CHAPTER- 3

CONCEPTUAL AND CONSTITUTIONAL FOUNDATION

3.1. AIMS AND OBJECTIVES OF THE CONSTITUTION

Socialism has an older ancestral origin than democracy in the sense that the debate about equality and inequality is as old as civilization itself. Ever since Plato lamented that every city is a city of two – one of the rich and the other of the poor, and Aristotle’s caution that inequality every where is the cause of revolution- the question of creating a just, equal stable and efficient society has been the core of political speculation\textsuperscript{168}. To trace the origin of socialist ideas to classical antiquity, like gray did, creates an ambiguity for its overlooks its modern concerns, viz. that it arose first out of commercialization and then become a reaction to the industrial revolution which decisively shaped human societies and lives. For the first time in human history there was a tremendous sense of optimism that it was possible to create a prosperous, abundant, force, equal and rational society for all with the aid of technology and science.

The concept of socialism has been interpreted by various thinkers and groups in diverse ways. The advocates of socialism are, indeed, numerous and the literature on the subject is so vast and varied that it is hard to say what exactly socialism means\textsuperscript{169}. Dr. Angelo Rappaport\textsuperscript{170} listed 39 definitions of socialism in his dictionary of socialism and he was still not clear in his own mind as to what it meant. These are

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\item \textsuperscript{168}Subrata Mukherjee and Sushila Ramaswamy. \textit{A History of Socialist Thought From the Precursors to the Present}. Sage Publications, New Delhi, (2000)
\item \textsuperscript{169} Shriram Narayan, \textit{Socialism in Indian Planning}. Asia Publishing House. Bombay.
\item \textsuperscript{170} Angelo Rappaport. Dictionary of Socialism (1924), quoted in Ibid note 168.
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four basic tendencies in socialist ideology egalitarianism, Moralism, nationalism, and libertarianism. It would be a mistake to treat socialism, Marxism and Communism as thought they were identical. In doing so one would overlook their theoretical diversity and the debates within. Like all major ideologies, socialism too has become an umbrella ideology. ‘Socialism is in fact the theoretical genus of which Marxism is a species and anarchism another; communism is best viewed as political practice, rather than as an ideology. However, common to all strands of socialism is a commitment to equality, human solidarity, and non-exploitative relationship and socialized humanity. The central idea to socialism like equitable distribution of wealth, reward and honor as a prerequisite to a just society, and concern for the poor, oppressed and the deprived – have always been a part of intellectual thinking. Beyond this general agreement, socialist differed not all of their favored common ownership of property and the means of production some wanted to achieve socialism through violent revolution, while others stressed a peaceful and gradual change. Some clacked that they had discovered the laws of historical development and projected socialism as the inscrutable destiny, while others remained content in just projecting what they can side red to be a perfect society. For some socialism was a universal human ideal while others saw it as the goal and aspiration the working class. Some socialist wanted to abolish the state altogether while others perceived it as instinct freedom and cultural elevation. While for some socialism was international, others combined it within their own national boundaries. After 1840 it was increasingly used across Europe to mean common owner socialism, Asian socialism and Gandhian socialism. It is because of such a variety that socialism was described as a hat which had lost its original shape after being worn by many heads.

A number of developments interlaced with one another to produce a new version of socialism in the post – Second World War era that led to actualization of the welfare state. First the relative decline of the manual working class meant that the

171 Ibid.
172 Ibid.
173 Ibid.
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parties became more heterogeneous in term of class composition. This meant that, in order to succeed electorlly, they needed to mobilize people from wider social and economic backgrounds. Second, in the 1950s, Western European Countries experienced unprecedented growth rate guaranteeing full employment, economic posterity and social security to all, including the working class, confirming Macmillan’s oft-quoted state meant that are never had it so good. Mass miseries were mitigated and poverty became a minority concern and in many parts of world, invisible. Third, there were structural changes in the economy. Like ownership was separated from control of capital leading to the extinction of the overbearing owner boss and the emergency of a new species of salaried managers. The managerial revolution that transformed capitalism bringing to the called post industrial society 174

Basically the concept of socialism was in some ways a reaction against the philosophy of individualism advocated by John Stuart Mill who thought that “the state will do well to leave people alone so long as the people in question leave other people alone”175. Bentham maintained that each man could be trusted to look after his own interests and that the satisfaction of the wants of all individuals is identical with the well-being of the community as a whole. The socialist thinkers, thought differing from one another in several important respects, strongly reacted against this individualistic approach to social problems and suggested various methods for bringing about an egalitarian order. Saint Simon was a firm believer in the virtues of large scale organization and planning; He hoped that the fullest use of science and technology could establish a socialist organization for the welfare of community. In contrast to this attitude of Saint Simon, Charles Fourier strongly believed that an agrarian oriented social structure alone could create conditions for the realization of a good life.176

174Subrata Mukherjee and Sushila Ramaswamy; A History of Socialist Thought From the Precursors to the Present. Sage Publications New Delhi. (2000),
176 Ibid.
Although the concept of socialism has meant different ideas to different persons, groups and nations, there has been more or less, a common understanding that a socialist society should promote the following ship of men,” with the conviction that every human being has an equal right to happiness and whatever else gives value to life. India has also decided to establish a socialistic pattern of society based on parliamentary democracy. To late Prime Minister Jawaharlal Nehru “the establishment of a socialist order means a controlled production and distribution of wealth for the public good”. “The socialist way of life” observes Jayprakash Narayan” is a way of sharing together the good things that common endeavor may make available”. Mahatma Gandhí upheld that idea of Sarvodaya which sought to achieve the material as well as moral well beings of all section of the community and more especially of the poorest and the lowest strata of society. The Constitution of India directs that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social economic and political, shall inform all the institution of national life”. It has been stated that all citizen have “the right to an adequate means of livelihood” and that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good”. The Directive Principles also enjoins the state to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Preamble of the Indian Constitution says, we, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizen: justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all; fraternity assuring the dignity of the individual and the unity and integrity of the nation; By the constitution 42nd Amendment, Act, 1976,

177 Ibid.
178 Ibid.
179 Part IV of the Constitution that deals with the Directive Principles of State Policies.
the words, socialist secular and integrity were inserted in the preamble. It indicates the source from which the constitution derives its authority and also states its objects which the constitution seeks to establish and promote. It is a key to open the mind of makers.

The principal aims of a socialist state as envisaged in the preamble are to eliminate inequality in income and status and standards of life. The basic framework of socialist is to provide a decent standard of life to the working people and especially to provide security from cradle to grave\textsuperscript{180}. The Constitution of India is not a mere pedantic legal text, but it embodies certain human values, cherished principles and spiritual norms and recognizes and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material moral and spiritual development as the chief concern of its various provisions. The core constitutional objective of social and economic democracy in other words, just social order cannot be established without removing the inequalities in income and making endeavor to eliminate inequalities in status through the rule of law and legislative actions. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due\textsuperscript{181}.

From the statements of objects and reasons of the 42\textsuperscript{nd} Amendment Act, 1976, it appears that the words socialism was inserted to spell out expressly the high ideals of socialism. What is meant by socialism is explained in the same context but there is no reference to collectivism or nationalism but mere social justice.\textsuperscript{182} These words are the objective of social economic revolution which would end poverty and ignorance and disease and inequality of opportunity……..\textsuperscript{183}

\begin{thebibliography}{9}
\bibitem{181} Ibid.
\bibitem{183} Ibid.
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In 1983, the Constitution Bench in *Nakara’s case* explained that meaning of socialist in the preamble, with reference to the foregoing statements of objects and reasons appended to the constitution (42nd Amendment) Act, 1976, in these words. “The principal aim of a socialist state is to eliminate inequality in income and status and standard of life. The basic framework of socialism people and especially provide security from cradle to grave. This amongst other on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxian and Gandhism leaning heavily toward Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewith that or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily therefore, a socialist state provides for the education from primary to Ph. D, but the pursuit must be by those who have the necessary intelligent quotients and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for want of where without while the ill-equipped son or daughter of a well-to-do father will enter the portal of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without lit or hindrance of caste, colors, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise, but even there the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a mahatma, a work or a pariah. The old age overtakes each one, death being the fulfillment of life providing freedom from bondage. Here socialism aims at providing an economic security to those who have rendered up to society what they were capable of doing when they were fully equipped with their mental and

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physical powers. It was such a socialist state which the preamble directs the centers of power legislative, executives and judiciary to strive to set up.¹⁸⁵

One of the main objectives of the constitution is to building of a welfare state and an egalitarian social order in our country. As stated before the fundamental rights and the directive principles have been described as the conscience of our constitution. The constitution makers had, among others, one dominant objective in view and that was to ameliorate and improve the lot of the common man to bring about a socio-economic transformation based on principles of social justice.¹⁸⁶ While the constitution makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have the dignity of the individual.

Part III of the constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of the individual.¹⁸⁷ The difference between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the courts to lean more and more in favour of nationalization and state ownership of an industry after the addition of the word socialist in the preamble of the constitution.¹⁸⁸ The principal aim of a socialist state is to eliminate inequality in income and status and standards of life. The word “socialist used in the preamble must be read from the goals that Arts. 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to reduce inequalities in income and status and to provide equality of opportunity and facilities.¹⁸⁹ The socialistic concept of the society is laid down in part III and IV of the

¹⁸⁵Ibid.
¹⁸⁷ Ibid.
¹⁸⁸ Excel Wear v. Union of India. A I R 1997 S C 25
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The aim of democratic socialism is to end poverty, ignorance, disease and inequality of opportunity.\footnote{H.S. E. B. v. Suresh, (1999) 3 S C C  601}

In the case of \textit{G.B. Pant University of Agriculture Technology v. State of U.P}^\footnote{A I R 2000 S C 2695}, the Supreme Court held that the economic justice is not mere legal jargon but in the new millennium, it is an obligation for all to confer this economic justice on a Sarker. If society is to rename, social justice in the order and economic justice is the rule of the day. A narrow pedantic approach to statutory document no longer survives. Justice, social and economic, ought to be made available with utmost expedition, so that socialistic Patten of the society as dreamt by founding paten can thrive and have its foundation. So that future generations donate life in dark and cry for social and economic justice. It was held that socialistic concept of society should be implemented in the true spirit of the Constitution.

In \textit{Balbir Kaur v. Steel Authority of India}^\footnote{A I R  2000  S C 1596} it was held that the concept of social justice is the yardstick to the justice administrative system or legal justice. It was further held that whatever is beneficial for the society, the endeavor of the law court would be to administer justice having due regards to it. In \textit{Tara Chand Vyas v. Chairman and Disciplinary Authority},^\footnote{(1997) 4 S C C  565} it was held that economic empowerments is a fundamental right of weaker section of the people in particular the scheduled caste and Scheduled Tribes, ensured under Article 46 of the constitution as a part of social and economic justice envisaged in the preamble of the constitution as the state is enjoined to promote their welfare effectuated under Article 38. The Supreme Court in \textit{Ajaib Singh v. Sirhind Co-Operative Marketing-cum-processing Service Society Ltd},^\footnote{A I R 1999 S C 1351} held that after inclusion of the word ‘socialism’ in the preamble was clearly to set up a vibrant, throbbing welfare society in the place of a feudal exploited society.
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The court must strive to give such an interpretation as will promote the march and progress towards socialistic, democratic state.

Greater concern must be shown to improve the condition of poor population of the country and every effort should be made to allow them as much benefit as may be possible after insertion of word socialism in the preamble was accepted by the Supreme Court in *Sohan Singh v. New Delhi Municipal Committee*¹⁹⁵. It was further held that the constitution as it originally was committed to economic justice and welfare of the needy. It was further held that for that reason, other provisions of the constitution cannot be ignored. Addition of the word socialism is to alienate inequalities in income and status. The emphasis is on economic equality in a socialist welfare society and while considering whether any classification is consistent with the socialist goal, set out in the preamble, must also be taken into consideration. In *Air India Statutory Corporation v. Union Labour Union*,¹⁹⁶ Supreme Court has also laid emphasis on social justice so as to attain substantial degree of social, economic and political equality. Social justice and equality are complementary to each other. In *Post Graduate Institute of Medical Education and Research v. K. L Narashimha*,¹⁹⁷ the Supreme Court held that the object of protective discrimination as envisaged in preamble, Article 15(4), 16(4), and 16(4-A) is to integrate them into national mainstream, so as to establish an integrated social order with equal dignity of person in which justice, social, economic and political are enjoyed by them in equal measures with general member of society. Again as regards to policy of reservation, the Supreme Court in *E.V. Chinniah v. State of A.P.*,¹⁹⁸ held that the policy of reservation must be considered from the social objective angle, having raged to constitutional scheme and not as a political issue. Even if the caste system has got struck in society, if any legislation is passed to do away with the civil effect thereof, it has to be in

¹⁹⁵ *AIR 1989 S C 1988*
¹⁹⁶ *AIR 1997 S C 645*
¹⁹⁸ (2005) 1 S C C 394.
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accordance with constitutional scheme. Reservation to a backward class is not constitutional mandate but a prerogative of the state.

The Preamble to the Constitution is not a mere flourish of words, but was an ideal set up for practices and observance as a matter of law through constitutional mechanism. It contains in a nutshell its ideals and its aspiration. The preamble is not a plentitude but the mode of its realization is worked out in detail in the Constitution. In A.K. Gopalan V. State of Madras, it was held that “it is this declaration i.e. preamble that makes our constitution sublime and it is the guarantees mentioned in the chapter as fundamental right that make it one of the greatest charter of liberty and of which the people of this country may will be proud. The charter has not been forced out of unwilling hands of a sovereign like the Magna Carta, but it has been given to themselves by the people of the country through their constituent assembly. The constitution has a noble and grand vision contained in the preamble. Through in an ordinary statue, much importance is not attached to the preamble all importance has to be attached to the preamble in a constitutional statute. Preamble relates to the basic structure of frame work if the constituent assembly formulates the preamble in the light of the objectives resolution, but restricted it to defining the essential features of the new state and its basic sociopolitical objective and the draft of the preamble was considered by the assembly last after considering other parts of the draft constitution to see that it was in conformity with the constitution. On the other hand, in constituting the fundamental rights enumerated in part III of the constitution, the high purpose and spirit of the preamble, namely, that it assured to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality should be borne in mind. The emphasis of our constitution, as expressed in the preamble is to establish a welfare state.

200 A I R 1950 S C 27

201 Basheshar v. C.I.T, A I R 1959 S C 149
In *Sajjan Singh v. State of Rajasthan*, it was held that the preamble does not make any grant of power but it gives a direction and purpose to the constitution which is reflected in part III and IV. A comparison of the preamble with the broad features is an epitome of these features or to put it differently these features on an amplification or concretization of the concept set out in the preamble. The preamble has the stamp of deep deliberation and is marked by precision. It would suggest that framers of constitution attached special significant to preamble. The true function of the preamble is to suspend the nature and extent and application of the powers actually conferred by the constitution and not substantially to create them. In *Kesavananda Bharati v. State of Kerala*, case the court said that “from the preamble, it is quite clear that the two primary objectives that were before the constituent Assembly (1) to constitute India into sovereign democratic republic and (2) to secure to its citizens the right mentioned therein. It was a plan to build a welfare state and an egalitarian society.

The scope of preamble in the Constitution was narrowed down in *India Nehru Gandhi v. Raj Narain*, it was held therein “the preamble through part of Constitution is neither a source of power nor a limitation upon that of the people. The preamble sets out the ideological aspiration of the people. The essential features of this great concept set out in the preamble are delineated in the various provision of the constitution. It is these specific provisions in the body of the constitution which determines the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which was their desideratum, the context of liberty of thought and expression, which they entrenched in that document, the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the constitution alone can determine the basic structure of constitution as established. The preamble generally

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202 A I R 1965 S C 845.
203 A I R 1973 S C 1461.
204 A I R 1975 S C 2299.
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uses words of passion and power in order to move the hearts of men and to stir them into action.

Thus equality, justice, liberty and fraternity are the chief objectives enshrined in the preamble to the constitution of India. Our founding fathers wished to build an edifice of democracy wherein those noble objectives might be materialized in regard to the entire India society which includes communities which had hitherto remained disadvantaged and under developed due to historical discriminations perpetrated in the name of caste, creed, race or the like. They therefore designedly embodied certain provisions in the constitution which conferred special favors and protection to the backward classes of citizens with a view to uplift them to level of equality with the rest of the society. The Indian constitution embodies manifold concessions, preferences, exemption and above all reservation as the means of achieving social justice. The backward of all sections viz., scheduled caste and schedule tribes along with other backward classes are provided reservation and other special favors in numerous areas including employment and admission as measure of social justice.

3. II. RIGHT TO EQUALITY

The Constitution of India guarantees the Right to equality through Articles 14 to 18, and it is one of the magnificent corner stone of Indian democracy. The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution. Art 14 outlaws discrimination in general way and guarantees equality before law to all persons. In view of a certain amount of indefiniteness attached to the general principle of equality enunciated in Article 14, separate

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206 Ibid.
207 Ashutosh Gupta v. State of Rajasthan, AIR 2002 SC 1533
provisions to cover specific discriminatory situations have been made by subsequent Articles. Article 14 is considered to be the most significant Constitutional provision. It has been given a highly activist magnitude in recent years by the courts and thus it generates a large number of court cases. The goal set out in the preamble to the constitution regarding status and opportunity is embodied and concretized in Articles 14 to 18. It may be noted that the right to equality has been declared by the Supreme Court as the basic feature of the Constitution. The Constitution is wedded to the concept of equality. The Preamble to the constitution emphasizes upon the principle of equality as basic to the Constitution. It means that even a Constitutional Amendment offending the right to equality will be declared invalid.208

Article 14 runs as follows: “The states shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This provision corresponds to the equal protection clauses of the 14th Amendment of the U. S. Constitution which declares: No state shall deny to any person within its jurisdiction the equal protection of the laws. Two concepts are involved in Article 14, viz., equality before law and equal protection of laws.209

The first is a negative concept which ensures that there is no special privilege in former of any one that all are equally subject to the ordinary law at the land and no persons whatsoever be his rank or condition, is above the law. This is equivalent to the second corollary of the Dicean Concept of the Rule of Law in Britain. This however, is not an absolute rule and there are a number of exceptions to it, e.g., foreign diplomats enjoy immunity from the country’s judicial process. Article 361 extends immunity to the president of India and the state governors, public officer and the judges also enjoy some protection and some special groups and interests, like trade unions have been accorded special privileges by law210.

209 M.P. Jain, Indian Constitutional Law. Fifth Ed.
210 Ibid.
The second concept equal protection of laws is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences of circumstances. Equal protection of the laws does not postulate equal treatment of all persons without distinction. What it postulates is the application of the same laws alive and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered. That the like should be treated alike without distinction of race, religion, wealth, social status or political influence.211 The Supreme Court has explained in *Sri Srinivasa Theater v. Govt. of Tamil Nadu*,212 that the two expressions equality before law and equal protection of law do not mean the same thing even if there may be much is common between them. “Equality before law” is a dynamic concept having many facets. One facet is that there shall be no privileged person or class and that none shall be above law. Another facet is the obligation upon the state to bring about, through the machinery of law a more equal society for equality before law can be predicted meaningfully only in equal society.

Article 14 prescribes equality before law but the fact remains that all persons are not equal by nature, attainment or circumstances and therefore a mechanical equality before the law may result in injustice. Thus the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances or conditions. The varying needs to different classes or sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must therefore, necessarily have the power of making laws to attain particular objects and for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate.213 The principle of equality of law thus means not that the same law should apply to everyone but that a law should deal alike with all in one class;

211 Ibid
212 A I R 1992 S C 1004
213 Chiranjeet lal v.Union of India, A I R 1951 S C 41.
that there should be an equality of treatment under equal circumstances. It means that
equals should not be treated unlike and unlike should not be treated alive. Like should
be treated alike.214

Article 14 thus means that equals should be treated alike; it does not mean that
unequals ought to be treated equally. Persons who are in the like circumstances should
be treated equally, on the other hand, where persons or groups of persons who are not
situated equally, to treat them as equals would itself be violative of Article 14 as this
would self result in inequality. As all persons are not equal by nature or
circumstances, the varying needs of different classes or sections of people require
differential treatment. This leads to classification among different group of persons
and differentiation between such classes. Accordingly, to apply the principle of
equality in a practical manner, the courts have evolved the principle that if the law in
question is based on rational classification it is not regarded as discriminatory.215 A
legislature is entitled to make reasonable classification for purpose of legislation and
treat all in one class on an equal footing. The Supreme Court has under lined this
principle thus: Article 14 of the Constitution ensures equality among equals; its aim is
to protect persons similarly placed against discriminatory treatment. It does not
however operate against rational classification. A person setting up a grievance of
denial of equal treatment by law must establish that between persons similarly
circumstanced, some were treated to their prejudice and the differential treatment had
a reasonable to the object sought to be achieved by the law.216 Article 14 forbids class
legislation, it does not forbid reasonable classification of persons, objects and
transactions by the legislature for the purpose of achieving specific ends classification
to be reasonable should fulfill the following two tests:217

1) It should not be arbitrary, artificial or evasive. It should be based on an
intelligible differentia, some real and substantial distinction, which

217 Ibid.
distinguishes persons or things grouped together in the class from other left out of it.

2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.

What is however necessary is that there must be a substantial basis for making the classification and that there should be nexus between the basis of classification and the object of the statute under consideration. In other words, there must be some rational nexus between the basis of classification and the object intended to be achieved. Therefore, mere differentia or the inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attach Article 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view in making the law in question. In Deepak Sibal v. Punjab University, the Supreme Court has pointed out that a classification need not be made with mathematical precisian but, if there is little or no difference between the persons or things which have been grouped together and those out of the group, then classification cannot be regarded as reasonable. The court has also pointed out that to consider reasonableness of classification it is necessary to take into account the objective for such classification.

The supreme court in a number of cases has established certain important principle concerning Article 14 and elucidated the scope of permissible classification:

(a) A law may be Constitutional even though it relates to a single individual if, on account of some special circumstances or reason applicable may be treated as a class by itself.

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218 Jaila Singh v. State of Rajasthan, A I R 1975 S C 1436
219 A I R 1989 S C 903
(b) There is always a presumption in favour of the constitutionally of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The person therefore who pleads that Article 14 has been violated, must make out that not only has been treated differently from others but he has also been treated differently from persons similarly circumstanced without any reasonable basis and such differential treatment has been unjustifiably made.221

(c) It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

(d) The legislature is free to recognize the degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.

(e) In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislations.222

(f) While good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislations.

(g) A classification need not be scientifically perfect or logically complete.

(h) The validity of a rule has to be judged by assessing its overall effect and not by picking up exceptional cases. What the court has to see is whether the classification made is just taking all aspects into consideration.

(i) The court must look beyond the ostensible classification and to the purpose of the law and apply the test of palpable arbitrariness in the context of the felt

221 Ramchand Jagdish Chand v. Union of India, A I R 1963 S C 563
222 Superintendent and Remembrance of Legal Affair v. Girish K. Navalakha, A I R 1975 S C 1030
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needs of the times and societal exigencies informed by experience to determine reasonableness of classification.

Equality has various shades. Its understanding and application have been shaped by social, economic and political conditions prevailing in the society. The reigning philosophy since 18th century has been the state’s responsibility to reduce disparities amongst various sections of the population and promoting a just and social order in which benefits and advantages are evenly distributed. To achieve this basic objective various theories have been advanced from time to time\(^{223}\). The formal equality advanced by Aristotle that equals should be treated equally and unequals, unequally was as much result of social and economic condition as the Rawls theory of justice or the Dworkins\(^{224}\) concept of right of all to treatment was equals. Liberty and right to equality taken individually may appear to pull in different directions. But viewed as part of justice and fairness the two are the primary tenets of modern egalitarian society. The real difficulty is translating them into practical working. The American concept of equal but separate doctrine is the best illustration of distance between theory and practice of equal protection. The recognition and realization that neither all man are equal nor are the circumstances in which they are born or grow and same gave rise to classification and grouping of persons similarly situated and extending then equal or same treatments.\(^{225}\)

In our Constitutional scheme the classification in matters of employment or appointment in the services has been done constitutionally. From entire class of all citizens any backward class has been classified for beneficial or benign treatment. The legislature or executive therefore cannot transgress it. Since the Constitution treats all citizens alive for purpose of employment except those who fall under Article 16(4) any further classification or grouping for reservation would be constitutionally invalid. No. legislative exercise can transcendent the constitutional barrier. For valid

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\(^{223}\) Indra Sawhney v. Union of India, A I R 1993 S C 477 Para 681

\(^{224}\) Quoted in Ibid.

\(^{225}\) Ibid
classification legislature or executive measures must be co-related with legislative purpose or objective. Once the Constitution itself unfolded the purpose of achieving the goal of equality by permitting reservation for backward classes, only any further reservation being beyond constitutional purpose would be impermissible and invalid.226

Abstract equality is neither the theme nor philosophy of our Constitution. Real equality through practical means is the avowed objective. Atoning for the past injustices on backward classes through Constitutional mechanism was morality raised to legal pain. Admonition to state not to deny equality before law or equal protection of laws found on sound public policy, is in reality the measure of fundamental right which every person enjoys. But, principle of the equal protection of law does not mean that every law must have universal application to all persons who are not by nature attainment or circumstances in the same position.227 The varying need of different classes of persons requires special treatment. Principle of reasonable classification was developed by theorists and counts to enable state to function effectively classifying reasonably. Various sub- Articles of Article 16 especially clause (4) indicates constitutional classification and creation of two classes are dealt in Article 16 (1) and other in Article 16(4). Principles of reasonable classification for purpose of creating another class or planting one class in another would be constitutionally infirm.

The doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facts, relevant to Indian society, have been referred to in the preamble and the Articles under the heading “Right to Equality” (Article 14-18). The goal of equality is Equality of status and of opportunity.228 Article 14-18 must be understood not merely with reference to what they say but also in the light of the

227 Dhirendra Kumar Mondal v. The S & R of Legal Affairs to the Govt. of West Bengal & Another, A I R 1954 S C 424.
228 Indra Sawhney v. Union of India. A I R 1993 S C 477
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several Articles in part IV of the constitution\(^{229}\). Among others the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities is status, facilities and opportunities not only amongst individuals but also amongst groups of people, screening adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the scheduled caste and Scheduled Tribes and backward class and to protect them from social injustices and all forms of exploitation\(^{230}\). Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality either equality before law or equality in any other respect\(^{231}\).

Formal equality simply requires the absence of any discrimination in the words of law. This motion requires that similar cases must be treated similarly “according to one and the same rule. The formal equality notion reflects nothing more than a demand for rationality - a demand that statements made about one person be generalized into statements about all similar persons in similar circumstances. It all men were equal similar in every respect except that they were distinct individuals formal equality would have been sufficient but men are not equal in their physical characteristics native endowments, social and economic position, subjective preferences values and tests. It becomes necessary then to determine in what respects men are similar and to decide which of those are relevant to the kind of treatment they should receive. The determination of relevant similarly and dissimilarly requires an appeal to empirical realities and adoption of a value system which considers similarities and differences between different persons\(^{232}\).

\(^{229}\) Part IV of the Constitution deals with the Directive Principles of State Politics. It contains the Justice, Social, Economic and Political.

\(^{230}\) Ibid.

\(^{231}\) Indra Sawhney v. Union of India. A I R 1993 S C 477 at. 502

Traditionally the equality notion did not concern itself with the elimination of group inequalities in the society caused by discriminatory social arrangements. For long it remained an individual oriented view of equality by the application of the formula that equals must be treated equally, unequal’s unequally. This traditional view that state is concerned only with formal equality and is not concerned to make men equal who are really unequal has undergone radical changes in the recent years. According to the new approach, justice demands “equality of result” which can be attained only by the mitigation of inequalities of men by positive state action. Equality as an aspect of justice requires the state to adopt a standard which takes into accounts the differing economic and social conditions of the people whenever those differences and disparities stand in the way of equal access to their basic rights. It has now been realized that the claim of equality is in fact a protest against unjust, undeserved and unjustified inequalities. The notion of equality represents into ideas numerical equality and proportional equality. According to numerical equality each individual is to receive numerically identical amount of benefits being distributed of the burdens imposed in the public sector. This notion concedes that human beings are unequal, if nevertheless concludes that all such differences are irrelevant for the purpose of distributing benefits and burdens among the members of the society. The principle of proportional equalities mean that all will receive the same consideration in the distributional decision but that the numerical amounts distributed may differ. It demands a differential and separate treatment to those who are unequal. Unequal and separate and differential treatment would necessarily require an identification system for the purpose of deciding who unequals are and why they are unequals. The principle of proportional equality would involve an appeal to some reason or criterion justifying differential treatment. A law which seeks to bridge the gap between equals and unequals would have to be viewed with approval by the counts as designed to achieve equality for all. Article 14 guarantees the principle of equality in general terms. This is exemplified and particularized in Articles 15 and 16. It has been rightly

233 Ibid
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held in State of Kerala v. N. M. Thomas.\textsuperscript{235} That Article 14 is the genus of the guarantee of equality of which Articles 15 and 16 are the species. Article 14, which has to be interpreted in the light of Articles 38 and 46, seems to enjoin the state to ensure substantive or factual equality. Accordingly, this provision confers on the state a wide latitude to provide for protective discriminatory measures with minimum of judicial interference.\textsuperscript{236}

In \textit{Kedar Nath Bazoria v. State of West Bengal}\textsuperscript{237} the Supreme Court of India observed the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying person or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislation classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain.

\textit{In Lachmandas v. State of Bombay}\textsuperscript{238}, the Supreme Court observed: “Article 14 forbids class legislation; it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differential which distinguishes person or things that are grouped together from others who are left out of the group, and (ii) that differential must have a rational relation to the object sought to be achieved by the Act.

In \textit{Kathi Ranging v. State of Saurashtra}\textsuperscript{239}, justice Mukherjee of Supreme Court observed “A legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations cannot but proceed upon whom

\textsuperscript{235} (1976) 2 S C C 310
\textsuperscript{236} D .N Saraf (Ed) Social Policy, Law and protection of weaker sections of society. Eastern Book Company. 56/6 Singar Nagar. Lucknow. 1986
\textsuperscript{237} A I R 1953 S C 404
\textsuperscript{238} A I R 1952 S C 235
\textsuperscript{239} AIR 1952 S C 123
the legislation or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious by the Constitution would not be violated to the statute operates equally on all persons whom included in the group and the classification is not arbitrary or capricious, but bears a reasonable relations to the objective which the legislation has in view.

In Ashok Kumar Thakur v. Union of India,\textsuperscript{240} it was held that equality is a multicolored concept incapable of a single definition as is also the fundamental right under Article (9)(1)(g). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the basic structure of the Constitution and may not be subject to amendment, although these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far reaching change that is objectionable, rather it is the contact of this change in so far as it implicates the question of Constitutional identity.

\textsuperscript{240} Ashok Kumar Thakur v. Union of India, (208) 6 S C C 1

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3. III. PROTECTIVE DISCRIMINATION

Discrimination shortly speaking means difference in treatment. The dictionary meaning of discriminate against is to “make an adverse distinction with regards to” distinguish unfavorably from others.\footnote{Durga Das Basu, *Commentary on the Constitution of India*, Sixth Edition (1975), Vol-B (Article 14 to 19), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012, p.281.}

The Indian Constitution intends to establish a welfare state. Actually it is the role of law which adds to the relevance and validity of law. Therefore, the concept of the rule of law is a dynamic one which not only aims at safeguarding and advancing the civil and political rights of the citizen of the country but also at establishing social, economic, educational and cultural conditions under which their legitimate aspirations and dignity may be realized. Further wherever social inequality exists or an economics injustice is found, a democratic state enters the arena, and with the aid of law, establishes social equality and removes economic injustice.\footnote{H.C Upadhyay, *Reservation for scheduled caste & Schedule Tribes*, Anmol Publications, 4378/4B Ansari Road, Darya Ganj – New Delhi} Therefore, it is, one of the objectives of the constitution to secure to all citizens equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of nation. As the right to equality and prohibition of discrimination on ground of religion, race, caste, sex or place of birth against any citizen were not enough to make the basic human right meaningful to the weaker section of the society.\footnote{P. P. Rao. *Right to Equality and The Reservation Policy*. 42 JILI (2000) p. 193.} The exclusion of any men from access to the society’s goods and services means denial of his freedom and equality. The existence of equality of opportunity depends not merely on the absence of disabilities but not on the presence of abilities. It obtains in so far as and only in so far as each member of a community, whatever his birth or occupation or social position, possession in fact, equal chances of using to the full, his national endowments of physique, of character and intelligence. If as a result of decades of unequal treatment in education, housing,
employment etc. the members of a group are poorly trained housed and educated it is not sufficient merely to remove the existing discriminatory barriers and to proclaim that therefore opportunities will be available to all on the basis of open competition equality of opportunity will not Then have been achieved, become although no one will be excluded merely for being belonging to a historically disadvantaged group, a casual connection will remain between those belonging to that group and being governed by unfavorable circumstances. The members of these disadvantaged groups still lack in economic, physiological and educational resources needed to participate on equal terms in the competition for the opportunities in question. In other words, one is not really giving equality of opportunity to a member of a disadvantage group and a member of wall-to-do group, if one contents oneself with applying the same criteria to the former, affected by unfavorable but curable conditions and to the latter affected by favorable conditions.\(^\text{244}\)

Indian society has always been full of inequalities. It was a caste ridden, stratified hierarchical society, and a particular segment of the society had been denied the bare human right. Their education, wages, living condition, social status was dilated by the whim of upper strata of society, reducing them to destitution. The economic backwardness brought social backwardness which consequently made them downtrodden and thus depriving them even of the dignity of life. In a society compartmentalized on caste basis, upper caste controlled the level of power enabling themselves to run their whips, prejudicial to the interest of lower segment of the society. Lower caste had to serve the upper caste without having any say and grievances redressal mechanism. This inhuman and barbaric condition perpetrated for centuries.\(^\text{245}\) It was natural that the higher castes were able to exploit the lower ones. Member of lower caste always suffered from discrimination in all areas of life, be it


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social, political or economic. One of the worst affects of casteism was that access to knowledge and leaving was denied to the lower castes.

In a society as ours where there exist forward and backward, higher and lower social groups, the first step to achieve social integration is to bring the power or backward social groups to the level of the forward or higher social groups. The trinity of the goal of the constitution viz socialism, secularism and democracy cannot be realized unless all section of the society participate in the state power equally, irrespective of their caste, community, race, religion and sex and all discrimination in the sharing of the state power made in those grounds are eliminated by positive measures. In such circumstances there is a necessary pressure to equal up the condition by giving unequal benefit to those governed by favorable condition and thus lacking in resources, incentives and background to succeed in open merit competition for the opportunities in question.\(^{246}\) This is perhaps the intellectual justification for giving compensatory treatment to those whose unequal environment contributes to inequality. Because of the past failure to ensure equality of opportunity to these deprived groups, society can move towards genuine equality or equality in fact by discriminating positively in their favor. The unequal characteristics of human beings are not seen as the result of innate inferiority or superiority but of the unequal environments into which they are born and must live. If the inequalities in their environment are removed, people will be able to find their real potential. Thus viewed equality is necessarily an aspect of distributive justice. While legal or formal equality in fact or substantive equalities requires a differential treatment in order to attain a result which establishes equilibrium between different situations. Equality in fact, thus necessarily implies the notion of end-equality or equality in result.\(^{247}\) In a heterogeneous society classified into different castes, groups, classes and communities etc, if all are treated at par, it would lead to aggravation of inequalities. Member of the lower strata or disadvantaged class cannot compete with the people of privileged class on equal footing.

\(^{246}\) Ibid.
\(^{247}\) Ibid.
The framers of the India Constitution were aware of the political, social and economic inequalities which existed in the country due to historical reasons and were anxious to remove these inequalities by positive state measures even of these measures impose unequal burdens on those individuals who had hitherto enjoyed undue advantages. They were aware of the prevailing miserable and appalling condition of the backward grounds who had remained far behind and segregated from national and social life and had continued to the social oppressed and economically exploited for centuries due to various type of disabilities. They believed that in a caste ridden society like ours where due to the historical reasons certain caste and classes were for decades socially oppressed, economically condemned to live the life of penury and educationally coerced to learn the family trade or occupation and to take the education set out for each class and caste by the society of doctrinaire insistence on formal equality would in fact aggravate and perpetuated inequality.248

A mere formal declaration of the right would not make unequal equal. To enable all to compete with each other on equal plane, it is necessary to take positive measure to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged, Article 14 and 16(1) no doubt would by themselves permit such positive measure in the favor of disadvantaged to make real the equality granted by them.249

It is become imperative, therefore, to adopt a policy of compensatory or protective discrimination as an equalizer to those who were made too weak to compete with the advanced section of the society in the race of life consonant with its resolve in the preamble to secure to all citizen ‘justice, social, economic and political, equality of status and opportunity.’250 Article 15(4) and 16(4) are the instance of protective discrimination. Untouchability has been abolished by Article 17 of the

248 Ibid.
249 Indra Sawhney v. Union of India. AIR 1993 S C 477.
250 Ibid.

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Constitution and the citizens are protected against discrimination even on the part of private person and institutions. The Constitution secures political equality to all citizens by providing special privileges to all politically powerless groups in the legislative bodies in the legislatures of these desperate groups in the spirit of real equality of opportunity to the people who are lacking in political consciousness and political experience.

The expression protective discrimination was used by Krishna Iyer J. in *Jagdish v. Union of India*.\(^{251}\) This expression is accurately used to describe a situation of the kind alleged by the Delhi University in *Jagdish v. Union of India*, namely, that since each university discriminated against students of other universities, the Delhi University was obliged to protect Delhi student from discrimination by other universities protective discrimination of this kind leaves the question of its validity undecided. For, if discrimination against students from other states is invalid, the fact that such discrimination is almost universally practiced would not make it valid. There is institutional preference in post graduation studies. Institutional preference indicates preference given in admission to post graduate courses to students who have graduated from the same university. The justification for such preference was stated by Pathak J., in *Jagdish v. Union of India* as follows: the student has become familiar with the teaching techniques and standards of scholarship and has adjusted his responses and reactions accordingly. The continuing of studies ensures a higher degree of competence in the assimilation of knowledge and experience. Not infrequently some of the same staff of professors and readers may lecture to the post graduate classes also. Over the under-graduate years the teacher has come to understand the particular needs a special encouragement in the removal of deficiencies.\(^{252}\)

Krishna I Year, J., laid down the following proposition relating to protective discrimination of Delhi students. He held that the literal terms of Article 14 did not

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\(^{251}\) (1980) S C R 831.

\(^{252}\) Ibid.
permit protective discrimination involved in reservation for student of a particular university, and such discrimination fell outside Article 15(4). Such reservation cannot be justified on the vague ground” that all other universities were practicing it-a fact not fully proved before the court. Against, universally illegality practiced by universities cannot make the practice legal.\textsuperscript{253}

Reverse discrimination is used correctly with reference to discrimination permitted by Art. 15(4). Article 15(4) is in two parts: Discrimination on grounds prohibited by Art. 15(1) is permitted, first, for socially and educationally backward classes, and, secondly, for schedule castes and Scheduled Tribes. Reverse discrimination is justice for the first category on the ground that it secures real equality by giving a helping hand to those who because of their backwardness would not be able to complete successfully in open competition. Members of the schedule castes and tribes occupy a special position in our Constitution. Broadly speaking, they used to be described as untouchables or harijans. They had to endure great ill-treatment from centuries and this reverse discrimination in their favour is justified not only because of their backwardness but also on the ground that such discrimination is also rightly applied to discrimination permitted by Art 16(4)\textsuperscript{254}. With the increase of time some more classes of people have been included in the fold and protection of reverse discrimination. The other backward classes have been accorded the protection of reverse discrimination permitted under Article 15(4) and 16(4) of the constitution.

The provision of protective discrimination are not intended to be negative or derogatory of the equality guarantee of Article 14, 15(1) and 16(1) and 16(2) but are definitive of equality in relation to the backward groups. Article 15(4) and 16(4) therefore clarify that when making a classification showing favoured treatment to the backward classes, the state might use the forbidden criteria because any real classification will have to take into account the inequalities based on the abuse of

\textsuperscript{253} Ibid.
Caste, religion, race, criteria etc. Therefore on one hand, the constitution, forbids discrimination on grounds of race, caste, or religion, etc. so that the old iniquitous situation may not be continued, on the other hand it permit these very criteria for correcting evil consequences following from their past misuse.\textsuperscript{255}

Any affirmative action must be supported by valid classification and must have a rational nexus with the object of redressing backwardness. It is much more so where such programmes totally exclude from consideration persons outside the chosen classes without regard to merits because of the set aside quotas. It does not matter whether clause (4) of Art. 16, like clause (4) of Article 15, is seen as a proviso or an exception or, in the words of Mathew, J., a legislative device to emphasis the extent to which equality of opportunities could be carried, viz., even up to the point of making reservation. The affirmative action to redress the condition of backward classes of citizens may be adopted either by a programme of preferential treatment extending certain special advantages to their or by reservation of quotas in their favor to the total exclusion of everybody outside the favored groups. Preferences without reservation may be adopted in favor of the chosen classes of citizen by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation of age or other minimum requirement. Further more, it would be within the discretion of the state to provide financial assistance to such persons by way of grant scholarship, fee concession etc. such preferences or advantages are like temporary crutches for additional support to enable the member of the backward and other disadvantaged classes to much forward and complete with the rest of the people. These preferences are extended to them because of their inability otherwise to complete effectively in open selections on the basis of merits for appointment to posts in public services and the like or for selection to academic courses. Such preferences can be extended to all disadvantaged classes of citizens whether or not they are victim of prior discrimination.\textsuperscript{257} Any such preference,

\textsuperscript{255} Ibid.
\textsuperscript{256} Indra S Awhney v. Union of India. AIR 1993 S C 477 at 523.
\textsuperscript{257} Ibid.
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although discriminatory on its face, may be justified as a being classification for affirmative action warranted by a compelling state interest\textsuperscript{258}.

In addition to such preferences, quotas may be provided exclusively reserving post in public services or seats in academic institutions for backward people entitled to such protection. Reservation is intended to redress backwardness of a higher degree. Reservation prima facie is the very antithesis of a free and open selection. It is discriminatory exclusion of the disfavoured classes of meritorious candidate.\textsuperscript{259} In \textit{M. R. Balaji v. State of Mysore},\textsuperscript{260} it was held that, it is not a case of merely providing an advantage or concession or preference in favour of the backward classes and other disadvantaged groups. It is not even a handicap to disadvantage the forward classes so as to attain a measure of qualitative or relative equality between the two groups. Reservation which exclude from consideration all those persons falling outside the specially favoured groups, irrespective of merit and qualification, is much more positive and drastic discrimination to achieve the same end of qualitative equality but unless strictly and narrowly tailored to a compelling constitutional mandate, it is unlikely to qualify as a benign discrimination. Unlike in the case of other affirmative action programmes, backwardness by itself is not sufficient to warrant reservation. What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the schedule caste and the schedule tribes. Reservation is remedial action specially addressed to the ill effect stemming from historical discrimination.\textsuperscript{261}

Thus the protective discrimination is one of the important method through which constitutional goal like social and economic justice can be secured to the Scheduled Castes and Scheduled Tribes and the backward class people. Protective discrimination means preference given in admission to public employment to the

\textsuperscript{258} Indra sawhney v. Union of India, AIR 1993 S C. 477

\textsuperscript{259} Ibid at 693.

\textsuperscript{260} A I R 1963 S C 649.

\textsuperscript{261} A IR 1963 S C 649.
weaker sections of the society including the Scheduled Castes and Scheduled Tribes and the backward classes. Protective discrimination is aimed at balancing the benefits of a social welfare state between the haves and the have-nots. It is primarily designed to uplift the backward sections of the society without harming the interests of the advanced sections of the society\textsuperscript{262}.

In consonance with the Constitutional Scheme, the preamble promise of equality of status and of opportunity has been concretized and clothes with flesh and blood by the provisions of Article 14, 15 and 16 read with Article 38, 46 and 335 of the Constitution. Article 38 obligates the state among other things to minimize the inequality in status, facilities and opportunities not only amongst individual but also amongst classes of individuals living in the country. In this context a special Constitutional obligation is imposed on the state by Article 46 to promote with special care the educational and economic interests of the weaker section of the people, and in, particular, of the Scheduled Castes and Scheduled Tribes and the backward classes. In order to enable the state to discharge the constitutional obligation imposed by those directives, the right to equality embodied in Articles 14 and 16(1) should be given a very liberal interpretation so that the right is made really meaningful to the Scheduled Castes and Scheduled Tribes and the backward classes of the India citizen\textsuperscript{263}.

It may be appreciated that the Constitutional goal of equality enshrined in the preamble of the Constitution is wide enough in its import to embrace both the concept of formal and substantive equality. Its imports are also wide enough to obligate the state to bring about substantive equality by according, if necessary, favoured or preferential treatment to those who deserve and need it\textsuperscript{264}. The idea of protective discrimination enjoins the state not only to make reservation in favour of the socially


\textsuperscript{263} Ibid.

\textsuperscript{264} Ibid.
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and educationally backward classes but also to make reservation in favour of the socially and educationally backward classes but also to make reservation in favour of the persons not adequately represented in the state services. Thus Articles 15(4), 16(4) and 16(4-A) permit protective discrimination in favour of Scheduled Castes and Scheduled Tribes and the Backward Classes of citizens of India.

3. IV. EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT

After Article 14, Article 16 lays down the elaborate provision for providing equality in the matter of employment in the state’s services. We can say that Article 14 provides equality in general and Article 16 provides equality in specific. Article 16 is one of the many facets of equality. Let us discuss the provision in detail here.

Article 16:

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

(2) 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.

(3) Nothing in this Article shall prevent parliament from making any law prescribing, in regards to a class or classes of employment or appointment to an office under the government of, or any local or other authority within a state or union territory prior to such employment or appointment.

(4) Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or post in favor of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state.

(4-A) Nothing in this Article shall prevent the state from making any provision for reservation in matter of promotion, with consequential seniority, to any class or
classes of post in the services under the state in favour of Scheduled Caste and Scheduled Tribe which, in the opinions of the state, are not adequately represented in the services under the state.

(4-B) Nothing in this Article shall prevent the state from considering any unfilled vacancies of a year which are reserved for being filled up in the year in accordance with any provision for reservation made under clause (4) or clause (4-a) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year.

(5) Nothing in this Article shall effect the operation of law which provides that the incumbent of an office 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.

Article 16(1) and (2) give effect to the equality before law guaranteed by Art 14 and to the prohibition of discrimination guaranteed by Article 15(1). The three provisions form part of the same Constitutional code of guarantees and supplement each other. The word “in respect of any employment” used in Art. 16(2) must include all matters relating to employment as specified in Article 16(1). A discrimination which involves the invocation of Art 14 is not necessarily covered by Art. 16(1). Article 16 cannot be invoked against a discrimination made by Constitutional provisions. The archaia common law concept that employment was a matter between the master and servant has been eroded by judicial decision and legislation particularly in its application to person in public employment to whom the Constitutional protection of Art. 14, 15, 16 and 311 is available. The employees of a

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corporation which is an instrumentality of state are entitled to protection of fundamental right under Article 14 and 16.\textsuperscript{268}

Article 16(1) is only an instance of the application of the general rule of equality laid down in Art. 14 and it should be construed as such. Hence there is no denial of the equality of opportunity unless the person who complains of discrimination is not equally situated with the person or persons who are alleged to have been favored. In other word Art. 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. The equality of opportunity guaranteed by it means “equality as between members of the same class of employees and not equality between members of the same class of employees and not equality between members of separate, independent classes\textsuperscript{269}. The principle underlying Art.14 has, accordingly been applied to the interpretation of Art 16(1), namely that the equality of opportunity guaranteed by it means equality as between members of the same class of employees.\textsuperscript{270}

In \textit{State of J & K v. Khosa}\textsuperscript{271}, it was held that the classification whether under Art.14 or under Art.16(a) must be founded on substantial differences which distinguish persons grouped together from those left out and (b) such differential attributes must bear a just and rational relation to the object sought to be achieved. Thus the selective test adopted by the government shall be violative of Art.16 if there is no relevant connection between the test and the efficient performance of the duties and obligation of the particular office. The classification made by the state between two groups of employees would similarly be invalid where the difference between the two groups of recruits may not be sufficient to give any preferential treatment of one against the other in the matter of promotion, or in other words, where there is no reasonable nexus between the differences and the promotion.

\textsuperscript{268} K. C Joshi v. Union of India. \textit{A I R 1985 S C 1046}.
\textsuperscript{269} All India Station Master’s Association v. General Manager, \textit{A I R 1960 S C 384}.
\textsuperscript{270} Ibid.
\textsuperscript{271} \textit{A I R 1974 S C 1}.
In *Union of India v. Kohli*,\(^{272}\) it was held that even in a technical line, a classification of candidates recruited from the same source may be classified for promotion, according to general education qualifications, because higher mental equipment would be conducive to efficiency of the employee. Such classification may not be challenged on the ground that the state has laid down the educational qualification requirement for promotion to the lower ranks without imposing it in the case of promotion to the higher ranks because the needs at the two stages of the same service may not be identical.

Equality of opportunity in matter of employment under Art.16(1) means equality as between members of the same class of employees and not equality between members of separate, independent classes. Clause (1) is much wider in scope than clause (2) and the ground of discrimination expressly mentioned in clause (2) are not exhausted. Equal opportunity in matter of appointment or promotion under Article 16(1) does not mean that the state government as the appointing authority is debarred from picking and choosing a particular candidate from amongst several candidates for the post although a particular candidate was not the senior most.\(^{273}\) Article 16(1) both in terms and in the allocation of the words indicates that it is confined to “employment” by the state, and has reference to employment in service rather than as contractors. Of course there may be cases in which the contract may include within itself elements of service. The expression “matter relating to employment” used in Article 16(1) is confined to initial matter prior to the act of employment, but comprehends all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, age of superannuation, promotion and even domination of employment.\(^{274}\)

\(^{272}\) A I R 1973 S C 811.


The equality of appointment guaranteed by Art.16 (1) need not be an absolute equality. It does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. It is open to the appointing authority to lay down such prerequisite conditions for appointment as would be conducive to efficiency of or proper discipline amongst government servants.\(^{275}\)

It is in evident that Article 16(1) seeks to implement the equality of opportunity ‘held out by the preamble of the constitution in so far as it relates to employment under the state. It does not ensure to each citizen an employment under the state, irrespective of his suitability for the same, but ensure that each will have an opportunity to be considered subject to his suitability for appointment or promotion to an office or post under the state-regardless of his affiliation to the party in power and irrespective of considerations which are irrelevant or extraneous to public employment, such as religion, race, caste, sex, descent, place of birth or residence.\(^{276}\)

In *Satish v. Union of India*,\(^{277}\) it was laid down that Article 16 does not mean that government is not, like other employers, entitled to pick and choose from amongst a number of candidates offering themselves for employment under the government. It is also open to the appointing authority to lay down such prerequisite condition of service as would be conducive to proper discipline amongst government servants. This also holds good in the case of promotion or appointment of part time servants to some whole time posts. Just as government may make it a condition that only those who had a satisfactory record in the past would be considered for promotion, so it is open to government to lay down that only those part-time servants who had been amenable to proper discipline during their part time employment should

\(^{275}\) Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol-B (Articles 14 to 19 ), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012, p. 281.

\(^{276}\) Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol-B (Articles 14 to 19 ), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012, p. 281.

\(^{277}\) A I R 1953 S C 250.
be considered eligible for appointment on a permanent basis. There is no denial of equal opportunity involved in such choice in the matter of recruitment or recruitment of persons in special terms by contract.

In *Achutan v. State of Kerala*, it was held that the word employment does not necessarily imply the relationship of master and servant, but, used in relation to word ‘under the state’, the word means that there must be an element of subordination to the state or other authority, referred to in clause (3). This Article has no application in the matter of election of a municipal councilor who cannot be said to be subordinate to the local authority. But subject to this, the words employment and appointment connote two different conceptions. While ‘appointment refers to appointment to an office’ and therefore implies the conception of tenure, duration, emoluments, duties and obligations, fixed by law or some rule having the force of law, these elements are absent in the case of employment which means a contract for temporary purpose, e.g., the engagement of laborers or professional experts by bilateral contracts. The word employment in Art.16 (1) is not wide enough to include contracts which involve no element of service, e.g., contracts for the supply of goods to government for price.

Article 16(2) emphatically brings out in a negative form what is guaranteed affirmative by clause (1). It prohibits discrimination on certain grounds and thus assures the effective enforcement of the right of equality of appointment guaranteed by clause (1).

So far as the private sphere is concerned, the legislature has enacted the Civil Right Act, 1964, to make unlawful any discrimination in the matter of employment or discharge or conditions of employment because of the individual race or colour. Through this act does not assure employment to members of minority racial, communities, it would invalidate any sort of discrimination based solely on race. Even

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278 *AIR 1959 S C 490.*
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if there be a legitimate ground for exclusion, e.g., unlawful conduct, the exclusion of a Negro will be struck down if such exclusionary rule or practice is confined to members of a particular race.\(^{279}\)

Through both Art.15 and 16 are species of the genus of the principle of equality which is enunciated in Art.14, nobody has said so far nor can say that the scope of this entire Article is identical. Article 15 is a provision which prohibits discrimination not only by the state but also by private persons, with respect to the user of certain public utilities and places. The matter of employment cannot be held to have been included within the ambit of Art.15, for, then, there would not have been necessary to adopt another special provision dealing exclusively with public employment.\(^{280}\) Clause (1) of Article 16 is wider than clause (2) and prohibits discrimination on any ground other than those mentioned in clause (3) and (4). Hence a preference given to political sufferers would be hit by clause (1). It is to be noted; however that exclusion from a state service on the ground of want of knowledge of the regional language has been held by Supreme Court to be a reasonable classification for the purpose of Art 14.\(^{281}\)

RESERVATION IN THE EDUCATIONAL INSTITUTIONS

Article 15 as originally enacted contained only three sub-clauses. Sub- clause (4) was inserted by the Constitution (1\(^{st}\) Amendment) Act, 1951, as a result of the decision in *State of Madras v. Champakam Dorairajan*.\(^{282}\)

\(^{279}\) Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol-B (Articles 14 to 19 ), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta-700012.

\(^{280}\) Supra note 276.


\(^{282}\) A I R S C 1951 226, in this case the state of madras maintained four medical colleges & only 330 seats are available for students in those four colleges. Out of those 330 seats, 17 seats are reserved for students coming from outside the state & 12 seats are reserved for discretionary allotment by the state & the balance of the seats available are apportioned between four distinct groups of districts on the state.
Likewise the State of Madras maintains four engineering colleges & the total number of seats available for students in those colleges are only 395. Out of these, 21 seats are reserved for students coming from outside the state, 12 seats are reserved for discretionary allotments by the state & the balance of the seats available are apportioned between the same four distinct groups of districts. For many years before the commencement of the Constitution, the seats in both the medical colleges & the engineering colleges so apportioned between the four distinct groups of districts used to be filled up according to certain proportions set forth in what used to be called the communal G.O. Thus for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis; Non-Brahmins (Hindus) - 6, Backward Hindu - 2, Brahmin-2, Harijans-2, Anglo-Indian & Indian Christain-1, Muslim-1. Subject to the aforesaid regional & what have been claimed to be protective provision selection from among the applicants from a particular community from one of the groups of districts used to be made on certain principles based on academic qualification & marks obtained by the candidates. In the case of the medical colleges, not less than 20% of the total number of seats available for students of the state were filled by women candidates separately for each region, it being open to the selection committee to admit a larger number of women candidates in any region if qualified candidates were available in that region and if they were eligible for selection on merits vis-a-vis the men candidates in accordance with the general principles governing such admissions as laid down in those rules. It appears that the proportion fixed in the old communal G.O has been adhered to even after the commencement of the Constitution on 26-1-1950. Indeed, G.O No.2208, dated 16-6-1950, laying down rules for the selection of candidates for admission into the medical colleges substantially reproduces the communal proportion fixed in the old communal G.O.

On 7-6-1950, Smt. Chapakam Dorairajan made an application to the H. C. of Judicature at Madras under Article 226 of the Constitution for protection of her fundamental rights under Articles 15(1) and Article 29 (2) of the Constitution and prayed for the issue of a writ of Mandamus or other suitable prerogative writ restraining the State of Madras and all officers and subordinates thereof from enforcing, observing, maintaining or following or enforcing or requiring the enforcement, observance or following by the authorities concerned of notification as the Communal G. O. in and by which admission into the Madras Medical Colleges were sought or purported to be regulated in such manner as to infringe and involve the violation of her fundamental rights. The Court held that the directive principles of the State Policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs. The directives principle of state policy has to conform to and run as subsidiary to the chapter of Fundamental Rights. However, so long as there is no infringement of any fundamental right, to the extent conferred by the provisions in part III, there can be no objection to the state acting in accordance with the directive principle set out in part IV, but subject again to the Legislative and Executive powers and limitations conferred on the state under different provisions of the Constitution. Finally the Court found that the Communal G.O. being inconsistent with the provisions of Article 29(2) in part III of the Constitution.

To modify the effect of this decision Article 15 was amended by the constitution (1st Amendment) Act, 1951. Under this clause the state is empowered to make special provision for the advancement of any socially and educationally backward classes of citizens or for the schedule caste and schedule tribes. After the amendment it would be possible for the state to put up a Harijans colony in order to advance the interest of the backward classes. The provisions made in clause (4) of Article 15 are only an enabling provision and does not impose any obligation on the state to take any special action under it. It merely confers discretion to act if necessary by way of making special provision for backward classes.
The object of this clause (4), added in 1951, is to bring Art. 15 and 29 in line with Art. 16(4), 46 and 340, and to make it Constitutional for the state to reserve seats for backward classes of citizens, schedule caste and tribes in the public educational institutions, as well as to make other special provisions as may be necessary for their advancement, e.g., to provide housing accommodation to such classes. The immediate object of this amendment was to override the decision in State of Madras v. Champanam Dorairajan, to the effect that Article 29(2) was not controlled by Article 46 and that the Constitution did not intend to protect the interest of the backward classes in the matter of admission to educational institutions. Through the amendment would validate reservation for the backward classes and schedule caste and tribe, it would not support the distribution of seats according to communities so as to discriminate between classes who are not backward, inter se; in short, the amendment would not sanction any communal order. Nor would it enable the state to extend the reservation to such an extent as to nullify the guarantee of equality under Article 15(1) altogether.

It is a provision which enable the state to do what would otherwise have been unconstitutional. It does not confer any right upon a member of these classes to compel the state to make such special provisions. Such special provision may be made not only by the legislative but also by the executive. If the special provision is for the advancement of the backward classes and does not altogether render nugatory the general rule of equality in Art. 15(1), the method of making such special provision rests with the state, and the court may not interfere. Such special provision may consists of-

(a) A reservation of seats for members of backward classes in an educational institution.
(b) Relaxation of the qualifications required for admission into such institution.

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283 Durga Das Basu, Commentary on the Constitution of India, Sixth Edition (1975), Vol- B (Articles 14 to 19 ), S C Sarkar & Sons (P) Ltd., 1-C. College Square, Calcutta- 700012.
284 A I R 1951 S C 226.
285 Ibid.
286 Ibid.
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(c) Providing housing accommodation to members of such classes, specially.
(d) Concessional treatment for them in the matter of settlement of government lands.287

3. V. MEANINGS OF RESERVATION

Reservations are the devices for removal of the historical distortions that have crept into our social system. These denote the body of rules recognized and enforced by the state in the administration of social justice. Reservation is the means to promote the goal of social justice. To put it simply social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunity, race, caste, religion, sex and title.288 In the words of the Supreme Court of India, it is the harmonization of the rival claims of the interests of the different groups and sections in the social structure, by means of which alone it is possible to build up a welfare society.289

The concept of job reservation relies upon government intervention into the labour relations area in order to promote the right of some particular portion of the population. The reasons for this intervention may come from diverse rationales but usually can be reduced to a political one.290 To quote Principal D.N. Sandashiv,291 the law of reservations encompasses the protective justice, corrective justice, distributive justice and promotive justice and social justice the expression that embodies within its content all these forms of justice.

The constitution permits the state to adopt such affirmative action as it deems necessary to uplift the backward classes of citizen to levels of equality with the rest of

288 Harpal Kaur Khehra : Job Reservation Versus Efficiency of Administration, C I L Q 1990. p. 28.
291 Ibid.
countrymen. The backward classes of citizen have been in the past denied access to
government services on account of their inability to compete effectively in open
selections on the basis of merits. It is therefore open to the government to reserve
certain number of seat in places of leaning or public services in favour of the schedule
castes and schedule tribes and other backward classes to the exclusion of all others,
irrespective of merits.

Reservation is meant to remedy the handicap of prior discrimination impeding
the access of classes of people to public administration. It is for the state to determine
whether the evil effect of inequities stemming from prior discrimination against
classes of people have resulted in their being reduced to positions of backwardness
and consequent under representation in public administration. Reservation is a remedy
or a cure for the ill effect of historical discrimination.292

Reservation is one of the measures adopted by the Constitution to remedy the
continuing evil effect of prior inequalities stemming from discriminatory practices
against various classes of people which have resulted in their social, educational and
economic backwardness. Reservation is meant to be addressed to the present social,
educational and economic backwardness caused by purposeful societal
discrimination. To attack the continuing ill effect and perpetuation of such injustice,
the Constitution permits and empowers the state to adopt corrective devices even
when they have discriminatory and exclusively effects.293

The concept of reservation is one of the crucial factors in the Constitution of
India to secure socio-economic justice to the downtrodden people and to bring them
to the main stream of the national life. The political, social and economic inequalities,
which existed in our country prior to our constitution, came into being made many
revolutionary and social thinkers to agitate for securing socio-economic and political
justice. Consequently, when the Constitution of India was being drafted, the

293 Ibid.
constitution-makers inserted the concept of equality so that no individual shall be treated unequally. They thought that the meaning of equality based upon individual achievement was too hypocritical in our caste ridden society where group identification had been historically used for the purpose of discrimination and separateness. Therefore, the makers of the Constitution adopted a policy of preferential treatment in favour of certain weaker section of the society to offset the effects of inherited inequalities and remedy historic injustice.294 In Chatterg Singh v. State of Rajasthan 295, the Supreme Court said that the state had evolved the principle of reservation to an office of the state or post as an affirmative action to accord socio-economic justice guaranteed in the preamble of the Constitution; the fundamental rights and the directive principles which are the trinity of the constitution to remove social, educational and economic backwardness as a Constitutional policy to accord equality of opportunity, social status or dignity of persons as enjoined in Article 14, 15, 16, 21, 38, 39, 39-A, 46 etc. Article 335 enjoys the state to take the claims of dalits and tribes into consideration for appointment to an office/post in the services of the state consistently with efficiency of administration. The object of reservation for the schedule caste and schedule tribe is to bring them into the mainstream of national life, while the objective in respect of the backward classes is to remove their social and educational handicaps296.

In Indra Sawhney v. Union of India, 297 the Supreme Court held that reservations can take various forms whether they are made for backward or other classes. They may consist of preferences, concessions, exemptions, extra facilities etc. or of an exclusive quota in appointment as in the present case. When measure other than an exclusive quota for appointments other than an exclusive quota for appointments are adopted, they form part of the reservation measures or are ancillary to or necessary for availing of the reservations. Whatever the form of reservation, the

295 Ibid.
296 AIR 1993 S C 477 at 644
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backward classes have to look for them to Art.16 (4) and the other classes to Article 16(1).

The constitutional scheme and context of Article 16(4) make it clear that larger concept of reservations take within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exception, concession and relaxations consistent no doubt with the requirement of maintenance of efficiency of administration- the admonition of Art.335. Therefore, where the state finds it necessary for the purpose of giving full effect to the provision of reservation to provide certain exemption, concession or preferences to members of backward classes, it can extend the same under clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provision for reservation can be provided as part of concept of reservations itself. Similarly, in a given situation, the state may think that in the case of a particular backward class it is not necessary to provide reservation of appointment/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under clause (4) itself.298

3. VI. AIMS AND OBJECTIVES OF RESERVATION

The aim of any civilized society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities is a walk of social life, is a denial of equal status and equal participation in the affairs of the society and therefore, of its equal membership. The dignity of the individual is dented and direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing, and give one’s best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct and indirect as when the wherewithal’s to avail of them,

298 Indra Sawhney v. Union of India, AIR 1993 S C 477
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are denied. Nevertheless, the consequences are as patent. Inequality ill-favours fraternity and unity remains a dream without fraternity. The goal enumerated in the preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all299.

Likewise, the social and political justice pledged by the preamble of the Constitution to be secured to all citizen, will remain a myth unless first economic justice is guaranteed to all. The liberty of thought and expression also will remain on paper in the face of economic deprivations. A remunerative occupation is a means not only of economic upliftment but also of instilling in the individual self-assurance, self-esteem and self-worthiness. It also accords him a status and dignity as an independent and useful member of the society. It enables him to participate in the affairs of the society without dependence on, or domination by, others, and on equal plane depending upon the nature, security and remuneration of the occupation. Employment is an important and by far the dominant remunerative occupation, and when it is with the government, semi-government or government- controlled organization, it had an added edge. It is coupled with power and prestige of varying degrees and nature, depending upon the establishment and the post. The employment under the state, by itself, may, many times help achieve the triple goal of social, economic and political justice300.

The employment – whether private or public thus, is a means of social leveling and when it is public is also a means of direct participating in the running of the affairs of the society. A deliberate attempt to secure it to those who were designedly denied the same in the past, is an attempt to do social and economic justice to them as ordained by the preamble of the Constitution. It is no longer necessary to emphasis that equality contemplated by Article 14 and other cognate Article including Article 15(1), 16(1), 29(2) and 38(2) of the Constitution, is secured not only when equal are

299 Ibid.
300 Ibid.
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treated equally but also when unequal are treated unequally conversely, when unequal are treated equally, the mandate of equality before law is breached. To bring about equality between the unequal therefore, it is necessary to adopt positive measure to abolish inequality. The equalizing measure will have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalization will not be of the unequals.

Article 14 which guarantees equality before law would by itself, without any other provision in the constitution, be rough to validates such equalizing measures. The founder of the Constitution, however, thought it advisable to incorporate another provision, viz., Article 16 specifically providing for equality of opportunity is matter of public employment. Further they emphasized in clause (4) therefore that for equalize the employment opportunities in the service under the state, the state may adopt positive measures for reservation of appointment or post in favor of any backward class of citizen which in the opinion the state, is not adequately represented in such service by hind sight, the foresight shown in making the provision specifically instead of leaving it only to the equality provision as under the U.S Constitution is more than vindicated. The absence of such provision may well have led to total denial of equal opportunity in the most vital sphere of the state activity. Consequently, Article 38(2) which requires the state in particular to strive to minimize the inequalities income, and Endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also among groups of people residence in different areas or engaged in different vocation and Article 46 which enjoins upon the state to promote which special care the educational and economic interest of the weaker section of the people, and to protect them from social injustice and all forms of exploitations, and Article 335 which requires the state to leave into consideration the claims of the schedule caste and schedule tribes in making the appointment to service and post under the union or state, would have, all probably remained on paper. The family of the goals of the Constitution, viz. socialism, secularism and democracy cannot be realized unless all section of the society participate in the state power equally irrespective if their caste, community, race, religion and sex and all
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discrimination in the sharing of the state power made on those grounds are eliminated by positive measures\textsuperscript{301}.

The purpose of the reservation is to help the weaker section of the society whose weakness is quantitative and not as they suffer from qualitative infirmities due to lack of educational facilities, economic opportunities, social status, places or habitation and nature of occupation followed\textsuperscript{302}.

The reservation are aimed at securing proper representation in administration to all section of the society, intelligence and administration capacity being not the monopoly of any one class, caste or communities. This would help to promote healthy administration of the country avoiding sectarian approaches and securing the requisites talent from all available sources\textsuperscript{303}.

The objectives of reservation may be spelt out variously. The U.S Supreme Court held in \textit{Metro Broadcasting, Inc. v. Federal Communications}\textsuperscript{304} and in \textit{Macro Defunis etc. al. v. Charles Odegaard},\textsuperscript{305} that the reservation or affirmative action may be undertaken to remove the persisting or present and continuing effects of past discrimination to lift the limitation on access to equal opportunities to grant opportunities for full participation in the governance of the society; to recognize the discharge special obligation towards the disadvantages and discriminated social groups, to overcome substantial chronic under representation of social group, or to serve the important governmental objectives. What applies to American society, applies ex prop Rio vigor to our society. The discrimination in our society is more chronic and its continuing effects more discernible and disastrous.

\textsuperscript{301} Indra Sawhney v. Union of India, AIR 1993 S C 477
\textsuperscript{302} Harpal Kaur Khehra. \textit{Job Reservation Versus Efficiency of Administratration}. C I L Q 1990 p.29.
\textsuperscript{303} Indra Sawhney v. Union Of India, AIR 1993 S C 477.
\textsuperscript{305} 40 Law Ed 2d 164. Quated in Ibid note.
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The objects of the reservation policy in stated to be to promote and protect educational and economic interest of the weaker section of society such reservation is said to be permitted under Article 15(4) and Article 46 for admission to educational institutes while under Artice 16(4) read with Article 335 as well as Article 46 provide for the reservation of claim of the Scheduled Castes and Scheduled Tribes service and post.\textsuperscript{306} The main objective of providing reservation for the Scheduled Castes and Scheduled Tribes and the backwards class in civil posts and service of the government is not just to give jobs to some person belonging to those communities and therefore increase their representation in the service but to uplift these people socially and educationally and to provide proper place for them in the society\textsuperscript{307}.

Sri. K. G. Balakrishna, CJI., in the matter of reservation of seats in central higher educational institutes for OBC opined in \textit{Ashok Kumar Thakur v. Union of India},\textsuperscript{308} that reservation is one of the many tools that are used to preserve and promote the essence of equality so that disadvantage groups can be brought to the forefront of civil life. It is also the duty of the state to promote positive measure to remove barriers of inequalities and enable diverse communities to enjoy the freedom and share the benefits guaranteed by the Constitution. In the context of education any measure that promotes the sharing of knowledge, information and ideas and encourages and improves learning among India’s vast diverse classes deserves encouragement to cope with the modern world and its complexities and turbulent problems, education is a must and cannot remain cloistered for the benefits of a privileged few. Reservation provide that extra advantage to those person who without such support can forever only dream of university education, without ever being able to realize it. This advantage is necessary. He also quoted the words of President Lyndon Johnson, “you do not take a person who, for years has been hobbled by chains and liberate him, bring him up to the starting line and then say, ‘you are free to complete with all the others.”

\textsuperscript{308} (2008) 6 S C C at 446.
Dr. Rajendra Prasad\textsuperscript{309}, at the concluding address of the Constitution Assembly, stated in the following words:

“To all we give the assurance that it will be our endeavor to end poverty and squalor and its companion, hunger and diseases; to abolish distinction and explanation and to ensure decent condition of living. We are in embarking on a great task. We hope that in this we shall have the unstinted service and cooperation of all our people and the sympathy and support of all the communities”.

3. VII. IS ARTICLE 16(4) EXCEPTION OR EXPLANATIONS TO ARTICLE 14 AND 16(1)?

Whether 16(4) is provision or explanation to Article 16(1) will ultimately depend upon the meaning one would, give to “equality” notion under the Indian Constitution. If equality guaranteed under Article 14, 15(1) and 16(1) is conceived as formal equality requiring the uniform distribution of governmental benefits and protecting meritocracy, then Article 15(4) or 16(4) are the exceptions to the equality clauses. If on the other hand, the Articles 14, 15(1) and 16(1) are viewed as including the broader notion of proportional equality or substantive equality then Article 15(4) and 16(4) are not the exceptions but only explanations of the main provisions. If Article 15(4) and 16(4) are viewed as exception then the state will be limited to only those forms of preferences which are expressly authorized by these clauses.\textsuperscript{310}

In \textit{Balaji},\textsuperscript{311} case it was held that there is no doubt that Article 15(4) has to be read as a proviso or an exception to Article 15 (1) and 29(2). It was observed that Article 15(4) was inserted by the first amendment in the light of the decision in \textit{Champakam case}\textsuperscript{312}, with a view to remove the defect pointed out by this court

\textsuperscript{309} Ibid.
\textsuperscript{312} A I R 1951 S C 226.
namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. In Devadasan case,\(^ {313}\) the Supreme Court held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1). Subbarao.J., however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that is only an emphatic way of stating the principle inherent in the main provision itself. Since the decision in Devandasan, it was assured by the Supreme Court that Article 16(4) is an exception to Article 16(1). This view however received a severe set-back from the majority decision in State of Kerala v. N. M. Thomas,\(^ {314}\) the majority held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). Though the minority stuck to the view that Article 16(1) being a fact of the doctrine of equality enshrined in Article 14 permits reasonable classification just Article 14 does. Article 16(4) is an instance of such classification. The backward classes of citizens are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the state. Accordingly the court held that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1).

3. VIII. RESERVATION AND SOCIAL JUSTICE

The concept of justice is of imponderable import and has been the watchword of all major social and political reforms movement since times immemorial. All social thinkers from Plato to Gandhi ji and others have been making supreme endless efforts in quest of justice in order to abolish injustice, tyranny and exploitation. All their energies whether material, mental or moral have been devoted to the sole cause of justice. States whether ancient or modern capitalistic or socialistic, democratic or authoritarian have been self proclaiming to be governed by the yard scales of justice and take pride in being styled as a just state with just law and just social order. However what is justice is an imponderable problem. Justice is generally equated with

\(^ {313}\) A I R 1964 S C 179.
\(^ {314}\) A I R 1976 S C 490.
truth fulness, rightness, goodness, equality, mercy, charity etc. and all these expressions being relative and vague have been eulogized universally as worthy of emulation and application in the ordering of human relation. However what constitutes justice at a particular time and place is not definite the standard of reasonableness, truth and justice has to be measured necessarily on the basis of shared values which are common to mankind. Therefore justice is that makes man to live honestly, not to injure any one to give everyone his due. As such justice is not a mere fantasy but a necessary and desirable goal of law and society.  

Justice is both an objective reality as well as abstract quality outside and within the realm of law involving values and reality, ethics and morality, equality and liberty, individual freedom and social control condition by the need of individual good and community interest. The notion of justice varies with time and place what is just at particular given time has not been generally considered at another. What should be good or right or justice at a particular epoch is conditioned by social milieu and moral ethos of each community. Hence search for justice is eternal quest and no attempt to delineate its contour can succeed. Nevertheless this concept continues to be of abiding interest of thinkers and philosophers, jurist and judges. At every interval of human history we find competing formulation and enunciations of theories of justice. Philosophers have been measuring in terms of distribution according to merit, capacity or need or in conformity to custom or equal opportunity for self development, utility or morality or as balancing of interest or felt- necessities of the people etc.

The concept of social justice denotes a philosophy of life and sets a way in which all social life should behave. Further, this concept in believed to be of a revolutionary import. There has been a historical process through which this concept,

316 Ibid.
317 Ibid.
318 Ibid.
which was initially a doctrine of social philosophy, had entered into state craft and captured the Constitutional field. The glorious revolution of 1688 in England with its achievement in the Bill of Rights (1689), the American War of Independence with its fruition in 1776, the French Revolution with its success in the declaration of the rights of man (1789) and the Russian Revolution of 1917 with its resurgence from the despotism of Czars, were political in their outlook and consequences yet of them each were motivated by social causes. This social Philosophy assumed a political shape because, in the Visia of the fathers of all such revolutions, the then existing political set-up was the only barrier impeding the proper harmony of the individual with his society. Justice is generally divided into legal and social. “Legal justice concerns the punishment of wrongdoing and the compensation of injury through the creation and enforcement of a public set of rules. Social justice requires equitable or just distribution of social goods and evils or of burden and benefits. The task of just distribution in the present day society has to be performed primarily by the state and therefore, though social justice may cover even private, or in Aristotle’s language ‘corrective’ justice, yet it is mainly concerned with distribution through the agency of the state. To operationalise the general notion of social justice from time to time thinkers have laid down several principles of distribution. Some of these principles are :- (1) to each according to this need; (2) to each according to his worth ; (3) to each according to his merit (4) to each according to his work; (5) to each according to the agreement he has made; and (6) to each according to his claims. The principles are neither completely mutually exclusive nor exhaustive. They also find different treatment in the hands of different writers. They may however all be put under the rubric of “to each his due.” What is one’s” due” is not easy to determine and these various principles attempt to provide a measurement or slandered to arrive at that “due”. Multiplicity of these principles, however, proves that no are standard is acceptable to all.

321 Ibid Note 158.
322 Ibid.
Justice K. Subba Rao has an analysis with a distinction. He explains: social justice is a compound word wherein justice is the noun and social is the adjective.\(^{323}\) It means that the social justice is one of the disciplines of Justice. Social relates to the society. Justice is a virtue of being just and fair to all individuals, to give every one, what is due. It depends upon time, place and circumstances. It conveys that as far as possible there shall be equality\(^{324}\). Whatever might be the peculiarities of social justice, it cannot reasonably claim existences outside the concept of justice’. David Miller in his treatise open with: “the concept of social of justice is best understood as forming one part of the broader concept of justice in general.” It is conveyed that “justice” is a body of which “social justice” is one of the species.\(^{325}\)

Social justice is a branch of justice which deals with the responsibilities of the state to promote the welfare of backward classes and the weaker section of society by improving their social and economic condition and protecting them from all kinds of exploitation.\(^{326}\) A just state would then be one which can supply in abundance the need of her people. In the fulfillment of their needs lies welfare of the people. In the modern phraseology, a welfare state in rightly another name for a just state. The first and greater necessity is food which is the condition of life and existence. The second is dwelling the third clothing, then education, then right to work and leisure, then freedom from exploitation, and so on and so forth. The more a state is able to make provision for the greatest number of wants, the more she is approximate to the idea of a luxurious state. The more she is so, the more she will be able to secure social justice to her people.\(^{327}\)

\(^{324}\) Ibid.
\(^{325}\) Ibid.
Social justice is the concomitant of a just state; it is concurrent with a just order of society. The prototype of a just state is one which strives to promote the welfare of the people by securing and protecting as effectively as she may, a social order in which justice social, economic and political, shall inform all the institutions of the national life. That state is able to secure to her citizens social justice which directs its policy by legislation or otherwise, towards securing to her people the right to an adequate means of livelihood that the material resources of the community are preserved from concentration and distributed only to sub serves common good; that there is equality before the law and equality of opportunity in matters relating to public life; that the health and strength of workers is not abused by sheer force of economic necessity; that children and youth are protected against exploitation; and so forth that the dignity of the individual is assured that he can realize his personality to the fullest of his being in all walks of life.\textsuperscript{328}

The master mind of Aristotle was superior to most people’s and his pioneer analysis still serves as crucible into which even modern craftsman continue to pour problems of the 20th century in the hope that an acceptable brew will emerge. In dealing with particular justice as distinct from universal justice, he distinguishes between distributions among equals. Corrective justice seeks to restore equals when this has been distributed e.g. by wrong doing, which assumes that the situation that has been upset was distributively just.\textsuperscript{329} However the application of his distinction to the problems of distributive justice might posthumously tinge his allusion to justice with some relevance starting with disadvantages, the most abundant of these are duties and liabilities. The imposition of duties is always distasted by policy. Doing justice here involves balancing various considerations for which no rules can be laid down with regards to imposition of liabilities, equalities should be very rough guide so that special variation in their incidence require justification with regards to disabilities, when these affects large numbers of people the question of justice concern their removal so as to produced equalities of advantages rather than the

imposition e.g., those attaching to women. Advantages may be divided into claims, liberty, power and immunities.\textsuperscript{330} With regards to claims professor Horore\textsuperscript{331} invites his readers to consider not primarily the duty to act justly but the demand for just treatment; and he continues ‘following Hohfeld’s usage it seems appropriate to use the word “claim” in this context to mark the point that we are here concerned not as we are in the analysis of liberty with the question “what are men permitted to do? But with the question “what are men entitled to demands”. For this purpose claim can be divided into those correlative to negative and positive duties. With regard to negative duties, e.g., the duties not to injure others, no one should be accorded less protection by the way of correlative claims than his neighbour unless he forfeits it by choice or his own conduct e.g., by consent or aggression. With regard to claims correlative to positive duties, these can be divided into claims against individuals and against the state. The allocation of the latter type of claim depends on state policy e.g., that the state shall provide basic subsistence. Professor Horore speaks of advantages which are generally desired and are in fact conducive to their well being, mean such things as life health, food, shelter, clothing, places to move in, opportunities for acquiring knowledge and skill for sharing in the process of making decision for recreation, travel etc. Men not only have a claim to these things but to an equal share in them.\textsuperscript{332}

The basic proposition of Communist theory is that economic forces determine the character of law and that it is not the result of free activity of legislature, judges and jurist. The material condition of production determines the social condition which finds expression in laws, religion, justice, metaphysics etc. of the people.\textsuperscript{333} Hence the conception of justice in the communist society is conditional by forces which bring about equality from each according to his ability to each according to his needs. The communist theory combines two principles in explaining the idea of justice, namely to each according to his ability and to each according to his needs. Thus merits and

\textsuperscript{330} Ibid.
\textsuperscript{331} Ibid.
\textsuperscript{332} Ibid.
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needs principles do not contradict each other but strive in establishing a practical
equality which does not ignore merit yet satisfies the needs irrespective of capacity or
work in other words individuals merit or desert gets recognized yet his need can be
summed up as justice in the communist sense.334

The Soviet jurists do not employ the term justice as a concept of juristic value
and instead use the phrase Socialist legality. The term Socialist legality connotes the
establishment of a classless society based on the principles of real equality non-
exploitation, ownership of the means of production in the hands of the state etc. The
function of law and court in the Communist society is to defend and further the
interests of the working class and promote the progress of the society what is
described as socialist legality is anti-thesis of capitalist justice which aims at
reconciling interests of the rich and poor, strong and weak on false legal equality in so
far as economically and socially weak sections of society are concerned and treats the
rich and poor by the same scale.335

Gandhi’s life is a sage of fighting injustice, tyranny and inequality in order to
establish a new socio-economic order based on truth, equality and non-exploitation.
He fought racialism in South Africa and imperial British rulers in India because both
of these evils were contrary to the principles of human liberty, dignity and equality.
He crusades for the liberation of depressed classes in India is the testimony of his
commitment to equality and social justice. In short he was against all kind of unjust
social, economic and political order.336 Adhering to such philosophy of human
equality and justice for all, Gandhi spiritualized politics, economic and social
philosophy and advocated socialism by wise renunciation of wealth. He subscribed to
the Marxian formula ‘to each according to his needs’ to be translated by love and not
violence, by persuasion and not by coercion.337

334 Ibid.
335 Ibid.
336 Ibid.
337 S. N. Dhyani, Fundamentals of Jurisprudence the Indian approach. Central Law Agency,
Social justice is an advanced mode of state-craft. It is through this advanced mode that a service state has emerged out of a police state. In this field, justice does not mean just decision but a just existence. It enjoys upon the state a way of life to be set for the individual rather than to set a way how justice is to be administered. It is a principle binding upon a tribunal. It is yet a philosophy to be observed by the state in the formulation of its legislative policy but is not a procedure to be followed by judicial or administrative tribunals. This is the fundamental differences between natural justice and social justice that whereas the one has totally transformed some principles of philosophy into a procedure of justice, the other is yet a philosophy superimposed on the legal system.338

Socialism seems to be a utopian programmed of social welfare. Social welfare is criteria of social prosperity or a standard of general happiness. The standard is a pattern which has either become a thing in itself or is one yet in progress of becoming. In the former case, it is a way to life, and in the latter, a pursuit of life; but both have their roots in the meaning of life, in the purpose for which life suffers and sustains. Social justice is conformity of social behavior with social purpose.

Social justice in our Socialist Republic is socio-economic revolution in the current miasmic milieu and in contemporary India the human condition is so poi grant that governments have been constrained to profess and promise revolutionary change, from socialistic pattern through ‘garibi hatao’ (removal of poverty), to total revolution. To epitomize, social justice is of revolutionary import although dismissed by many as a vague ideal or glittering phrase or a Constitutional dope.339

When we speak of social justice in the Indian context, we have to focus on its human dynamics. The content of social justice was best expressed in lay eloquence by

Nehru at the dawn of our freedom. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.  

Social justice, Constitutionally accented but left undefined, is a relative concept taking in its wings the people, their traditions and aspirations, their turmoil and torments, their backwardness, blood, sweat and tears. The democracy took upon itself the task of attaching five giant evils; want diseases, ignorance, squalor and idleness. Basically, all these five giant units thrive on the fundamental evil of property. Therefore, under the concept of welfare state, the primary function of the state to attack the problem of poverty, assumes considerable significance. Democracy realizes that this problem which concerns an overwhelming large number of its citizens cannot be successfully met unless it wisely uses its mighty weapon of law and attempts to restore balance to the economic structure and to remove the causes of economic tension from the body politic of the community. All the attempts made by democratic legislature to meet the challenge to poverty constitute attempts to give to the citizen of the state economic justice. Equality of opportunity to all citizens to develop their individual personalities and to participate in the pleasure and happiness of life is the goal of economic justice. Social justice as distinguished from economic justice has a special significance in the context of Indian society. As we are all aware, the Hindu social structure is based on caste and communities which creates wall and barriers of exclusiveness and proceed on the basis of consideration of superiority and inferiority.

This vice of social inequality assumes a particular reprehensible form in relation to the backward classes and communities which are treated as untouchable.

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340 Ibid at 13.
341 Ibid.
342 Ibid at 33
343 Ibid at 33
and so the problem of social justice is as urgent and important in India as in the problem of economic justice ..........Using the term social justice in a comprehensive sense so as to include both economic justice and social justice. The concept of social justice thus takes within its sweep the removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities.\textsuperscript{344}

Social justice is a relative concept with changing context dependent on time and circumstances, on people culture and aspirations. We concern ourselves with an ancient Asian member of the Third World with its inherited injustices, cultural kinds and enormous economic, social and demographic problems.\textsuperscript{345} So our perception must be conditioned by the past, present and future and the traditions and aspirations of the broad community in working its way towards liberation, all of which have, in good measure, codified in our Constitution but even within the Constitution, which is the sanction for the correction of the old way of life and the direction for the new social order, there is spacious scope for interpretation guided by social perspective.\textsuperscript{346} The Indian Constitution, says Granville Austin, is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the renascence, the core of the commitment to the social revolution lies in parts III and IV, in the Fundamental Rights and the Directive Principles of State Policy. These are the conscience of the Constitution.\textsuperscript{347}

The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence and they are included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The rights and principles thus connect India’s future, present and past adding greatly to the

\textsuperscript{344} Ibid at 33.
\textsuperscript{345} Ibid at 35.
\textsuperscript{346} Ibid at 35.
\textsuperscript{347} Ibid.
significance of their inclusion in the Constitution and giving strength to the pursuit of the social revolution in India.³⁴⁸

Dr. Ambedkar regarded part IV as a socialist chapter and contended that the intention of the nation was not to pay lip service to these principle but they were to be made the basis of all legislative and executive action that they might be taking hereafter in the matter of the governance of the country. He vehemently objected to making the Constitution any other then a mere political contrivance. He cited the Directive Principles as giving us the substance of a socialistic state. He said “if these directive principles are not socialistic in their direction and in their contents, I fail to understand what more socialism can be. Thus, social justice is the balancing wheel between freedom, political, economic and indeed makes for the survival of democracy.”³⁴⁹

By the time our Constitution makers began their deliberations the weakness of the meritarian concept of market and individualistic society leading to wide spread social injustice had already been exposed by thinkers like saint Simon, Durkhein, the Webbs, Tawney, Laski, and Green. These thinkers had also drawn an alternative plan for a new society which will assure greater equality to all and take in to account the existing disabilities of the people. Laying down the foundation of a social welfare state they emphasized that social good result from the national coordination of the activities of altruistic men, rather than from the free play of individuals self interest. These ideas had immensely impressed the leading figures in our freedom struggle as well as the Constitution makers. They thought that the solution to Indian problem lay in the implementation of these ideas.³⁵⁰

³⁴⁸ Ibid. 35
³⁴⁹ Ibid.
This is the background in which our Constitution, describe first and for most a social document was drafted. Although like the Constitution of the USSR, or the People Republic of China, it does not embody any specific principles or maxim of social justice, yet certainly it cannot be supposed to have recognized merit as the social or even dominant basis of social arrangement and allocation of social goods. This is crystal clear from its provision. Its Preamble makes explicit in bold letters our resolves to constitute India into a socialist, democratic, republic with the view to securing, inter alia, social, economic, and political justice, equality, liberty, and above all, dignity of the individuals. Translating these general principles into concrete legal proposition, Part III of the constitution guarantees certain fundamentals rights to the individuals which are not at all negative in character but envisage positive state action. Among these rights Articles 14, 15, 16 and 17 deal with other facets of social justice. The right to equality in its various facets, including the authorization of the state to take affirmative action for the benefits of the backward classes, the scheduled caste, and the Scheduled Tribes, abolition of Untouchability, prohibition of traffic in human beings are clearly representative of egalitarian as opposed to meritarian concept.

The same concept has been expressed with greater clarity in the directive principles of the state policy contained in part IV. The directives in no uncertain terms require the state inter alia, to promote the welfare of the people by securing and protecting a social order in which justice, social, economic and political should inform all the institution of national life, to reduce economic disparities; to make available adequate means of livelihood; to distribute the ownership and common good; to operate the economic system in such a way that it does not result in the concentration of wealth and means of production to the common detriment; to promote health and strength of workers and children of tender age against abuse, to provide for legal assistance and aid, to provide right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement and the

351 Ibid at 256
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others cases of undeserved want; to secure just and human condition of work and provision for maternity relief, to provide for living wages and condition of work ensuring descent standard of life and full enjoyment of leisure and social and cultural opportunities, to promote with special care the educational and economic interest of the weaker section of the people of their protection from social injustice and all forms of exploitation, and to raise the level of nutrition and the standard of living and public health. These principles can be enforced notwithstanding the general right to equality in Article 14 and right to the six freedom in Article 19. Part IV specially, Articles 38, 39, 39-A, 41, 43, 43-A and 46 sums up the socio-economic facets of social justice.

Justice K. Subba Rao remarks; “it is impossible to make all men equal”. Justice to all and not a favoured class. Justice may demand preferential treatment to the weaker section, to corrective the imbalance and not to cause unnecessary harassment to the advanced section thereof. In broader sense it endeavors to remove the imbalances in the political, social and economic life of the people. He summarized social justice, as a constitutional process and also an object of democracy where in social justice may be defined as justice to all members of the society in all facts of human activities. The doctrine of equality is the foundation of law. The concept of social justice implements doctrine of equality and it gives practical contents to the latter. The doctrine of social justice and equality are complementary to each other and maintain their potency. They should also be so harmonized that both of them should maintain their vitality. In democratic countries, rule of law has become a potent instrument of social justice.

352 Ibid at 256.
353 Ibid.
355 Ibid.
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As justice is the key-stone of our constitution and the principle of equality is the very foundation of justice\textsuperscript{356} but our society has always been full of inequalities. It was a caste ridden; stratified hierarchical society and a particular segment of the society had been denied the bare human right. Their education, wages, living condition, social status was distilled by the whims of upper strata of society, reducing them to destitution. The economic backwardness brought social backwardness which consequently made them downtrodden and thus depriving them even of the dignity of life. In a society of power, enabling themselves to run their whips, prejudicial to the interest of lower segment of the society. Lower caste had to serve the upper castes without having any say and grievance redressal mechanism. This inhumane and barbaric condition perpetuated for centuries.\textsuperscript{357} Members of the lower strata or disadvantaged class cannot compete with the people of privileged class on equal footing and that is why framers of our constitution sought to elevate the unprivileged to the level of privileged or other by distributing the things in proportion to the disability they have earned in the past.\textsuperscript{358}

In order to check furtherance of injustice and sufferings of people because of their handicaps of being born in a particular class, community or caste, our Constitution prohibits the state from discriminating on grounds of religions, race, caste, sex or place of birth.\textsuperscript{359} The state had vast power to make reservation in employment and admission for such backward people or downtrodden people.\textsuperscript{360} Any state-socialistic or otherwise which thinks in terms of well being of its inhabitants has to take care of the last person of its soil. In a nation with limited resources like ours, the need to treat those unfortunate millions, by distributing higher dividends could not rationally be debated. This is the supporting treatment to the less equal to minimize the imbalance. Thus, the civilized society ordains. It takes shape of constitutional

\textsuperscript{357} K. P. Singh Mahalwar. Protective Discrimination and Some Socio-legal Perspective. C I L Q 1989 p. 244.
\textsuperscript{358} Ibid.
\textsuperscript{359} Harpal Kaur Khehra. Job Reservations Versus Efficiency of Administration, C I L Q 1990 p. 28
\textsuperscript{360} Ibid
objectives which are, however, to be accomplished by the modus operandi evolved and within the parameters prescribed by the Constitution itself. The social justice as one of the Constitutional objectives is to be aimed at accordingly. Distribution have to reach to the less equals in a proportion as commanded by the Constitutional scheme.361

Thus reservation is the means to promote the goal of social justice. To put it simply, by social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunities, race, caste, religion, sex and title.362

Justice E. S. Venkatamaiah, in the case of Crown Aluminum Works v. Workmen363, held, social justice in a broad sense involves political justice and in restricted sense economic or distributive justice. Political justice is sought to be guaranteed in our country by a constitutional mechanism providing for elected legislatures, parliamentary executive and an independent judiciary. Social justice measures which are introduced to reduce the effect of centuries old social injustice include abolition of untouchables, reservation of seats in educational institutions and of posts in government employment, reservation of seats in elected bodies and certain other positive measures such as financial assistance given to socially and economically backward people in order to ameliorate their condition.

To quote Principal D.N Sandanshiv364 the law of reservation encompasses the protective justice, corrective justice, distributive justice and promotive justice and social justice is the expression that embodies within its contents all these four forms of justice. The purpose of the reservation is thus to help the weaker sections of the society, whose weakness qualitative and not quantitative as they suffer from

362 Ibid.
363 A I R 1958 S C 30
364 Quoted in Harpal Kaur Khehra. Job Reservations Versus Efficiency of Administration, C I L Q 1990 p. 28
qualitative infirmities due to lack of education facilities, economic opportunities, social status, places of habitation and nature of occupation followed \(^{365}\).

### 3. IX. PROTECTIVE DISCRIMINATION IN THE UNITED STATES

In the United States, the problem of blacks (Negros) holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in U.S.A. the problem is just 200 years old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters. \(^{366}\) In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. In quick succession followed several decisions in the U. S. A. which effectively outlawed all discrimination against blacks in all walks of life. But the ground realities remained. Socially, educationally and economically blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their marks. They were still unable to compete with their white counterparts. Similarly was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of persisting effects of past-discrimination. The Congress, the State University and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally these measures were challenged in courts with varying results. Although like the Constitution of India, the U.S. Constitution does not in terms authorize positive or protective discrimination, it was very soon realized that it was too hypothetical to talk about equality based upon individual achievement when the

\(^{365}\) Ibid.

\(^{366}\) Dred Scott v. Sandford (1857) 15 Law Ed 691, Quoted in A I R 1993 S C 477 at 529.
In *Defunis v. Charles Odegard*, the University of Washington Law School, in December 1973, an admission policy where under certain percentage of seats in the Law School were reserved for minority racial groups. The admission policy stated that because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under representation can effect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admission policy to contribute to the solution of the problem. The procedure for admission for the minority students was different and of a lesser standard than the one adopted for all others. *Defunis*, a non-minority student was denied admission while granting it to minority applicants with lower evaluation. He commenced an action challenging the validity of the programme. According to him, the special admissions programme was violative of the equal protection clause in the Fourteenth Amendment.

The trial court granted the requested relief including admission to the plaintiff. On appeal, the Supreme Court of Washington reversed the Trial Court’s judgment. It upheld the constitutionality of the admission policy. The matter was brought by *Defunis* to United States Supreme Court by way of certiorari. The judgment of the Washington Supreme Court was stayed pending the decision. Four of the judges Brennan, Douglas, White and Marshall, JJ., however, did not agree with that view. Of them, only Douglas, J., recorded his reasons for upholding the special admissions’

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368 Infra Note 414.
369 (1974) 40 Law Ed 2d 164
370 Ibid
programme. The learned Judge was of the opinion that the equal protection clause did not require that law school employ and admissions formula based solely upon testing results and under-graduate grades nor does it prohibit Law Schools from evaluating an applicant’s prior achievements in the light of the barriers that he had to overcome.\textsuperscript{371}

The learned Judge while agreeing that any programme employing racial classification to favour certain minority groups would be subject to strict scrutiny under the Equal Protection Clause, yet concluded that the material placed before the court did not establish that Defunis was invidiously discriminated against because of his race. Accordingly, he opined that the matter should be remanded for trial to consider whether the plaintiff has been individually discriminated against because of his race.\textsuperscript{372}

The next case is in \textit{Regents of the University of California v. Allen Bakke}.\textsuperscript{373}

The medical school of the University of California at Davis had been following two admissions programmes, one in respect of the 84 seats (general) and the other, a special admission programme under which only disadvantaged members of certain minority races were considered for the remaining 16 seats- the total seats available being 100 a year. For these 16 seats, none accept the members of the minority races were considered and evaluated. The respondent, Bakke, a white, could not obtained admission for two consecutive years, in view of his evaluation scores, while admission was given to members of minority races who had obtained lesser scores than him. He questioned the validity of special admissions programme on the ground that it violated the equal protection clause in the Fourteenth Amendment to the constitution and also Title VI of the Civil Rights Act, 1964.

The Trial Court upheld the plea on the ground that the programme excluded members of none-minority races from the 16 reserved seats only on the basis of race.

\textsuperscript{371} Ibid
\textsuperscript{372} Ibid
\textsuperscript{373} (1978) 57 Law Ed 2d 750
and thus operated as a racial quota. It, however, refused to direct the plaintiff to be admitted in as much as he failed to establish that he would have been admitted but for the existence of the special admissions programme. The matter was carried in direct appeal to Supreme Court of California which not only affirmed the Trial Court’s judgment in so far as it held the special admissions programme to be invalid but also granted admission to the plaintiff-respondent in to the Medical school. It was of the view that the University had failed to prove that in the absence of special admissions programme the respondent would not have been admitted.

The matter was carried to the United States Supreme Court, where three distinct view-points emerged. Brennan, White, Marshall and Blackmun, JJ., were of the opinion that the special admission was a valid one and is not violative of the Federal or State Constitutions or of Title VI of the Civil Rights, 1964. They were of the opinion that the purpose of overcoming substantial, chronic minority under-representation in the medical profession is sufficiently important to justify the University’s remedial use of race.

Since the judgment of the Supreme Court of California prohibited the use of race as a factor in University admissions, they reversed that judgment. Chief Justice Warren Burger, Stevens, Stewart and Rehnquist, JJ., took the other view. They affirmed the judgment of the California Supreme Court. They based their judgment mainly on Title VI of Civil Rights Act, 1964, which provided that “no person in the United States shall, on the ground of race, colour or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any programme or activity receiving Federal Financial Assistance.” They opined that Bakke was the victim of, what may be called, reverse discrimination and that his exclusion from consideration in respect of the 16 seats being solely based on race is impermissible. Powell, J., took the third view in his separate opinion, partly agreeing and partly disagreeing with the other view-points. He based his decision on Fourteenth Amendment alone. He did not take into consideration the 1964 Act. The learned judge held that though racial and ethnic classifications of any kind are
inherently suspect and call for the most exacting judicial scrutiny, the goal of achieving a racially balanced student body is sufficiently compelling the justify consideration of race in admission decisions under certain circumstances. He was of the opinion that while preference can be provided in favour of minority races in the matter of admission, setting up of quotas (which have the effect of foreclosing consideration of all others in respect thereof) is not necessary for achieving the said compelling goal. He was of the opinion that impugned programme is bad since it set apart a quota for minority races. He sustained the admission granted to Bakke on the ground that the University failed to establish that even without the quota; he would not have been admitted.

To Powell, J., the argument that a guarantee of equal protection to all person permits the recognition of special wards entitled to a degree of greater protection than accorded to others, was an amorphous concept of injury that may be ageless in its reach in to the past. There was no principle, he argued, to force an innocent individual to be asked to suffer in order to promote the welfare of the victims of societal discrimination when such an individual might not be the actual victimizer.