AIR 1972 SC 1375
* 76 AIR 1976 SC 2381
Poverty. Poverty and economic standard is a relevant factor in the determining backwardness. But neither caste alone nor poverty alone will be the determining test. Both of these factors are relevant to determine backwardness. Occupation, place of habitation may also be relevant factors for the purpose.

Any how, a clear picture as to who are socially and educationally backward was drawn just after the second Backward Classes Commission or the Mandal Commission’s Report and formally in Indra Sawhney’s judgment in 1993.

Thus a Second Commission, under Article 340 was next appointed in 1979, known as Mandal Commission, which submitted its Report at the end of 1980. When the Commission submitted its Report, the Government of India issued certain Memoranda in 1990-91. In pursuance of this Report, various writ petitions were filed, challenging the Constitutional validity of the Mandal Commission Report and the office Memoranda.

These petitions were eventually heard and disposed of on 16-11-1992 by a 9-Judge Bench in Indra Sawhney-vs-Union of India.*77 In this case the court has laid down some principles and tests for determining social and educational backwardness and further recommended the setting up of a permanent Commission for periodically identifying such backward classes. Accordingly, in

* 77 AIR 1993, SC 477
pursuance of the above mentioned recommendations, Parliament has enacted the National Commission for Backward Classes Act, 1993, for the purpose of identifying backward classes other than Scheduled Caste and Tribes and reporting to the Central Government to that effect. However the position was once and for all settled in Indra Swahney's case which has laid down the following test to identify the —

“Socially and Educationally backward classes” :-

I. The Schedules Castes and Tribes being mentioned with the ‘backward classes’ in Art 15 (4), it is evident that by the expression ‘backward classes’, the clause refers to classes of persons other than the members of the Schedule Caste and Tribes. Other classes (even amongst Christians, Jain and Muslims) may be included within the fold of Art. 15 (4) provided they are socially and educationally backward. (Paras 38, 39)*78.

II. In view of the vastness of the country with heterogeneous conditions, no uniform test can be laid down for determining whether a class, as a whole, is socially and educationally backward. [Paras 81, 83, 94 126 (3) (b)]*79.

Thus, though Art 15 (4) does not speak of economic backwardness, there are places such as Mysore, where the economic backwardness of a class, on the basis of their occupation may lead to

---

*78 Indra Sawhney-vs- Union of India AIR 1993, SC 477
*79 Ibid
their social and educational backwardness. (Paras 35, 37)*80 In other words, economic backwardness or poverty alone is not relevant under Art 15 (4); but in some cases, along with other circumstances it may be indicative of social backwardness.

III. The test of backwardness under Article 15 (4) is 'social and educational' consequently, the backwardness must be in both respects - 'social and educational' and this attribute must relate to the class in question, identified as a class.

In B.C. Swain-vs-W.T. Department*81 it was held that although Harijans do not fall within Scheduled Caste and Schedules Tribes, the Court could not take judicial notes of the fact that Harijans are socially and educationally backward.

Mere educational backwardness would not justify a special provision under Art 15 (4) if the class is not socially backward.

* Residence in certain areas, e.g. along the 'cease fire line', may be a cause of social and educational backwardness, provided such backwardness is founded, not on the place of their birth, but on the precarious conditions of life prevailing in such areas, lack of the communication, educational facilities or the like.*82 ‘Caste’ is also,

* 80 Indra Sawhney-vs- Union of India AIR 1993, SC 477
* 81 AIR 1974, ORI 115
* 82 R. Sree Kumar vs- State of Kerala AIR 1998 Ker 77
one of the relevant circumstances in determining backwardness but if a group has been classified as backward on other relevant considerations, the classification can not be challenged as invalid on the ground of omission to take caste into consideration.\footnote{83}

In Indra Sawhney-vs- Union of India; (AIR 1993 SC 477) Supreme Court accepted caste as a determinant of backwardness. But a balance was struck with the principle of secularism, by declaring the concept of creamy layer.\footnote{84}

IV. Even though a class may appear to be generally backward, there may be sections or groups within such class who may not be socially and educationally backward. In identifying a class as backward, therefore, the state should take care to exclude such sections or groups as are not 'backward. This has been called the 'creamy layer.' (Para86)\footnote{85}

'Creamy layer' in a caste is not socially and educationally backward, rather it is on par with forward classes and is to be excluded from reservation. Conferring benefit of reservation to 'creamy layer' among backward classes amount to treating unequals as equals and equals as unequals, then violating the principle of equality, which is the basic feature of the Constitution.\footnote{86} The Supreme Court has confirmed the 'exclusion of creamy layer' to be mandatory in this instant case, as

the class would remain a homogenous group only on the exclusion of the ‘creamy layer’ and the class would be truly backward if the creamy layer was excluded. The court has however laid down that there are certain positions, the occupants of which can be treated as ‘socially advanced’ without further inquiry. Thus, if a member of a designated backward class becomes an IAS or IPS officer or becomes a member of All Indian Service, he is no longer socially disadvantaged. Thus, to identify the creamy layer the court has directed the Govt. to specify the basis of exclusion- whether on the basis of income, extent of holding or otherwise.

Pursuant to the above decision in Indra Sawhney –vs- Union of India.*87, the Central Government issued a Notification in 1993 which specified the sections of people that would constitute the creamy layer, which was further summarized in Indra Sawhney (II)-vs- Union of India.*88 In this case of India Sawhney-II the Supreme Court had clarified its stand that the classes to be excluded as creamy layer is a declaration of law and not a mere example as stated in Indra Sawhney-I

In Ashoka Kumar Thakur-vs- Union of India*89 (Ashoka Kumar Thakur-II) in which the Central Educational Institutions(Reservation in Admission) Act 2006 was challenged on the ground that it provide for reservations for socially and educationally backward classes without excluding the creamy layer. It was held that

* 87 AIR 1993 SC 477
* 88 AIR 2000 SC 498
* 89 AIR 2008 SCW 2899
regarding the exclusion of creamy layer the same principles will apply to Art 15 (4) as in the case of Art, 16 (4). It was further held that exclusion of creamy layer is mandatory and the exclusion of the 'creamy layer' was held necessary to identify the 'socially and educationally' backward classes.

In regard to the benefit of reservation or to provide 'special provision' the courts have accepted the general criteria of means cum social status to validly claim preferential treatment.

D.2 Economic Criteria as a basis of classification of socially and educationally backward classes :-

The application of economic criteria to determine "socially and educationally backward classes" has often been put before the screening of the Indian Courts, starting from Kumari Jayasree-vs- State of Kerala.*90

The State Government issued an order, pursuant to which only those applicants belonging to the Ezhava class who were members of families whose aggregate annual income was below Rs. 10,000/- would be entitled to admission to the seats reserved for students belonging to the socially and educationally backward Ezhava class. The petitioner was denied admission as she did not qualify due to income criteria.

* 90 AIR 1976 SC 2381
The crux of the petitioner’s argument was that exclusion of the creamy layer based on income level was invalid and that income could not be the criteria of admission to determine the benefit under Art. 15 (4).

The Apex Court, however negated the petitioners argument and unequivocally stated that economic criteria was a valid criteria for classification, as economic backwardness led to social and educational backwardness. While caste and economic criteria individually could not be the sole basis of classification, together they were valid criteria in determining social and educational backwardness.

An incorporation of a Means Test to determine applicability of reservation under Art. 15 (4) was validated in a number of cases. As the law marched on, the proposition that economic criteria alone could not be the singular criteria to determine backwardness was laid down in Janaki Prasad Parimoo-vs- State of Jammu & Kashmir. The Supreme Court reflected that if reservations were made only on the ground of economic considerations, an untenable situation would arise due to the fact that even in sectors which are recognized as socially and educationally advanced there are large pockets of poverty and such people would end up benefiting from the reservations.

This point was reiterated by the Indian Courts and emphasis was laid on the fact that a number of factors including caste, occupation as well as poverty need to be taken into account.

* 91 Gauri Sankar Verma-vs- State of Haryana AIR 1982
* 92 AIR 1973 SC 930
A revolutionary judgment in this regard is K.C. Vasantha Kumar-vs- State of Karnataka*[^93] in which Desai. J. for the first time took the view that economic consideration should be the sole criteria for determining social backwardness. Desai. J. concluded that economic criterion was a more accurate criterion than caste to determine socially and educationally backward classes.

Economic criteria for implementation of protective discrimination according to the learned Judge would lead to destruction of the caste system in turn enhancing the secular character of the nation. It would also lead to poverty alleviation, which was the need of the hour.

Justice O. Chinnappa Reddy gave great importance to the economic criterion as well. He observed that from the angle of class, status and power, poverty was one of the prime causes of the problems. He however did not disregard 'caste' as a criterion for deciding backwardness. Poverty, caste occupation and habitation were considered by him to be the primary factors that ought to be considered in order to classify a class as backward. However, a means test was paramount to prevent the creamy layer from enjoying the benefits of reservation.

This view of Justice Chinnappa Reddy, was commended by Justice B.P. Jeevan Reddy, in the majority judgment of Indra Sawhney-vs- Union of India. (AIR 1993, SC 477) Thus, it is clear that the position

[^93]: AIR 1985 SC 1495
of law is that economic criteria, like caste can be one of the criteria but it can not be the sole criteria.

Justice Dalveer Bhandari in Ashoka Kumar Thakur -vs- Union of India*94 took the view that economic criteria was a valid criteria for determining social and educational backwardness, however, he was bound by the precedent of India Sawhney-vs Union of India.*95

Thus Courts have in a number of cases upheld annual income upto a limit to be a valid criteria to claim the benefit of protective discrimination. This test has also been upheld by the Supreme Court as the most acceptable on the ground that the economic position had a direct nexus to social and educational backwardness because it was the economic backwardness which in turn contributed to social backwardness, preventing educational advancement. In Indra Sawhney-vs Union of India*96, majority of the Judges held that 'means test' can be taken as a 'measure' of social advancement and on that basis 'creamy layer' of a given caste, community or occupational group can be excluded to arrive at the true backward class. Even if there is no adequate representation of certain backward classes in services, if certain creamy layer is excluded, that can not be a valid reason after the Judgment in Indra Sawhney’s case for continued inclusions of creamy layer in the list of backward classes. It was held that persons who are employed in higher services are not be treated as backward and are to be

* 94 MANU/SC/1397/2008
* 95 AIR 1993. SC477
* 96 AIR 1993 SC 477
D. 3 : The Special provision must be for ‘Advancement’ :

It is worth mentioning that a special provision made for a ‘backward’ class, in order to be valid, must be for its advancement. Hence, even a member of such class may challenge its validity on the ground that it is not beneficial but detrimental to the interest of that class. However, the question remains that what provision can be said to be for the ‘advancement’ of a socially and educationally backward class. A full bench of Patna High Court*97 has held that such advancement need not be confined to only ‘social and educational’ advancement and that it may be extended to advancement in the economic field having regard to Directive Principles of State policy in Art. 46.

D. 4 Extent of Permissible Reservation under Article 15 (4)

Regarding the quantum of reservation the Supreme Court has set its face against excessive reservation because otherwise it is bound to affect efficiency and quality by eliminating general competition.

It was for the first time in Balaji-vs- State of Mysore, the question was raised before the Supreme Court relating to the extent of

* 97 Chait Ram-vs- Sikandar AIR 1968. Pat-337
special provisions which the states can make under Art 15 (4). In this case reservation upto 68% was made by the state of Mysore for backward classes for admission to the state medical and engineering colleges and leaving only 38% seats for merit pool. The state around that since Art 15 (4) does not contain any limitation on the state’s power to make reservation, cent percent reservation could be made in favour of backward classes in the higher educational institution. The Supreme Court rejected this extreme argument and also rejected the rule of 68% reservation.

Thus, the Supreme Court set its face against excessive reservation under Art 15 (4) for it may affect efficiency by eliminating general competition. The general principle laid down by the court is that the maximum limit of reservation should not be more than 50% for all classes under Art 15 (4) viz, backward classes, Scheduled Castes and Scheduled Tribes. Thus, reservation of 68% was declared void in Balaji. The court observed that the interests of the weaker sections of the society need to be adjusted with the interest of the society as a whole. The court directed that reservation should not exceed 50%. The same principle was followed and reiterated in. The limit of 50% for reservation thus has its basis in M.R. Bajali-vs- State of Mysore.*98

Later on in Indra Sawhney-vs- Union of India*99 majority of the Judges declared that identification of backward class can certainly be done with reference to castes among and along with other

* 98 AIR 1963 SC 649
* 99 AIR 1993, SC 477
occupational groups., classes and sections of the people. The majority, was of the view that neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor it is advisable for the court to lay down any procedure or method. It must be let to the authority appointed to identify. It can adopt such method, procedure as it thinks convenient and so long as it surveys the entire produce, no objection can be taken first.

The Supreme Court has also observed in Indra Sawhney, that the policy of reservation has to be operated year wise and there can not be any such policy in perpetuity. The state can review from year to year the eligibility of the class of socially and educationally backward class of citizen. Further, it has been held that Art. 15 (4) does not mean that the percentage of reservation should be in proportion to the percentage of the population of the backward classes to the total population. It is in the discretion of the state to keep reservations at reasonable level by taking into consideration all legitimate claims and the relevant factors. It was also held that 50% limit applies to reservation only and not to exemptions, concessions and relaxations under Art 16(4)

On the other hand, while 50% shall be the rule, it is necessary not to put out of consideration certain extra ordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national
life and in view of the conditions peculiar to them, need to be treated in
a different way, some relaxation in this strict rule may become
imperative. On this point the court affirmed the Balaji and Devadasan
cases and over-ruled the state of Kerala-vs- N.M. Thomas and K.C.
Vasnth Kumar-vs- State of Karnataka cases. But in doing so, extreme
cautions are to be exercised and a special case made out. (Para 94-A)*100
However, reservation in excess of 50% of the total seats would subvert
the principle of merit and would violate the guaranteed fundamental
right under Articles 15 (1) and 16 (1)

The Supreme Court has consistently declared in a series of
cases that reservation on the basis of caste, as determinant of
backwardness, but it has struck a balance with the principle of
secularism which is the basic feature of the Constitution, by bringing the
concept of 'creamy layer'. Exclusion of creamy layer was held
necessary to identify the 'socially and educationally' backward class.
(Indra Sawhney-vs-Union of India)*101

Regarding the extent of permissible reservation under Art
15 (4) it is to be mentioned that in Indra Sawhney-vs- Union of India
*102 the Supreme Court specifically laid down that the 'creamy layer'
test was not applicable to Scheduled Castes and Scheduled Tribes. This
view was again reiterated in Ashoka Kumar Thakur-vs- Union of India.
(Ashoka Kumar Thakur-II)*103 It was held that the test was used

* 100 Indra Sawhney-vs- Union of India AIR 1993 SC 477
* 101 AIR 1993 SC 477
* 102 Ibid
* 103 MANU/SC/1397/2008
merely to identify the backward classes, it could not apply to SC's and ST's as they were constitutionally recognized to be a separate class.

The reservation which is authorized by Art 15 (3) and 15 (4) is a special provision authorized by the Constitution in the interest of women or the backward classes mentioned in these provisions. Such reservation would not debar candidates belonging to such classes from competing for any of the general or unreserved seats. For the same reason if girls or Scheduled Caste candidate secure some seats from the general pool, on the basis of their individual merit, the number of such seats secured by them can not be taken into account for determining whether the quota of reservation made under Art. 15 (3) or Art 15 (4) should be struck down as unreasonable.

Conversely, a provision that in case reserved candidates are not available, it could be filled by candidates from open merit candidates is valid and the same does not amount by dereservation.*104

**Horizontal and Vertical Reservations:**

The Supreme Court in Indra Sawhney-vs- Union of India*105 held that both horizontal and vertical reservations are permissible.

While vertical reservations included reservation made in favour of Scheduled Castes, Scheduled Tribes and other backward

---

*104 K.H. Sijar-vs- High Court of Kerala, AIR 2006, SC 2339
*105 AIR 1993, SC 477
classes (Pursuant to Articles 15 (4) and 16 (4); and reservation that were made for the physically handicapped (under Articles 16 (1); or 14) would be horizontal reservations. Horizontal reservation cut across the vertical reservation, known as ‘interlocking reservation.’

The position regarding horizontal and vertical reservations is that such reservations are permissible and that the state has the discretion of deciding how the interlocking between the two has to be. It can also provide for specific exclusions of applicants seeking admission through horizontal reservations from a specific category of the vertically reserved category, if it deems fit.

It is respectfully submitted that the Judiciary by allowing horizontal reservations, over and above 50% vertical reservations appears to have taken a conflicting stand. One of the prime reasons for setting the 50% limit was because merit should not be sacrificed. Clearly, following the logic of 50% rule as approved in Indra Sawhney-vs- Union if India.*106 it should not be permissible. Even though the 50% rule as per Indra Sawhney was declared to be valid with respect to reservations under Art. 16 (4) alone, it was also indicated that reservations outside Art 16 (4) should be allowed only in special circumstances and the state has to justify the same.

While operating Articles 15 (4) and 16 (4), the states objective of bringing about and maintaining of social justice must be

* 106 AIR 1993 SC 477
achieved reasonably having regard to the interest of all. It is primarily the duty and functions of the state to inject moderation into the decision taken under Articles 15 (4) and 16 (4) and if the state contravenes Articles 16 (1) and 335, the Supreme Court will intervene*107

D. 5 : Reservation in Admission :

Question arises frequently regarding reservation of seats for administration in educational institutions for categories of persons other than those falling under Articles 15 (3) and 15 (4). This can be done under Art 15 (1) itself but the main question to consider is whether the classification is reasonable. The tests applied here are the same as are applicable in case of Art 14 to adjudge whether the classification is reasonable. As the Supreme Court has stated, the ‘socially and educationally backward’ can be shown some preferential treatment because of Art 15 (4). The underlying idea is that in course of time, these persons will be able to stand in equal position with the more advanced sections of the society. The same principle may be applied to other handicapped sections which do not fall under Art 15 (4). Thus, reservation of seats for children of defense personnel, ex-defense personnel, political sufferers has been upheld.

Reservation for children of residents of the Union Territories (other than Delhi) in professional institutions has been upheld because of general backwardness of these areas and absence of such institutions there. Also reservation for children of Government servants-

* 107 K.C. Vasant Kumar-vs- State of Karnataka AIR 1985 SC 1495
posted abroad in Indian Missions has also been upheld because these persons face lot of difficulties in the matter of education. There could be reasonable classification based on intelligible differentia for purposes of Articles 15 (1) and Art 15 (4)

On the whole the impact of judicial pronouncements in the area has been whole some. The growing tendency to make reservations in technical institutions for all and sundry has been curbed to some extent. In the absence of judicial control, reservation would have run riot excluding all merit.

While the Supreme Court has shown some flexibility of approach in the matter of fixation of criteria/reservation/preference for admission to graduate courses like MBBS etc, it has adopted some what stringent approach towards admissions to post graduate courses and still more stringent attitude to admissions to super specialties. In a landmark judgment in Dr. Priti Srivastava-vs- State of Madhya Pradesh, a five Judge Constitution Bench of the Supreme Court by 4:1 majority has held that merit alone can be the criterion for selecting students to the super specialty courses in medical and engineering. “At the level of admission to super specialty courses, no special provisions are permissible” the court declared. The Supreme Court said admissions to the highest available medical course in the country at the super speciality levels, where even the facilities for training are limited must

* 109 AIR 1999 SC 2894
be given on the basis of competitive merit. The object of Art. 15 (4) is to advance the equality principle by providing for protective discrimination in favour of the weaker sections so that they may become stronger and be able to compete equally with others. One can not ignore the wider interest of society while devising such special provision. Thus, the court has ruled in Preeti Sagar’s case that at the level of super specialization, there can not be any special provision as it is contrary to the national interest. Merit alone can be the basis of selection.

Therefore from the above it is clear that the provision of Art 15 (4) does not contemplate to reserve all seats or majority of the seats in an educational institution at the cost of the rest of the society. The same principle should also apply with equal force in the case of cent percent reservation of seats in educational institutions for a certain class of persons to the exclusion of meritorious students. *110 Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunate in the main stream of society by bringing them to the level of others which they can not achieve unless on protectively pushed. Once it is done, the protection needs to be withdrawn in the interest of protectors, so that they develop strength and feel confident of stepping in higher rungs on their own legs shedding the crutches. Pushing the protections of reservation beyond the primary level betrays the big wings desire to keep the crippled, crippled forever. *111 Reservation must have a time span, otherwise concessions tend to

---

* 110 Deepak Sibal –vs- Punjab University. AIR 1989 SC 903
* 111 AIIMS Students Union-vs- AIIMS (2002) AIR 2001 SC 3262
become vested interest. Reservation must match the inadequacy of representation. This principle will apply for both under Articles 15 (4) and 16 (4). The doctrine of protective discrimination embodied under Articles 15 (4), 16 (4) and the mandate of Art 29 (2) can not be stretched beyond a particular limit. When the benefit of reservation is given to a class of citizens, the same can not be allowed to continue without limitation and the same has to be reviewed periodically and the state can not be bound in perpetuity to treat such classes of persons for all times as socially and educationally backward. *112


The new clause 5 provides that nothing in Article 15 or in sub clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision by law, for the advancement of any socially and educationally Backward classes of citizens or for the Scheduled Caste and Scheduled Tribes in so far as such special provisions relate to admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of Article 30.

* 112 Jagdish Negi-vs- State of U.P. AIR 1997 SC 3505
However, the above amendment has been enacted to nullify the effect of the three decisions of the Supreme Court, i.e.; T.M. Pai Foundation-vs- State of Karnataka*113; Islamic Academy-vs- State of Karnataka*114 and P.A. Inamdar-vs-State of Maharashtra*115.

In TM Pai Foundation and P.A. Inamdar cases it has been held that the State can not make reservation of seats in admission in privately run educational institutions. There the admission can be done by common admission test conducted by the state or these institutions and on the basis of merit. In Islamic Academy case the court held that the state can fix quota for admissions to these educational institutions but it can not fix fee and also admissions can be done on the basis of common admission test and on the basis of merit. However, in P.A. Inamdar case the court has overruled the Islamic Academy ruling to the effect that the "State could fix the quota for admissions to private professional educational institution." This Amendment enables the state to make provision for reservation for the above categories of classes in admission to private educational institutions. The Amendment, however, keeps the minority educational institutions out of its purview. Article 15 prohibits discrimination on the ground of religion.

**O.B.C. Reservation in Higher Educational Institutions : Constitutional**

In Ashok Kumar Thakur-vs- Union of India*116, a five Judge bench of the Supreme Court headed by Chief Justice K.G.

* 113 AIR 2003 SC 355
* 114 AIR 2003 SC 3724
* 115 AIR 2005 SC 3226
* 116 AIR 2008 SCW 2899
Balakrishnan held that the Constitution 93rd (Amendment) Act, 2006 providing 27 percent reservation in admission to OBC candidates in higher educational institutions like IIT's and IIM's is Constitutional. However, the court left open the question of reservation to these category of citizens to private educational institutions. The Amendment provided that without touching the present strength of general category of students, the OBC candidates can be given reservation. The court also held that the benefit of reservation can not be made available to creamy layer candidates. The court held that the reservation must be reviewed in after every 5 years. The Creamy Layer requirement will not apply to SCs/STs candidates.

It is worth mentioning that in the Mandal Commissions case the Supreme Court had held that there can be no reservation to other backward classes in higher educational institutions e.g. IIT's, IPM and post graduate level in the Universities. But due to vote bank policy this ruling of the Mandal Commission has been given burial by 93rd (Amendment) Act 2006 of the Constitution.

The framers of the Constitution did not intend the quota to continue in perpetuity. Art 334 of the Constitution originally provided that reservation for SCs/ STs and Anglo-Indians in Lok Sabha and Assemblies for 10 years which should have been ceased to exist in 1960. But, the reservation have been extended when the Parliament substituted 30 years for another 10 years by the 45th Amendment Act, 1980 and this was again extended by the Parliament for another 10 years
and further extended by 10 years through the 79th Amendment Act 1999 and thus these reservations would now last up to January, 25, 2011, and as such it is continuing till date. It seems that nothing is more permanent than temporary in this respect.

Thus, from above it can be ascertained that the affirmative action through reservation under the zeal of protective discrimination is continuing on and on though originally it was not decided by the framing fathers of Constitution that will be perpetuated by the politicians only for their gain. History has shown that it is not politically possible for Parliament to say no to reservation, particularly when caste is involved.

So, let's depend on time which will show that for how long reservation system will continue under the Constitutional protection. Because again in census 2011, the inclusion of caste has been a vexed question for the polity. On Sept. 9, 2010 the Central Government clearly gives its approval, paving the way for 'Caste' being included in census 2011. So, it implies that we can hope for another amendment Act in regard to Art 334 for extension of reservation.

Therefore from the above it can be ascertained that a major difficulty raised by Art 15 (4) is regarding the determination of who are "socially and educationally backward classes". This is not a simple matter as the sociological and economic considerations come into play in evolving proper criteria for its determination. It is crystal clear that
Art 15 (4) lays down no criteria to designate ‘backward classes’ and it leaves the matter to the state to specify backward classes which is subject to judicial review.

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the Supreme Court’s approach has been that state resources are limited; protection to one group affects the Constitutional rights of other citizens to demand equal opportunity, and efficiency and public interest have to be maintained in public services. The court also seeks to guard against the perpetuation of the caste system in India.

From the several judicial pronouncements concerning the definition of backward classes several propositions emerge:

Firstly, the backwardness envisaged by Art 15 (4) is both social and educational and not either social or educational. This means that a class to be identified as backward should be both socially and educationally backward.

Secondly, poverty alone can not be the test of backwardness in India because by and large people are poor and therefore, large sections of population would fall under the backward category and thus the whole object of reservation would be frustrated.

Thirdly, backwardness should be comparable, though not exactly similar, to the Scheduled Castes and Scheduled Tribes.
Fourthly, 'caste' may be a relevant factor to define backwardness, but it can not be the sole or even the dominant criterion. If classification for social backwardness were to be based solely on caste, then the caste system would be perpetuated in the Indian Society.

Fifthly, poverty, occupations, place of habitation, all contribute to backwardness and such factors can not be ignored.

Sixthly, backwardness may be defined without any reference to caste. As the Supreme Court has emphasized, Art 15 (4) does not speak of 'castes', but only speak of 'classes' and that 'caste' and 'class' are not synonymous. Therefore, exclusion of caste to ascertain backwardness does not vitiate classification if it satisfies other tests. It has to be remembered that Art 15 (4) is an enabling provision and its objective is to advance the interest of the weaker elements in society. Reservations under Art 15 (4) must be within reasonable limit. Reservation should and must be adopted to advance the prospects of weaker section of society, but while doing so, care should be taken not to exclude the legitimate expectation of the other segments of the community and once a class appears to have reached a stage of progress, the state will do well to review such instances and suitably revise the backward classes and any decisions by the Government in this aspect is open for judicial review. Thus, when the benefit of reservation is given to a class of citizens, the same should not be allowed to continue without limitation and it should be review periodically by the state. Reservation can never be the sole substitute for the upliftment of the weaker section on the
social and economic plane. It was envisaged in the Constitution of India as a means to an end and the end being ‘Social Justice’.

II. Article 16 (4) of the Constitution of India and Protective Discrimination:

Article 16 (4)*117 provides the state with the power of impose reservation of appointments of posts for the benefit of ‘Backward Classes’ which in the opinion of the state are not adequately represented in the service under the state. Reservation in relation to appointment in public service connote the setting apart of post for being filled up by special categories of candidates. It means reservation of posts in the services for members of Scheduled Caste and Scheduled Tribes and Other Backward Classes. The powers conferred on the state can only be exercised in favour of a backward class and therefore, whether a particular class of citizens is backward, is an objective factor to be determined by the state. While the state has necessarily to ascertain whether a particular class of citizens is backward or not, having regard to acceptable criteria, it does not have the final say in the matter. State’s determination is justiciable and may be challenged if it is based on irrelevant considerations.

It was held that protective Discrimination under Article 16 (4), 16 (4) (A), is the armor to establish the equilibrium between equality in law and equality in results as a fact to the disadvantaged.*118

*117 Article 16 (4) states: “Nothing in this article shall prevent the state from making any provision for the reservation of appointment or posts in favour of any backward class of the citizens which, in the opinion of the state, is not adequately represented in the service under the State.”

*118 Jagadish Lal-vs- State of Haryana AIR 1997 SC 2366
A: **Article 16 (4) is an enabling provision; it does not grant a right to reservation:**

Articles 16 (4) and 16 (4-A) do not guarantee any fundamental right to reservation and they are enabling provision vesting a discretion in the state to consider providing reservation.

Explaining the nature of Art 16 (4), the Supreme Court has stated in Mohan Kumar Singhania-vs- Union of India, *119 that it is ‘an enabling provision’ conferring a discretionary power on the state for making any provision or reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services of the state. Art 16 (4) neither imposes any Constitutional duty nor confers any fundamental rights on any one for claiming reservation.*120

In M.R. Balaji-vs- State of Mysore*121 Gajendra Gadkar, J. observed that Article 15 (4), like Article 16 (4) was in the nature of enabling provision and imposed no positive obligation on the state. This however, did not constitute the ratio-decidendi of the judgment.

One of the first cases in which it was laid down as a part of the ratio-decidendi that Article 16 (4) does not grant a fundamental rights to the backward classes is C.A. Rajendran-vs- Union of India.*122

---

* 119 AIR 1992 SC 1, 26: 1992 Supp (1) SCC 594
* 121 AIR 1963, SC 649
* 122 AIR 1968, SC 507
A petition was filed under Article 32 praying for the issue of writ quashing an office Memorandum providing for no reservation for Scheduled Caste and Scheduled Tribes in post filled by promotion.

The court rejected the petition and held that the language of Art. 16 (4) had to be interpreted in the context and background of Article 335 of the Constitution. In other words, in making a provision for reservation of appointments or posts the Government has to take into consideration not only the claims of the members of the backward classes, but also the maintenance of efficiency of administration which is a matter of paramount importance.

It was observed that Article 16 (4) does not confer any right on the petitioner and there is no Constitutional duty imposed on the Government to make a reservation for Scheduled Caste and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. Thus, Article 16 (4) was described as an ‘enabling provision’ which confers a discretionary power on the state to make reservation of appointments in favour of backward class of citizens which in its opinion, is not adequately represented in the services of the state.

In P and T Scheduled Caste /Tribe Employee’s welfare Association (Regd)—vs- Union of India*123 the Supreme Court observed that Art 16 (4) ‘is only an enabling clause’ and “no writ can be issued ordinarily compelling the Government to make reservation” under it.

* 123 AIR 1989 SC 139, 142
Therefore, Art 16 (4) neither confers a right on any one to claim, nor imposes a Constitutional duty on the Government to make, any reservation for any one in public services. It is merely an enabling provision and confers a discretionary power on the state to reserve posts in favour of backward classes of citizens, which in its opinion are not adequately represented in the state service. A balance need to be struck between individual rights under Art 14 and Art 16 (1) on the one hand, and the affirmative action taken by the state under Art 16 (4). Therefore, reservation under Article 16 (4) has to be within reasonable and legitimate limits. In making reservation under Art 16 (4), the state can not ignore the fundamental rights of the rest of the citizens.¹²⁴

When there is a clash of interests and competing claims, there is craving for equality of opportunity amongst the people and for emancipation from the pangs of absolute prohibition. Articles 15 (2) to (4), 16 (4) and (4-A) read with the Directive principles, poured forth practical content, softened the rigor of legal equality and gave practical content of equality in opportunity through distributive justice in favour of unequals to hold an office or post under the state in the democratic governance. These Articles give power to the state to make positive discrimination in favour of the disadvantages, in particular the Dalits and Tribes. Socio economic empowerment secures them dignity of person and equality of status.¹²⁵

¹²⁴ C.A. Rajendran-vs- Union of India AIR 1968, SC 507 SBI
SC/ST Employees Welfare Assam-vs- State Bank of India, AIR 1996, SC 1838
Article 16 (4) is not an exception to Article 16 (1), but only an instance of classification implicit and permitted under Art. 16 (1). It was observed that even without Article 16 (4) the state could have classified 'Backward class of citizen' in a separate category for special treatment in the nature of reservation of posts/appointment in Government services and Article 16 (4) has put the matter beyond doubt in specific terms.

B: Backward Class - Identification thereof:

The term 'Backward class', as used in Art. 16 (4), takes within its fold Scheduled Castes and Scheduled Tribes. Art 15 (4) speaks about "socially and educationally backward classes of citizens" and 'Backward Class' in Art 16 (4) is a wider term than 'socially and educationally backward class' in Article 15 (4). However, it has been settled by a series of judicial pronouncements that the expression 'backward class of citizens' in Article 16 (4) means the same thing as the expression "any socially and educationally backward classes of citizens" in Art. 15 (4). Thus it includes Scheduled Caste and Schedule Tribes too within its ambit.

Any determination of backwardness for the purpose of reservation is not a subjective exercise, but an objective one and if the execution does not satisfy the relevant criteria, it would amount to fraud on power.*126

* 126 Indra Sawhney-vs- Union of India AIR 1993, SC 477
Regarding identification of 'Backward Classes' after review of earlier case laws, the Court concluded that judicial opinion emphasizes the integral connection between caste, occupation, poverty and social backwardness. Social, educational and economic backwardness are closely intertwined in the Indian context and 'caste' may be used as a criteria because caste often is a social class; though it can not by itself be the sole criteria for reservation. Though reservation is not made in favour of a caste if the caste satisfies the criteria of backwardness, it becomes a backward class for the purpose of Article 16 4. It was observed taking into consideration the different language used and Articles 15 (4) and 16 (4), backwardness contemplated under Article 16 (4) is mainly social backwardness. A backward class can be identified on the basis of occupation -cum- income without reference to caste, though identification on the basis of caste and economic condition is not permitted.*127

For this purpose of identification of 'Backward class'; Article 16 (4) 'mainly' contemplates social backwardness and it would not be correct to say that backwardness under the Article should be 'both social and educational'. Certain classes that do not qualify for reservation under Art, 15 (4) may qualify under Article 16 (4). A class which is not socially and educationally backward though economically or even educationally backward is not a backward class for the purpose of Article 16 (4).

*127 Indra Sawhney-vs- Union of India AIR 1993 SC 477
In Indra Sawhney-vs- Union of India*128 it was firmly affirmed regarding the meaning of the expression ‘backward classes’ of citizens, what does the expression signify and how should such classes be identified. Accordingly, the accent of Art 16 (4) is on social backwardness. From a review of the previous case laws in the area, the court has concluded that the judicial opinions emphasize the integral connection between caste, occupation, poverty and social backwardness. As regards identification of backward classes, caste may be a criteria, but it can not be the sole one. Reservation under Art 16 (4) is not in favour of a caste, but a backward class. Justice Reddy has observed in this connection that besides castes (whether found among the Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. Among the non Hindus, there are several occupational groups, sects and denominations which, for historical reasons are socially backward. They too represent backward social collectivities for the purpose of Art 16 (4). On the whole, backwardness contemplated by Art 16 (4) is mainly social backwardness.

C : Backward Class does not include the Creamy Layer of the class:

In Indra Sawhney-vs- Union of Indian*129 the Supreme Court while considering the question of ‘reservation of backwardness’ held that those members of the designated class of backward classes

* 128 AIR 1993, SC 477
* 129 Indra Sawhney II-vs-Union of India AIR 2000 SC 498
who were highly advanced, economically and educationally should be excluded. Such advanced classes was labeled as 'Creamy layer’ within the backward classes. It was observed that the Constitutional Provision will not be converted into citadels for unjustified patronage. If the forward classes are mechanically included in the high of backward classes or creamy layer among the backward classes is not excluded, the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will be taken away by the forward castes and the creamy layer. They will leave the truly backward, backward forever. Once backward, always backward is not acceptable. Otherwise, the very logic and philosophy behind the reservation system under the shelter of the Constitutional provision will be frustrated.

In simple terms, the creamy layer of a backward class refers to the affluent section of that class which is not backward and hence not in need of reservation. “Creamy layer of a backward class” is in a sense an oxymoron, as a class is a homogenous group and with the inclusion of the creamy layer in a ‘class’ the group would no longer remain homogenous and hence would not constitute a ‘class’.

The Supreme Court confirmed the 'exclusion of creamy layer’ to be mandatory in Indra Sawhney-vs- Union of India\textsuperscript{*130} as the class would remain a homogenous groups only on the exclusion of the creamy layer and the class would be truly backward only if the creamy layer was excluded. But the real difficulty is how and where to draw the

\*130 AIR 1993 SC 477
line. For drawing the line, it should be ensured that it does not result in
taking away with one hand what is given by the other.

The Court however, laid down that there are certain positions, the occupants of which can be treated as ‘socially advanced’ without any further inquiry. Thus, when a member of a designated backward class becomes a member of IAS or IPS or any other all India Service, his status in society rises, he is no longer socially disadvantaged. His children get full opportunity to realize their potential.

However instead of itself laying down, finally the test to identify the ‘creamy layer’, the court has directed the Government to specify the basis of exclusion – whether on the basis of income, extent of holding or otherwise.

The Court also expressly laid down that this discussion was confined only to other backward classes and had no relevance vis-à-vis Scheduled Tribes and Scheduled Castes.

Thus, the majority judgment in Indra Sawhney-vs- Union of India*131 remains the law of the land. Pursuant to the above decision, the Central Government issued a Notification dated 08-09-1993 which specified the sections that would constitute the Creamy Layer. This Notification excludes the following categories *132:

* 131 AIR 1993 SC 477
* 132 This notification was summarized in the case of India Sawhney-vs- Union of India (Indra Sawhney II) AIR 2000 SC 498
A) **Children of holders of Constitutional Posts like —**

a) President of India  
b) Vice-President of India  
c) Judges of the Supreme Court and High Courts  
d) Chairman and Members of UPSC and State Public Service Commission, Chief Election Commissioner, Comptroller and Auditor General of India.  
e) Persons holding Constitutional positions of like nature.

B) **Service Category**: Children of parents, Group A/Class I officers of All India Central Service and State service (direct recruits) where both or one of the parents are class I officers, subject to certain conditions; children of Group B/ class II officers of the Central and State Services (direct recruitment), subject to certain conditions; children of employees of Public sector undertakings, Banks, Insurance organizations, Universities etc. and in comparable posts and positions under private employment, children of members of Armed Force and Para-Military Forces;  

C) **Professional Category**: Children of those in professional class or those engaged in Trade and Industry beyond a particular income limit,  

D) **Property Owners (agricultural holdings)**: plantation vacant land or holdings in Urban areas or Urban agglomerations holding property beyond a particular extent as being outside the backward classes.
In Indra Sawhney-II*, the Supreme Court had altogether clarified the stand taken in Indra Sawhney-I. The court clarified that the classes to be excluded that were mentioned in Indra Sawhney-I was a declaration of law and not a mere example. The court also observed that the categories specified in the Government notification issued in 1993 were also a part of the creamy layer. And the non exclusion of the creamy layer would violate the basic structure of the Constitution.

While all the above cases dealt with Article 16 (4), the same principles apply to Article 15 (4) as well. This was laid down in Ashoka Kumar Thakur-vs- Union of India* (Ashoka Kumar Thakur-II) in relation to a challenge to the validity of the Central Education Institutions (Reservation in Admission) Act. 2006. One of the grounds of challenge was that it provided for reservations for socially and educationally backward classes without excluding the creamy layer. The court however held that the exclusion of 'Creamy Layer' was mandatory. The exclusion of the ‘Creamy Layer’ was held necessary to identify the “socially and educationally backward class”. It was held that identification of SEBC (Socially and Educationally Backward Classes) for the purpose of either Articles 15 (4), 15 (5) and 16 (4) solely on the basis of Caste is expressly prohibited by various decisions of this court and it is also against Article 15 (1) and Article 16 (1) of the

* 133 AIR 2000 SC 4968
* 134 MANU/SC/1397/2008
Constitution. To fulfill the conditions and to find out truly what is socially and educationally backward class, the exclusion of ‘creamy layer’ is essential.

**Creamy Layer test not applicable to SC’s and ST’s:**

In Indra Sawhney’s case the Supreme Court specifically laid down ‘Creamy Layer’ was not applicable to SCs and STs. This view was reiterated in Ashoka Kumar Thakur-vs- Union of India*135 (Ashoka Kumar Thakur –II). It was held that so far as this test was used merely to identify the backward classes, it could not apply to SCs and STs as they were Constitutionally recognized to be a separate class.

**D : Extent of Reservation under Article 16 (4):**

It is already mentioned that Articles 16(4) and 16 (4-A) do not guarantee any fundamental right to reservation and they are simply enabling provision vesting a discretion in the state to consider providing for reservation. However each backward class would cease to be the beneficiary of the reservation policy the moment the state comes to the conclusion that it is adequately represented in the services.*136

Reservation under Article16 (4) is really an instance of classification permitted under Article 16 (1) and being a facet of Article 14 which permits reasonable classification. To achieve equality, differential treatment of persons who are unequal is permissible by the Constitution itself. However, on the other hand, there is an ocean of difference

* 135 MANU/SC/1397/2008
between a well advanced class and a backward class in a race of open competition in the matter of public employment and they having been placed unequally, can not be measured by the same yard stick. It is in order to make the unequal equal, this constitutional provisions, namely Art 16 (4) has been designed and purposely introduced, providing some preferential treatment to the backward class. *137

In the same case, The Supreme Court after taking into consideration earlier decisions considered, how for Article 16 (4) is exhaustive on the question of reservation. The court explored the meaning and the scope of the expression 'Reservation' and held that having regard to the context in which it occurred, clause (4) is not and can not be held to be exhaustive of the concept of reservation, "it is exhaustive of reservation in favour of backward classes alone". But it is not exhaustive of representation that can be made for classes other than backward classes under Article 16 (1)

Article 16 (4) has to be interpreted in the background of Article 335. Reservation should not be excessive. Article 335 enjoin that while taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes, in making appointments in connection with the affairs of the State or Union, the policy of the state should be consistent with the maintenance of efficiency of administration.

* 137 Indra Sawhney-vs- Union of India AIR 1993 SC 477
It was held that relevance and significance of merit at the stage of initial recruitment can not be ignored. At the same time, it can not also be ignored that the very idea of reservation implies selection of a less meritorious person and that is necessary to implement constitutional promise of social justice. It was observed that nature has endowed merit upon the members of the backward classes as much as it has endowed upon members of other classes and what is required is an opportunity to prove it. Therefore, reservations are not anti-meritorious.

It was also found that certain services and positions where on account of nature of duties attached to them, or the level (in the hierarchy) at which they obtain merit alone counts. In such cases reservation are not permissible i.e. technical posts in research and development organizations departments, institutions, in the field of medicine, engineering, other courses in physical service and mathematics, in defence service. Similarly, in the case of posts at the higher echelons, professors, pilots in Indian Airlines, Scientist and Technicians in nuclear and space applications, provision for reservation is not advisable.*138

Regarding the extent of reservation, it should be exercised reasonably and fairly. The power conferred by clause (4) should be exercised in a fair manner and within reasonable limits and barring extraordinary circumstances it should not exceed 50%. The rule should be applied each year. The principle that reservation shall not exceed 50% applies only to reservation in respect of backward classes. Thus, the

*138 Indra Sawhney —vs- Union of India AIR 1993, SC 477 also in Preeti Srivastava (Dr) —vs- State of MP AIR 1999, SC 2894
provision under Art. 16 (4) conceived in the interest of certain sections of the society- should be balanced against the guarantee of equality enshrined in clause (1) of Article 16.

Again the vacancies can be carried forward against the reserved posts. In Indra Sawhney-vs- Union of India*139 the Supreme Court held that the 'carry forward' rule was valid. But the result of 'carry forward' rule should not result in breach of the 50% rule. In other wards— a 'carry forward' rule which provides that, if for want of suitable candidates from the Scheduled Castes, any of the post reserved for them can not be filled up, such unfilled up post should be carried forward for the next year and added to the seats reserved for the Scheduled Castes. But it would be unconstitutional if as a result of the rule, the reservation of the Scheduled Castes in a subsequent year exceeds 50%

If a member belonging to a Scheduled Caste gets selected in the open competition on the basis of his own merit, he will not be counted against the Quota reserved for Scheduled Caste and he will be treated as open competition candidate. In Indra Sawhney-vs- Union of India the court divided the total reservation of 50% into 'vertical' and 'horizontal' reservation. While reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes under Art. 16 (4) was called vertical reservation and reservations in favour of physically handicapped was called horizontal reservation.

* 139 - Indra Sawhney —vs- Union of India AIR 1993, SC 477
Very recently the Supreme Court in Public Service Commission, Uttaranchal-vs- Mamta Bisht and others*140 has set aside the judgment and order of Uttaranchal High Court where in the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social). The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, so she ought to have been appointed against the vacancy in general category in view of the judgment in Indra Sawhney- vs- Union of India. (AIR 1993, SC 477) and the petitioner ought to have been appointed giving the benefit of reservation.

But the Supreme Court held that the view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this court in Rajesh Kumar Daria -vs- Rajasthan Public Service Commission and others.*141 Social reservations in favour of SC, ST and OBC under Art 16 (4) are ‘vertical reservations’ special reservations in favour of physically handicapped, women etc, under Articles 16 (1) or 15 (3) are ‘horizontal reservation’. Accordingly it was held that where a ‘vertical reservation’ is made in favour of a backward class under Article 16 (4), the candidates belonging to such backward classe, may compete for non reserved posts and if they are appointed to the non reserved posts on their own merit, their number will not be counted against the ‘Quota’ reserved for respective Backward Class.

* 140 AIR 2010 SC 2613
* 141 AIR 2007 SC 3127
The entire reservation ‘Quota’ will be intact and available in addition to those selected under open competition category.*142 But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Caste, the proper procedure is first to fill up the quota for Scheduled Caste in order of merit and then to find out the number of candidates among them who belong to the special reservation group of “Scheduled Caste Women”. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota.

Article 16 (4) speaks of ‘adequate representation’ and not ‘proportionate representation’ and power under Art, 16 (4) must be exercised in a fair manner and within reasonable limits. The Supreme Court had declared that under Art 16 (4) care should be taken not to provide for unreasonable, excessive or extravagant reservation and reservation under Article 16 (4) should be within permissible and legitimate limits and any excess is liable to be challenged “as a fraud on the Constitution”. It was held that for attracting meritorious and talented persons to the public services, a balance has to be struck, while making provision for reservation in respect of a selection of the society. Affirmative action stops where reverse discrimination begins.*143

---

* 142 Indra Sawhney-vs- Union of India AIR 1993 SC 477
* 143 Ajit Singh II-vs- State of Punjab. AIR 1999 SC 3471
Thus, regarding the extent of reservation in case of public employment by the state under Article 16 (4), the Supreme Court has very recently given a significant judgment in Union of India -vs- Ramesh Ram and others.*144 held that the reserved category candidates "belonging to OBC, SC/ST categories" who are selected on merit and placed in the list of general/ unreserved category candidates can choose to migrate to the respective reserved category at the time of allocation of services. Such migration as envisaged by Rule 16 (2) of the All India Services Act (61 of 1951) is not inconsistent with Rule 16 (1) of the Act or Articles 14, 16 (4) and 335 of the Constitution. Rule 16 (2) should not be interpreted in an isolated manner since it was designed to protect the interest of MRC (Meritorious reserved category candidates) candidates. Moreover the aggregate reservation should not exceed 50% of all the available vacancies. Therefore, the MRC candidates who avail the benefit of Rule 16 (2) and are eventually adjusted in the Reserved category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the general pool will therefore be offered to General Category candidates. This is the only viable solutions since allotting these General Category seats (vacated by MRC) to relatively lower ranked reserved category candidates would result in aggregate reservations exceeding 50% of the total number of available seats.

The Court also held in the instant case that affirmative action measures should be scrutinized as per that standard of

* 144 AIR 2010 SC 2691
proportionality. This means that the criteria for any form of differential
treatment should bear a rational correlation with a legitimate
governmental objective.

Therefore, Articles 14, 15 and 16 including Articles 16 (4),
16 (4-A) must be applied in such a manner so that the balance is struck
in the matter of appointments by creating reasonable opportunities for
the reserved classes and also for the other members of the community
who do not belong to reserved classes. Such a view has been indicated
in Balaji’s case (AIR 1963 SC 649); Devadasan case (AIR 1964, SC
179) and Sabharwal case (AIR 1995, SC 1371). Even in Indra Sawhney
case, the same view has been held by indicating that only a limited
reservation not exceeding 50% is permissible. It is to be appreciated that
Article 15 (4) is an enabling provision like Article 16 (4) and the
reservation under either provision should not exceed the legitimate
limits. In making reservations for the backward classes, the state can not
ignore the fundamental rights of the rest of the citizens.*145

After Indra Sawhney where the court held that reservation
under Article 16 (4) must only be confined to appointment and not
promotion, and that 50% ceiling limit on reservation should be applied
each year, so as not to choke the general category, the government
amended the Constitution insert Articles 16 (4-A), 16 (4-B) and the
proviso to Article 335. These amendments, firstly, empower the state to
make reservations in matters of promotion in favour of SCs and STs*146.

* 145 Union of India –vs- Ramesh Ram and others AIR 2010, SC 2691
* 146 Constitution, Art. 16 (4-A) inserted by Constitution (77th Amendment)
  Act, 1995 and further amended by the Constitution (85th Amendment) Act. 2010
and secondly permitted the state to fill and unfilled vacancies [(reserved under Article 16 (4) and (4-A)] in a particular year in the next succeeding years as a separate class of vacancies which is not to be considered as part of the 50% ceiling limit for those successive year\(^\text{147}\) and further allowed the state to make provisions relaxing the qualifying marks or lowering the standard of evaluation of SCs and STs, not withstanding the overall efficiency requirements of Article 335.\(^\text{148}\)

These amendments were challenged as resulting in reversed discrimination and thereby destroying the rule of equality which is a basic feature of the Constitution, in M Nagaraj-vs- Union of India\(^\text{149}\). In the instant case the court held with respect to clause (4-A) of Article 16 that it is an enabling provision which is carved out of Article 16 (4) and thus, any state action under Article 16 (4-A) would have to be guided by the two compelling requirement of Article 16 (4); i.e., 'backwardness' and 'inadequacy' of representation. Further it would also have to take into account the 'overall efficiency in administration' as provided under Article 335, since it had already been held in Ajit Singh II\(^\text{150}\) that Article 335 was an essential consideration for any reservation policy under Article 16 (4). Thus, all the three factors would have to be kept in mind by the state when providing reservations in promotion for SCs and STs\(^\text{151}\). Thus, it is important that

\(^{147}\) Art 16 (4-B), inserted by ( 81st Amendment) Act, 2000

\(^{148}\) Art. 335, Proviso, inserted by the Constitution (82nd Amendment) Act. 2000

\(^{149}\) AIR 2007 SC 71, (2006) 8 SCC 212

\(^{150}\) Ajit Sing II-vs- State of Punjab, AIR 1999 SC 3471 (1999) 7 SCC 209

\(^{151}\) Nagaraj vs- Union of India, AIR 2007 SC 71
Article 16 (4-B) has removed the ceiling limit of 50% on the percentage of carry over unfilled vacancies, any state action taken there under must incorporate the time factor. By introducing time factor within Article 16 (4-B), the Court dealt with the question of the said amendment going against the mandate of Indra Sawhney, and preserved the effect of the main clause or Article 335 despite its relaxation by the proviso. Thus, the Constitutional scheme of reading Article 16 (4) with Article 335, and not Article 16 (4) in isolation, becomes the hallmark of the basic structure in cases of reservation.

Thus, reservation is provided only in order to make unequals equal, and Article 16 (4) has been designed and purposely introduced providing some preferential treatment to the backward classes. Reservation is a discriminatory exclusion of the disfavoured classes of meritorious candidates. On the whole, reservation is temporary in concept, limited in duration, Constitutional in application and specific in object. Reservation must contain within itself the seeds of its termination, then only the true picture of protective discrimination in its strive for equality in deed will come out.

III. Article 46 of the Constitution Supports Protective Discrimination:

Article 46 is one of the Directive Principles of the state policy which were designed by the framing fathers of the Constitution of India to usher in a social and economic democracy in the country. These principles obligate the state to take positive action in certain directions
in order to promote the welfare of the people and achieve economic democracy. These Directive Principles seek to give certain directions to the legislatures and governments in India as to how and in what manner and for what purpose, they are to exercise their power. Nevertheless, the Constitution declares that the Directive Principles, though not enforceable by any court are 'fundamental' in the governance of the country and as such the state has to make laws and use its administrative machinery for the achievement of these Directive Principles.

A : Promotion of Educational and Economic interest of weaker sections; Distributive Justice:

Article 46 enjoins the states to promote with special care the education and economic interest of the weaker sections of the people, and in particular of the Scheduled Caste and Scheduled Tribes and to protect them from social injustice and all forms exploitation.

Art. 46 supplements Articles 15 (2), 15 (4), 16, 17 and 29(2) of the Constitution of India. Thus, in one sentence it can be said that the provisions of Art. 46 clearly supports the doctrine of 'protective discrimination' or 'affirmative action' by specifying the weaker sections of the society with the aim of implementing the principles of social justice in deed.

Out of Art 46, the Supreme Court has developed the concept of Distributive Justice. Because of Art 46; an act made to protect and preserve economic interest of persons belonging to the
The court has emphasized that the Constitution not only permits but even directs the state to administer distributive justice. In the words of R.W.M. Dias ‘Distributive justice’ is based on the principle that there has to be equal distribution among equals. Equal distribution among equals means that according to a given criterion of discrimination, unequal cases are to be treated differently. However, in the sphere of law making, this concept connotes, inter-alia., the removal of economic inequalities and rectifying the injustice resulting from dealings and transaction between unequals in society. The court has explained the concept of distributive justice as that it comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct regulation of contractual transactions, by forbidding certain transaction etc. It also means that those who have been deprived of their properties by unconscionable bargaining should be restored their properties.

The Supreme Court has also observed* that Articles 38, 39 and 46 mandate the state, as its economic policy, to provide socio-economic justice to minimize inequalities in income and in opportunities and status. It positively charges the state to

---

* 152 Ahmedabad Municipal Corporation-vs- Nawab Khan Gulab Khan, AIR 1997 SC 152, 163
distribute its larges to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make the life worth living with dignity of person and equality of status and to constantly improve excellence.

Article 46 reading together with Articles 14, 21, 38, 39 and the Preamble to the Constitution, the Supreme Court has developed the doctrine of economic empowerment of the weaker sections of the society. The court has held that the right to economic empowerment to the Dalits, Tribes and the poor is a part of distributive justice and is a Fundamental Right. The court has observed in R. Chandevvarappa -vs- State of Karnataka* 153 :

"The economic empowerment, therefore, to the poor, dalits and tribes is an integral constitutional scheme of socio-economic democracy is a way of life of political democracy. Economic empowerment is, therefore, a basic human right and a fundamental right as part of right to life, equality and of status and dignity to the poor, weaker sections, dalits and tribes."

The court has further observed in Charan Singh-vs- State of Punjab*154 that it is settled policy of the Government as enjoined under Art. 46 of the Constitution and the Directive Principles, particularly Articles 38, 39 (b) and the Preamble to the Constitution

---

* 153 (1995) 6 SCC 309
* 154 AIR 1997 SC 1052 1054 (1997) 1 SCC 151
that economic and social justice requires to be done to the weaker sections of the society, in particular to the Scheduled Castes and Scheduled Tribes and to prevent them from social injustice and prevention of all forms of exploitation.

In the light of this Constitutional objective of economic empowerment, the government allotted land on lease to Scheduled Castes and Scheduled Tribes at a very concessional rate. After the expiry of the lease, the government sought to make possession of the land and sell it by auction. The court ruled that the government could not sell the land after the expiry of the lease, the government ought to regularize their possession.

Thus, with this end in view, economic empowerment to the Dalits, Tribes and the poor as a part of distributive justice has been held to be a Fundamental Right. The state is therefore, enjoined to provide adequate means of livelihood and to distribute material resources of the community, to the poor, weaker sections of the society, the dalits and the tribes.

It is necessary to state here that the expression ‘weaker sections’ of the people used in Art 46 is somewhat different from the expression ‘backward classes; of citizens used in Art 16 (4). The expression ‘weaker section’ of the people is wider than the expression ‘backward class’ of citizens which is only a part of the
'weaker sections'. The expression weaker section connotes all sections of society who are rendered weaker due to various causes.

So, with the use of some specific words containing affirmative action but discriminatory in use, not only the framing fathers of the Constitution, but the legislators till date, has successfully inputted and carrying the germ of protective discrimination. Thus, besides the Fundamental Rights, certain Directive principles obligates the state to ensure the welfare of certain sections of people.

IV. Special Provisions relating to certain Classes and Protective Discrimination:

Special provisions relating to certain classes implies a separate chapter containing certain safeguards to Minorities, Scheduled Castes, Schedule Tribes and Backward classes. Article 330 to 342 make special provisions for safeguarding the interest of Schedule Castes, Scheduled Tribes, Anglo-Indiana and Backward classes. Article 347-350, 350-A, 350-B make provisions for protecting the interest of linguistic minorities.

India has a composite population having a number of groups based on religion, language, caste or backwardness, such as the Scheduled Caste, Scheduled Tribes, Anglo-Indians, Muslims, Parsis, Sikh, Indian Christians etc.
It is well known that minority problem is very much influenced and coloured the political life of the country before Independence. The partition of India diluted to some extent the Muslim minority problem, but did not solve it completely. Besides, there are large groups of other religious minorities such as Christians, Sikhs, Jains, Parsis and others. The Schedule Caste and Scheduled Tribes are still treated at par with other religious minorities deserving special considerations.

However, the Constitution of India does not define the term ‘Minority’, nor the Supreme Court is able to determine any exact yardstick as to who are minority people. The Constitution uses the term ‘minority’ only twice. Once in Art 29 where emphasis is on linguistic and cultural minorities, having a distinct language, script or culture of its own. Again Art 30 refers to linguistic or religious minorities i.e. minorities based on religion or language.

1) Fundamental Rights Covers Minority Rights:

A wide range of minority rights are covered by the provisions relating to the Fundamental Rights, Articles 14, 15, 16, 25 and 29 (2) seek to protect them from hostile and discriminatory state action. Articles 15 (2), 16 (3), 17, 23 and 25 (2) (b) seek to remove social and economic disabilities of the depressed classes of people. Articles 25 to 30 safeguard the religious and cultural rights of the minority groups in India.
2) Directive Principles:

Besides the Fundamental Rights, certain Directive Principles obligates the state to ensure the welfare of certain sections of people.

Art 38 requires the state to promote the welfare of the people by securing a social order based on justice.

Again, as discussed above Art 46 requires the state to take special care in promoting educational and economic interest of the weaker sections of the people, and, in particular, of the Scheduled Caste and Scheduled Tribes.

3) Scheduled Caste and Scheduled Tribes; their identification:

The Scheduled Caste are not strictly speaking, a racial, linguistic or religious minority. In fact, they are part and parcel of the Hindu society and they are the depressed sections of the Hindu society who have suffered for long time due to socio-economic reasons or the social structure that the Hindus are following since time immoral and thus need special protection and help for the amelioration of their social, economic and political conditions.

The Scheduled Tribes (STs), also known as aborigines, are those backward sections of the Indian population who still observe their tribal ways, their own peculiar customs and culture norms. These people are divided into three distinct zones- North, Eastern, Central and...
Southern. The three main characteristics of these people are their primitive way of living, nomadic habits, love for drink and dance and habitation in remote and inaccessible areas. The Scheduled Tribes also need special provisions for safeguarding their interest.

The Constitution does not specify the Castes or Tribes which are to be called as the Scheduled Castes or the Scheduled Tribes. It leaves the power to list these Castes and Tribes to the President, i.e. the Central Executive. Thus, Articles 341 and 342, however, empower the President and draw up a list of these castes and tribes. Under Article 341 the President after consultation with the Governor with respect to the state, specify the castes, races or tribes or of groups within castes, races or tribes for the purpose of the Constitution. If such notification is in respect of a state, it can be done after consultation with the Governor of the state concerned. Any inclusion or exclusion from the Presidential notification of any caste, race or tribe can be done by Parliament by law.

Regarding identification of SCs and STs, the Supreme Court has expressed in Milind* that the words ‘Castes’ or ‘Tribes’ in the expression ‘Scheduled Castes’ and ‘Schedule Tribes’ have not been used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366 (24) and 366 (25). In this view, a caste is a ‘Scheduled Castes’ or a tribe is a ‘Scheduled Tribes’ only if —

---

* 155 First Report of the Commissioner for Scheduled Caste and Scheduled Tribes 3, 11 (1952)
* 156 Maharashtra-vs- Milind, AIR 2001, SC 393
they are included in the President’s order issued under Articles 341 and 342 respectively.

It has been held that a person belong to SC in one state cannot be deemed to be so in relation to any other state to which he migrates for the purpose of employment or education. Lists of SCs are declared in relation to each state separately.

The Scheduled Caste and Scheduled Tribes have been specified by 15 Presidential orders issued under the provision of Articles 341 and 342 of the Constitution. According to the 2001 census, about 24.40 percent of the country’s population comprised the Scheduled Caste and Scheduled Tribes. In addition, some state governments have also specified other categories of people known as ‘other Backward Classes’ and de-notified nomadic and semi-nomadic communities.

a) Constitutional Safeguards:

Under Art 330, seats are to be reserved for the Scheduled Castes and Scheduled Tribes in Lok Sabha. Similarly, Art 332 provides for the reservation of seats for Scheduled Caste and Scheduled Tribes (except the Scheduled Tribes in the autonomous district of Assam) in the Legislative Assemblies of every state.

The number of seats reserved in any state or Union Territory for such castes or tribes will be made on the population basis. The expression population means the population as ascertained at the
last preceding census of which the relevant figures have been published. The Constitution 87th Amendment 2003 has amended the provision to Article 330 and substitutes the figures of 2001 for the figures of 1991 census. Thus, it means that the expression ‘population’ for this purpose will be ascertained on the basis of 2001 census. The allocation of the seats in the Lok Sabha for SCs and STs shall be frozen till the year 2026. This means that there will be no increase in the strength of Lok Sabha till the year 2026.

Originally, under Art 334 the reservation of seats for SCs/STs and Anglo Indians in the Lok Sabha and State Assemblies respectively was to operate for ten years from the commencement of the Constitution. But this duration has been extended continuously since then by 10 years each time. Now, under the Amendment of the Constitution, enacted in 1999, this reservation will last until January 25, 2011 [Art. 334 (a)] and is continuing till date.

b) Consideration of Efficiency:

The general principle as regard government services is merit, but in case of the Scheduled Caste and Scheduled Tribes, some relaxation is needed because of their backwardness. Art 335 therefore, makes it clear that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a state. This provision, thus imposes a constitutional
obligation on the governments to take steps to ensure that the claims of members of the Scheduled Castes and Scheduled Tribes are duly considered in making appointments to government services.

In this connection, reference may also be made of Art 16(4) which is already discussed in earlier pages. Art 16 (4) is an enabling provision conferring power on the state to make reservation of posts in favour of any backward class of citizens who, in the opinion of the state Government, are not adequately represented in the state service. Reference may also be made to Art 46 in this connection which enjoins the state to promote with special care the educational and economic interest of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation.

Article 335 insists on drawing a balance between reservation of posts for the Scheduled Castes and Scheduled Tribes in government post and maintenance of efficiency in the administration. Thus, Art 335 makes efficiency in administration an express constitutional limitation upon the discretion vested in the state while making provisions for adequate representation for the Scheduled Castes and Scheduled Tribes.*157

* 157 Ajit Singh II-vs- State of Punjab; AIR 1999 SC 3470
In Indra Sawhney's case*158 the Supreme Court has stated that the provisions of the constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved category.

The Supreme Court has also observed in this connection in Ashutosh Gupta-vs- State of Rajasthan*159 that Art 335 stipulates that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistent with the maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the affairs of the union or of the state.

c) Additional Provisions for Scheduled Tribes:

Under Art 339 (1), the President may appoint a Commission at any time and must appoint it after ten years of the commencement of the Constitution to report on the welfare of the Scheduled Tribes in the states and the administration of the Scheduled areas. There are special provisions for the administration of the Scheduled areas and Scheduled Tribes in any state other than the State of Assam and Meghalaya, Tripura and Mizoram are contained in Art 244 (1) and the Fifth Scheduled to the Constitution. No such provision has been made in the Constitution as regards the Scheduled Castes.

* 158 Indra Sawhney I -vs- Union of India AIR 1993 SC 477 Indra Sawhney
   II - vs-Union of India AIR 2000 SC 498
* 159 (2002) 4 SCC 34, 40
These areas are treated differently from the other areas in the country because they are inhabited by aboriginals who are socially and economically rather backward and special efforts need to be made to improve their conditions.

Again, Art 339 (2) empowers the Centre to issue directives to any state giving directions as to the drawing up and execution of schemes specified in the directives to be essential for the welfare of the Scheduled Tribes in the state.

d) The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act 1989:

Parliament has enacted this Act to prevent the Commission of offences of atrocities against the Scheduled Castes and Scheduled Tribes, to establish special courts for the trial of such offences and to provide for the relief and rehabilitation of the victims of such offences.

The State Governments are required to make provision for the economic and social rehabilitation of the victims of atrocities, and provide them legal aid.

4. Anglo Indians:

The Constitution contains some special provisions to safeguard the interest of the Anglo-Indian community.
The Anglo-Indians constitute a religious, social as well as linguistic minority. According to Article 366 (2) an Anglo-Indian is a person whose father, or any of whose other male progenitors in the male line, is or was of European descent, but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein.

The President may nominate not more than two members of the Anglo-Indian community to the Lok Sabha, if he is of the opinion that they are not adequately represented. Similarly, the Governor of a state, may nominate one member of the community to the State Legislative Assembly, if he is of the opinion that the Anglo-Indian community needs representation. These provision were necessary for being numerically an extremely small community, and being inter­spread all over India, the Anglo-Indians could not hope to get any seat in any Legislature through election. However, this reservation was ceased to be in operation from 25th January 2011 [Art 334 (b)] but unfortunately it is continuing

5. Other Backward Classes:

Besides the Scheduled Caste and Scheduled Tribes, there are ‘Other Backward Classes’. But the Constitution itself has not provided any exact definition of this phrase too.
It is already discussed in the preceding part of this chapter as to who are “socially and educationally backward classes” under Article 15 (4) and the special provisions for them as well, besides the Scheduled Castes and Scheduled Tribes. Under Art 16 (4) also the state can make provisions for reservation of appointment or posts in favour of “any backward class of citizens” as narrated earlier in this chapter.

It is important that while making affirmative action in favour SCs/STs and Anglo Indian communities regarding reservation of seats in Lok Sabha and the State Legislative Assemblies, but there exist no such provision for reservation of seats for socially and educationally Backward Classes in the Lok Sabha and the State Legislative Assemblies.

Again, while under Art 335, there is a constitutional obligation to consider the claims of the members of the SCs/STs in the making of appointments to services and posts in connection with the affairs of the Centre and States, there exist no corresponding provision for the other Backward Classes.

On the whole, till today a very difficult problem of the day is to identify Other Backward Classes. Generally socially and educationally backward persons fall within the category of Backward Classes, but even after 60 years of enforcement of the Constitution, it has not been possible to find out an acceptable criteria for the purpose of identifying the OBCs.
Thus to facilitate the task of identifying the backward classes and laying down criteria for the purpose, Art 340 (1) empowers the President to appoint a Commission to investigate the conditions of "socially and educationally backward classes" in India and the difficulties under which they labour. Accordingly, the President of India appointed the First Backward Classes Commission under the Chairmanship of Sri Kaka Saheb Kalelkar in 1953 and it submitted its report in 1955. But the commission failed to suggest a positive and practicable criteria towards identification of Backward Classes. In one hand it condemned the caste system, on the other it made ‘caste’ a predominant factor in identification of Backward Classes. But the Central Government rejected the caste criteria in determination of backwardness as it was contrary to the first principle of ‘Social Justice’ and Constitution also.

Followed by so many case laws and dictum of the Supreme Court of India starting from Balaji-vs- State of Mysore*160 (which are already discussed in preceding pages of this chapter), the Central Government again appointed the Second Backward Classes Commission (known as Mandal Commission) in 1979 with the same purpose as before to investigate the conditions of the socially and educationally backward classes within the territory of India. The Commission submitted its report in 1980. The Commission by and large identified castes with backward classes and more or less entirely ignored the economic tests. The Commission also ignored that even among the so

*160 AIR 1963 SC.649
called higher castes, there may be number of socially and educationally backward people. The Commission held that 52% of the total Indian population could be characterized as backward and therefore 52% of all posts could be reserved for them. The commission, however, refrained from making such a drastic recommendation in view of Supreme Court’s ruling that the total quantum of reservation under Art 16 (4) should be below 50%. In view of this legal constraint, the commission was obliged to recommend reservation of 27% only for the Other Backward Classes so that the total reservation for SCs/STs and the other backward classes would amount to a little less than 50%. However, in short and on the whole, the Commission’s recommendations have proved to be very controversial.

Subsequent to the Report of the Backward Commission, the question of characterizing Backward Classes again cropped up before the Supreme Court. In Vasantha Kumar-vs-State of Karnataka*161 The Judges of the Supreme Court expressed a diversity of views in this regard. The only point on which all the Judges were agreed was that ‘caste’ can not be the sole determinant of backwardness, but it is not an irrelevant test and can be taken into account along with other factors. However, in 1993, in the famous Indra Sawhney’s case*162 a nine Judge Bench of the Supreme Court considered the depth of the question of backwardness and reservation of post under Art 16 (4) which

* 161AIR 1985 SC 1495
* 162 AIR 1993 SC 477
have already been analyzed in the preceding pages of this chapter in detail.

6. Apparatus to Supervise Safeguards:

In order to ensure the safeguards provided to various groups like SCs/STs and OBCs and Minorities etc. under the Constitution do not just remain mere paper safeguards, but are implemented effectively. The Constitution makers felt it necessary to set up a machinery to keep a continuous watch and vigilance over the workings of these safeguards throughout the country and also to bring to the notice of the government and the legislature concerned.

Accordingly, there is a provision for appointment of Commissioner for the Scheduled Castes and Schedule Tribes under Art 338 (1). He is appointed by the President.

Again, under Art 338 (3), the Commissioner of Scheduled Castes and Scheduled Tribes also discharged similar functions with respect to such other Backward classes as the President, on receipt of the report of the Backward Classes Commission, specified by order.

But in course of time, it began to be felt that instead of a special officer (Commissioner of Scheduled Castes and Scheduled Tribes) a more effective arrangement for the purpose would be to have a Commission to guarantee constitutional safeguards for these people.
Accordingly, Art 338 has been amended by the Constitution (65th Amendment) Act 1990, so as to abolish the office of the Commissioner and to provide for the appointment of National Commission for the Scheduled Castes and Scheduled Tribes [Art 338 (1)]

Thus consecutively the other Commissions like National Commission for Minorities appointed in 1978 to safeguard the interest of the religious and linguistic minorities, and the National Commission for Backward Classes were appointed in 1993 under the National Commission for Backward Classes Act 1993 to examine the request for inclusion of any class of citizens as a Backward Class in the list and to tender advise to the Central Govt. in that regard as it deems fit.

So, the above mentioned are the special provisions specially drafted for those sections of people considering them either numerically weak in strength to the other or socially or educationally weak to the rest of the society. They are considered to be less advantaged in sharing their persona either socially, economically or educationally as a whole. With this end in view the founding fathers of the Constitution had inputted the general concept of ‘Equality’ as one of the Fundamental Rights supported by some special provisions either as
Fundamental Rights or Legal Rights to provide a balance society where the people of all sections irrespective of their castes, creed, religion, sex etc. could breathe under the same umbrella of Equality with many facets.

Equality is a dynamic concept with many facets, but within the shell of Rule of law. Again absolute equality is not possible as discussed earlier which will dilute the concept of Equality destroying its originality in practice.

Again equal justice is an aspect of social justice, the salvation of the very weak and downtrodden and the methodology for leveling them up to a real equality being the accent. Thus, in a spacious sense 'equal opportunity' for member of a hierarchical society makes sense only if it is a strategy by which the underprivileged have environmental facilities for developing their full human potential. This consummation is accomplished only when the utterly depressed groups can claim fair share in public life and economic activity including employment under the state or when a classless and casteless society blossoms as a result of positive state action, to help the lagging social segment by special care is a step towards the stable concept of Equality. Those special care, protection or affirmative action for the so called weaker sections of the society is in practice seems to be protective discriminatory. It is also accepted that such affirmative action though apparently discriminatory is calculated to produce equality as a broader basis by eliminating de-facto inequalities and placing the weaker sections of the society at par with the rest of the society.
It is firmly accepted that Protective Discrimination is a facet of equality under Articles 14, 15 and 16 of the Constitution. The very concept equality implies recourse to valid classification, for preference in favour of disadvantage classes of citizens, to improve their conditions so as to enable them to raise themselves to portions of equality with some more fortunate classes of citizens.

It was held that the object of positive discrimination was empowerment of backward classes and adequate sharing of power. Reservation is a remedy for historical discrimination and its continuing ill effects, other affirmative action programmes are intended to redress discrimination of all kinds whether current or historical. But such reservations should not be allowed to become a vested interest. The efficacy of the reservation policy will consist in how soon reservations can be done away with, and thus the then Chief Justice Y.V. Chandrachud stated in Vasanth Kumar’s case*163 that the policy of reservation in employment, education and legislative institutions should, be reviewed every five years or so.

The Constitution has provided for some ‘special measures’ in a separate chapter for the upliftment of the weaker sections of the society. But the ‘special measures’ have been reduced to reservations. But that word is waved to fool the poor, whether it is the best way to help the poor, whether the benefit from it are reaching the really poor, none of these is examined.

An affirmative action in the way of protective discrimination may, be constitutionally valid by reason of Articles 15 (4) and 16 (4) and various Directives Principles of State Policy, but the court can not ignore the constitutional morality which embraces in itself the doctrine of equality. So, it would be constitutionally immoral to perpetuate inequality among majority people of the country under the guise of protecting the constitutional rights of minorities and constitutional rights of backwards and downtrodden. All the rights of these groups are part of the right to social development which can not render national interest and public interest subservient to right of an individual or right of a community.*164 There is no doubt that all the disadvantaged must be helped but what is done today in the name of reservation for certain specific classes to achieve the goal of social justice is nothing but to buy the 'Vote Banks' for the partisan ends of the major political parties who are ultimately the people's representatives in the democratic setup of our country.