CHAPTER-III

CONSTITUTIONAL PROVISIONS AND RESERVATION POLICY

Equality is a concept which appeals to each and every individual in a society. Every individual aspiring to grow in position, or to elevate himself for a better position in life, knows well that equality is indispensable. Likewise the fullest development of an individual is possible only though the principles of equality. The view of equality keeps on changing from time to time, but the concept of equality remains unchanged. Equality as a principle is bound to stay in every society in of all whatever adds the society may have to face.  

The concept of equality is difficult to define. In the words of Max Radin,

“Those of us who have learned humility have given over the attempts to define law”

This statement of Max Radin may be used to express a similar difficulty in defining ‘equality’, but as legal scholars, not taking in humility have attempted to define ‘Law; so have Jurists and political scientists attempted to define the word equality.

“Discussions of equality are invariably accompanied by warnings to proceed with caution; the concept is difficult to grasp; it is often laden with emotional overtones; and connotations, incapable of accommodating a single writing is reflected by more than two

thousand years of disagreement among philosophers and political theorists over just what “equality as a political notion signifies”. ¹

Equality is a compendious notion. It has many dimensions and prospective as an individual is capable of his own perception of it. Like many familiar phrases of political philosophy, equality is vague, ambiguous and has changed in connotation from one thinker and society to another; nevertheless it appears, more than any other formulas, to constitute the irreducible minimum of the ideal of equality

The word ‘equality’ possesses more than one meaning, and that the controversies surrounding it arise partly at least because the same terms is employed with different connotations. Mathew Arnold discussing on the text:-

“Choose equality and free greed, observed that in England inequality is almost a religion, and remarked on the incapability of that attitude with the spirit of humanity and sense of truly civilized society. On the one side, infect, in equality harms by pampering; on the other by vulgarizing and depressing. A system founded on it is against nature, and in the long run, breaks, down” ²

Mathew Arnolds statement is equally applicable to the present society:

Hans Kelson has criticised Aristotle’s principle of proportional equality on the ground that it fails to indicate what differences among men are to be allowed as justifying discriminatory treatment. Kelson represents the principle as follows:

“If the individuals A and B are equal, the rights to be allotted to them must be equal too. However, there are in nature no two individuals who are really equal, since there is always a difference as to age, sex, health, wealth and so forth”. ¹

The decisive question in connection with social equality, ges on Kelson, is what difference are relevant and Aristotle’s formula provides no answer to this.

Aristotle’s principles of proportionate equality, does not tell us what differences between men would render discriminatory treatment justifiable. But he was fully conscious of it. To quote Aristotle:

“Equals are entitled to equal things, but the important question is: equals and unequals in what?” ²

The concept of equality, thus is pregnant with the concept of inequality. And to make this concept a general viable concept of equality. We have to take into consideration the other notion and

¹ Kelson, Aristotle’s Doctrine of Justice,(1950) P.54
² Ibid at P.65
perspectives expressed by Jurists, Social thinkers and Philosophers for multi-Dimensional Perspectives.

Prof. Harold J. Laski has discussed the concept of equality with variance. The approach of prof. Laski is such that it would stand the lest of time for generations. In the words of Laski:

Equality does not mean identity of treatment. There can be no ultimate identity of treatment so long as men are different in want and capacity and need. Equality does not even imply identity of reward for efforts so long as the difference in reward does not enable me, by its magnitude to invade the rights of others. Equality, broadly, is a coherence of ideas each one of which needs special examination. The meaning ultimately of equality surely lies in the fact that the very differences in the nature of men require mechanisms for the expressions of their wills that gives to each its due hearing. Equality therefore, means first of all absence of special privilege. Equality means in the second place, that adequate opportunities are laid open to all equality, therefore, involves up to the margin of Sufficiency identity of response to primary needs. And that is what is meant by Justice. We are rendering to each man his own way by giving him what enables him to be a man. We are, of course, there in protecting the weak and limiting the power of the strong. We so act because the common welfare includes the welfare of the weak as well as of the strong”.

What laski had stated then, applied to the present day society and that speaks of the standing of his propositions of equality. As per his version, equality can be achieved in the society to a certain extent. This certain extent means fulfilling the primary needs. If the people are treated at a par in a matter of primary needs, equality to that extent is achieved.

The concept of equality, which demands that equals must be treated equally and those who are similarly situated must be accorded similar treatment, is undoubtedly a statutory legal principal. But in India, a few unfortunate sections were suppressed, socially and economically, for several centuries in the past, and consequently an imbalanced socio-economic order came into existence. In such an imbalanced socio-economic order, strict observance of concept of equality would lead to perpetuation of the existing inequality. So, necessarily, some initial advantages should be granted to the weaker sections as compensation for the lost opportunities, or opportunities which were denied to them in the past.

There is a difference between equality in law and equality in fact. The permanent court of International Court of Justice has explained the difference by observing “equality of law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between situations.”

(1) Green L.C., *International law through cases*, (1959), P.340
absence of discrimination in the words of the law or the preclusion of “discrimination of any kind”. “Equality in law” in this sense has been embodied in clauses (1) and (2) of Article 15 of the Constitution of India. The initial compensatory benifities given to the “weaker sections” or backward classes “would be able to establish an equilibrium or equality in fact between different situations in which two classes “Backward Classes” and Forward classes” are found. In other words the concept of “equality in fact” is essentially equilibrium- creating “different treatment “ or what prof. Alexandrowicz calls “Protective Discrimination” the phrase “weaker sections” mentioned in Article 46 of the constitution is wide enough to include women, scheduled castes and Scheduled Tribes, Socially and Educationally Backward classes, children, untouchables and bonded labour. But in view of the Pancity of funds and time and also to study at microscopic level the present discussion is confined only to the special provisions provided to the scheduled castes, scheduled tribes and socially and educationally backward classes under articles 15(4) and 16(4) of the constitution of India. In this chapter the constitutional framework relating and other connected aspects are briefly explained

(1) Alexanchowinz, C.H., constitutional Development in India; (1957), PP.56-64. He coined the term protective discrimination to denote the discrimination in favour of weaker sections of the society to protect and primate their social, educational and economic advancement.
1.1. **Constitutional Framework relating to reservation**

The objectives sought to be achieved by the constitution are declared in the preamble of the constitution in terms of Justice, Liberty, Equality and Fraternity. These noble and cherished ideals were transformed into the body of the constitution in terms of Fundamental Rights and the Directive Principles of State Policy.

Fundamental Rights and the Directive Principles are intend to ensure socio-economic equality to all the persons irrespective of caste, religion, race etc. Provisions were enacted in the constitution to prohibit discrimination on certain grounds. At the same time, the makers of the constitution also realized that discrimination in favour of certain classes is inevitable and necessary so as to give effect to the preambulatory message of “Equality”. As such provisions were incorporated in the body of the constitution by permitting the state to make special provisions in favour of the specified classes in order to promote these social educational and economic advancement. In this backdrop, it is necessary to trace out the provisions of the constitution permitting preferential treatment to ensure socio-economic Justice to the classes of persons who are different and distinct from the others left out the group. In this context one may recall Articles 15(4) and 16(4) of the Constitution.
Geneses of Article 15(4) throws some light on the problem of selecting the criterion or criteria to determine “the socially and Educationally Backward Classes” of citizens. As a matter of fact, clause(4)of Article 15 was not found in the original Constitution of India. It was introduced into the Constitution by the Constitution (First Amendment ) Act,1951,to get over the difficulties created by the decision of the court in Chompakam Dorairajan case.¹ The decision of the court and subsequent debate in Parliament on the First Amendment of the Constitution help us to understand the problem to a great extent.

Prior to the commencement of the constitution of India, Government of Madras issued a Communal Government orders reserving seats in Medical and Engineering colleges on the basis of religion, caste and race. The validity of the communal Government order was impugned in Champakam Dorirajan² as being volative of the fundamental rights guaranteed by articles 15(1) and 29(2) of the constitution.

The supreme court in Champakam Dorairajan speaking through Mr. Justice S.R.Das, held that the communal G.O. was based on religion, race, and caste, discrimination on the basis of which is forbidden under Article 29(2).

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(2) Ibid at P.226
the communal G.O. it was stated that for every 14 seats to be filled by the selection committee, candidates were selected on the following basis:-

- Non – Brahmin (Hindus) - 6
- Back ward Hindus - 2
- Brahmins - 2
- Scheduled Castes - 2
- Anglo Indians & Indian - 1
- Christians - 1
- Muslims

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The court rejected the argument of the state based on Article 46 of the Constitution on the ground that the fundamental rights are “Sacrasanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the appropriate article in Part – III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights”

In the course of its Judgement the Supreme Court referred to Article 16, which guarantees equality of opportunity in public

(1) Article 46 provides: The state shall 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 shall protect them from social injustice and all forms of exploitation.

(2) Ibid. at P.228
employment, and also to clause(4) of Article 16, which specially enables the state to make reservations of appointments or posts in Government services in favour of Backward Classes, and said that if the argument founded on Article 16 would have been wholly unnecessary and redundant. According to supreme courts, omission of Clause in Article 29 similar to Clause (4) of Article 16 was significant, for the intention of the makers of the constitution might be well that communal consideration for reservation was not desirable in matters of admission in educational institutions maintained by the state or receiving aid out of state funds

The above observations of the court gave a clue to the Parliament as to what should be done to enable the state to help the Backward Classes of citizens to set admission in educational institutions. The result is the Constitution (First Amendment), Act, 1951., which introduced clause (4) to Article 15 to enable the state to make special provisions for the advancement of “Socially and Educationally Backward Classes, Scheduled Castes and Scheduled Tribes”. The debate in Parliament over the First Amendment revolved not only around the desirability of providing educational preferences to the Backward Classes but also on the question of identification of backward classes. A review of the Parliamentary Debates on the insertions of Article 15(4) would give us an idea as to what was really intend by the makers of the First Amendment.

1.2. **Article 15 (4) and the Parliament**

In the beginning there was a move in the Parliament to amend Article 15 (3) so as to empower the state to promote the educational, economic and social advancement of the Backward Classes of citizens. The Parliament gave up the idea of amending Article 15(3) and later decided to insert an altogether new clause in Article 15.

As regards to criteria to be adopted in determining the backwardness contemplated in Clause(4) of Article 15, members expressed various views. Dr.B.R.Ambedkar, the then Law Minister, observed that the amendment was required because “what are called Backward Classes are -- nothing else but collection of certain castes.\(^1\) Dealing with that issue, Prime Minister Nehru said that, “there are groups, classes, individuals, communities........who are backward. They are backward in many ways economically, socially, educationally sometimes they are not backward in one of these respects and yet backward in another\(^2\). Obviously Nehru was not referring to caste alone as a criterion to determine backwardness. He was for ending all those “Infinite divisions that have grown up in our social life”, which, he said,“ we may call by any name you like, the caste system or religious divisions, etc,. They are of course economic divisions

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(2). Ibid; P. 9616
but we realize than and we try to deal with them\textsuperscript{1} Prof. K.T.Shah Strongly felt that the backwardness to be remedied was economic, and, therefore, he proposed the word “economically” to quality the term backward classes.\textsuperscript{2} But it was not agreeable to it for two reasons. First, the addition of the word “economically” would make article 15(4) different from the language used in article 340. Secondly, he felt that the addition of the word “economically” would not help much, for according to him, ‘socially’ is a much wider word including many things and certainly including “economically”.

“socially and educationally backward classes” occur in Article 340 and it wanted to bring them bodily from there. However, the main questions were, who would decide about the socially and educationally backwardness of the sections of the society and what criteria would be taken into consideration in coming to such decision. One view was that since the language of article 15(4) is on the lines of article 340, the specification of backward classes by the President after the recommendation made by the commission appointed under Article 340 would be final. \textsuperscript{3} This was approved by few others. \textsuperscript{4} The other view was that the identification of backward classes would be within the preview of the state Government who might be trusted to do their Job well \textsuperscript{5}

\textsuperscript{1} Ibid., P. 9121
\textsuperscript{2} Ibid.,P.9830
\textsuperscript{3} There are views of Shakardas Bhargava and Ayyangar .M.A.For this refer parliamentary debates, Vol. x 11-13, (Part-II) at Col.9719 & 9817.
\textsuperscript{4} It was approved by Hukumdigh and Mookerjee S.P., Ref. parliamentary debates, Vol. XII-13 at .Col. 9823 and 9824
\textsuperscript{5} Parliamentary debates, Vol.XII-13, (part-II) at Col.9832-33.
Parliamentary debates on the inclusion of Clause (4) in Article 15 make it clear that the members wanted to empower the state to make special provisions for the advancement of socially and educationally Backward classes and scheduled castes and scheduled tribes. However the parliament left to the states to determine the criteria to be followed for the identification of socially and educationally backward classes.

1.3. Article 16 (4) and the constituent Assembly

In the interim report Article 16 was shown as clause 5 and the “reservation clause” of the present clause (4) of Article 16 was shown in second paragraph of Clause (5). This Second Paragraph of clause 5, which was “Reservation Clause” was worded thus:-

“Nothing here in contained shall prevent the state from making provision for reservation in favour of classes who, in the opinion of the state, are not adequately represented in the public service “ The entire Clause (5) was discussed in the Constituent Assembly on 13th April 1947. The only change brought about then was to rearrange the paragraphs of Clause (5) and that dealt with equality of opportunity for all citizens in matters of public employment the second paragraph, which contained “Reservation clause” was given the third place and numbered (c )

Subsequently, a draft was prepared by Shri. B.N.Rau, the constitutional adviser, on the 7th October, 1947. In that draft no substantial change was made in the text of clause 5, which by then was known as section, except some verbal modifications and redesignating the paragraphs as sub-clauses and renumbering them as (1),(2), (3) etc. The
“Reservation clause” was numbered sub-clause (3) and some significant verbal modification was made there in. This sub-clause (3) in B.N.Rau’s draft read thus: “Nothing in this section shall prevent the state from making any provisions for the reservation of appointments or posts in favour of any particular class of citizens who, in the opinion of the state are not adequately represented thus, in B.N.Rau’s draft of 7th October 1947 not only sub-clause (3) was elaborated but also the word “Particular” qualified the phrase “class of citizens”. But the drafting committee put the clause (section) 5 as Article 10 in its draft of 21st February, 1948. So, in the draft constitution, article 10 (3) read thus: “Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward classes of citizens, who, in the opinion of the state are not adequately represented in the services under the state”

It is interesting to note that a few amendments were suggested to clause (3) of Article (10) of the Draft Constitution. One amendment sought to insert the words “economically or culturally” in clause (3) after the words “or posts in favour of any”1 another demanded deletion of the word “backward” from the clause 2 and yet another desired that the words “Scheduled castes or”3 Dealing with them, B.N.Rau in his note said (1) that in view of the fact that the

(1) This was suggested by B.R. Diwakar and S.V.Krishna Murthy Rao, B.Shiva Rao, the framing of Indian constitution, (1968), Vol.(IV).P.31
(2) This was suggested by Ramalingam Chettiard T.S., and the madras legislative council
(3) This was the suggestion made by Upendranath Bannan
drafting committee suggested the section of the word “backward” without any further qualification and the expression used in article 37 was “the weaker sections of the people “and the one used in Article 301 was “socially and educationally backward classes” there was no great objection to the first amendment except that it was perhaps unnecessary, (1) that the acceptance of the grant of wide power to the state to reserve the appointment or posts in favour of any class of citizens who were not adequately represented and it was, therefore, for the constituent assembly to decide whether the scope of this clause should be extended, and (2) the third did not arise as there was no such recommendation to that effect by the advisory committee on minority rights. Besides, there was very interesting suggestion by a lawyer from Calcutta that in clause(3) of article 10, after the words” shall prevent the state “the words” for a period of fifteen years from the commencement of the constitution should be added. He felt that the reservation of posts in favour of backward classes of citizens should be allowed only for period of fifteen years from the commencement of the constitution rest the people should develop vested interest in “Backwardness” and backwardness be perpetuated.(4)

(1). Ibid

(2). Suggested by Atul Chadra Gupta, Ibid,at ,P.32
The Article came up for consideration before the constituent Assembly on 30th November, 1948. Then a few amendments were suggested to clause (3) and different views were expressed on matters relations to reservation of appointment in favour of backword class of citizens. A member, Loknath Misra, suggested deletion of clause(3)from Article (10) of the draft constitution, for he felt that it was not a fundamental right for any citizen to claim a portion of state employment.¹

As a matter of fact, during the debate in the Constituent Assembly on 30th November, 1948, much controversy regard around the “Backward” in clause (3). Some wanted to delete the clause altogether, while some others desired that at least the reservation should be restricted to a period of ten or fifteen years and yet another group of members expressed their apprehension that the word “backward” was vague and might help to show the seeds of communalism in so important a matter as selection of candidates for public service ². A Madras Representative, Mohamed Ismail Sahib, pointed out that in Madras the word was defined and bore a technical meaning, according to which more than one hundred and fifty communities, excluding scheduled castes were counted under this label. In Madras, therefore,” Backward” meant one of those one hundred and fifty communities,

(1).C.A.D., Vol.VII.P.673

(2).Ibid.at .P.691
which actually constituted the majority of the population of the province, and not any community that was generally backward. If the word “backward”, then, he said, the backward class found in the minority communities, such as Christians and Muslim communities, would be kept out of the place of the clause (3)\(^1\). According to T.Chennaiah. a Mysore Representative, the word “backward “ in South India refereed to socially educationally backward classes of citizens \(^2\) thus various connotations of the word “backward” puzzled certain member who, therefore, thought that it should be either dropped from the text or defined precisely.

The Chairman of the drafting committee, Dr. B. R. Ambedker, dealt with the questions of “backward. “ He gave lengthy answer to clear the doubts. He said that the use and the extent import of the word backward” must be understood in the context of an attempt made to reconcile the opposing views of undiluted, perfect equality of opposing views of undiluted, perfect equality of opportunity in the matter of government employments. A glance at the Article, he said would show that the principle of equality of opportunity and the demand for reservations of posts for the communities, which higher to had no “people look-in “ in to the administration, were happily provided for (3)

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(1) C.A.D., Vol. VII, P. 693

(2) C.A.D., Vol.VII, P.690

(3) C.A.D., Vol.VII, P.701
Then, discussing the idea of reservation, he said that supposing reservations made for communities, the total which came to something like 70 percent of the total posts leaving the other 30 percent as open to general competition, that would be extremely unsatisfactory from the point of view of the principals of equality, for the reservations must necessity be confined to minority seats. The exception in favour of reservation, therefore, could not be made, he said, without such qualifying word as backward. He admitted that the word did not originally find a place in the Fundamental Rights and the drafting committee look the entire responsibility of introducing it. Then, dealing with the question “what its backward community ” he pointed out that it was clear from the language of the Draft Constitution that it was left to be determined by each local government. This provision brought to the question whether the reservation was a Justiciable issue. But, Dr. B. R. Ambedkar admitted that it was rather difficult to give a dogmatic answer to it. He thought, however, that it was a Justiciable matter. In this connection he said : “If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court or the Supreme Court and say that the reservations is of such a magnitude that the rule regarding equality of opportunity has been destroyed, and the court will then come to the conclusion whether the Local Government or the State Government has acted in a reasonable and prudent manner ¹.

(1) C.A.D., Vol. VII, P.702
Their Constituent Assembly therefore adopted only those amendments, which had been accepted by Dr. Ambedkar with respect to Article 10, and rejected the rest. The clause (3) emerged in the form how it is now found in clause (4) of Article (16). At the revision stage in the Constituent Assembly, Article 10 of the draft constitution was put by the drafting committee as article 16 thus the reservation clause (4) of Article 16 of the Constitution.

The aforesaid discussion of clauses (4) of Article 16, the reservation clause, in the Constituent Assembly would show that the word “backward” had not been precisely defined, but it had been left to the determined by the state governments. The state governments were, however, expected to approach the problem of determining the “backward classes” in a very reasonable way. This is clear that the three points made out in the course of the debate in the Constituent Assembly.

They are:-

(1). That the exact use and connotation of the word “backward” must be understand in the context of an attempt made to reconcile the opposing views of undiluted perfect equality of opportunity in the matter of Government employment.

(2). That the reservations of posts are ment for communities, which hither to had no “proper look-in” into the administration, and

(3). That the reservations of posts must be confined to minority seats. In other words, the state government are expected to determine or bring within the fold of “Backward classes” and the same of reservations of posts are such that they do not destroy the principle of equality of opportunity.
Under Indian Constitution, a string of Articles deal with the right to equality Article 14 to 16 are prominent among them. The right guaranteed under these articles supplement each other. Article 14, guaranteed equality before law, any disability, liability, restriction, or condition with regard to:

(a) Access to shops, public restaurants, hotels and places of public entertainment
(b) The use of wells, tanks, bathing shals, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public. Nothing in this article shall prevent the state from making any special provision for women and children

Nothing in this article or in Cl. (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally Backward classes of citizens or for the scheduled castes and scheduled tribes

Article 16 – equality of opportunity in matters of public employment:

1. there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state

(1) Article 15(2)
(2) Ibib.
(3) Article 15(3)
(4) Article 15(4)
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 appointment to

2. an office under the government of any local or other authority within, a state or union territory any requirement as to residence within that state or union territory prior to such employment or appointment.

3. 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 service under the state law, the doctrine of special equality is provided under Article 15 which prohibits discrimination on grounds of religion, race, caste, sex, place of birth. Article 16, guarantees equality of opportunity in matter of public employment.

Article 14, use two expressions “equality before the law” and “equal protection of laws”. Both these expressions aim at establishing what is called equality of statutes outlined in the preamble of the Indian Constitution. While both the expressions may seem to be identical, they do not convey the same meaning “Equality before law” is a somewhat negative concept implying the absence of any special privilege in favour of individuals, the equal subjection of all classes to the ordinary law. “Equal protection of law” is a more positive concept implying the equality of treatment in equal circumstances. However, one dominant idea common to both the expressions in that of equal Justice as Dr. Jenning puts it that:-
“It assumes that among equals the laws 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 the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status, or political influences”\(^1\)

The guarantee of equal protection of laws is similar to one embodied in the 14\(^{th}\) Amendment to American constitutions. This means subjection to equal laws applying to all in the same circumstances. It only means that all persons have right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the laws. The rule is that like should be treated alike not that unlike should be treated alike.

Article 14 permits classification, but prohibits class legislation, because all persons are not, by nature, attainment or circumstances in the same position and the varying needs of different class of persons often requires separate treatment. So reasonable classification is not only to be permitted, but is necessary, if the society is to progress.

\(^1\)Junnings - the law and the constitution, 49 (fourth edition, 1952) see also Lachman Doss v/s state of Bombay, A.I.R.,1952, S.C.235
This classification however, should not be arbitrary. It must always rest up on some real and substantial distinction bearing reasonable and just relation to the thing in respect to which the classification is made. Classification.¹

To be reasonable must fulfil the following two conditions:-

1. That the classification must be founded on intelligible differentia which distinguishes persons, or things that are grouped together from others left out of the group;²

that the differentia must have a rational relation to the object sought to be achieved by the act ³

Thus, class legislation is not violation of equality clause as prescribed under the constitution. Hence it is submitted, that under the doctrine of class legislation, laws could have been validly made for safeguarding the interest of the women, children and scheduled castes and scheduled tribes instead of making separate constitutional provisions for them. But the constitution makers wanted to be doubly sure. The separate provisions in detail in were provided for socially and Educationally

(2).See also Abdul Rahim VS Pinto, A.D.R.,1951, Hyederabad-II., Jasjit Singh VS state, A.I.R.,1954. Hyderabad -28
(3).Ramakrishna dalmia VS Justice Tendarkar, A.I.R., 1958, S.C., 406, see also state of west Bengal VS Anwar Ali Sarkar, A.I.R., 1952,
Backward Classes, and scheduled caste and scheduled tribes by way of abundant caution.

The framers of the constitution while keeping in view the problems of the depressed classes enacted provision in part – III of the Constitution for the social and economic advancement of the weaker sections of the society. It is important to note here Articles 15, 16, 17 and 23 of the Constitution. Article 15 (4) deals with what prof. Alexandrowicz described as protective discrimination whereas Articles 17 and 23 are directed against the eradication of the social evils such as untouchability and forced labour. Article 15 (4) enable the state to make special provisions in favour of Socially and Educationally Backward classes of citizens and scheduled caste and scheduled tribes. Though article 15 (1) prohibits the state from making any discrimination against any citizen on any ground of religion, race, caste, sex, or place of birth, the above mentioned provision permit expressly the state to show concessions or to make special provisions in favour of the specific groups of people mentioned there in. Article 16(11) enables the state to make reservations of posts or appointments in the Government service in favour of “Backward classes” of the citizens who are not adequately represented in the state services.

Thus under article 15(4) two groups of people, namely, scheduled castes, scheduled Tribe and socially, educationally Backward classes are mentioned for the purpose of special treatment to promote their advancement. Article 16(4) speaks of “Backward Classes” who are not
adequately represented in the state services. Evidently, these two groups have been treated as weaker sections.

3.4. **Identification of scheduled castes, and scheduled Tribes**

The first group of weaker section is Scheduled Caste and Scheduled Tribes. The question here is as to the criteria for identification of scheduled castes and scheduled tribes. The constitution of India article 366 (24) & (25) empowered the president of India to specify the castes and tribes, which can be regarded as scheduled castes and scheduled tribes for the purpose of preferential treatment.

The president of India issued two notifications under Article 341 and 342 of the Constitution and thereby specified the scheduled castes and scheduled tribes which can be regarded as the scheduled caste and scheduled tribes for the purpose of preferential treatment(1)

3.5. **Criteria for Scheduled Castes:**

The very question in relation to the lists of scheduled castes and scheduled tribes arises as to the basis on which a community is listed as a scheduled caste and or scheduled tribe. So far as the scheduled castes are concerned, this term was used for the first time in the Government of India Act 1935. In April 1936 the British Government issued the
Government of India (Scheduled caste) Order, 1936, specifying certain castes, recess and tribes as scheduled caste, in the then provinces of Assam, Bengal, Bihar, Bombay, central province of Madras, Orissa, Berar, Punjab and united provinces. Prior to the government of India Act, 1935 the then used for these committees were depressed classes (1)

“From the point of view of the state the important test is the right to use public convenience- roads, well, and schools, and if this be taken as the primary test, religious disabilities and the social difficulties in directly involved by them may be regarded as contributor only. Some importance must be attached to them, since obviously if the general public regards the persons of certain groups as so distasteful that concerted action is resorted to in order to keep them away, persons of those groups to suffer under a serious disability the above criteria, which in other words mean discrimination based on the obnoxious practice of untouchability, appear to hold good for purposes of specifying the scheduled castes.

3.6. **Criteria for Scheduled Tribes**

Unlike the case of scheduled castes where some definite criteria have been adopted for determining the status of a community as a scheduled caste, the issue of adopting certain definite criteria for treating a community as a scheduled tribe and the practical application of those criteria is complex. The expression scheduled tribes had been used for the first time in the Constitution only and the earlier expressions used in Pre-Independence were aboriginal tribes, backward tribes, etc. It may be mentioned in passing through that for the colonial rules almost the entire Indian people were Backward or primitive or uncivilized and due care was not exercised in using the term tribe in an objective or scientific manners. However, it may be stated in the context of the primitive societies all over the world that there is no universal definition of a tribe given by the noted Indian anthropologist, the late Dr.D.N.Majumdar, defined a tribe as follows:

“A tribe is a social group with territorial affiliation, endogamous, with no specialisation of functions, ruled by tribal offices, hereditary or otherwise, united in language or dialect, recognizing social distance from other tribes or castes but without any stigma attached in the case of a caste structure, following tribal traditions, beliefs and customs, illiberal of naturalization of ideas from alien sources, above all conscious of a homogeneity of ethnic and territorial integration”

It is true that due to various factors and force and the different stages of transition through which various tribal communities have been passing, an Indian tribe today may not answer all the descriptions or
characteristics included in Dr. Mujumder’s definition. But we can say that if a community answers Majority of these characteristic it can be treated as a tribe. In the first report of the commissioner of scheduled castes and scheduled tribes (1951) it was stated that the state Governments were requested to treated as Scheduled Tribe which of the tribes. In appendix IV of that report the criteria suggested by 14 state governments were indicated. They offered conflicting views. However, the following appeared to be the features common to the tribes in various states

(I).Tribal origin,

(II). Primitive way of life and habitation in remote and less easily accessible areas

(III) General Back wardness in all respects.

Thus there is no difficulty in identifying the scheduled caste and scheduled tribes for the purpose of favourable treatment under the constitution.

The other group of people entitled for preferred treatment are “Socially and educationally backward classes”. It is pertinent to note here that unlike scheduled castes and scheduled tribes the constitution is silent as to the identification of the classes who can be designated as socially and educationally Backward Article 340 of the constitution

(1) Ibid; P.552
empower the president of India to appoint a commission to investigate the conditions of socially and educationally backward classes. It is important to note here that the investigation of conditions of the backward classes is altogether different from scheduled caste and scheduled tribes.

In this connection it is relevant to note the commission i.e., National commission for scheduled castes and scheduled tribes 1990 “Recommended to appoint a special for the scheduled caste and Scheduled tribes to be appointed by the president of India and it shall be his duty to investigate all the matters relating to the president on their working. The safe guards are provided under Articles 15,16,17,19,23 and 29. It was felt that a high level seven member commission under Article 338 would be more effective arrangement than a single special officer as at present Accordingly the Article has been amended to provide for the “National Commission of scheduled castes and scheduled tribes”. The commission is consisting of a chairperson Vice-Chairperson and other members to be appointed by the president by warrant under his hand and seal.

Summary

The concept of equality has been described by jurists, social thinkers and philosophers for multidimensional perspectives. It envisages that idea

(1). Article 338 of the Indian Constitution
that all human beings are born free and equal and that there should be no discrimination on the basis of religion, race, caste, colour or creed. It speaks

3.7. **Annual Survey of India, 1990.**

the constitution 65\textsuperscript{th} Amendment Act, 1990.(the Act, the Gazette of India, Part-II, S. I exts. No:36,8-6-1990). The death –knell of privileged classes in the society in its social manifestations.

In India a few unfortunate sections were suppressed, socially, educationally and economically for several centuries in the post and consequently an imbalanced socio-economic order, strict observance of concept of equality would lead to perpetuation of the existing inequality

In part-III of the constitution, which embodies fundamental rights provisions have been made in three places to enable the state to make protective discrimination in favour of weaker sections of the society. The phrase “Weaker sections” mentioned in article 46, of the constitution is wide enough to include women, scheduled castes and scheduled tribes, socially and educationally backward classes, children, “Untouchables” but here the decision on social Justice has been carried on mainly in relation to compensatory discrimination stipulated in the constitution to achieve equality among the people.

(1) Annual Survey of India,1990 the constitutional 65\textsuperscript{th} Amendment Act,1990(the Act, the Gazette of India, Part II ,S,Exts No:36,8-6-1990).
Therefore mere proclamation of equality will be of no use to persons growing under the stigma of poverty and backwardness. They need special treatment to participate in the main stream of national life.

Hence an attempt is made to study the concept of equality with special reference to protective discrimination as an aspect of distributive Justice to scheduled caste, scheduled tribes and Backward classes in the society.