CHAPTER XII

RELIGIOUS NON-DISCRIMINATION

Introduction

A secular state is either neutral towards religions or follows the policy of non-discrimination when it wants to give positive protection to different religions. This would mean that the benefits of state help, if any, should be available equally to people belonging to different religions. They should, at the minimum, enjoy equality before the law and equal protection of the laws, and should be entitled to equal treatment in places of public importance and be given equal opportunities in case of public employment. It may also be noted that some special efforts become necessary, in case of those who were denied these opportunities in the past for one reason or the other. Such neglected sections of society need additional protective measures to enable them to march along with others. This chapter is devoted to understanding what has been, and is being done in this connection and how the judiciary has appraised the efforts in this direction.

Equality Before the Law

Article 14 of the Constitution of India reads:

"Equality before law. The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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The two phrases incorporated in this Article, though similar, are not identical. The first of the two phrases is of English and Irish origin, while the second is a verbatim adoption of the phrase occurring in the 14th Amendment of the American Constitution.¹ The first part of this Article is a declaration of equality of the civil rights of all persons within the territories of India and thus it enshrines what American judges regard as the basic principles of republicanism. The second part, which is a corollary of the first, and is based on the 14th Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination or favouritism.²

This principle of 'the equality before the law and equal protection of the laws' has been considered by Dicey as one of the three fundamental postulates of the system of rule of law signifying 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'.³ Jennings interprets this principle to mean 'the absence of special privilege in favour of any person

and also that among equals, the law should be equal and
should be equally administered, that like should be treated
alike. The principle of equality before the law, however,
does not postulate absolute equality. It does not mean that
things which are different shall be treated alike. It only
means that no privilege can arise by reason of birth, creed
or the like and all are equally subject to the law of the
land. Article 14 secures all persons within the territories
of India against arbitrary laws as well as the arbitrary
application of laws.

In numerous cases which came before it, the Supreme
Court of India had to make clear the implications of the
provision regarding 'equality before the law and equal
protection of the laws'. As this provision is incorporated
from the 14th Amendment of the American Constitution, the
Supreme Court of India was very much under the influence of
the interpretations of the 14th Amendment given by the
American judges. The Supreme Court of India admits that 'a
too rigid adherence to the view expressed by the American
judges was neither necessary nor desirable in interpreting
Article 14 of the Constitution of India, ... (but) ... the
general principles enunciated in many of these cases do
afford considerable help and guidance in the matter.\(^5\)

\(^4\) The Law and the Constitution, 3rd Edn. University
of London Press, p. 42.

\(^5\) State of Bengal V. Anwar Ali Sarkar (1952) 3.C.J. 55,
at 74.
The principles underlying the provisions of Article 14 have been summarised by the full bench of the Supreme Court of India in Budhan Choudhary and others v. State of Bihar in the following terms:

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely,

1. that 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. that, that differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases, namely geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the objects of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also a law of procedure."
In another case, the Supreme Court held 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; the varying needs of different classes of persons often require separate treatment. The principle of equality does not take away from the state the power of classification for legitimate purposes. While in C.I. v. The State of Uttar Pradesh, the Court pointed out that 'Article 14 does not forbid reasonable classification for the purposes of legislation; no doubt it forbids class legislation, but if it appears that the impugned legislation is based on a reasonable classification founded on intelligible differentiae and that differentiae have a rational relation to the object sought to be achieved by it, its validity cannot be successfully challenged under Article 14.'

In Katra Education Society v. State of U. P. and others, the Court held that 'to claim the protection of Article 14, it must be shown that persons differently treated are similarly situated and discrimination is made with an even hand. ... A plea of unlawful discrimination

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8 S.C.J. 1960, 368 at p. 371.
cannot be adjudged unless the petition contains a full averment of the grounds on which equality is claimed, and the denial of equality is pleaded as not based on rational relation to the object to be achieved by the statute which makes a classification. 1

P. K. Tripathi comments that these propositions have been repeated so many times during the past few years that they now sound almost platitudinous. 10

The International Commission of Jurists has defined the substantive aspect of the rule of equality before the law as follows:

"The law passed by the legislature must not discriminate between human beings except insofar as such discrimination can be justified on a rational classification consistent with the progressive enhancement of human dignity within a particular society." 11


For these judgments see -

Chiranjitlal Choudhary V. The Union of India and others (1951) S.C.J. 29 : S.C.R. 869.


Purshottam Govindji Narsi V. B. M. Desai (1956) S.C.J. 75.

One has to note that the term 'discrimination' does not occur in Article 14 of the Constitution of India. The Article, however, is considered a guarantee against discrimination. Equal treatment does not mean identical treatment. On the other hand identical treatment in unequal circumstances amounts to inequality. Equal protection of the laws will not therefore signify protection by identical laws.  

In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all persons alike. In such a society, the legislature has to deal with a variety of problems arising out of the infinite variety of human relations. It must necessarily have the power of making special laws to achieve particular objects. The equal protection clause has been understood as not prescribing rigid equality but as permitting the discretion and wisdom of the state a wide latitude. A doctrinaire interpretation will smother beneficent legislation.  

As Justice Holmes puts it 'We must remember that the machinery of government could not work if it were not allowed a little play in its joints.'  

"In adjusting legislation to the needs of the people

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12 *Supra* n. 1, p. 54.
of a state, the legislature has a wide discretion, and it may be fully concede that perfect uniformity of treatment of all persons is neither practicable nor desirable; that classification is constantly necessary.\textsuperscript{15}

The main implications of 'the equality before the law and equal protection of the laws' - provision as understood from the judgments of the Supreme Courts of the U.S.A. and India can be summarised as follows:

1) Article 14 of the Constitution of India embodies a guarantee against discrimination and assures equal treatment for all.

2) The protection implied in Article 14 is very comprehensive in character. It extends to citizens and aliens alike,\textsuperscript{16} to individuals as well as corporations, in respect of substantive as well as procedural laws,\textsuperscript{17} in relation to statutory laws as well as administrative instruments such as administrative orders and notifications.\textsuperscript{18}

3) The equality postulated is not absolute equality but equality of the operation of laws on persons according to their relations.\textsuperscript{19}

\textsuperscript{15} Truax V. Corrigan 120 U.S. 68, quoted \textit{Ibid.}, p. 56.
\textsuperscript{16} Yick Wo V. Hopkins, 118 U.S. 356 (1886), quoted \textit{Ibid.}, p.58.
\textsuperscript{17} \textit{Supra} n. 5, p. 89.
\textsuperscript{18} Dhanraj Mills V. B.K. Kocher, A.I.R. 1951 Bom. 132.
\textsuperscript{19} Hayes V. Missouri 120 U.S. 68.
4) The principle permits the state the power of classification for legitimate purposes.

5) Such classification is permissible only if it is reasonable and not arbitrary.

6) The test of permissible classification is that it must be based on intelligible differentiae distinguishing persons or things grouped from those left out of the group and the differentiae must have a rational relation to the object sought to be achieved.

7) Classification need not cover all that need protection nor need it take into account new and hypothetical inequalities.

8) Classification need not be made by the legislature itself, but the policy being adumbrated in the statute, which may vest authority to do it in officers or administrative bodies.

9) If in fact and in substance, there is inequality, it would not be proper to make the constitutionality of the Act depend on the degree of inequality so brought about.

Justice P. B. Gajendragadkar, former Chief Justice of

20 Classification is merely a 'systematic arrangement of things into groups or classes, usually in accordance with some definite scheme'. Supra n. 5, at p. 70.

21 Supra n. 1, p. 66.

22 For detailed discussion see S. Venkatraman, supra n. 1, p. 52.
the Supreme Court of India describes very succinctly the
main implications of Article 14 as follows:

"(Article 14) does not prohibit differentiation on
a reasonable basis, which has a rational nexus with the
object of the statute in question. In other words, if the
object of the legislation requires some differentiation
to be made in the treatment given to different classes of
citizens, that differentiation would not be violative of
Article 14, provided the differentiation is reasonable and
there is a nexus between that differentiation and the
object of the legislation. However, the rational basis
which justifies the discrimination must not include grounds
which have been expressly excluded by the Constitution.
Besides, any legislation based on such differentiation is
open to examination and review by the judiciary. The rule,
therefore, has a two fold aspect: it implies parity or equal
treatment of equals in equal circumstances and permits
differentiation in certain specified circumstances." \(^2\)

It is in the light of these implications of Article 14
of the Constitution of India, that one has to consider the
scope of Articles 15 and 16 which provide for other aspects
of equality. Here must be noted the distinction between
Article 14 and 15. Whereas Article 14 guarantees equality
before the law to all persons including aliens, Article 15

\(^2\) *Supra* n. 2, p. 26. Italics mine.
and Article 16 are in their application limited to citizens, though their scope is otherwise very wide. Another distinction between the said Articles is that when a law is challenged as violative of Article 14, there is always a presumption that the classification made by the impugned legislation is reasonable and whoever challenges the validity of the law has to prove the contrary. In regard to an alleged contravention of Article 15, there is no such presumption in favour of the validity of the classification. 24

**Article 15**

Article 15 reads:

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

   a) access to shops, public restaurants, hotels and places of public entertainment; or

   b) the use of wells, tanks, bathing ghats, roads

24 Ibid.
and places of public resort maintained
wholly or partly out of state funds or dedi-
cated to the use of general public.

3) Nothing in this Article shall prevent the State
from making any special provision for women and children.

4) Nothing in this Article or in clause (2) of Article
shall prevent the State from making any special provi-
sion for the advancement of any socially and educationally
backward classes of citizens or for the Scheduled Castes
and the Scheduled Tribes. 25

From the wording of Article 15, it is clear that it
is more illustrative in character than one introducing any-
thing substantially new. Article 14 contains more or less
a mere general declaration of the right to equality, while
Article 15 provides for social equality and contains a
reference to possible types of discrimination prevalent in
the country 26 and tries to prevent the same. There is one
striking feature of this Article, namely, that this Article
brings within its scope, although in a limited way, the
actions of private individuals. The Article prohibits social
discrimination which is likely to take place in case of
individuals belonging to different religions, races, castes,

25 This clause (4) was inserted as a result of the First
Amendment of the Constitution made in 1951. All Italics mine.

26 M. V. Pylee, Constitutional Government in India
Ed. 1965, p. 207.
sexes and so on in public places. A public place is defined by the Article as one of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public. The matter of definition of a public place was elaborately discussed in the Constituent Assembly and the implications of the term shop contained in the Article were clarified by Dr. B. R. Ambedkar, Chairman of the Drafting Committee, who said:

"... I am using it in a generic sense. ... To define the word 'shop' in the most generic term one can think of, is to state that the shop is a place where the owner is prepared to offer his services to any body who is prepared to go there seeking his services. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of the service are agreed to."

The scope of Article 15 Clause 1 is made clear by the Supreme Court of India in Main Sukh Das v. State of U.P., where the Court maintains 'that the fundamental


v. In illustrations reference was made to 'laundry', shaving salon as well as offices of lawyers and doctor's clinic. Social discrimination practices in the name of 'Untouchability' are analysed in detail later in the context of Article 17.

right conferred by Article 15(1) is conferred on a citizen as an individual and is a guarantee against his being subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen generally."

Clause (3) of Article 15 allows the State to make any special provision for women and children. Clause (4) of this Article, which permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and the Scheduled Tribes, did not occur either in the Draft Constitution of India, 1948, nor in the Constitution of India which came into force in 1950. This clause was inserted in Article 15 by section 2 of the Constitution (First Amendment) Act, 1951, as a result of the judgment of the Supreme Court of India in two cases: The State of Madras V. Shrimati Champakam Dorseirajan, and The State of Madras V. C.R. Srinivasan. By these judgments the Supreme Court had declared the Communal G.O. of Madras State as being inconsistent with the provisions of Article 29(2) of the Constitution and therefore void under Article 13. These cases also involved a reference to Article 15. These

S.C.J. 1951, p. 313.  
30 Ibid.  
31 For details see supra Chapter III on Fundamental Rights and Judicial Review.
cases, however, are analysed in detail later in the next chapter on minority rights.

These two clauses (3) and (4) of Article 15 provide for 'protective discrimination' to women and children in the former and to citizens of socially and educationally backward classes of citizens in the latter. The special treatment meted out to women and children is in the larger and the long range interest of the community itself. It also recognises the social customs and the background of the country as a whole. The second authorises preferential treatment to backward communities as a result of the policy of the government to ameliorate group differences. This experiment of protective discrimination, in the eyes of an American observer, is likely to be considered as novel and strange but it 'is by no means a novelty in India.'

Protective Discrimination

Marc Galanter points out that this technique of protective discrimination is not a new concept so far as India is concerned. He states that in the latter part of the British period, preferences and arrangements for

32 Supra n. 26, p. 208.
34 Ibid., at p. 42.
distribution of benefits according to membership in communal groups were accepted methods for the adjustment of the political balance of communities as well as for the amelioration of the condition of the lowly. The new Constitution definitely and drastically confines the use of protective discrimination to the latter purpose. It is outlawed as a generally applicable principle of governmental operation. It is envisaged as an exceptional and temporary measure to be used only for the purpose of mitigating the inequalities between communities and it is designed to disappear with these inequalities. It is not a device to consolidate and protect a group's separate integrity.

This technique of protective discrimination, however, was deplored and opposed both before and after the adoption of the Constitution. Article 9 of the Draft Constitution which corresponded to Article 15 of the Constitution of India was hotly debated in the Constituent Assembly. Professor K.T. Shah proposed an amendment to Article 9 of the Draft Constitution suggesting special treatment to 'Scheduled Castes and backward tribes for their advantage, safeguard and betterment'. This amendment was vigorously opposed by Dr. B. R. Ambedkar who said:

35 quotas and preferences as well as special representation were provided by various acts passed during the British period.

36 This amendment was moved on 29th November 1948.
The object which all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public. For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a state to say, 'Well, we are making special provision for the Scheduled Castes!' To my mind they can safely say so by taking shelter under the Article if it is amended in the manner the professor wants it."37

In view of this opposition, the Amendment moved by Prof. K.T. Shah was negatived by the Constituent Assembly.38 Various distinguished authorities have equally emphatically deplored this system of protective discrimination.39 They have contended that these preferences and reservations create strong vested interests and will become extremely difficult to discard if a time should come when the discrepancies that inspired them are overcome.40 It has also been argued that distribution of benefits along communal

38 D.N. Banerjee, Our Fundamental Rights, p. 87.
40 Supra n. 33, at p. 43.
lines reinforces communalism by preserving existing caste distinctions, by further injecting caste into politics, and by encouraging the predilection to seek public largesse through the agency of the group and that distribution of preferences along communal lines will inevitably increase and eventually undermine the non-discrimination principles of the Constitution."^41

Though the Constitution of India did not contain the clause regarding "protective discrimination", political thinking in the country, after the Supreme Court judgments in Doraireaj^42 and Srinivasan^43 cases, was in favour of these preferences and hence the First Amendment introduced the said clause. It may, here, be noted that when the Amendment was being discussed in parliament, many speakers expressed their genuine fear about power conferred by this clause being abused by Government and thereby defeating the very purpose of the provision contained in Article 15.

The expression 'socially and educationally backward classes of citizens' in clause 4 of Article 15 is very vague and not capable of precise definition. Similarly, there could be honest differences of opinion on a matter whether any action taken by the government under the clause is

41 Ibid.
42 S.C.J. 1951, p. 313.
43 Ibid.
justiciable or not and it was hoped that the power conferred by the clause could be used by the government cautiously and reasonably.\textsuperscript{44}

The implications of Article 16 may be noted at this stage. This Article provides for equality of opportunity in matters of public employment. It states that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against, in respect of any employment or office under the State.\textsuperscript{45} Nothing in this Article prevents Parliament from making any law prescribing any requirement as to residence within the State or Union Territory prior to such employment or appointment.\textsuperscript{46} Clause 4 of this Article states:

'Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State.'

Clause 5 of this Article reads:

'Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office

\begin{itemize}
\item \textsuperscript{44} \textit{Supra} n. 38, p. 87.
\item \textsuperscript{45} Article 15(2).
\item \textsuperscript{46} Article 15(3).
\end{itemize}
in connection with the affairs of any religious or denominational institution or any member of the governing body, thereof, shall be a person professing a particular religion or belonging to a particular denomination. 47

It may be pointed out that Articles 15(4) and 16(4) provide for what has been described as 'Protective discrimination', 48 to the extent to which they permit special provisions for backward classes. There is, however, subtle distinction in the scope of these Articles. While Article 15(4) applies to the State in all its dealings, Article 16(4) is confined specifically to the field of Government employment.

As these two Articles refer to different aspects of protective discrimination, the judicial review of these Articles shall be considered jointly. The general observation which can be made at the very outset is that the judicial interpretation of these clauses has varied from time to time.

The preferences implied in these Articles are not mandatory but are only permissive in character. These provisions do not confer on backward groups any fundamental right to such arrangements, but rather are an exception to the rights that others would otherwise enjoy. 49

47 This aspect has been analysed in detail in Chapters VII and VIII on Hindu Religious Endowments of this thesis.
48 Supra n. 33, p. 36.
49 Ibid., at p. 44.
It was in B. Venkataraman v. State of Madras, that the constitutional validity of the Madras Communal C.O. was tested in the light of the provisions contained in Article 16. In December 1949, the Madras Public Services Commission invited applications for 83 posts of District Munsifs in the Madras Subordinate Civil Judicial Service. It was notified that out of these 83 posts to be filled by direct recruitment, selection would be made from various castes, religions and communities in accordance with the rules prescribed in the Communal C.O. namely, for Harijans 19, Muslims 5, Christians 6, Backward Hindus 10, Non-Brahmin Hindus 32 and Brahmans 11.

The petitioner, B. Venkataraman was a graduate and possessed other requisite qualifications for being selected as a District Munsiff. He presented his petition praying that the rule of Communal Rotation applied in these selections was repugnant to the Constitution to the extent to which it violated the provision for equality of opportunity guaranteed by Article 16.

The Supreme Court, while dealing with the petitioner's case, points out that Clause 4 of Article 16 expressly permits the State to make provision for the reservation of appointment of posts in favour of any backward class of citizens which, in the eyes of the State, is not adequately

represented in the services. The Court, therefore, points out that the reservation of posts in favour of any backward class of citizens, cannot be regarded as unconstitutional. The Communal G.O. itself makes an express reservation of seats for Harijans and Backward Hindus. The other categories, namely, Muslims, Christians, Non-Brahmin Hindus and Brahmans must be taken to have been treated as other than Harijans and Backward Hindus. The attention of the Court was drawn to a schedule of Backward classes set out in Schedule III to Part I of the Madras Provincial and Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. It was in the circumstances, impossible to say that classes of people other than Harijans and Backward Hindus can be called Backward classes. The Court maintains:

"As regards the posts reserved for Harijans and Backward Hindus, it may be said that the petitioner who does not belong to those two classes is regarded as ineligible for those reserved posts not on the ground of religion, race, caste, etc., but because of the necessity for making a provision for reservation of such posts in favour of a backward class of citizens, but the ineligibility of the petitioner for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a
Brahmin. ... For instance the petitioner may be far better qualified than a Muslim or a Christian or a Non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment, ... nevertheless he cannot expect to get any of these posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of these posts reserved for the other communities ... is brought about only because he is a Brahmin and does not belong to any of those categories. This ineligibility created by the Communal G.O. does not appear to us to be sanctioned by Clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16(1) and (2)."\(^51\)

Thus in this case, the Supreme Court considered the Communal G.O. as repugnant to the provisions of Article 16 and as such void and illegal. It cannot, however, be forgotten that the Court did uphold reservations for Harijans and Backward Hindus of four out of fourteen posts.

In Kesava Iyenger v. State of Mysore,\(^52\) the High Court of Mysore conceded that 'reservation' in Article 16(4) signified a 'small fraction' or 'small portion' of the main (presumably less than one half), but 'each backward

\(^{51}\) Ibid., pp. 319-20.

\(^{52}\) A.I.R. 1956 Mysore 20.
class is an independent class whose claim for appointment can be sustained under Article 16(4). This implied that the State could reserve such a portion for each backward community and could, on this basis, give all the available posts to backward groups.

Secondly, as was stated in the case, the State could make reservations for component parts of the total backward group and would not be confined to one aggregate reservation. Such a breakdown of reservations was recommended specifically on the ground that a single un compartmented reservation would help only the relatively advanced groups among the backward classes and would be disadvantageous to the more backward.

Marc Galanter comments that 'Nothing in the Constitution would seem to warrant restriction of the broad power to make 'any provision' for 'any backward class' into a requirement of a single un compartmented reservation. ... The expansive view taken in the Kesava Iyenger case, which permits total reservations to exceed fifty percent, and would even allow reservation of all posts, is not entirely free from doubt. The chief draftsman of the

53 Ibid., at p. 23.
54 Supra n. 33 at pp. 44-45.
55 Ibid. As will be made clear, later judgments have challenged this position.
Constitution, defending Article 16(4) before the Constituent Assembly, indicated that the reservation authorized was of a 'minority of seats' and gave the example of an aggregate reservation of seventy percent of posts as falling outside the power bestowed by the clause.\(^57\)

It has already been noted that Articles 15 and 16 are to be read along with Article 14 which permits the legislature to legislate on the basis of reasonable classification. If the classification is reasonable, and is founded on intelligible differentiae, and the same differentiae have a rational relation to the object sought to be achieved by the statute based on such reasonable classification, the validity of the statute cannot be successfully challenged under Article 14.\(^58\)

It may be observed that the word 'rational' has been quietly replaced by the word 'reasonable', the latter being not only more familiar in judicial reasoning but also indicating a far greater measure of judicial control over the executive or legislative activity under review.\(^59\) In recent years, the Supreme Court has adopted the criterion

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56 Dr. B. R. Ambedkar.
57 Marc Galanter, supra n. 33 at p. 45.
of reasonableness rather than rationality in deciding the cases under Article 14 and this approach has enabled the Court to decide the reasonableness or otherwise of the executive action or statutory legislation. This change has been reflected in the judgment of the Supreme Court in Kangahari Haldar v. State of West Bengal\(^60\) when it said:

"In applying the said principles to the different sets of facts presented by different cases emphasis may shift and the approach may not always be identical; but it is inevitable that the final decision about the vires of any impugned provision must depend upon the decision which the court reaches having regard to the facts and circumstances of each case, the general scheme of the impugned Act and the nature and effect of the provisions the vires of which are under consideration."

In M. R. Balaji v. State of Mysore,\(^61\) the Supreme Court of India projected a wider and more broadly based approach to the right of equality by importing some fresh criteria for judicial enquiry. The facts of the case were that the Government of Mysore reserved seats for candidates belonging to backward classes in certain educational institutions in the State. The list of these classes was prepared on the basis of a criterion recommended by the

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60 Supra n. 58, p. 459.
special committee appointed by the Government for the purpose. The criterion was that every community which had a representation below 7 per thousand was considered as backward. Communities which had representation 50 per cent below this average were rated as 'more backward'. In this way, the Government reserved about 68 per cent seats for candidates belonging to 'backward' and 'more backward' classes in the State. This arrangement was challenged by the petitioner on the grounds that the order violated the provisions of Clause 1 of Article 15. The Government of Mysore, on the other hand, claimed that the provisions of the order were intended to secure the advancement of the socially and educationally backward classes in the State and thus was valid under Clause (4) of Article 15 and was protected from the operation of Clause (1) of Article 15.

The Government Order would have been held valid if the Court would have applied the traditional formula of an 'intelligible differentia' and 'rational relationship between the differentia and the object'. The criterion was intelligible in as much as the communities which had a representation in the high school classes were chosen for preferential treatment. It was apparent that the

62 It is interesting to note that about 90 per cent of the population of the State of Mysore was regarded as backward and out of these, 68 per cent were to receive preferential treatment under the Order and hence the constitutional compliance was purely technical and in substance spurious.
traditional formula had failed and if the constitutional guarantee was to have any real meaning, what was needed was a forthright exposition of the actual operation of the governmental order laying bare the hollowness of the formal compliance. The Court did this when it observed:

"Even assuming that the test applied is rational and permissible under Article 15(4), the question still remains as to whether it would be legitimate to treat castes or communities which are just below the state average as educationally backward classes. If the State average is 6.9 per thousand, a community which satisfied the said test or is just below the said test cannot be regarded as backward. It is only communities which are well below the state average that can properly be regarded as educationally backward classes of citizens. Therefore, in our opinion, the state was not justified in including in the list of Backward classes, castes or communities whose average of student population per thousand was slightly above, or very near, or just below the state average."

The order of the Government divided the population of the state into most advanced and the rest further divided into backward and more backward. The Court therefore,

63 P.K. Tripathi, supra n. 59, p. 494.

64 The Court felt that classes of citizens whose average of student population works below 50 per cent of the state average are obviously educationally backward classes of citizens.
pointed out that Article 15(4) was in the nature of an exception and did not create authority for the state to exclude the rest of the community from benefits sought to be reserved for the backward classes. In the opinion of the Court, the purpose of Clause 4 of Article 15, while protecting the interests of the Backward classes, was not to ignore completely and absolutely the fundamental rights of the citizens who constituted the rest of society. 65

Till this Bajaji case was decided the Court had never interfered with the discretionary power of the legislator to decide the quantum of reservations for backward classes but the percentage of reservations in the instant case was so palpably unjust that the Court found it to be violative of the guarantee so much so that the Court criticised the Government Order as a 'fraud on the power conferred on the State by Article 15(4). 66

The Supreme Court outlines in brief the considerations which the Government would follow in making provisions for the protection of the interests of backward classes. It says:

"In our opinion, when the state makes a special provision for the advancement of the weaker sections of society specified in Article 15(4) it has to approach its

65 Supra n. 61, p. 662.
66 Ibid., p. 663.
task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighed; the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations.\footnote{67}

The Court considers the reservation of 68 per cent as plainly inconsistent with the provisions of Article 15(4). It does not prescribe any rigid rule regarding appropriate percentage for reservations to be made but suggests that the special provision should not extend to more than 50 per cent of the total number of available seats, how much less or more would depend upon the variables involved in the particular case.

This judgment of the Supreme Court is significant for one more reason, namely that the Court criticised the order of the Government of Mysore which made caste the sole criterion of backwardness and disregarded several factors such as poverty, occupation and place of habitation which according to the Court were more relevant factors in determining backwardness.

The Supreme Court states that 'it may not be irrelevant\footnote{68} to consider the caste of the said group of citizens

\footnotesize{67} Ibid., p. 663. Italics mine.
\footnotesize{68} Ibid., p. 659.
in deciding whether any class of citizens is socially backward but if the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves. It would not be logical because certain sections of Indian society like Muslims, Jains, and Lingayats do not recognise the caste system. The Court, therefore considers that the 'caste' as a sole test fails to determine their backwardness.

This view which was taken by the Supreme Court in Balaji case was further clarified in Chitralekha v. State of Mysore. This explanation was necessary in view of the fact the word caste was used in Clause 4 of Article 15. The Court points out that 'caste' is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court (in the Balaji case) which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. Justice Subba Rao maintains that this interpretation (in Balaji case) helps the really backward classes instead of promoting the interests of individuals or groups, who (though) they

69 Ibid.
71 Ibid., at p. 1833.
belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. "If we interpret the expression 'classes' as 'castes' the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not."72

Caste as a Test of Backwardness

The Oxford Dictionary defines 'class' as division of society according to status, rank or caste. Webster's New International Dictionary defines 'class' as 'caste' and Caste is defined as one of the hereditary classes into which the society of India is divided. Chamber's Twentieth Century Dictionary defines caste as 'a social class in India, an exclusive social class'. The Backward Classes Commission used the term 'classes' synonymously with castes and communities and prepared the list of the other backward classes by taking 'castes' as units73 and it interpreted the term Backward Classes as relating primarily to social hierarchy based on caste and pointed out that such an

72 Ibid.
interpretation is not only correct but inevitable and no other interpretation is possible. 74 Dr. B. R. Ambedkar, while commenting on the Constitution First Amendment Bill (1951) said that backward classes were 'nothing else but a collection of certain castes'. 75 On the whole, it appears that classes are equated with castes at least so far as Hindus are concerned.

It may be noted that the Constitution had deliberately used the word 'class' and not 'caste' except in the case of scheduled castes. In M. R. Balaji V. State of Mysore, 76 the Supreme Court pointed out that in the social history of Hindus the caste played an important part in determining the status of the Hindu and, therefore, the Court accepted 'class' to mean 'division of society according to status, rank or caste'. 77

Though the Supreme Court equated 'class' with 'caste' at least among the Hindus, it was not ready to accept caste as the sole criterion of deciding the backwardness. On the other hand, if the entire sub-caste, 78 by and large,

74  Ibid., p. 42.
75  Parliamentary Debates 1951, Third Session Part II, Vol. XII, Col. 9007.
76  Supra n. 61, p. 649.
77  Ibid., p. 659.
78  The judge did not explain what he meant by Sub-caste.
is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution.

The learned Judge made a distinction between 'factor' or 'consideration' and 'unit' and conceded that Caste may be taken as 'factor' in order to determine to which class a person or group may belong but he categorically stated that Caste cannot be the basis (i.e., as the unit) of the determinator.

In the learned judge's view, the object and purpose behind these Articles (15(4) and 16(4)) is, as laid down in Article 46, to promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitation. He observed:

"These provisions recognize the factual existence of backward classes in our country brought about by historical reasons and make a sincere attempt to promote the welfare of the weaker section thereof. They shall be so construed as to effectuate the said policy but not to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong. The important factor to be noticed in Article 15(4) is that it does not speak of castes, but only speaks of classes. ... The juxtaposition of the expression 'Backward Classes' and 'Scheduled Castes' in Article 15(4) also leads to a reasonable inference that the expression 'classes' is not
synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belongs to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong. 79

The Court itself explains that this interpretation helps the really backward classes instead of promoting the interests of individuals or groups, who, though belonging to a particular caste or majority whereof is socially and educationally advanced. 80 It may be noted that in fact this was the scope of the legislation to Clause 4 of Article 15 when the Select Committee of Parliament assured that "this provision is not likely to be misused by the government for treating non-backward classes as backward for the purpose of conferring privileges on them." 81

The two cases (Balaji and Chitralekha) are extremely significant from the point of view of judicial interpretation of Articles 15(4) and 16(4).

P. K. Tripathi points out:

"The decision in the Balaji case demonstrates the resolve and the power of the Court not to be misled or

79 Chitralekha v. State of Mysore. Supra n.70, pp.1833-34.
80 Ibid.
thwarted by fake and superficial compliance with the requirements of the Constitution and to emphasise and insist upon substantial and genuine compliance. The opinion of Mr. Justice Gajendragadkar in this case, it is submitted, will undoubtedly go down as a great landmark in our constitutional history.\(^2\)

The reasoning adopted in the Chitralekha case is a clarification of the view adopted in the Balaji case. The Balaji case established that the 'caste' has some relevance in determining the backwardness of a class but in the Chitralekha case, the Court went further and tore the veil of the 'caste' to find out who were the actual backward people, within the real intendment of the Constitution, the object of privileged treatment.\(^3\) When the social, economic and educational (as construed by the Court in the Balaji case) attainment of a particular group of citizens are taken as factors, in substance, for measuring backwardness, and these factors are excluded from an individual's (belonging to a caste) life, the remnant would be a mere husk of caste. Mohamed Imam asks why cling to the husk of 'caste' when the Court has successfully determined the real substance which is the only object of the constitutional

\(^2\) Supra n. 59, p. 496.

\(^3\) Mohamed Imam, "Reservation of Seats for Backward Classes in Public Services and Educational Institutions," Journal of the Indian Law Institute, Vol. 8, No. 3 (1966), 441 at p. 445.
protection. By relying on the substance rather than the form, the Court could have cleared the stigma of caste for an individual, in his dealing with the state, once and for all. According to him the second part of the Chitralekha conclusion is a salutary one and can, with sound logic and reasoning, be brought to conform to the underlying policy of Articles 15(1), 16(1) and 29(2) as intended by the framers of the Constitution.\(^4\) He concludes his critical article by saying:

"Thus Articles 15(4) and 16(4) providing for making special provisions for the advancement of backward classes, though expressed in absolute terms, came to be interpreted by the Court to mean only an exception not overriding the equality clauses of Article 15(1) and 16(1) and 29(2); an exception, the innovation of which is conditioned by the factual existence of circumstances determined by objective criteria. In evaluating whether or not a particular circumstance fulfils the condition proper for the exercise of the power, the Supreme Court has dived deep to observe whether the practices of the Constitution conform to the substance of the intention of the framers (of the Constitution).\(^5\)

Before we proceed to analyse the implications of Article 17 which abolishes untouchability, a reference to

\(^4\) Ibid., at p. 446.
\(^5\) Ibid., at p. 449.
the carry forward rule regarding the reservations for Scheduled Castes and Scheduled Tribes would not be out of place. In Devadasan v. Union of India, the Supreme Court was called upon to pronounce upon the constitutionality of the 'Carry Forward Rule' framed by the Government of India to regulate appointments of persons belonging to backward classes in public services.

In 1950, the Government of India passed a resolution indicating its intention of reserving 12 1/2 per cent and 5 per cent of the total available vacancies in any one year respectively for Scheduled Castes and Scheduled Tribes' candidates exclusively. The resolution further provided that if in any particular year the number of suitable candidates available was less than the number of reserved posts, the excess posts would be treated as unreserved for that particular year but in the succeeding year the number of posts which would have otherwise been reserved for such candidates in the normal course would be increased by the number which had been converted into non-reserved posts in the preceding year. This process was known as carry-over and was to operate for a period of two years at a time.

This rule of carrying forward was challenged in Devadasan v. Union of India alleging that it violated

87 Ibid.
the provisions of Article 16 of the Constitution of India. The Supreme Court by a majority of four to one held the rule as unconstitutional on the ground that the power vested in the Government by Article 16(4) could not be exercised so as to deny reasonable equality of opportunity in matters of public employment to members of classes other than the backward.

According to the majority, the purpose of this provision was to ensure that the backwardness of backward classes would not handicap unduly their members from securing public employment. It further held that when the State made reservations in favour of backward classes, it provided for backward classes an opportunity equal to other classes in matters of public employment. Repeating its reasoning in M. R. Balaji case,38 the majority maintained that where the reservation was so excessive39 in its character as to deny in practice a reasonable opportunity to other classes, it was a fraud upon the Constitution.

The majority declared the carry-forward rule as invalid and prescribed90 some important guidelines in interpreting Article 16(4).

38 Supra n. 61, p. 649.
39 In the instant case the reservation was 68 per cent and therefore was excessive.
1) What precise method should be adopted for giving adequate representation to members of backward classes enjoined by Article 16(4) of the Constitution is a matter for the government to consider. But whatever method adopted, it must strike a reasonable balance between the claims of the backward employees and the claims of other employees.91

2) Reservation of more than half the vacancies is per se destructive of the rule of equality of opportunity ensured by Article 16(1). It should be less than half, and how much less than half would depend upon the prevailing relevant circumstances in each case.

3) A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision.

4) In order to effectuate the guarantee of equality of opportunity, each year of recruitment will have to be taken by itself, and the reservation for backward communities should not be so excessive as to create a monopoly, or to disturb unduly the legitimate claims of other communities.

According to Justice Subba Rao, who delivered the dissenting judgment, 'Once a class is a backward class the question whether it is adequately represented or not is left to the subjective satisfaction of the state. ... If

91 Italics mine.
these two conditions are complied with, the state is at liberty to make any provision for the reservation of appointments or posts in favour of the said class of citizens.\textsuperscript{92}

On the basis of this argument, Justice Subba Rao upheld the 'carry forward rule' which according to him was only a convenient method of implementing the provision of reservations. He pointed out that as long as the provision made by the state was for reservation of appointments and posts, Article 16(4) did not circumscribe the power of the State to make any provision to achieve that object. Unless it was established that an unreasonably disproportionate part of the cadre strength was filled up with backward classes, it was not possible to contend that the provision was not one of reservation but amounted to an extinction of the fundamental right.

The Judgments of the Supreme Court in H. H. Balaji case and Devadasan case are complimentary to each other. While the former illustrates the problem of social justice in the field of education, the latter involves the problem of social justice in the field of public employment.

The content of the minority judgment may briefly be noted. The judgment states that the question whether the backward class is adequately represented or not is left to the subjective satisfaction of the state. The word adequate

\textsuperscript{92} Supra n. 86, p. 190.
is relative and adequacy is always related to the conditions and circumstances of not only backward classes as implied in the minority judgment but also to the conditions and circumstances of other classes as rightly understood by the majority judgment of the Supreme Court. That has been obviously the intention of the framers of the Constitution. Any process of balancing would necessarily require the Court to assume evaluating function. It is respectfully submitted that the majority judgment has rightly considered this matter as a justiciable one. The majority judgment is significant in another respect, namely, that it provides a solution by striking a reasonable balance between the claims of backward classes and the claims of others.

V. M. Shukla rightly comments:

"Article 16(1) says that there shall be equality of opportunity of appointments under the state, but if this provision stood alone, backward communities would gain nothing in a society of uneven basic social structure. The rule of absolute equality itself involves an inequality and not equality. Hence equality implies an unequal distribution to even out the disparities among recipients. The system of handicapping the stronger must be resorted to to bring about fair competition, if, in the opinion of the State, backward classes are not adequately represented in

Mohammed Imam, Supra n. 83, at p. 449.
the services. The provision for adequate representation was made to ensure equality of participation in the administration of the State. It was made to ensure that the citizens who belong to backward classes would also feel that they were active partners in the vast enterprise of resurgent India. It is only in this sense that the provision can be taken to reflect correctly the spirit which lies behind Article 33 and the preamble to the Constitution to secure social justice to the citizens of the nation. Social Justice does not merely mean equality of opportunity, it means something more. 94

In Hegade Janardan Suabarya V. The State of Mysore, 95 the Supreme Court pointed out that the judgment in Balaji case does not affect the validity of the reservation which is distinct and separate from, and independent of, the other reservation which was challenged. The said reservation continues to be operative and the fact that the impugned orders have been quashed does not alter that position. The said orders have been quashed solely by reference to the additional made by the impugned orders in regard to the socially and educationally Backward Classes.

In B.N. Tiwari V. Union of India, 96 the Supreme Court

94 Supra n. 90, pp. 409-10.
96 Ibid.
points out that the Judgment of the Court in Devadasan case is only concerned with that part of the instructions by the Government of India which deal with the carry forward rule, it does not in any way touch the reservation for scheduled tribes at 12 1/2 and 5 per cent respectively, nor does it touch the filling up of scheduled tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes candidates are not available in a particular year or vice versa. The effect of the judgment in Devadasan case therefore, is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes.

It shall be worthwhile to note two recent judgments of the Supreme Court of India regarding Clause 4 of Article 15. These two cases are P. Rajendran and others V. The State of Madras\(^\text{97}\) and The State of Andhra Pradesh V. F. Sagar and G. Latchana\(^\text{98}\) and they do not make any departure from the rules enunciated in the earlier Balaji and Chitralekha cases, but clarify certain points.

In P. Rajendran and others V. The State of Madras,\(^\text{99}\) the Court observed:

"... If the reservation in question had been based

\(^97\) S.C.J. (1968) II pp. 801-06.
\(^98\) Ibid., pp. 778-84.
\(^99\) Supra n. 97 at p. 804."
only on caste and had not taken into account the social and educational backwardness of the castes in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is socially and educationally a backward class of citizens within the meaning of Article 15(4). ... It is true that ... the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens."

In The State of Andhra Pradesh V. P. Sagar, C. Latchana100 the Supreme Court pointed out that in determining whether a particular section forms a class, caste cannot be excluded altogether. But, in the determination of a class, a test solely based upon the caste or community cannot also be accepted. Clause (4) of Article 15, being an exception to Clause (1), cannot be extended so as to effect to destroy the guarantee of Clause (1). Parliament has by enacting clause (4) attempted to balance as against the right of equality of citizens, the special necessities of the weaker sections of the people, by allowing a provision

100 Supra n. 98 at pp. 778-79.
to be made for their advancement. In order that effect may be given to clause (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally, and they are other than the scheduled castes and scheduled tribes and that the provision is made for their advancement.

The Court further points out that reservations may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining backwardness must not be based solely on religion, race, caste, sex or place of birth, and backwardness, being social and educational, must be similar to the backwardness from which the scheduled castes and scheduled tribes suffer. 101

The Court maintains that Article 15 guarantees by the first clause a fundamental right of far reaching importance to the public generally. Within certain defined limits, an exception has been grafted upon the freedom in clause (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist.

When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against

101 Ibid., p. 782. Italics mine.
discrimination is valid on the plea that it is permitted under clause (4) of Article 15, the assertion by the State that the officers of the State had taken into account the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of society were, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. While asserting its power of judicial review in this connection the Court says:

"The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which prima facie infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the materials placed before them. By merely asserting that the law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of Courts to determine whether by making the law a fundamental right has been infringed is not excluded. ... The validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law-maker was satisfied that what

102 Ibid., p. 784. Italics mine.
he did was right or that he believes that he acted in a manner consistent with the constitutional guarantees of the citizens. The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed."

One can, on the basis of the judgments analysed above, make some concluding observations regarding 'protective discrimination' permissible under Articles 15(4) and 16(4).

The language of Articles 15(4) and 16(4) indicates that the framers of the Constitution and, later on those who amended the Constitution, relied primarily on the discretion of the legislators and administrators, rather than the Courts to keep the principle of preference within boundaries consistent with the overall scheme of the Constitution to eliminate caste, religious and other discriminations. But this discretion of the law-makers and executors is not entirely beyond the scope of judicial review. By and large, protective discrimination is accorded to backward classes in view of the fact that they are backward, and unless they are given an opportunity to bring

103 Ibid., p. 784. Italics mine.
themselves on par with others, the provisions regarding equality will have no meaning. The Constitution has conferred on the legislators and executors the power of determining who the backward are, but this power has been made subject to judicial review to the extent to which the Courts scrutinize and review designations of backward classes and see whether the government has used its discretion within the limit of those exceptions.104

In exercising this power of judicial review of Articles 15(4) and 16(4) the Court has tried to strike a balance between the interests of backward classes as well as the interests of other classes and has seen that in protecting the preferential claims of the backward classes, the legitimate claims of other classes are not unjustly and unduly sacrificed. The Courts have considered caste and religion as some of the criteria of determining backwardness but they have not treated them as the ultimate criteria. The Courts have accepted the inherent difficulty of defining 'backwardness' and in view of the scarcity of information available on the social and economic conditions of various sections of the population, the Courts have shown their reluctance to establish definite standards for

104 It is expected that these provisions of preferences shall be temporary in character. The debates in the Constituent Assembly indicate that they were intended to be so. Secondly, the debates also indicate that the framers also expected these provisions to be subject to judicial review. C.A.D. VII p. 599.
defining backwardness; nevertheless, they have listed some important criteria such as literacy, occupation, income, etc. Though caste and religion, as indicators of backwardness, cannot be completely disregarded under the present circumstances, it must be borne in mind that the perpetuation of these standards might result in the creation of communal quotas and thus postpone the achievement of the equality the Constitution has designed to promote.\textsuperscript{105}

In conclusion, it may be said that caste and religion are considered by the Courts to be 'intelligible differentia' for distinguishing among groups of persons. Even though the State is permitted to use in defining backward classes the classifications otherwise forbidden, such as caste and religion, the Courts may require that a rational relation be shown between the differentiae used and the eradication of backwardness. Similarly the Courts may require that some reasonable criteria have been used by the authorities to determine the backwardness. It is, here, therefore, submitted that the Courts have exercised this power of judicial review regarding Articles 15(4) and 16(4) in such a manner as to protect the preferential claims of backward classes without disregarding the claims of other communities for equal protection of the laws granted to them under Articles 14, 15 and 16.

\textsuperscript{105} Mars Galanter, \textit{supra} n. 33, at p. 69.
Article 17: Abolition of Untouchability

The worst enemy, perhaps, of the idea of secular state has been the practice of 'Untouchability' among the Hindus. This age-old institution had its justification in ancient religious literature and there was very close connection between caste and traditional Hindu religion. The practice of untouchability necessarily is against the principle of equality and in a modern liberal society it is rightly considered as a social stigma. It was but natural that the Government of Independent India was the first in the country's history that declared total war on untouchability. On 29th November, 1948, the Constituent Assembly of India adopted the constitutional provision abolishing untouchability. The provision reads:

"Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law."

It was with reference to this provision that the Parliament of India passed 'The Untouchability Offences Act' in 1955. While defending the Bill regarding the same in the House, the Home Minister said:


This cancer of untouchability has entered into the very vitals of our society. It is not only a blot on the Hindu religion, but it has created intolerance, sectionalism and fissiparous tendencies. Many of the evils that we find in our society today are traceable to this heinous monstrosity. It was really strange that Hindus with their sublime philosophy and their merciful kind-heartedness even towards insects should have been party to such an intolerable dwarfing of manhood. Yet, untouchability has been there for centuries and we have now to atone for it. ... The idea of untouchability is entirely repugnant to the structure, spirit and provisions of the Constitution.  

The Untouchability Offences Act of 1955 outlaws the enforcement of disabilities 'on the ground of untouchability' in regard to, inter alia, entrance and worship of temples, access to shops and restaurants, the practice of occupations and trades, use of water sources such as wells, Places of public resort and accommodation, public conveyances, hospitals, educational institutions, construction and occupation of residential premises, holding of religious ceremonies and processions, use of jewellery and finery.  

The imposition of disabilities arising out of untouchability is made a crime punishable as an offence by fine upto Rs.500.

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108 Quoted by M. V. Pylee, supra n. 26, p. 215.
109 Sections 3-6.
imprisonment for up to six months, cancellation or suspension of licences and public grants. Similarly, the Act not only punishes the enforcement of disabilities but indirect social support of untouchability is also made punishable. For example, the use of social boycotts against persons who exercise rights under the Act, the use of sanctions, including excommunication against persons who refuse to practice untouchability and the instigation of the practice of untouchability in any form are also prohibited and penalised.

Section 12 of the Act makes an unusual provision, stating that where any act constituting an offence under the Untouchability (Offences) Act is committed in relation to a member of a scheduled caste as defined in clause (2) of Article 366 of the Constitution of India, the Court (of Law) shall presume, unless the contrary is proved, that such an act was committed on the ground of 'untouchability'. The implication of this provision is that the burden of proving the innocence lies on the accused charged with the commission of an offence under the Act against any member of a scheduled caste. This marks a departure from the

110 Section 8.
111 Section 9.
112 Section 7(1)(b).
113 Section 7(2).
normal principle of rule of law but is justified as an extraordinary remedy for dealing with a problem of exceptional difficulty.114

Before proceeding to an analysis of the implications of provisions to abolish untouchability, it is better to refer, in brief, to the position of law in the matter before independence. The institution of untouchability had historical religious sanction, and, therefore, earlier rulers had actively intervened to support and enforce privileges and disabilities associated with membership in a particular social group. During the British period, the practice of untouchability and other discrimination by private persons did not enjoy such explicit governmental sanction. Such conduct was not directly prescribed by legislation but as a part of the government's policy of non-intervention in social and religious matters, there was little effort to interfere with these usages.115

Temples and other religious institutions were not accessible to the particular caste groups which were considered untouchable and damages were awarded for purificatory ceremonies necessitated by the pollution caused by the presence of lower castes. Deliberate pollution of a temple by a member of the excluded castes was considered a criminal

114 D. N. Benerjee, supra n. 38, p. 100.

It may, however, be noted that the courts declared that no right to exclude others from the use of secular public facilities such as roads, streets, schools and wells could be maintained. Castes and religious groups retained a broad sphere of autonomy over religious and social conduct, and though, on many occasions, matters were not referred to courts, the social penalties such as social disapprobation and social boycott acted as effective instruments to enforce discriminatory practices.

The British Government made some fragmentary attempts to ameliorate the condition of the lower caste groups and tried to protect them from disabilities. But it was in the thirties of this century that most of the provinces in India passed resolutions and issued orders to prevent private discriminatory behaviour and in some provinces positive steps were taken to provide lands, housing and schooling for depressed classes.

Perhaps, the most comprehensive piece of legislation in this connection was the Madras Removal of Social Disabilities Act of 1938. This Act made it an offence to discriminate against untouchables not only in regard to publicly supported facilities such as roads, wells and transportation, but also in regard to 'any other secular

116 Atmaram V. King Emperor, A.I.R. 1924 Mad. 121(1).
117 Sadagopachariar V. Rama Rao, I.L.R. 26, Mad. 376 at 382.
institution" to which the general public was admitted, including restaurants, hotels, shops, etc. Violation of this Act was made a cognizable offence punishable by fine and/or imprisonment for subsequent offences.

Before the adoption of the Constitution in 1950, most of the provinces and princely states (before integration) passed Acts more or less on the lines of the Madras Act of 1938 to remove disabilities of untouchables known as Harijans or backward classes. Most of these acts outlawed the enforcement of disabilities against untouchables and they were given access to public places such as roads, shops, wells, hotels, etc. Violation of these provisions was treated as an offence punishable by law. The Federal Court, as well as the provincial courts, upheld these laws as valid under the power granted to provincial legislatures by the Government of India Act, 1935.

Similarly, religious institutions such as temples were gradually opened up to the excluded classes. Progressive princely states such as Baroda and Travancore enacted legislation to remove the disability of untouchables in entering temples. By 1938, the provincial legislatures of Madras and Bombay enacted similar laws permitting

116 For detailed enumeration of these provisions see Marc Galanter, supra n. 115, p. 212.
119 Ibid., p. 213.
temples to be opened to excluded classes. A bill on similar lines was introduced into the Central Legislature in 1933, but was withdrawn in view of widespread opposition. The period between the end of the war and the adoption of the Constitution witnessed the second more vigorous phase of temple-entry legislation by most of the provinces. By 1950, the year of enactment of the Constitution, customs and practices which recognised 'untouchability' and excluded untouchables from public facilities and public temples came to be treated as offences punishable by law throughout most of India. The Constitution of India, 1950, went further, in as much as, it made freedom from such discriminatory practices as a fundamental right.

Article 17, which abolishes 'untouchability' does not create any special privilege for any one, yet it is a great fundamental right, a charter of deliverance to one-sixth of the Indian population from perpetual subjugation and despair, from perpetual humiliation and disgrace.120 As M. V. Pylee notes 'there could be no better sign of the determination to eradicate the evil than incorporating this Article into the chapter on Fundamental Rights in the Constitution.'121

121 M. V. Pylee, supra n. 26, p. 214.
What Is 'Untouchability'? 

Even though the term 'untouchability' in its social context is commonly understood, it is difficult of precise legal definition. In view of this difficulty, neither the Constitution nor the Untouchability Offences Act of 1955 has defined the term untouchability or the practices implied therein. An untouchable is defined by Funk and Wagnells\(^{122}\) as 'inaccessible to the touch, out of reach, forbidden to the touch; in India, a member of the lowest caste, whose touch was formerly counted as pollution by Hindus of higher station.' It obviously means 'untouchability on the grounds of descent, caste, race or religion.'\(^{123}\) The practice of untouchability may be thought to include such acts as refusal of commensality, invidious separation at various functions, perhaps even observance of purificatory rites after contact.\(^{124}\)

There are three possible interpretations of the term, untouchability.

1. In its broadest sense untouchability would mean all possible instances in which a person is treated as ritually unclean and as a source of pollution. In this

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\(^{123}\) D. N. Banerjee, supra n. 38, p. 98.

\(^{124}\) Marc Galanter, supra n. 115, p. 222.
sense women at childbirth, menstruating women, mourners would be considered as untouchables. But this view is not accepted so far as the word untouchability in Article 17 is concerned. As pointed out by the High Court of Mysore 'the subject matter of that Article is not untouchability in a literal sense but the practice as it had developed historically in this country.'

2. The second interpretation of untouchability would include all instances in which a person is treated as unclean and polluting, not because of incidents of personal history but because of his origin or membership in a particular group i.e., where he is treated as untouchable because of differences of religion or membership in a lower or different caste. In Devarajiah V. Padmanna, an orthodox Jain had prevented a non-Jain from entering or offering worship in Jain temples or taking food with Jains, arguing that admission of non-Jains to common worship was contrary to the tenets of Jainism. He was prosecuted under the Untouchability Offences Act. The Court held that 'this instigation of social boycott' did not constitute an attempt to enforce a disability out of untouchability. The Court suggested that the untouchability with which Article 17 is concerned is that which 'refers to those regarded as...

125 Devarajiah V. Padmanna, A.I.R. 1958 Mys. 84 at p. 85.
126 Ibid., p. 84.
untouchables in the course of historic development and which is related to the relegation of persons "beyond the pale of the caste system ... on the ground of birth ... in a particular class." 127

3. The third sense refers to those practices concerned with the religion of certain groups confining it to those disabilities imposed on groups commonly regarded as untouchables. The view adopted by the Mysore High Court considering untouchables as those 'beyond the pale of the caste system' suggests that the untouchables are those outside the four varnas of the traditional Hindu system. It may be pointed out that the phrase used by the Mysore Court is an imprecise and unworkable formulation because even the lowest castes were within the system of reciprocal rights and duties, the disabilities and prerogatives enjoyed by them being articulated to those of other castes. 128

'Untouchability' implied in Article 17 could, therefore, be interpreted to mean discriminations against certain definable classes of persons. It would include any invidious treatment of a person associated with his membership of origin in an untouchable group, even if the treatment did not involve avoidance of pollution. 129 It would extend to

127 Ibid., p. 85.
128 Marc Galanter, supra n. 115, p. 220.
129 Ibid., p. 222.
such social conduct as avoidance of commensality, denial of social acceptance and even observance of purification after contact. The disabilities implied in Article 17 and the Untouchability Offences Act are those which must arise out of untouchability involving deprivation of the rights to use public facilities and enforcement of customary deference.\textsuperscript{130}

The Untouchability Offences Act does not apply to Hindus alone, though it is a characteristic practice of traditional Hinduism. It applies to all communities in India and it covers all possible cases of untouchability and disabilities arising therefrom. The scope of the Act was made clear by the Minister of Home Affairs\textsuperscript{131} when he introduced the Bill and observed:

"This Bill does not apply to Hindus alone. It applies to all. ... To Christians in the south who are not allowed to enter Churches by those who consider themselves as belonging to higher classes. There are certain Muslims who are treated in the same manner by the followers of Islam. They will have the benefit of this provision. It is for their benefit that the word 'untouchability' has been left undefined. So far as the Scheduled Castes are concerned, the

\textsuperscript{130} For example, Acts such as molestation, injury, annoyance, obstruction to exercise rights.

\textsuperscript{131} Lok Sabha Debates, 27th April 1955. Cols. 6545, 6672.
Act makes it clear that they are entitled to the benefit of the provisions of this Act in any case."

Some cases which were decided by the High Courts before the adoption of the Untouchability Offences Act, 1955, indicate how the Courts approached the issue. In State v. Banwari,\textsuperscript{132} it was held that refusal to serve untouchables in anticipation of economic or social detriment, such as loss of other trade or of social acceptance, are cases of refusal on the grounds of untouchability and, therefore, punishable. It was also held that the refusal must be of present services, not a refusal to agree or promise to render service in future.

In Banniali Das v. Pakhu Bhandari,\textsuperscript{133} the provisions of The Bengal Hindu Social Disabilities Removal Act of 1948 were challenged. In this case, the complainant, Banniali Das alleged that Pakhu Bhandari and others had refused to trim the complainant's hair and also to render similar services to others who belonged to the same caste as that of the complainant, namely, a cobbler. The defendant Pakhu Bhandari contended that the Act under which proceedings were started against him was invalid, in as much as, it unreasonably restricted the right to exercise their profession, namely of a barber. The High Court

\textsuperscript{132} A.I.R. 1951 All. 615.
\textsuperscript{133} A.I.R. 1951 Cal. 167.
unaniously rejected the contentions of Pakhu Bhandari stating that there was nothing in the Act which cut down his right to carry on his profession as a barber. The Court maintained:

"All it (the Act) does is to prohibit him from discriminating between one Hindu and another in carrying out his duties as a barber. The Act compels him to serve all and really enlarges the scope of his services rather than restricts the same. ... The citizens of India should not be subdivided, but should form a united body and that is an end that is rightly sought for by our law making bodies. The makers of the Constitution have recognised it and have abolished untouchability and have also provided that there should be no discrimination only on the ground of caste or religion. ... The Act does not discriminate, but penalises and abolishes tendencies in Hindu society to discrimination. ... (it) does not deny any person equality before law. It tends to make all persons equal in society and before the law, and it cannot possibly be argued that this Act denies any person equal protection of laws."\(^{134}\)

In State v. Kanu Dharma,\(^{135}\) loud words by a worshipper frightening an untouchable boy out of a temple have been held to constitute an offence under the Act enacted by the

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134 Quoted by M. V. Pylee, supra n. 26, p. 217.
Government of Bombay. Similarly, in State v. Kishan, it was held that vulgar abuse and insult on the ground of untouchability could constitute enforcement of a disability, punishable by law.

Justice P. B. Gajendragadkar considers the provision for abolishing 'untouchability' an eloquent illustration of the concept of secularism. He points out that 'untouchability' is a special feature of the practice of traditional Hinduism. A large number of Hindus who belonged to the economically and socially weaker strata were treated as untouchables and this practice was traditionally believed to be based on certain ancient texts. Nevertheless, the Constitution has specifically provided that the practice of untouchability is hereby completely barred. No one would be allowed to say that because the practice of untouchability purports to derive some sanctity or assistance from ancient texts, the law cannot intervene to prohibit it. That is where the doctrine, that fundamental rights prevail over religion, operates.

There is no doubt that the caste system has proved itself to be the greatest fissiparous force known to politics, splitting society into introspective and egocentric

136 Ibid.
138 Supra n. 2, p. 42.
groups which find the same difficulty in adapting themselves to the general national life, as do introspective individuals in adjusting themselves to society. The deep rifts and disunity which are admittedly the distinguishing features of Indian society are primarily due to the caste system. Moreover, caste as the dominating institution has set the pattern of all forms of social organisation so that society has tended to become more divided and sectionalised. It has immeasurably complicated the problem of organising of diverse creeds and people to live in peace and cooperate for the common good. Untouchability, undoubtedly, has been the worst part of the caste system. It was but natural that the framers of the Constitution, with one voice, raised their protest against this ignominious, invidious institution.

It is admitted that the evil of untouchability is gradually disappearing but occasionally we find monstrous

139 George Schuster and Guy Wint, India and Democracy, pp. 38-40.

140 It is interesting to note that there were castes whose members were compelled to carry a broom with which to obliterate their footprints, lest the sight of these should pollute a Brahman. Cited Ibid., p. 44.

141 As indicated by the reports of Commissioner for Scheduled Castes.

This is partly true in case of urban areas but not so with rural ones. The present author along with students has recently undertaken a project of adopting villages under the National Service Scheme. It has been observed that in the villages which are not far away from a city like Poona, untouchables are given discriminatory treatment. There are separate wells for caste Hindus and untouchables and the latter are not allowed to enter the temples in the villages even today.
crimes committed against the so-called untouchables even today. Constitutional provisions and legislative enactments have created a base to meet the challenge posed by the problem of untouchability. Judicial decisions on the basis of these provisions have helped in the eradication of this evil. Nevertheless, it may be pointed out that, these measures can only touch the fringe of the problem. The institution which has its roots deep in past history and which appears to have religious sanction cannot possibly be expected to wither away completely by constitutional and legislative enactment alone; whatever may be the sincerity and the devotion of the people who are expected to put those provisions in practice. The problem is social and moral and in the fight against social and moral evils, legislation is only one of the many weapons. Legislation is a poor remedy for prejudices. As pointed out by N. V. Pylee, 'the battle against every form of untouchability and social discrimination has to be carried to the hearts and minds of prejudiced people through mass contacts, the mustering of public opinion and social action.' It is equally important to note that no social or popular effort can be successful in a large measure unless there is the strong arm of the law to protect those who undertake this gigantic task. The submission is that this is precisely what the Constitution

142 Supra n. 26, p. 217.
has tried to do, and what the Courts have tried to fortify through their decisions.

Conclusion

The overall conclusion of the foregoing analysis is that the judiciary in India has interpreted the provisions regarding religious non-discrimination in such a manner as to give effect to the intention of the framers of the Constitution by understanding the spirit of the law rather than the mere wording of it. The judiciary has supported the provisions of protective discrimination by exercising its power of judicial review so as to protect the preferential claims of backward classes without disregarding the legitimate claims of other communities for equal protection implied in the Constitution.