CHAPTER V
CHAPTER – V (A)
EQUALITY BEFORE LAW

(i) BACKGROUND OF RIGHT TO EQUALITY

Right to equality naturally got priority under the Constitution of India in its preamble as well as in Chapter-III which deals with the fundamental rights of the citizens. The most important reason for laying emphasis on this right was due to the prevalence of discrimination on grounds of religion, race or place of birth in large scale during British rule. The fundamental rights guaranteed under the Indian Constitution are not based on the theory of natural rights and reasonable restrictions have been imposed on the exercise of different rights in the interest of community. Pt. Jawahar Lal Nehru in this connection rightly observed “no individual can overside ultimately the rights of the community at large and no community should injure and invade the rights of the individuals unless it be for the most urgent and important reasons

Moreover it cannot be claimed that the framers of the Indian Constitution could draft a wholly indigenous or a novel constitution to achieve this objective of rightly balancing the interests of the individual with those of the community. Dr. B.R. Ambedkar was quite correct when he observed that there could be nothing new in a constitution framed so late in the history of the world. According to him “in a constitution framed so late in the day are variation made to remove the faults and to accommodate it to the needs of the country”

And no where this stark fact and pragmatic approach are more apparent than in the formulation of the fundamental rights and especially in setting forth systematically the rights relating to equality.

The Indian society has been traditionally pluralistic and its culture has been defined by a rich variety of diversities. The question of formulating a set of fundamental rights guaranteeing right to equality in
such a social context, harmonising the rights of the individual with those of community, could not be free from controversy or confusion. According to Sardar Vallabhbhai Patel, the Chairman of the Advisory Committee, “These two schools viewed the matter from two different angles one school of thought considered it advisable include as many rights as possible................, rights, in regard to which a citizen may without difficulty go straight way to court of law and get his rights enforced. The other school of thought considered it advisable to restrict fundamental rights to a few essential things that may be considered fundamental. Between the two schools there was a considered amount of discussion and finally a mean was drawn which was considered to be a very good mean”.

The framers of the constitution also made it clear that there could be no other fundamental rights of the individual than those guaranteed by the Constitution of Part-III. Contrary to this the Ninth Amendment of the Constitution of United States provides that the ‘enumeration of certain rights in the Constitution shall not construed to deny or disparage others retained by the people’. In the absence of such a provision in the Constitution of India, it is logical to sum up that there is no scope for the courts in India to formulate any more fundamental rights by the application of the doctrines of ‘implied and inherit’ rights of the individual.

The provisions of the Indian Constitution relating to right to equality prohibits all kinds of unjustified inequalities. The concept of equality is based on the principle of natural justice that all individuals should be treated alike. “In the context of social sciences, “the concept of equality refers sometime to certain properties when men are held to have in common but more often to certain treatments which men either receive or ought to receive”

The concept of equality is, in fact, an indication of the fact that all men are ultimately equal. It is therefore, a noble ideal which provides
dignity to all individuals. Nonetheless, the concept does not necessarily
denote that every one should be treated alike regardless of individual
abilities. Absolute equality is, in fact, an impossibility and what equality
really signifies is that among equals laws should be equal and equally
administered also. It further denotes that every one who is classified as
belonging to the same category, for a particular destination, is to be dealt
within the same manner. The concept of equality is closely attached with
the concept of justice. This is what the Supreme Court and the High Courts
of India emphasize through their various judgements.

In the Constitution of India, Right to equality is provided under
Article 14, 15, 16, 17 and 18. Article 14 lays down the General Rule which
prohibits the state from denying any person equality before law or the
equal protection of the laws, while succeeding Articles 15, 16, 17 and 18
provide particular applications of the Rule.

In the Constituent Assembly, provisions relating to right to equality
were examined in considerable details. The Advisory Committee on
Fundamental Rights dealt only with 'the equal treatment of laws' but added
the 'due process' clause regarding the right to life and liberty. The
Drafting Committee substituted the term equality before law for equal
treatment of law and added a new phrase, viz., 'equal protection of the laws
6. Originally in the Draft Constitution' the right to equality before law and
the right to personal liberty were combined together in one article. But after
the second reading stage decision was taken by the Constituent Assembly
to provide equality before law in a separate article.

The Constitution advocates for the abolition of social disabilities.
According to the Advisory Committee the state was not to discriminate
against any citizen on the grounds only of religion, race, caste or sex with
regard to trading establishments, or the use of wells, tanks, roads and places
of public resort which were maintained partially or wholly by Public Funds. The Drafting Committee accepted these non-discriminatory provisions and added the words 'or any of them' to clear any doubtful or double meaning. Mr. Rauf placed an amendment to add 'place of birth' in the non-discriminatory provisions which was also accepted by the committee.

Some of the members opposed detailed provisions for abolition of social disabilities which according to them could be removed sooner or later by social reforms. Prof. Saxena considered it essential to 'prepare the ground' to give effect to these changes by the Constitution by name. "However, majority of the members were in support of embodying these provisions in the Constitution".

Somnath Lahiri pointed out that there should be no discrimination either on social grounds of political beliefs and faiths. Hence he thought an amendment wanted to add the words 'Political creeds' under the clause (4) of the Interim Report on Fundamental Rights which was not accepted.

The Advisory Committee accepted for equality of opportunity for all citizens in matters of public employment, in clause (5) of the Interim Report. It, therefore, maintained that no citizen was to be discriminated against in matters of Public employment on grounds only of religion, race, caste, sex, descent, place of birth or any of them except in the case of any section of society which was 'not adequately represented in the public services'. The state was authorised to legislate suitably to safeguard the interests of such sections of society. The Draft Committee passed these provisions and added the work 'backward' to signify that class of people which was not adequately represented in the Public Services.

Some members were of the opinion that the term backward could not be defined in brief and this might create confusion. Aziz Ahmad Khan
wanted to drop the word "backward" altogether but Dharam Prakash was in favor of replacing the term "backward classes" by "depressed classes" or Scheduled Castes to make it more clear.

On the other hand, Pt. H.N. Kunzru opposed to the principle of reservation of seats for backward classes in matters of public employment which according to him would lead to social disharmony. He however suggested for a time limit for such reservations subject to further extension if the Parliament considered it desirable. Dr. B.R. Ambedkar while rejecting this proposal observed that it was a compromise formula of the three divergent views expressed by the members and the public at large in this connection. These were equality of opportunity for all; no reservation of any kind for any section of the community and due representation to backward communities in administration. He, therefore, claimed that under such circumstances no better formula could be evolved and this as included in clause 3 of Article 10 of the Draft Constitution.

Although Advisory Committee had not prescribed residential qualification for public employment, the matter was raised in the Constituent Assembly. A.K. Ayyar wanted to insert a new clause which could empower Parliament to enact a law, if essential, for any state to limit a certain class of employment for the residents of that state. T.T. Krishnamachari, however, considered this suggestion as unnecessary. Dr. B.R. Ambedkar too did not like this idea. He observed: "the argument that residence should not be qualification to hold appointments under state is perfectly valid and a perfectly sound argument."

Some members objected to the inclusion of the provision of abolition of untouchability in chapter dealing with fundamental rights. According to them it was a social evil and could not be removed through
Constitutional provision unless the caste-system itself was abolished. Dr. S.C. Banerjee observed that "untouchability was not a disease but a symptom of a disease, namely, caste system." Moreover, there could be no appropriate definition of untouchability and according to D.N. Dutta "unless there is a definition it cannot be considered as an offence." Members like R.K. Choudhary and Naziruddin Ahmed vainly tried to define untouchability but their definitions could not be accepted by the House. Finally, the provision for the abolition of untouchability was carried through by the unanimous vote of the Constituent Assembly.

Likewise, titles were also abolished under clause 7 of the Interim Report on fundamental rights which provided that the Union Government was not to confer any "heritable title, nor was any person, " holding any office of profit or trust" under the state to have any title from any alien state without the permission of the Government. However, in the Draft Constitution the qualifying word 'heritable' was dropped and a saving clause 'not being a military or academic distinction' was added at the second reading stage. Meanwhile, Balkrishna Sharma opposed abolition of titles on grounds of social tradition of the country and psychology of the people. Another member Mr. Prakasa wanted distinction to be made between titles awarded by the state and titles awarded by the State should be abolished. Furthermore, H.V. Kamath enquired from Dr. B.R. Ambedkar whether the abolition of titles was a justiciable right. The latter replied in the negative and observed that in fact it was not a right but a duty upon an individual and a condition of combined citizenship by itself is not a justifiable right.
(ii) CONCEPT OF EQUALITY:

Equality is one of the Human Rights, which was declared in order to maintain humanism in our society. The human rights are basic socio-political conditions to which every human being is entitled.

The concept of equality envisages the idea that all men are born free and equal, and there should be no discrimination on the basis of religion, race, caste, sex, colour or creed. Hon’ble Justice Methew emphasised that the claim of equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a symbol of man’s revolt against chance, fortune, disparity, unjust power and crystalized privileges.

The equality among men means that every citizen physically strong or weak, effective or non-effective, rich or poor, is entitled to equal opportunities along with all other members of the society. In a broader perspective, equality as a principle of distributive justice amounts to no more than that men should all be treated in the same way save where there is a sufficient reason to treat them differently. The value of equality demands the giving of favoured treatment to the deprived and the weaker sections of the society, to enable them to compete with fairness with advanced members of the society. The equality in fact, involves an equilibrium creating or equilibrium oriented compensatory discrimination. It takes into account social economic and educational inequalities by affirmative actions. Equality helps in promoting brotherhood among human beings and it protects status and dignity of all men. It is the foundation of sociolistic democracy based on secularism. It requires the state to take action legislative, judicial or administrative to provide protection to weaker sections of the society.

Equality as an aspect of justice has two phases namely, equality as a means of doing justice and equality as an end of justice. One may accept
the notion of equality, social economic and political as an end of justice. However, it is not practicable to accept the notion of equality without 'protective discrimination'. There are various synonyms used for protective discrimination in legal literature they are, "reservation", 'quotas', "compensatory treatment" or "preferential treatment" and "adventitious aids" etc. Protective discrimination is a means of doing justice. The road to distributive justice is a two lane highway – one requiring the equal treatment of the equals and the other requiring the unequal treatment of unequals 31. In order to discover substance of distributive justice, it is necessary to establish a body of rights and duties and then to examine them in the light of the formal principle of equality, the aim being to exclude every form of invidious discrimination not justified by relevant differences.

The doctrine of equality envisages the idea of protective discrimination in all its manifestations. The notion of protective discrimination aims at unequal treatment of unequals i.e., those who were the victims of man made asperities for centuries together now need to be compensated. Mere proclamation of abstract equality will be of no use to such persons groaning under the object poverty and the deadening weightage of backwardness. They need ‘protective discrimination’ or ‘adventitious aids’ to develop their personality and to participate in the mainstream of national life, the way, the constitution, vouchsafes and ordains for them.

It is the legitimate aspiration of citizens in a welfare state that good education and the security of job should be provided to all of them. If no protective discrimination is given to the weaker sections in the matters of education and employment they will remain as they were and our professions of distributive justice will be a dream and a teeming illusion to be vainly pursued in an agnoising atmosphere of inequality ridden society.
However the pursuit for equality and distributive justice has often led to conflicts between the guaranteed individual rights and social justice to people belonging to backward classes and weaker sections of the society while the guaranteed fundamental rights are enforceable, the claim to social justice by the members of the backward classes and weaker sections is not enforceable as such, unless the state passes a law in that direction, since the constitution authorises the state to make preferences for them. While the state action in implementing the preferential schemes have to encouraged, it has also be seen that in the exercise of the powers, the government does not abuse or misuse its power, so as to impair the interest of others. The government has to perform a formidable task of balancing the competing claims of different sections of the society. The harmonisation is required to resolve this conflict between “need basic claims” of the backward groups to protective discrimination and the rights of the members of the advanced sections to which they became entitled because of their ‘performances, contribution and merit’. The court also perform a tremendous task in ensuring that the protective discrimination is confined strictly to constitutionally permissible objectives and of over-seeing that a balance is struck between the fundamental rights of the individual and social justice to the backward classes.

(iii) EQUALITY AS AN ASPECT OF DISTRIBUTIVE JUSTICE:

The concept of equality envisages the idea that all men are born free and equal, and that there should be no discrimination on the basis of religion, race, sex, caste, colour or creed. It is a sin quo non for the effective exercise of rights guaranteed in the constitution. “The more equal are the social rights of the citizens” says Laski, “the more likely they are to be able to utilize their freedom in realms worthy of exploration. Certainly, the history of the abolition of special privileges has been, also, the history of
the expansion of what in our heritage was open to the common man. The more equality there is in a state, the more use, in general, we can make of freedom”.

The word ‘equality’ is incapable of single definition as in its ambit it is multi-dimensional. It is a comprehensive concept having many shades and connotations and it has no one common attributive. Attempts to identify such attributes are likely to lead to for-ranging discussions — discussions of the relations between equality and justice and between equality and liberty, and these are mainly the problems of distributive justice.

The term equality is undefinable since it can only be realised and understood in contra-distinction with inequality. It would be correct and reasonable to say that men ought to be treated unequally, because they are of unequal rank, circumstances, ability and race. Equality can only be achieved when we have a social order which is based on the identity of interests, roles, power and authority in different sectors of human life.

According to Friedmann:

*It is clear, however, that the principle of absolute equality between individuals of all classes and races cannot be understood in a rigid sense. It means the abolition not of natural differences, which it is not within men’s power to abolish, but of man made differences inherit in the organisation of the society. It is these which is the task of law, in democratic societies, to remove.*

The principle of formal equality proclaims that each man to count for one and no one to count for more than once. But men are not equal in
all respects. "The claims for equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a man's revolt against chance, fortuitous disparity, unjust power and crystalized privileges" 36. The equality in physical sense to achieve physical equality, we often have to resort to the principal of proportional equality which speaks for the treatment of equals equally and unequals unequally proportional equality demands that all would receive the same consideration in the distributional decisions, but the numerical amounts distributed may differ. Proportional equality thus means equality in the distribution according to merit or need. In the words of Mathew J:

_So interpreted, it does not imply that men are identical or equal in intelligence, strength, talent or many other respects. As a normal principle, its meaning might be summed up in this way: human beings are entitled to treated as if they are equal on all matters important to them and matters really important to them are matters that are common to men_ 37.

Rashdall was of the opinion that the principle does not require that every person be given an equal share of wealth or of political power, but rather equal consideration in the distribution of ultimate good 38. The equality of men means that every citizen, of whatever capacity, is entitled to equal consideration from all members of society. Physically strong or weak, effective or non-effective, rich or poor, he is to be regarded as deserving such opportunities of self-development as he is capable of grasping, or even share protection and sustenance if he is incapable through natural defects or undeserved misfortunes, of maintaining any foot hold for himself in society.
In a broader perspective, equality as a principle of distributive justice amounts to no more than that men should all be treated in the same way save where there is a sufficient reason to treat them differently. But this version of equality seems to leave open what is to count as a sufficient reason and all kind of invidious distinction could make entry that way. However, the belief in this aspect of equality of equality, viz., one man should not be preferred to another without sufficient reason, is a deep rooted principle of human thought. Like other ends, it cannot itself be defended or justified for it is itself that which justifies other acts. Plato’s remarks about law is equally applicable to the concept of equality that “a perfectly simple principle can never be applied to a state of things which is the reverse of the simple”. Aristotle observed that the origin of all quarrels and complaints, can be traced to the fact that the doctrine of proportional equality has been violated, as when equals have been or are awarded unequal shares, or unequal equal shares. He maintained that awards should be made according to merit, but, there is no consensus as to what constitutes merit. The differential treatment would be unjustified, if the persons concerned are not distinguishable because in such cases the equals would be treated unequally which will be tantamount to the principle of proportional equality. The doctrine of differential treatment has been expounded by Rousseau thus “it is precisely because the force of circumstances tends to destroy equality that force of legislation must always tend to maintain it”.

John Rawls in “A Theory of Justice” demands the priority of equality in a distributive sense and setting up of the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in the society without giving or receiving compensatory advantages in return. His basic principle of justice is “All
social primary goods – liberty and opportunity, income and wealth, and the basis of self-respect are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of least favoured”. One of the essential element of Rawl’s conception of justice is what he calls the principle of redress. This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, those inequalities are somehow to be compensated for society must, therefore, treat more favourably those with fewer native assets and those borne into less favourably social positions. Thus, the Rawl’s Theory of Justice and Redress Principle furnish an answer to the problem that “Equality of opportunity must yield Equality of Results”.

In a society, the individuals possess certain needs in common, thus they are to be treated equally until and unless those needs are minimally met. In this context, Laski maintains:

*Equality, therefore involves upto the margin of sufficiency identity of response to primary needs.*

*And that is what is meant by justice we are rendering to each man his own by giving him what enables him to be man we are, of course, therein, protecting the weak and limiting the power of the strong. We so act because the common welfare includes the welfare of the weak as well as of strong...... This involves a payment by society to men and women who limp after its vanguard, the equality of state depends on its regarding their lives worth preserving. To act otherwise is to regard them not as person but as instrument.*
The value of equality demands the giving of favoured treatment to the deprived and the weaker sections of the society, to enable to compete with fairness with the well-to-do and more advanced members of the society. Thus, the measures which are designed to promote an effective equality by giving preferential treatment to the unequals and to make them equals cannot be different from the distributive justice.

The equality in fact, therefore, involves an 'equilibrium creating' or equilibrium orientated, compensatory discrimination. The compensatory discrimination notion takes into account social, economic and educational inequalities and seeks the elimination of the existing inequalities by affirmative actions. This policy is justified because unequal characters of human beings are not as a result of innate superiority or inferiority, but of unequal environment into which men are born and have to live. If the inequalities in their environment are removed or eliminated, there will be a greater chance to attain a stage of real and effective equality. The call of the moral perspective of equality value is: "Equals must be treated equally. Unequals must be treated unequally, not to perpetuate the existing inequalities but to achieve and maintain a real state of effective equality."

The Indian Society is a caste-ridden and economically imbalanced society. The strictness of caste barriers from centuries together has led to the social isolation and economic oppression of a section of society to their misery and penury. The doctrine of social equality would be meaningful in the Indian society only if 'protective discrimination' or 'initial advantage' or 'privilege' is given as an equaliser to those who are too weak, socially, economically and educationally to avail the advantage of guaranteed freedoms on the footing of equality. It demands equality in fact, which alone can be the basis for social equality. The Indian Constitution makers
did provide both these doctrines to impart distributive justice to its citizens. Dr. B.R. Ambedkar had rightly pointed out in the Constituent Assembly 48.

A similar opinion has been expressed by Mr. Justice Subha Rao. According to him the concept of equality “in practice can only be worked out by accepting two principles “ (I) to give equal opportunity to every citizen of India, to develop his own personality in the way he seeks to do; and (ii) to give adventitious aids to the under-privileged to face boldly the competition of life. Though these two principles appear to be conflicting but the harmonious blending of both give equal opportunities to all citizens to work out their way of life. Doctrinaire insistence of an abstract equality of opportunity leads in practice to inequality which the doctrine seeks to abolish 49.

The Indian society is traditionally caste ridden and caste oriented. It thrives on numerous factors grounded essentially inequality. Therefore, equality in fact, can be realised by treating on the one hand, the ‘forward classes’ and the ‘under privileged classes’, differently. In other words, it is a device of ‘protective discrimination’ or adventitious aid’ in the favour of the latter which alone can equate them with the former. On the other hand, it requires the removal of all social evil or factors perpetrating social inequality to attain and make the goal of distributive justice a living reality.

(iv) PRINCIPLE OF EQUALITY UNDER THE CONSTITUTION:

Article 14 of the Constitution provides that the state shall not deny to any person equality before the law or equal protection of law within the territory of India. The spirit behind this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of the constitution.
Equality before law is a negative concept which ensure that there is no special privilege in favour of any one, that all are equal subject to the ordinary law of land and that no person, whatever, be his rank or condition, is above the law.

The concept, equal protection of laws is a positive concept. It postulates for the application of the same law alike 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 alike without distinction of race, religion, wealth social status or political influence.

(v) REASONABLE CLASSIFICATION AND NOT CLASS DISTINCTION:

All persons are not equal by nature, attainment or circumstances. The varying needs of different classes or sections of people require differential and separate treatment. The state 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 ends or objects and for that purpose of distinguishing, selecting and classifying persons and things upon which laws are to operate. The state can make reasonable classification in making legislation. The doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the guarantee under Article 14, by accommodating it with the practical needs of the society.

The classification should rest on real and substantial criteria and should be supported by an intelligible object intended to be pursued by the legislature. The legislature should neither treat unequals as equals, nor equals unequals without any rhyme or reason or intelligible purposive
difference, relatable to the legislative purpose spelled out by it. The doctrine of classification should not be allowed to eat up the doctrine of equality. Neither the courts nor the legislature should make anxious and vigorous effort to discover, somehow, somewhere the basis for classification just to get the enactment declared as constitutional. The protection of equal laws should not be allowed to be replaced by the protection of law making reasonable classification, otherwise the guarantee of equality may be replaced by over worked methodology of classification.

The Supreme Court has laid down the following principles which should be kept in mind by the Judges while deciding the Constitutional Validity of laws in reference to Article 14 of the Constitution:

(I) that the law may be constitutional even though it relates to a single individual or institution if on account of some special circumstances or reasons applicable to him only.

(II) That there is always a presumption in favour of the constitutionality of the enactment.

(III) That it must be presumed that the legislature understands and correctly appreciates the need of its own people and that its discriminations are based on adequate grounds; and

(IV) That while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, it 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 legislation.
These very principles have constantly been followed by the Supreme Court whenever it is called upon to adjudge the constitutionality of any particular law as discriminatory and violative of Article 14 of the Constitution. The classification necessarily implies the making of a distinction or discrimination between classified and those who are not members of that class. Indeed, the very idea of classification speaks of inequality. In making classification, the legislature must seek to implement the good of the largest possible number of people, must implement the Directives, must take into consideration the history, social change, economic and industrial developmental factors and the like. The basis of classification can be provided by its appreciation of the needs of different sections of the people and the true nature and effect of the given legislation, sociological and economic factors, experience relating to the problems facing them, geographical conditions historical factors and the economic size and importance of industrial, business or banking units, etc.

In order to know the intention of the legislature in enacting an Act, the recital in the statutory preamble, the thrust of the legislative provisions, surrounding circumstances, the report of the proceedings, debates in the Houses, and the whole background perspective must be looked into. The State can fix a cut-off date for making differentiation but such a cut-off date should have reasonable nexus with the objects sought to be achieved.

The state can fix different minimum wages for different industries keeping in view the different economic and local conditions. The State can make laws discriminating in its favour. The state can also make provisions for the segregation of prisoners under death sentence from other
prisoners. State can give different treatment to persons belonging to same class on basis of educational qualification but cannot prescribe quota between graduates and non graduates in promotions.

(vi) JUDICIAL INTERPRETATION OF EQUALITY BEFORE LAW:

Article 14 of the Constitution says that the state shall not deny to any person equality before the law or the equal protection of the law within the territory of India. The first expression 'equality before the law' is taken from the English common law which is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. No man is above law. Every person whatever be his rank or condition, is subjected to the jurisdiction of ordinary courts. The second expression 'the equal protection of the laws', which is rather a corollary of the first expression is based on the last clause of the first section of the 14th Amendment to the American Constitution, which directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination.

Thus Article 14 uses two expressions to make the concept of equal treatment a binding principle of state action. It will be difficult to imagine any violation of the expression, "the equal protection of the laws", which would also be a violation of the expression, "equality before the law". Equality before the law is a negative concept; Equal protection of law is a positive one. The former declares that everyone is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land: the latter postulates equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed
The guiding principle of the Article is that all persons and things circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equality before the law means that amongst equals the law should be equal and should be equally administered and that like should be treated alike. Hence, what it forbids is discrimination between persons who are substantially in similar circumstances or conditions. Unequal treatment does not arise as between persons governed by different conditions and different set of circumstances. The rule is that like should be treated alike and not that unlike should be treated alike.

This article applies to any person and is not limited to citizens alone. A corporation, which is a juristic persons, will also be entitled to the benefit of this Article. It is accepted that persons may be classified into groups and such groups may be differently be treated if there is a reasonable basis for such difference or distinction. Article 14 forbids class legislation, but does not forbid classification or differentiation which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in objects to which it is directed or by the territory within which it is to operate. The rule of differentiation is that in enacting laws differentiating between different persons or things in different circumstances which govern one set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require different treatment. The rule of classification is not a logical and natural corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. The equal protection
of the laws guaranteed by Article 14 does not mean that all the 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 persons or things for the purposes of legislation 75.

A classification to be valid must not be arbitrary. It should always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made. In order to pass the test of permissible classification two conditions must be fulfilled:

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

2) The differentia must have a rational relation to the object sought to be achieve by the statute in question.

The object of classification should also be lawful. Classification must be made in the utmost good faith: Classifications that are scientific and rational, that will have direct and reasonable relation sought to be achieved yet can be bad because despite all that the object itself cannot be allowed on the ground that it offends the latter and spirit of Article 14. In such a case, the object itself must be struck down and not the mere classification which, after all, is only a means of attaining the desired end 76.

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2. C.A.D. Vol VII, at p.37
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9. C.A.D., Vol. VII. at P. 659
10. Article 10 of the Draft Constitution
11. C.A.D., Vol. VII. at pp. 681-82
12. Ibid., at pp. 686-87.
13. Ibid., at pp. 679-80
14. Corresponding to Clause 4 of Article 16 of the Constitution.
16. Ibid., at p.697
17. Ibid., at p.700
18. C.A.D., Vol. III, at p.403
19. Ibid.
20. Ibid.
22. Article 12 of the Draft Constitution
23. C.A.D., Vol. III, at p.70-8
24. Ibid., at p.453
25. Ibid., at pp. 454-55
27. Ibid., at p.709
35. W.Friedmann, Legal Theory, 387 (1960)
36. State of Kerala v. N.M. Thomas, AIR 1976 SC 490 at 573 (per Mathew J.)
37. Supra note 33 at p.16.
40. Ibid., See also John Rees on Equality, at p.124.
41. Supra note 36 at 513 (per Mathew J.)
48. For detail see chapter IV (B).
51. Ibid., at p.472.
60. R.C. Cooper v. Union of India, AIR 1970 SC 564.


CHAPTER V (B)
CONSTITUTIONAL PROVISIONS AGAINST DISCRIMINATION ON GROUNDS OF RELIGION, RACE, CASTE, SEX OR PLACE OF BIRTH

The Constitution of India devotes a separate Article for preventing any kind of discrimination on grounds of religion, race, caste, sex or place of birth or any of them. Article 15 of the Constitution consists of four clauses out of which first two provide against discrimination on grounds of religion, race, caste, sex or place of birth in different spheres and the rest deals with the exceptions to which the main provision will not apply originally to this article had only three clauses and the state was permitted to make special provision for women and children. Meanwhile the Supreme Court declared "the Madras Communal Government Order" as ultra vires in The State of Madras v. Champakam Dorai Rajan case as it violated the provision under clause 1 of the Article 15. This judgement of the Supreme Court resulted in the First Amendment Act of 1951 which added clause 4 in Article 15. This new clause had practically cooled down the spirit of the Article itself since right to equality cannot prevent state to make special provision for the advancement of any socially and educationally backward classes. In a caste-ridden society like India Classes have been identified with castes, subcastes and communities. On the importance of caste system in India J.H. Morris Jones has significantly remarked "caste (or sub caste or communities) is the core of traditional politics. To it belongs a complete social ethos. It embraces all and is all embracing. Every man is born into particular caste or group and within it
inherits a place and situation in the society for which his whole behaviour and outlook in ideas, at least to be derived.

Article 15 of the Constitution lays down:

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

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

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

(b) the use of wells, tanks bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the state making any provision for women and children.

(4) Nothing in this Article shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

Clause 2 of Article 29 provides that "No citizen shall be denied admission to any educational institution maintained by the state or receiving and out of state funds on grounds only of religion, race, caste, language or any of them." Here the word 'state' in relation to Fundamental Rights connotes "the Government and Parliament of India and the Government and the legislature of each of the states and all local or other authorities within the territory of India or under the Control of the Government of India."
The word 'discrimination' according to the Oxford Dictionary means to 'make an adverse distinction with regard to or distinguish unfavourably from others'. The prohibited discrimination under Article 15 of the Constitution is limited to specific grounds, eg., religion, race, caste, sex or place of birth. Any discrimination other than those mentioned above has to be viewed under the general Article i.e., Article 14, if it is consistent and reasonable or not. If it is to be found that it is inconsistent and unreasonable with the demands of the changed situation than Article 14 prohibits it.

Protective discrimination is a concept and device which is used for the eradication of present institutionalized effects of the past discriminations, through positive governmental steps awarding preferential treatment in favour of certain weaker sections of the society. Article 15(3) and (4) of the Constitution provides for such protective discrimination. These provisions empower the state to make enactments favouring vulnerable sections of the society.

The notion of protective discrimination aims at unequal treatment of unequals i.e., those who were the victims of man made asperities for centuries together now need to be compensated. Mere proclamation of abstract equality will be of no use to such persons groaning under the weight of objective poverty and deadening influence of backwardness. They need ‘protective discrimination’ or ‘adventitious aids’ to develop their personality and to participate in the mainstream of national life, the way, the Constitution vouchsafes and ordains for them.

The rationale behind preferential treatment of towtrodden and backward classes has very succinctly been pointed out by Justice Sabha Rao; In the race of life, unless adventitious aids are given to the under-privileged people, it would be impossible to suggest that they have equal
opportunities with the more advanced people. This is the reason and the justification for the demand of social justice that the under-privileged citizens of the country should be given a preferential treatment in order to give them an equal opportunity with other more advanced sections of the community.

Protective discrimination aims to be used as an effective measure and balancing wheel between haves and have-nots. It does not rob Peter to give it to Paul, not does it aim to pull down the advanced sections of the society but only to uplift the backward sections, thereof, without unduly and unreasonably affecting the interests of the former.

Protective discrimination intends to direct and empower the state to make special measures for the advantage of the weaker sections. The equality clause aspires to see that backward classes should not remain backward, but must come to the level with the advanced sections of the society. Protective discrimination is a condition precedent for stabilization and strength of the society. It ensures that unequals are not treated as equals.

A perusal of Article 15 reveals that whereas its first clause specifies various prohibitory grounds for the state with in its competence, the second clause restrains both the state and the private individual who may be in control of the public places, as mentioned in the clause concerned. But the third clause provides special power to state to protect women and children. And a special clause four has been added to Article 15 by the 1st. Amendment Act, 1951, so as to provide particular attention to socially and educationally backward classes.

Discrimination is prohibited against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them. It is, however,
permitted in favour of women and children for obvious reasons, and special
provision may be lawfully made for them. This is quite in accordance with
the basic purposes of Constitution as outlined in its preamble, and also
follows as an essential corollary to the principle of secular democracy.

Article 15 is only meant for Indian citizens. Resident aliens in India
do not come with its scope. However this may not deter others from
pointing out to the court when they are directly affected (or prosecuted) that
the law in question is void under the Constitution. Then can, in their
defence, plead the law to be void under Article 15, but they cannot enforce
a fundamental right under that article. In United States of America
persons other than discriminated against can raise the question of validity
of statute or law. But in India only the affected persons under Article 32,
can move to the Supreme Court.

(i) JUDICIAL INTERPRETATION OF ARTICLE 15(4):

Clause 4 of Article 15 is not the original provision of Constitution. It
was inserted according to section 2 of the Constitution (First Amendment
Act) in 1951. The Judgement of the Supreme Court in Champakam
Dorairajan Case and the State of Madras v. C.R.I Srinivasan
necessitated such amendment. The details of the two noted cases are as
follows:

There were four medical colleges in the state of Madras with 330
total number of seats out of which 29 were reserved to S/C’s and S/T’s and
the rest were apportioned among four distinct communities, likewise out of
395 total seats of four engineering colleges 33 were reserved and rest were
apportioned district wise among the different communities of the state.
Before the commencement of the Constitution these seats were filled up
according to the Communal Government Order community wise and also
district wise which are as follows:
Non Brahmin (Hindus) 6, Backward Hindus-2, Brahmins -2, Harijans-2, Anglo Indian and Indian Christians-1 and Muslims-1.

The Candidates for admission were selected on the basis of marks obtained at the last examination but within the community of the district concerned.

The Communal Government Order was challenged in the Madras High Court on the ground of being contrary under Article 29(2) 14 and 15(1) of the Constitution through two writ petitions moved separately on behalf of Champakam Dorairajan a protective candidate for admission in medical college and C.R. Srinivasan who had actually applied for the admission in an Engineering college. The Madras High Court allowed both writ petitions and issued writ of mandamus accordingly. The state of Madras filed appeal in Supreme Court against the two identical judgements of Madras High Court which had quashed the Communal Government Order. The Supreme Court also dismissed both the appeals and held the Communal Governmental Order as violation of Article 29(2) of the Constitution. Justice S.R. Das interpreted clause (1) and (2) of Article 29 as thus:

"It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is the right which an individual has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizens on the grounds only of religion, race, caste, language or any of them."
If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on the ground he certainly cannot be heard to complain of an infraction of his Fundamental Right under this article. But on the other hand, if he has the academic qualifications but is refused admission only on ground of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right”.

The judgement of the Supreme Court was exclusively based on clause (2) of Article 29 which provides that “No citizen shall be denied admission to any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language of them 17. The contention of the petitioner that the Communal Government Order was in conformity with Article 46 of part IV according to which “The state shall promote with special case the educational and economic interests of the weaker sections of the people……” was not accepted and the Supreme Court significantly observed:

“So long as there is no infringement of any Fundamental Right there can be no objection to state acting in accordance with the Directive Principles subject of course to the legislation and executive powers conferred or the state under different provisions of the Constitution. But the chapter on Fundamental Rights is sacrosanct and is not liable to be abridged by any legislative or executive act, except to the extent provided in part III. Hence in case of conflicts between the Directive Principles and the Fundamental Rights the former have to conform to and run as subsidiary to the chapter on FundamentalRights”. 
The Supreme Court had also not accepted the plea that the Communal Government Order was constitutional and valid under clause (4) of Article 16 which empowers the state to make any provision for the reservation of appointment or part in favour of any backward class of citizens. On the other hand it maintained that “the omission of a provision corresponding to Article 16(4) in Article 29 is significant. The reservation for backward classes which was thought necessary for their protection in the matter of appointment was not considered necessary in the matter of admission into educational institutions or aided by the state. Hence seats in such institutions cannot be allotted according to religion, caste or language and a person who is denied admission only on such grounds is entitled to relief from the court”.

Justice Das in his judgement elaborated the facts of case in considerable detail and observed:

“Take the case of the petitioner Srinivasan. It is not disputed that he secured a much larger number of marks than the marks secured by many of the Non-Brahmin Candidates and yet the Non-Brahmin Candidate who secured less number of marks will be admitted into six out of every 14 seats but the petitioner Srinivasan will not be admitted into any of them. What is the reason for this denial of admission except that he is a Brahmin and not a non-Brahmin. He may have secured higher marks than the Anglo-Indian and Indian Christian (S/C) or Muslim Candidate but, nevertheless, he cannot get any of the seats reserved for the last mentioned communities for no fault of his except that he is a Brahmin and not a member of the aforesaid communities. Such denial of admission cannot but be regarded as made on ground only of his caste”.

“It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reason eg., (a) they are
Brahmins have an allotment of only two seats out of 14 and (c) the two seats have already been filled up by meritorious Brahmin candidate. This may be true so far as these two reserved for the Brahmins are concerned but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for, so far as those seats are considered, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom these reservations been made. The classification in the Communal G.O. proceeds on the basis of religion, race and caste. In our view, the classification made in the Communal G.O. is opposed to the Constitution and constitutes a clear violation of the Fundamental Rights guaranteed to the citizen under Article 29(2). In this view of the matter, we do not find it necessary to consider the effect of Article 14 or 15 on the specific articles discussed above.

"For the reason stated above, we are of the opinion that the Communal G.O. being inconsistent with the provisions of Article 29(2) in Part III of the Constitution is void under Article 13".

As a result of above judgements the Constitution was amended for the 1st. Time in 1951 and clause 4 was added under Article 15 according to which nothing in Article 15 or in clause (2) of Article 29 shall prevent the state making any special provision for the advancement of any socially and educationally backward classes of citizens or of Scheduled Castes and Scheduled Tribes. As a matter of fact, when Article 9 of the Draft Constitution was under the consideration of the Constituent Assembly Prof. K.T. Shah through this amendment on 29.11.1948 observed that at the end of clause (2) of Article 9, the following be added:-

"or for Scheduled Castes or backward tribes' for their advantage, safeguard of betterment".
Dr. B.R. Ambedkar opposed the amendment claiming that it might “have just the opposite effect”.

“The object” he continued “which all of us have in mind is that the Scheduled Castes and the Scheduled Tribes” should not be segregated from the general public. For instance none of us I think, would like that a separate school should be establish for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it probably give a handle for a state to say, “well we are making special provision for the Scheduled Caste. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the professor wants it. I, therefore, think that it is not a desirable amendment”.

(ii) ARTICLE 15(4) AND LAND MARK JUDICIAL PRONOUNCEMENTS:

The Madras Communal Government Order was again subjected to judicial review in Katraman v. state of Madras. This time also the Supreme Court declared it beyond the jurisdiction of Article 16(4). In S. Gurumukh Singh v. Union of India and others the Constitution Scheduled Castes Order, 1950 issued by the President under Article 341(1) was questioned as discriminatory. The said order notified 34 different castes of the Punjab to be scheduled castes. Para 3 of the order stated that no person who professes a religion other than Hinduism shall be deemed to be a member of Scheduled Castes. Gurumukh Singh was a Bawaria Sikh and he claimed that discrimination on the ground of religion rendered the order ultra vires. On exception to this was inclusion of the castes viz., Ramdasis, Kabir, Panthis, Mezhabis and Skligars which comprised of both Hindu and Sikhs.
The Supreme Court observed that clause (4) of Article 15 and Article 341 were exceptions to the general rule laid down in 15(1). The power of the President under Article 341 of the Constitution in selecting a caste, or even a group within a caste for special treatment is within his competence. Thus if the President selected four castes and further selected groups within thereby castes in Punjab for their inclusion in the list of Scheduled Castes, it was within the scope of this power and this right of pick and choose was not contrary to the provision of Article 15(1) as regulated by Article 15(4). The court has no authority to go into the question whether a group within a caste is actually backward or not.

On the other hand the court in *Jagwant Kaur Kasar Singh Dang and other v. State of Bombay*[^21], declared the order passed under Bombay Land Requisition Act 33 of 1948 requisitioning land for a Harijan Colony as violation of Article 15(1). Since part IV of the Constitution was subsidiary to part III the provision for promoting educational and economic interest of scheduled castes, scheduled tribes and other weaker sections does not permit the state to make discrimination in favour of scheduled castes in utter violation of Article 15(1). But with the insertion of clause (4) in Article 15 the state can build a Harijan Colony in order to advance the interest of Backward Classes of citizens, or Scheduled castes or Scheduled Tribes as a whole. The Court, however, held that Constitution of a colony only for Harijans was discriminatory as these were other backward classes of citizens too.

Likewise, the Madras Education Rules 92 was challenged in the court of law in *Re Thomas by Father and Natural Guardian S. Masilamans v. State of Madras*[^22] case. Appendix 17 of the said Rule provided a list of Scheduled Castes which included only those who were either themselves or their fathers or natural guardians were converts.
Thomas, a Christian convert boy did not come under the category of Scheduled Castes as only his grandfather was a convert. The court held that concessions cannot be demanded as a matter of right and if under 15(4) special encouragement was given to backward classes and the Government sought to include among them only a particular category of Harijan convert boys and not others, court cannot question it. If the Government made some allowances to recent converts only the petitioner could not claim for the same. He could not be treated as a recent convert. Since his grandfather was converted to Christianity and thus case of discrimination could not be made out.

The underlying question before the Supreme Court in Principal, Guntur Medical College, Guntur and others v. Y. Mohan Rai was: whether a person whose parents belonged to the Scheduled caste before their conversion to Christianity could after regarded as a member of the Scheduled Castes so as to be eligible for the benefit of reservation of seats for Scheduled castes in the matter of admission to a medical college.

The Supreme Court was of the opinion that a person whose parents belonged to a Scheduled Caste before their conversion to Christianity can, on conversion or re-conversion to Hinduism, be regarded as a member of the Scheduled Caste only if he is accepted as a member of that caste by the other members of the caste. Only such acceptance he would be eligible for the benefit of reservation of seats for Scheduled Castes in matter of admission to a medical college.

"In the words of Justice Bhagwati, "It will, therefore, be seen that on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he
would become such member, if the other members of the caste accept him as a member and admit him within the fold." 24. "It is for the member of the case to decide whether or not to admit a person within the caste. Since the caste is a social combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide admit a new member just as it may expel an existing member." 25.

In *Puppala Sudarsan v. State of A.P.* 26 the court of Andhra Pradesh posited that the Fundamental Right of a citizen whether he belonged to a backward community or not, was to secure admission to any educational institution run by the state without his being discriminated on grounds on only of religion, race, caste, or any of them. The state may, in exercises of the powers under article 15(4) direct that certain percentage in each faculty of educational institutions should be reserved for candidates from backward classes without injuring to students of other communities.

In *Ramakrishana Singh Ram Singh v. State of Mysore*, 27 the notification of the Government of Mysore which provided for reservation of a certain percentage of seats in medical colleges to certain classes on grounds of social and educational backwardness was challenged as infringing Article 15(4). The list of backward classes was prepared on the basis of consensus Report of 1941 which included 95% of the total population of the state and only a few castes and communities were left out. The Mysore High Court was of the opinion that determination of backward classes was not based on intelligible principle since it deprived only a few castes and communities from the benefit of reservation of seats in the medical colleges. The court held it more discriminatory against those castes and communities than a provision for the backward classes. More over, it was a provision not for socially and educationally backward classes, but for the classes who were comparatively backward to the most forward
classes. Therefore, the court could not justify the notification of the Government under Article 15(4) and held it void.

In State of U.P. and others v. Pradip Tondon and others 28, the main question for consideration was whether the instructions framed by the state in making reservations in favour of candidates from Rural Areas, Hill Areas and Uttarakhand were constitutionally valid? These reservations were made by the state Government for admission of students to medical colleges in the state of U.P.

The contention on behalf of the state was that the reservations for rural, hill and Uttarakhand areas were for socially and educationally backward classes. It was further argued that these reservations on geographical or territorial basis were also valid. The Judgement of the Court was delivered by the Chief Justice A.N. Roy. It was submitted that the Hill and Uttarakhand areas in U.P. were instances of socially and educationally backward classes of citizens. Backwardness is judged by the economic basis that each region has its own measurable possibilities for the maintenance of human members. The people in the Hill and Uttarakhand areas were educationally backward classes of citizens because lack of educational facilities kept them stagnant and they had neither meaning and values nor awareness for education. Where the people have traditionally apathy for education owing to social and environmental conditions or occupational handicaps, it is an example of educational backwardness. The Hill and Uttarakhand areas were inaccessible. There was lack of educational institutions and educational aids.

It was held that the reservation for rural areas could not be sustained on the basis that the rural areas represented socially and educationally backward classes of citizens. This reservation was made for the majority population of the state 80% of the population in the state of U.P. in rural
areas cannot be a ‘homogeneous class’ by itself. Their occupation and standards were different. Population cannot be a class by itself. Rural element does not make it a class. The special need for medical men in rural area would not make the people in the rural areas socially and educationally backward classes of citizens. “Poverty in rural areas cannot also be the basis of classification to support reservation for rural area. Poverty is found in all parts of India” 29. The Supreme Court further maintained that the reservation of the ground of place of birth violate Article 15. So the reservation of seats for candidates from rural areas was unconstitutional on this ground also because the incident of birth in rural areas was made the basic qualification. The Supreme Court finally held that “the reservations for the Hill and Uttarakhand areas are severable and these are valid 30.

The judgement of the Supreme Court in Balaji V. States of Mysore 31 was a landmark so far as the interpretation of clause 4 of Article 15 is concerned, the fact involved in the case was that the Mysore Government by an order reserved 28%, 22%, 15%, and 3% of the total seats in medical and engineering college respectively for backward class, more backward classes, Scheduled castes and Scheduled Tribes the Supreme Court that this classification was solely based on caste considerations and thus void which interpreting Article 15(4) the Court laid down the following prepositions.

(a) The backwardness under Article 15(4) must be social and educational.
(b) The group of citizen to whom Article 15(4) applies are described as classes of citizens not as castes of citizens. In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of a group of citizens. Though the caste of group of citizens may be relevant its importance not be exaggerated 32.
(c) The sub-classification into backward and more backward classes does not appear to be justified under Article 15(4) and is not warranted by the provisions of Article 15(4)\(^3\). 

(d) That the provision authorized to be made under Article 15(4) is a special provision\(^4\).

The Supreme Court also maintained that in laying down principal for the determination of backward class but also the removal of Causes, which led to the growth of backward should also be taken into consideration. Justice Gajendra Gadhkar was of the opinion that backwardness contemplated under article 15(4) must be social and education.

Article 15(4) authorizes the state to make special Provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes of citizens or for the scheduled classes of citizens or for the Scheduled Castes and Scheduled Tribes\(^5\). But Constitution does not define socially and educationally backward classes of citizens. Therefore, when the question arises whether a particular provision made by the state is valid under Article 15(4) or not, the questions to be determined whether the state has validly determined who should be included in backward class. The Supreme Court held the view that the backward classes, for whom important special provision is contemplated by Article 15(4) should be in the matter of their backwardness comparable to the Scheduled Castes and Scheduled Tribes.

According to the Court, social backwardness was the result of poverty\(^6\) place of habitation of a community of persons\(^7\), place of habitations of a community of persons\(^8\) in the society. The problem of rural India is such that certain classes of citizens in rural area really socially backward ward and would fall with in the purview of Article 15(4).
As regard the educational backwardness the court observed that the state average of student population should be taken as a test for determining the educational backwardness of a community or castes. A community or caste which confronts to such as average cannot be regarded as educationally backward classes of citizens. The Supreme Court further held that a caste or community the average of student population of which is less than 50% of the State average should be included in the list of educationally backward classes.

In Chitralekha v. State of Mysore, the Supreme Court did not lay down any new proposition as to how a state make a special provision under Article 15(4). This clause explained the earlier decision of the Supreme Court in Balaji v. State of Mysore. The Supreme Court held that a special provision made for backward classes would be valid under Article 15(4) irrespective of the fact that caste had not been taken into consideration in determining the socially and educationally backward classes.

In the two cases, namely, P. Rajendran and others v. State of Madras and others and State of A.P. and another v. P. Sagar decided by the Supreme Court, in 1968 it laid down new propositions as to how a list of backward classes could be prepared having consistency with the provisions of Article 15. In both cases the Supreme Court took the view that a socially and educationally backward classes could be prepared having consistency with the provisions of Article 15. In both the cases the Supreme Court took the view that a list of socially and educationally backward classes could be specified by castes provided that the list was not based on caste alone. In the latter case, the Supreme Court took the view that, when a question arose whether a law which prima facie infringed a guaranteed Fundamental Right is within an exception, the court could call
for materials to satisfy itself that the law was validly made and falls within the exception.

The question here, to be examined is to how far the proposition laid down by the Supreme Court in the above two cases that a list of socially and educationally backward classes could be caste wise or community wise is consonant with the propositions laid down in the earlier decisions of the Supreme Court in the cases, namely, *Balaji v. State of Mysore* and *Chitralekha v. State of Mysore*. It was held in *P. Rajendran* and others that a caste was a class of citizens and if the caste as a whole was socially and educationally backward, reservation could be made in favour of such a caste on the ground that it was a socially and educationally backward class of citizens within the meaning of Article 15(4).

The next question is related to the effect of the Principles enunciated in *P. Rajendran and others v. State of Madras and others, and State of A.P. and another v. P. Sagar*. It may be that there are castes whose members as a whole are socially and educationally backward. As there will be classes of persons who are socially and educationally backward but such classes may not fall within any caste or community. If the list of socially and educationally backward classes can be made caste wise or community wise it will definitely leave out the above two categories. Persons who are socially and educationally backward but do not belong to a caste or community whose members as a whole are socially and educationally backward and also persons who are socially and educationally backward but do not come within any caste or community will be left out of the protection given under Article 15(4) similarly it should not be forgotten that if a list of socially and educationally backward class of persons in drawn caste wise or community wise for giving protection under Article 15, it will only perpetuate the caste system and will hinder the movement towards
an egalitarian society, which is the objective of the Constitution makers to achieve. Therefore, although the principles laid down by the Supreme Court in *P. Rajendran and others v. State of Madras and state of A.P. and another v. P. Sagar* are not inconsistent with the principles for determining educationally and socially backward classes for the purpose of Article 15(4) so that no one who is socially and educationally backward is left out of the protection under Article 15 that is to say the very concept of equality.

The facts of the case in *Kumari Jayashree v. State of Kerala* in brief were as follows:

The petitioner applied for admission to the M.B.B.S. Course for 1975-76 in one of the Medical Colleges of Trivandrum in the State of Kerala, clause 9 Sub Clause (iv) of the prospectus for admission provided among other things that the applicant should produce certificate of community and income (from all sources) in the prescribed form in the case of candidates belonging to the communities recognised by the Government as socially and educationally backward classes. The petitioner produced the certificate from the Tahsildar, claiming that the total income of the family from all sources was Rs. 11,752 for the year 1975-76 and that she was an Ezhava.

Moreover, the minimum marks prescribed for candidates belonging to Ezhava community in the state was 363 in the optional subjects of Physics, Chemistry and Biology. The Petitioner obtained 372 marks. The Petitioner alleged that the list of candidates belonging to the Ezhava/Thiyya Community selected for the seats reserved for them under Article 15(4) of the Constitution was published on 10 October, 1975 and the petitioner was not selected though candidates belonging to Ezhava community who had obtained less marks than the petitioner had been selected. The petitioner
further alleged that the list showed that candidates Nos. 6 to 27 obtained marks ranging between 371 and 357. The Principal Medical College communicated to the petitioner that, as her income exceeds Rs. 10,000 her case could not be considered under reservation scheme.

On 2 May, 1966 the state Government issued an order inter alia, that only applicants belonging to Ezhavas, whose aggregate annual income was below Rs. 6,000 could be entitled for admission to the seats reserved for students belonging to the socially and educationally backward class.

The said order of the Government was challenged in the Kerala High Court. The learned Judge quashed the Government Order by decision dated 24 February, 1975 reported in AIR 1975 Kerala, p.131. The state filed an appeal. The validity of the Government Order dated 2 May, 1966 was upheld by the Kerala High Court. The decision of the High Court dated July, 1975, reversing the judgement of the learned Judge is reported in State of Kerala v. Krishna Kumar. The High Court held that "economic backwardness plays a part in social and educational backwardness. Poverty or economic standards is a relevant factor. Economic backwardness contributes to social backwardness."

The petitioners contented that there are no reason to exclude an insignificant part of the community on the basis of income alone. The petitioner laid emphasis on the fact that if the socially and educationally backward classes were set out in the annexure, income cannot be the criterion of admission to determine the benefit of Article 15(4).

The contention of the state was that the Government Order dated May 2, 1966 was not in a violation of Article 15(4) because the expression "backward class" in Article 15(4) is not used as synonymous, with backward caste or backward community. The members of an entire caste or community may in social, economic and educational scale of values, at a
given time be backward and may on that account be treated as a backward class. The reason is that they were treated as socially and educationally backward not because they were members of a caste or community but because they formed a class.

The court held that 'in ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot, however be made the sole or dominant test. Social backwardness is the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness.

The Court further held that "the problem of determining who are Socially and educationally backward classes is undoubtedly not simple. Sociological and economic consideration come into play in evolving criteria for its determination." This is the function of the state. The Courts Jurisdiction is to decide whether the tests applied are valid. If it appears that tests applied are proper and valid the classification of socially and educationally backward classes based on the tests will have to be consistent with the requirements of Article 15(4).

In A. Periaruppan V. State of Tamil Nadu The Supreme Court held that
The classification of backward classes an basis of Caste in well within the purview of Article 15(4) provided that these castes are shown to be Socially and educationally backward. Reservation of seats should not be allowed to became vested interest. The Government decision in this regard is open to judicial review.
In State of A.P V. US. V. Balaram, the supreme Court reiterated and said that sole test for ascertaining whether a particular class is backward or not, yet if an entire caste, as a fact, found to be socially and educationally backward classes by their name is not violative of Article 15(4). If once a class appears to have been reached a stage of progress from which it could be safely inferred that no further protection is necessary the state will also do well to review such instances and suitably revise the list of backward classes.

In Arti V. State of J & k, the Supreme Court held that the classification made for rectification of regional imbalance without identification of the areas suffering from imbalance was vague and arbitrary and therefore violative of Article 15(4) of the constitution. It was held that there was no material before classifying villages as socially and educationally backward areas and hence the classification was arbitrary and Unconstitutional.

Similarly in Suneel Jatley V. state of Haryana, It was held that the reservation of Seats of admission to M.B.B.S and B.D.S course for students Who received education from class I to VIII in Common rural area Schools was held to be violation of Article 15(4).

In Padmraj Samarendra V. State, the Patna High Court upheld the reservation of ‘Cultural Seats’ for the admission to the Medical College.

In State of M.P V. Nivedita Jain, The Supreme Court upheld the Validity of an Executive order of the state Government which had completely relaxed minimum qualifying mark in pre-medical examination for selection of students of medical Colleges of the state in Scheduled Caste and Scheduled Tribes Candidates the High Court struck down the order as violation of Article 15(4) on appeal, the Supreme Court held that the regulation relating to condition to minimum qualifying marks was merely
directory and not mandatory and hence the executive order completely relaxing the minimum qualifying and Article 15(4). Under this Article, the state is obliged to do every thing possible for the upliftment of the Scheduled Castes and Scheduled Tribes and other backward communities and is entitled to make reservation for them. In the absence of any law to the contrary, it is open to the Government to impose such condition as would make the reservation effective.

In Amalendu Kumar V. State of Bihar, the Patna High Court held that the reduction of qualifying marks in favour of Scheduled caste and Scheduled Tribes by an executive order on the ground that the seats reserved for these categories would remain Unfilled was violative of Article 15(1).

In Dr. Neelima v. Dean of P.G. Studies A.P. Agriculture University Hyderabad, it has been held that a high caste girl marrying a boy belonging to Scheduled Tribe is not entitled to the benefit of reservation available to schedule tribes. The appellant was born in Reddy Caste which is a forward class and married to a Erukala Tribe boy one of the Scheduled Tribe in the state of Andhra Pradesh. After marriage she sought admission to M.Sc. Course in the Agriculture University Hyderabad under reservation quote for Scheduled Tribes. The court held that she was not entitled to get the benefit of reservation available to the Scheduled Tribes.

In a significant judgement a five Judges bench of the Supreme Court has held that a person belonging to Scheduled Caste or Scheduled Tribe, bearing the same name in two state is entitled to the rights and privileges and benefits only in the State of his origin and not be available to him after he migrates to other states though they are specified in the SC and ST list of that state. The Court said:
"Coincidentally it may be that a caste or tribe bearing the same name is specified into two states but the consideration on the basis of which they have been specified may be totally different".

This is clear from the language used in Article 341 and 342 of the constitution. These very Articles clearly state that the present may specify the caste or tribes as the case may be, in relation to each state or Union Territory for the purposes of the Constitution. Besides, before specifying the castes or tribes under either of the two article the President, is obliged to consult Governor of that state. Therefore when a class is specified by the President, after consulting the Governor of the state, it is difficult to understand how that specification made "in relation to that state" can be treated as specification in relation to any other state whose Governor the President has not consulted.

In Anil Kumar Gupta v. State of U.P. 58, the validity of reservations to medical courses, for the year 1994-95 made by U.P. Government was challenged on the ground that it was contrary to the decision of the Supreme Court in Indira Sawhney v. Union of India. As a result of the above reservation policy 60% of seats were reserved in favour of various classes/ categories leaving only 35% for open competition category. The reservation provided in the policy was as follows (1) Backward classes 27% (2) Hill Region 3% (3) Uttarakhand Region 3% (4) Scheduled Castes 21% (5) Scheduled Tribes 2% (6) Real dependent of freedom fighters 5% (7) Son/Daughter of soldier died in war/handicapped soldiers 2% (8) For handicapped candidates 2% total 65%.

A further reservation of 30% in favour of women was also provided in each of the following above categories. Pending the petition of the Govt. modified the reservation policy and horizontal reservation was provided in
all medical colleges on total seats of all courses. It was provided that the reservation for (1) Real dependents of freedom fighters 5% (2) Sons/Daughters of deceased /disabled soldiers 2% (3) Physically handicapped candidates 2% (4) Candidates belonging to hill areas 3% (5) Candidates belonging to Uttaranchal areas – would be horizontal and the candidates of these categories selected on the basis of merit would be kept under categories of SC’s/ST’s other backward classes categories to which they belong. The reservation in favour of women was removed from all reserved categories. Later a corrigendum was also issued stating that the reservation in favour the above five categories shall be horizontal and not vertical reservations. It was also clarified that if any candidate belonging to SC/ST’s are OBC categories is selected in open competition on the basis of merit, then he will not be adjusted in seats for categories concerned. The court held that the horizontal reservation of 15% seats for special categories was excessive and has resulted in reduction of seats available for open categories. A separate horizontal reservation of 6% and 15% for special categories, i.e. candidates of hill areas and Uttrakhand apart from and in addition to 27% reservation of OBC’s is clearly illegal. The reservation for these categories be treated as that in Article 15(4) of the Constitution and not under Article 15(1), i.e., they are reservation in favour of society and educationally backward proper and correct course for filling the seats is to first fill up the open category quota (50%) on the basis merit and then fill up each of the special reservation quota i.e., SC, ST and BC, and third step should be to find out how may candidates belonging to special reservations have been selected on the above basis. If the fixed quota for horizontal reservation is already satisfied no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social
reservation categories deleting the corresponding number of candidates there from. Despite the aforesaid errors in the rule of reservation the court held that it was not advisable to interfere with the admissions already finalised. The method laid down by the Courts is more for the purpose of future guidance for the respondents. To rectify the injustice done to the open competition candidates in the admissions the court directed that in the matter of admissions made to CPMT – 1994 while the admissions already finalised shall not be disturbed. The U.P. Government to create 34 additional seats in the MBBS Course and admit from the open category against those seats. If any seat are vacant on the date of the present judgement they shall also be filled from the open category alone. This criterion of additional seat is confined to current session only.

Thus the cases examined above establish the principles in which classification of backward classes is currently being made may result in denial of equality. This is due to the fact that socially and educationally backward classes have not been well defined in the constitution. Dr. B.R. Ambedkar observed in the Constituent Assembly:

"Somebody asked me, "what is a backward community?"
Well, I think, any one who reads the language of the draft will find that we have left it to be determined by each local government. A backward community is a community which is backward in the opinion of the Government". Thus, since the State Government have the power to classify the "socially and educationally backward classes" the classification must be arbitrary and deprive the genuinely socially and educationally backward classes of the benefit of Article 15(4).

It is therefore suggested that these classes be defined precisely
notwithstanding the fact that judicially review acts as a check on arbitrary classifications”.

(iii) RESERVATION FOR SC’s, ST’s AND OBC IN SUPER SPECIALITY COURSES:

In a significant judgement, the Supreme Court has ruled that merit alone can be the criteria for selecting students to super specially courses in medical and engineering. “At the level of admission to the super speciality courses, no special provisions are permissible ⁶⁰.

The Supreme Court has placed the national interest above social and other interests in ruling that special provisions like reservation for SC’s ST’s or other backward classes (OBC’s) were not permissible in admissions to super speciality courses in medical and engineering. Merit alone can be basis of selection ⁶¹.

The Supreme Court’s pronouncement followed a batch of petitions challenging the Uttar Pradesh Post Graduate Medical education (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act and a Madhya Pradesh Government order that had lowered the cut of percentage for reserved category candidate to appear in Post Graduate Medical Entrance examination.

By a 4:1 majority, the court held there cannot be a wide disparity between the minimum qualifying marks prescribed for the general and reserved category even for admission to the Post Graduate level in medicine. The court said, ‘Admission to the highest “valuable medical courses in the country at the super speciality levels, where facilities for training are limited, must be given only on the basis of competitive. There can be no relaxation at this level”.


The court directed the Medical Council of India (MCI) to examine whether minimum qualifying marks for the reserved category candidates could be prescribed Post Graduate medical courses. The Bench comprising Chief Justice Adarsh Sein Anand, Justice S.B. Magimdar, Justice Sajata v. Monohar, Justice K. Venkataswami and Justice V.N. Khare disposed of a batch of appeals, writ petitions and review petitions concerning admissions to medical and engineering courses in various states.

The Court struck down the Uttar Pradesh Post Graduate Medical Education (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1997, which reduced the minimum qualifying marks from 35 to 20% for reserved category candidates for admission to post graduate medical course. It also struck down the Madhya Pradesh Government order of June 7, 1997, prescribing minimum qualifying marks for the reserved categories. The court also disapproved the disparity in qualifying marks for the general and reserved categories. It said that the percentages of 20 for the reserved category and 45 for the general category are not permissible under Article 15(4), the same being unreasonable at the post graduate level and contrary to national interest”.

“The marks cannot be lowered further for admission to post graduate medical courses, especially when at the super speciality level it is the unanimous view of all then judgements of this court that there should be no reservations.” The court added. The court however, pending consideration of the question of qualifying marks for admission to post graduate medical courses by the MCI, UP and MP governments may follow the norms laid down by the MCI for lowering of marks for admission to undergraduate MBBS course as a temporary measure.

Thus it is clear that the purpose of reservation was to ensure that reserved category candidate with the requisite training and callibre to
benefit from post graduate medical courses and rise to the expected standards were denied this opportunity by making them compete with general category candidate. The court explained. "The general category do not have any social disabilities which prevent them from giving their best. The special opportunities which are provided to those who are substantially below the levels prescribed for general category candidates, it said. It would not be possible for such candidate to fully benefit from the very limited and specialised post graduate training opportunities.

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CHAPTER- V (C)
EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT

Equality of opportunity in matters of Public employment may be regarded as an important right of citizens in a democracy to create a social order in social economic and political justice is attained for all. The Constitution of India provides this right under Article 16 which contain five clauses. The first two clauses lay emphasis on equality of opportunity in matters of employment without any discrimination on grounds of religion, race, caste, sex, descent, place of birth or residence. Other clauses however, provide certain exceptions to which equality of opportunity for all citizens shall not apply. The different clauses of Article 16 are as follow:

“(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 citizens shall, 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 of office under the state.”

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office, (under the Government of or, any local or other authority within state or Union Territory, any requirement as to residence within that state or Union Territory) prior to such employment or appointment”. 
(3) Nothing in this article shall prevent the state from making an provision for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the state, is not adequately represented in the services under the state.

(4) Nothing in this article shall effect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religion or denominational institution or any member of the governing body there of shall be a person professing a particular denomination.

Prior to the enactment of the Constitution, equality of opportunity in matters of public employment was guaranteed under section 278 and 298(i) of the Government of India Act, 1955. Sec.275 laid down that “A person shall not be disqualified by sex for being appointed to any civil service of or civil post under the crown in India .......” Section 298 (i) further provided that “No subject of his Majesty domiciled in India shall on grounds of religion, place of birth, descent, colour or any of them be ineligible for office under the crown in India”.

In this connection reference may also be made to Article 335 of the Constitution that runs as follows:

“The claims of the members of the Scheduled Castes and the Scheduled Tribes shall taken into consideration consistently with the maintenance of efficiency of administration in making of appointments to services and services and posts in connection with the affairs of the Union of a state”.
The main aims of the above mentioned clauses is to provide equality of opportunity to each and every citizen of India in matters of public employment, irrespective of his, religion, race, caste, sex or place of birth. No discrimination is ordinarily permissible on ground of residence but Parliament may frame a law under clause 16(3) providing for residential qualification as essential for certain types of appointment in the clause concerned. The word residence in clause (2) and clause (3) was inserted in Article 16 by the constituent Assembly on November 30, 1948 through an amendment based on the motion of Yaspal Roy Kapoor and views expressed by K.M. Munshi and Alladikrishna Swami Ayyar. While insisting for insertion of the word residence in clause[2] of Article 16 Kapoor observed that his object was to ensure that "every citizen of the country, wherever he might be living should have" an "equal opportunity of employment under the state Anywhere in the country", and that "there being only one citizenship of the whole country it should carry with it the unfettered right and privilege of employment in any part and in every nook and corner of the country".

Unluckily, he proceeded, "for sometime past we have been observing that provincialism has been growing in this country. Every now and then we hear the cry, "Bengal for Bengalis' 'Madras for Madrasis' and so on so forth. This cry is not in the interest of the unity of the country or in the interests of the solidarity of the country. I can easily understand a Provincial Government laying it down as a rule that only those who possess adequate knowledge of the provincial language shall be eligible for employment in the province. I can also understand a rule being laid down that a person who wants employment in the province should have adequate knowledge of the local conditions. All that is easily understandable in the interests of the efficiency of the services."
therefore submit that in the matter of employment there should be absolutely no restriction whatsoever unless it is necessary in the interests of the efficiency of the services. The unity of the country must be preserved at all costs. We must do everything in our power to preserve the unity of the country, and the amendment that I have moved aims at this and is a step in this direction”.

Dr. B.R. Ambedkar while accepting the motion of Kapoor as amended by K.M. Munshi and Alladi Krishna Swami Ayyar significantly observed:

“It is the feeling of many persons in this House that, since we have established a common citizenship throughout India, irrespective of the local jurisdiction of the provinces and the Indian states, it is only a concomitant thing that residence should not be required for holding a particular post in a particular state because, in so far as you make residence a qualification, you are really subtracting from the value of a common citizenship which we have established by this Constitution or which we propose to establish by this Constitution. Therefore, in my judgement, the argument that the residence should not be a qualification to hold appointments under the state is a perfectly sound argument. At the same time, it must be realised that you cannot allow people who are flying from person to another, from one state to another, as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for posts and so to say, take the plums and walks away.
Therefore, some limitation is necessary. It was found, when this matter was investigated, that already today in very many provinces rules have been framed by the provincial governments prescribing a certain period of residence as a qualification for a post in that particular province. Therefore, the proposal in the amendment that, although as a general rule residence should not be a qualification, yet some exception might be made, is not quite out of the ordinary. We are merely following the practice which has been already established in the various provinces. However, what we found was while different provinces were laying down a certain period as qualifying period for posts, the period varied considerably. Some provinces said that a person must be actually domiciled what that means, one does not know. Others have fixed ten years, some seven and so on. It was, therefore, felt that while it might be desirable to fix a period as a qualifying test, that qualifying test should be uniform throughout India. Consequently, if object is to be achieved, viz., that the qualifying residential period should be uniform, that object can be achieved only by giving the power to the parliament and not giving it to the local units, whether provinces or state. That is the underlying purpose of this amendment putting down residence as a qualification”.

(i) JUDICIAL INTERPRETATION OF ARTICLE 16(4):

Article 16(4) is an exception to the general rule embodied in Article 16(1) and 16(2). It expressly permits the state to make
provision for the reservation of appointments or posts in favour of any backward classes of citizens which are not adequately represented in the services under the state. The power conferred can only be exercised in favour of the backward classes. The state has to decide which particular class of citizens is backward. In order to apply Article 16(4) two conditions must be satisfied:

1) **There must be a class of citizens which is backward both socially and educationally. That backward class must not be adequately represented in the services under the state.**

2) **While ascertaining whether a particular class is a backward class or not the principle laid down in M.R. Balaji v. State of Mysore will apply.**

The expression “backward class of citizens” under Article 16(4) is vague and may lead to a lot of confusion. Some members of the Constituent Assembly also observed that in the absence of a clear definition “the term ‘backward class of citizens’ might be subjected to different interpretations and might ‘lead to lot of litigation’” Dr. B.R. Ambedkar however did not agree with them when he said: “My honourable friend, M.T.T. Krishnamachari asked me whether this rule will be justiceable. It is rather difficult to give a dogmatic answer”. Personally, I think it would be a justiceable matter. If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is a such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government
has acted in a reasonable and prudent manner". One can hardly agree with this view of Dr. B.R. Ambedkar. In fact, in the absence of any definite criteria for judging the backwardness of a class of citizens, one fails to see. How the court of law can help in this matter. As a matter of fact, there will be no precise and unchanging, yardstick for judges to act upon in this matter. Consequently, the interpretation of Article 16(4) will vary from case to case and the judges will have wide discretion while applying it.

However, Dr. B.R. Ambedkar while replying to the debate in the Constituent Assembly made the forthcoming observation:  

"I should like to begin by making some general observations so the members might be in a position to understand the exact import, the significance and the necessity for using the word 'backward' in this particular clause ....... There are three points of view which it is necessary for us to reconcile. If we are to produce a workable proposition which will be accepted by all, of the three points of view, the first is that there should be equality of opportunity for all citizens. It is the desire of many members of this house that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualification tested so as to determine whether he is fit for the post or not and there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly share by a section of the House is that, if this principle is to be operative and it ought to be operative in their
judgement to its fullest extent there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. The Drafting Committee had to produce a formula which would reconcile these three points of view."

Moreover, he gave the following explanation for inserting the term “backward class of citizens”. If honorable members will bear these facts in mind – the three principles, we had to reconcile, - they will see that no better formula could be produced than the one that is embodied in such clause (3) of Article 10 of the Constitution, they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a genetic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which now – for historical reasons – been controlled by one community or a few communities, that situations should disappear and that the others also must have an opportunity of getting into the public services. Suppose, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest
extent. What would really happen is, we shall be completely
destroying the first preposition upon which we are all agreed,
namely that there shall be an quality of opportunity..........
Therefore, the seats (posts ?) to be reserved, if the reservation is to
be consistent with sub clause (1) ¹³ of Article 10, must be confined
to a minority of seats (posts ?). It is then only that the 1st. Principle
could find its place in the Constitution and (be) effective in
operation. If honorable members understand this namely, the
principle of equality of opportunity and at the same satisfy the
demand of communities which have not so far representation in the
state, then, I am sure they will agree that unless you use some such
qualifying phrases as ‘backward’, the exception made in favour of
reservation will ultimately eat up the rule altogether. Nothing in this
rule will remain. That I think, if I am to say so, is the justification
why the Drafting Committee under look on its own shoulders the
responsibility of introducing the word ‘backward’, which, I admit
did not originally find a place in the fundamental right in the way
which it was passed by this Assembly........... I think this is,
sufficient to justify why the word “backward” has been used,” ¹⁴.

This is quite evident from the above statement of the
Chairman of the Drafting Committee that clause (4) of Article 16 of
the Constitution which corresponds to clause (3) of Article 10 of
the Draft Constitution in a sort of compromise between the demand
for the reservation of posts in the services of the state in favour of
certain communities which are not adequately represented in state
services owing to their social, educational, economic and political
backwardness.
However, it must be mentioned here that, although the reservation of posts in favour of ‘backward classes’ of citizens is constitutionally permissible, the state cannot reserve any post or appointment on religious or communal grounds, except as allowed for the Anglo-Indian community under Article 336 of the Constitution for a short period. This principle was clearly laid down by the Supreme Court in *Venkataramana v. State of Madras* 15. The facts of the case were as follows:

“The Madras Public Service Commission by a notification dated December 16, 1949 invited applications for 83 posts of District Munsiffs under the Madras Subordinate Civil Judicial Service out of which 12 were to be filled up by those already working in the Madras Civil Judicial Department and for the rest direct recruitment were to be made from among the official receivers, Assistant Public Prosecutors and Practicing members from that bars. It was further notified that selection of candidates were to be made on caste and communal basis in pursuance of the rules prescribed under Communal Government Order according to the following ratio:

Harijan – 19, Muslim-5, Christians-6, Backward Hindus-10, Non-Brahmin Hindus-32 and Brahmins-11.

Further more, different age limits were prescribed for communities other than Harijans and Backward Hindus and no age limit was fixed in the case of the latter. The petitioner Venkataraman would have been selected on the basis of marks secured by him in the competitive test but for the Communal Government Order he was denied appointment for the post of District Munsif. Consequently, he moved for the writ petition under Article 32 of the Constitution alleging infringement of his fundamental right to
equality in matters of employment and prayed for questioning the Communal Government Order as violation of the Constitution.

"The Constitution by Article 16, specifically provides for equality of opportunity in matters of public employment. The relevant clauses are as follows: Clause(4) expressly permits the state to make provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state, is not adequately represented in the services of the state. Representation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional. The Communal Government Order itself makes an express reservation of seats for Harijans and Backward Hindus. The other categories, namely, Muslim, Christian, Non-Brahmin, Hindus and Brahmins must to taken to have been treated as other than Harijans and Backward Hindus. Our attention was drawn to a Schedule of Backward Classes set out in schedule III to Part-I of the Madras provincial and Subordinate Services Rules. It was therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in the schedule. It is, in the circumstances, impossible to say that classes of people other than Harijans and Backward Hindus can be called Backward class. As regards the post reserved for Harijans and Backward Hindus. It may be said that the petitioner who does not belong to those two classes is regarded as intelligible for those reserved posts not on the ground of religion, race, caste etc., but because
of necessity for making a provision for reservation of such posts, in favour of a backward class of citizens but the ineligibility of petitioner for any of the posts reserved for community other than Harijans and Backward Hindus cannot be regarded as founded on the ground only of his being a Brahmin. For instance the petitioner may be for better qualified than a Muslim or a christian or a Non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment, as is conceded by the learned Advocate – General of Madras, but, nevertheless, he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the posts reserved for the other communities, although he may have for better qualifications than those possessed by members falling within those categories, is brought about only because he is a Brahmin and does not belong to any of those categories. This ineligibility created by the Communal G.O., does not appear to us to be sanctified by Article 16(4) and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16(1) and (2). The Communal G.O. in our opinion, is repugnant to the provisions of Article 16 and is an such void and illegal ......... We, therefore, direct the respondents to consider and dispose of the petitioner's application for the post after taking it on its merit and without
applying the rule of Communal rotation. The petitioner will be entitled to his costs of this application.

Likewise the scope of Article 16(4) was defined by the Madras High Court and the Supreme Court in the General Manager, Southern Railway v. Rangachari 17. According to this case the Railway Board reserved certain posts of selection grade in class III of the Railway Services for Scheduled Castes and the Scheduled Tribes. It issued a number of circular prescribing a quota of reservation in the above mentioned service with retrospective effect. The petitioner Rangachari was adversely affected by such sort of reservation and thus filed a writ petition in the Madras High Court which held the circulars of the Railway Board as infringement of Article 16(4).

The case come before the Supreme Court for hearing in the form of appeal and the majority judgement reserved the judgement of Madras High Court. The court come to the conclusion that the power of reservation conferred on the state under Article 16(4) were exercisable not only in the case of initial appointments but also in the case of selection grade.

On the other hand, the Supreme Court in Devadasan v. Union of India observed that reservations for backward communities should not interfere with the rights of the other communities 18. According to this right the Union Public Service Commission issued a notification regarding reservation of certain percentage of posts for Scheduled Castes and Scheduled Tribes. This notification was based on the resolution of the Minority of Home Affairs described as the rule of “carry forward”, that is to say, that if a sufficient number of candidates of Scheduled Castes and Scheduled Tribes were not available for appointment to the reserved posts the vacancies were to be filled up by the general candidates. However, equivalent number of vacancies would be reserved in the following year of
Scheduled Castes and Scheduled Tribes in addition to their reserved quota of that year. However, the Supreme Court held that the rule of "carry forward" as unconstitutional. It observed that recruitment of each year must be considered by itself while making appointments, and reservation for a particular year should not be so excessive as to give monopoly to them over appointments and thereby interfere with the legitimate claims of other communities.

In *C.A. Rajendran v. Union of India* and others, it was stated that the official memorandum provided reservations for the Scheduled Castes and Scheduled Tribes only in class III and IV services and Government Servants belong to the Scheduled Castes and Scheduled Tribes were deprived of benefit of such reservations at the time of appointments for class I and II posts. It was alleged that the official memorandum was discriminatory and violated Article 16(4). The Supreme Court while dismissing the writ petition observed that Article 16(4) did not guarantee such right to the petitioner and there was no constitutional obligation on the part of the state to make reservation for the backward classes either at the initial stage or at the stage of promotion. Moreover, the claims of the members of Scheduled Castes and Scheduled Tribes should be taken into consideration to the extent which is consistent with the maintenance of efficiency in administration while making appointments to services and posts related to the affairs of the state.

Likewise, the distribution of posts to Muslims, Jammu Hindus and Kashmiri Hindus in the ratio of 50:40:10 by the Government of Jammu & Kashmir was challenged in *Triloki Nath v. State of Jammu and Kashmir*. The Supreme Court admitted the right of the state to make provision for reservation in favour of backward classes but mentioned that the distribution of total number of posts for appointment on the basis of
common unity or place of residence was against the constitutional guarantee under Article 16(2) and 16(4).

The Supreme Court declared that Jammu and Kashmir Civil Services (classification, control and Appeals) Rules, 1976 as ultra vires in Janki Prasad Parimoo and others v. State of Jammu and Kashmir and others on the basis of judgement earlier pronounced by it in Makhan Lal Waza v. State of Jammu and Kashmir. The above said Rules provided reservation in favour of any backward class, which in the opinion of the Government, was not adequately represented in the service. Promotions were to be made on the basis of merit-cum-seniority. However, the state Government followed the communal pattern of appointments and promotions reserving 50% for Muslims, 40% for the Hindus of Jammu and remaining 10% for Kashmiri Pandits, Sikhs and other minority community. The Supreme Court while declaring the above said rules as unconstitutional made the following observation.

“Mere educational backwardness or the social backwardness which makes a class of citizens backward, the class identified as a class as above must be both educationally and socially backward”.

Further, ‘backward classes must be comparable to Scheduled Castes and Scheduled Tribes’.

Likewise the Allahabad High Court declared the orders issued by the U.P. Government in 1955, 1958 and 1977 providing for reservation for backward classes in Government services as unconstitutional. The facts of the case Chottey Lal Pandey and others v. State of U.P. are as follows.

The Government of U.P. through its several order issued in 1955, 1958 and 1977 provided for reservation for the backward classes in Government services. According posts in the state (i) judicial services were
reserved for the backward class, dependents of freedom fighters as well as detenus of M.I.S.A. and D.I.R. and other dependents. A competitive examination was held in 1977 to fill up 150 posts in the Judicial Service out of which 23, 12, 8, 27 and 3 were reserved for backward classes, disabled officers of the armed forces, dependents of freedom fighters, Scheduled Castes and Scheduled Tribes respectively. Chottey Lal Pandey and six others who had appeared in that competitive examination challenged the orders of the State Government as violation of Article 16 in Allahabad High Court through a writ petition.

Two judges of the Allahabad High Court viz., T.S. Misra and K.N. Goel while declaring the orders of the State Government providing for reservations for backward classes in Government services as ultra vires observed.

"Having given our thoughtful consideration, we are driven to the irresistible conclusion that the Government orders dated September 6, 1955, September 17, 1958 and August 20, 1977 are a fraud on the Constitutional powers conferred on the State under Article 15(4) and 16(4) of the Constitution in the sense that the expression (backward classes) have been defined in the Balaji Sapra case and are, as such invalid". They were however, of the opinion. "It will, of course, be open to the Government to pass fresh orders for reservation after identifying backward classes through proper investigation and inquiry".

The Court did not agree with the definition of backward classes as given by the State Government which also included Adhirs and Kurmis and who were not economically and socially backward. As a matter of fact,
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The Court did not agree with the definition of backward classes as given by the State Government which also included Adhirs and Kurmis and who were not economically and socially backward. As a matter of fact,
a caste is considered backward class then should continue to backward for all time. The Government should review the list and if a class reaches the state of progress where reservation is not necessary it should delete of that class from the list of the backward classes.

The power of reservation which is conferred on the state under Article 16(4) can be exercise by the state not only for providing reservation in appointment but also in selection posts. Thus selection posts can also be reserved for backward classes. In matter of filling selection posts, the question of seniority is not relevant but selection, is made solely on merit basis.

In *State of Kerala V.N.M. Thomas*, the important question which come up was whether it was permissible to give preferential treatment to Scheduled Castes and Scheduled Tribes under Article 16(1) i.e., outside the exception of Article 16(4). A seven members bench of the Supreme Court by a majority of 5:2 held that the classification of employees belonging to Scheduled Castes and Scheduled Tribes for following them an extended period of 2 years for passing tests for promotion from other classes of employees was a just and reasonable classification because the temporary relaxation of test qualification to Scheduled Castes and Scheduled Tribes was warranted in view of their overall backwardness. Thus accordingly to the majority reservation for backward classes may be made even outside the scope of 16(4) and therefore rules and order were not violative of Article 14, and 16(2) and valid. This is the new interpretation of Article 16(1).

In *A.B.S.K. (Rly) v. Union of India*, the Supreme Court following Thomas Case upheld the validity of the Railways Board Circular under which reservations were made in selection posts for Scheduled Castes and Scheduled Tribes candidates. The court held that under Article
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without application of means test. Another 15 years will it so from the commencement of the Constitution, a period which is reasonably long for these classes to overcome the baneful effects of social oppression, isolation and humiliation.

(2) The means test is the test of economic backwardness which is ought to be applicable even to Scheduled Castes and Scheduled Tribes after 15 years (after 2000 A.D.)

(3) For other backward classes two tests should be satisfied:

(i) That they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness.

(ii) That they should satisfy the means test such as the state Government may lay down in the context of prevailing economic conditions.

(4) The policy of reservation in employment education and legislative institution should be reviewed every five years or so. This would afford an opportunity:

(i) to the state to rectify distortions arising out of particular fact.

The scope and extent of Article 16(4) has been examined thoroughly by the Supreme Court in historic case of Indira Sawhney v. Union of India popularly known as Mandal Case 33.

The facts of the case were as follows on January 1, 1979 the Government headed by the Prime Minister Sri Morarji Desai appointed the Second Backward Classes Commission under Article 340 of the Constitution under the Chairmanship of Shri B.P. Mandal to investigate the socially and educationally backward classes within the territory of India and recommend steps to be taken for their advancement including desirability for making provisions for the reservation of seats for them in
It had identified as
Many as 3,743 castes as socially and educationally backward classes and
Recommended for reservation of 27% government jobs for them. In the
meantime the Janata Government collapsed due to internal dissention and
the Congress Party headed by the Prime Minister Smt. Indira Gandhi come
to Power at the centre. The Congress government did not implement the
Mandal Commission Report until 1989. When the Congress Party was
defeated in the Parliamentary elections and the Janata Dal again come
into power and decided to implement the Commission's report as it had
promised to the electorate. Accordingly the Government of India, headed
by the Prime Minister Shri V.P Singh issued the Office Memoranda
(called O.M) on August 13, 1990, reserving 27% seat for backward Classes in
government Services on the basis of recommendations of the Mandal
Commission. The acceptance of the Report of the Mandal Commission
threw the nation into turmoil and a violent anti-reservation movement
which rocked the whole nation for nearly three months resulting in huge
loss of property and persons.

A writ petition on behalf of the Supreme Court Bar Association
was filed challenging the validity of the office memoranda and for staying
this operation. In her petition, Ms. Indira Sawhney submitted that Mandal
Commission Report and the Office Memorandum of August 13, 1990,
and September 25, 1991, were unconstitutional, illegal and void for the
following reasons one prejudice to the other.
(a) The identified of backward classes and reservation of jobs in services under the state have been made by a mere executive order.

(b) The identification has been based on indicators which themselves constitute irrelevant criteria and weightage given are arbitrary and unreasonable and do not disclose any classification which bears a reasonable nexus to the object of the classification and thus violating Article 14 right to equality of the constitution.

(c) Mandal Commission Report is based on conjectures and surmises because no report of the Technical Committee or of the Panel of Experts has been filed nor can the same be found from the perusal of the report.

The petition further submitted that the identification of 3,743 castes apart from being constitutional as being based on castes, is further erroneous since the Anthropological Survey of India has given the figures of 1,130 as castes which could be traced. The result, therefore, follows that the other remaining castes are non-existent on the ground of not being traceable or on the ground of being Synonymous sub-group etc.

The Five Judge Bench of the Court stayed the operation of the O.M. till the final disposal of the case on October 1, 1990. Unfortunately the Janata Government again collapsed due to defection and in 1991 Parliamentary elections of the Congress Party again came to power at the centre.

The Congress Party government headed by Shri P.V. Narsimha Rao issued another office Memoranda on September 25, 1991 but made two changes in the O.M. of Janata Dal Government issued on August 13, 1990, that:
1) added the economic criterion in giving reservation to proper sections of Scheduled Castes and Scheduled Tribes in then 27% quota and

2) reserved another 10% of vacancies for other commercially Backward sections of higher castes.

The five Judge Bench referred the matter to a special constitution Bench of nine judges in view of the important of the matter to finally settle the legal position relating to reservations as in several other judgements the Supreme Court have not spoken in the same voice on this issue. Despite several adjournments the Union Government failed to submit the economic criteria as mentioned in office memoranda of September 15, 1991.

The nine Judge constitution Bench of the Supreme Court by 6-3 majority (Justice B.P. Jeevan Reddy, CJ. M.H. Kania, M.N. Venkatachaliah, A.M. Ahmadi with S.R. Pandian and S.B. Sawant) concurring by separate judgements held that the decision of the Union Government to reserve 27% Government jobs for backward classes provided socially advanced persons — creamy, layer among — them are eliminated, it is only confined to initial appointments and not promotions and the total reservation shall not exceed 50%. The court accordingly partially held two impugned notifications (O.M.) dated August 13, 1990 and September 15, 1991 as valid and enforceable but subject to the conditions indicated in the decision that socially advanced persons — creamy layer — among. Backward classes are excluded. The court, however, struck down the Congress government O.M. reserving 10% Government jobs for economically backward classes among higher classes. The majority also held that the reservation should not exceed 50% while 50% shall be rule but it is necessary not to put out consideration certain
extraordinary situations inherit in the great diversity of this country and people.

In view of this the majority did not express any opinion on the correctness or adequacy of the Mandal Report. The dissenting Judgement was given by Justice T.K. Thommen, Kuldeep Singh and R.M. Sahai. The minority struck down the two O.M.’s issued by the Union Government as unconstitutional. It also held that Mandal Report is unconstitutional and recommended for the appointment of another commission for identifying the Socially and Educationally Backward classes of citizens.

The Court examined the scope and extent of Article 16(4), in detail and clarified various aspects on which there were difference of opinion in various other judgements. The majority opinion of the Supreme Court on various aspects of reservation provided in Article 16(4) are as follows:

(a) **BACKWARD CLASS OF CITIZENS IN ARTICLE 16(4) CAN BE IDENTIFIED ON THE BASIS OF CASTE AND NOT ONLY ON THE ECONOMIC BASIS:**

The majority held that caste can be and quite often is a social class in India and if it is backward socially it would be a backward class for the purpose of Article 16(4). There are classes among non-Hindus, Muslims and Christians and Sikhs and if they are backward socially they are entitled for reservation under Article 16(4). Although Urbanisation has to same extent broken this caste-occupation relationship but not wholly and is still predominant in rural areas.

The majority held that neither the Constitution nor the law prescribes any procedure or method for the identification of the backward classes. Not it is advisable or possible for the court to lay
down any such procedure or method. The court said that it must be left to the authority appointed to identify. It is free to adopt any method it thinks convenient and so long as it covers the entire population identification of Backward classes can certainly be done with reference to castes among, and along with other occupation of groups. Caste will have to be considered among and along with other criteria as the test of backwardness. Caste alone cannot be taken into consideration for purposes of identification of backward classes. A similar process can be adopted for occupational groups, communities and classes.

(b) **ARTICLE 16(4) IS NOT EXCEPTION TO ARTICLE 16(1). IT IS AN INSTANCE OF CLASSIFICATION RESERVATION CAN BE MADE UNDER ARTICLE 16(1):**

The majority held that Article 16(4) is not an exception to Article 16(1) but an independent clause. Reservation can be made under Article 16(1) on the basis of reasonable classification. The court accordingly overruled its decision in *Balaji v. State of Mysore*[^40], in which it was held that Article 16(4) is an exception to Art 16(1). The court approved the decision in *State of Kerala v. V.N.M. Thomas*[^41], where it was held that Article 16(4) is not an exception of Article 16(1) but a facet of Article 14 and permits reasonable classification just as an Article 14 does.

(c) **BACKWARD CLASSES IN ARTICLE 16(4) ARE NOT SIMILAR TO AS SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES IN ARTICLE 15(4):**

The majority held that the Backward class of citizens contemplated in Article 16(4) is not the same as socially and
educationally backward classes referred to in Article 15(4). It is much wider clause (4) does not contain the qualifying words socially and educationally as does the clause (4) of Article 15. Backward class of citizens in Article 16(4) taken in SC’s and ST’s and all other backward classes of citizens including the socially and educationally backward classes. Thus certain classes may not qualify for Article 15(4), may qualify Article 16(4) is the socially and educationally backward classes in Scheduled Castes and Scheduled Tribes mentioned in Article 15(4).  

(d) **CREAMY LAYER CAN BE AND MUST BE EXCLUDED FROM BACKWARD CLASSES:**

The majority held that while identifying the backward classes the socially advanced person - the creamy layer among them should be excluded. The court directed the Government of India to set up a Commission within four months from the decision specifying the basis applying the relevant and requisite socio-economic criteria to exclude socially advanced persons that is the creamy layer among backward classes.  

The court held that the basis of exclusion of advanced sections creamy layer from other backward classes for the purpose of reservation should not merely be economic unless the economic advancement is so high that it necessarily means social advancement. While the income of the person can be taken as a measure of his social advancement, the limit prescribed should not be such as to the result in taking away with one hand what is given with the other. But the court said that there are certain positions of which one can be treated as advanced without further inquiry. For
example, if a member of designated class becomes a member of IAS or IPS or any other all India Service his status in society rises, he is no longer socially disadvantaged. His children get full opportunity to realize their potential, they are in no way handicapped in the race of life. His salary is also such that he is above want. It is not logical that his children should be given the benefit of reservation for giving them the benefit of other reservation disadvantaged members of the backward class may be deprived of that benefit 44.

The majority said that while the rule of reservation cannot be called anti-meritian, there can be certain services and posts to which it may not be advisable to apply the rule of reservation. For example, technical posts in research and development organization; department institutions in specialities and super specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishment connected therewith. Similarly in posts of higher echelon eg., Professor (in Education) Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application.

(e) ARTICLE 16(4) PERMITS CLASSIFICATIONS OR BACKWARD IN BACKWARD AND MORE BACKWARD CLASSES:

On this point the court over ruled the Balaji Case in which it was held that the sub-classification between Backward Classes and more Backward classes was unconstitutional. In the Mandal Case the court held that the classification is necessary to help the more backward classes, otherwise the advanced sections of Backward Classes might take all the benefits of reservations.
(f) **A BACKWARD CLASS OF CITIZENS CANNOT BE IDENTIFIED ONLY AND EXCLUSIVELY WITH REFERENCE TO ECONOMIC CRITERIA:**

It was held that it would defeat the very object of Article 16(4) to give adequate representation to backward classes in the services. Article 16(4) does not aim at economic upliftment or alleviation of poverty. It is specially designed to give a due share in the state power to those who have remained out of it mainly on account of their social and therefore, educational and economic backwardness.

(g) **RESERVATION SHALL NOT EXCEED 50%:**

The majority held that the maximum limit of reservation cannot exceed 50%. However in an extra ordinary situations it may be relaxed in favour of people living in for flung and remote areas of the country who because of their peculiar conditions and characteristics need a different treatment. But in doing so the court said that extreme caution is to be exercised and a special case made out on this point. The majority affirmed that the **Balaji and Devadasan** Cases in which the 50% rule was laid down and overruled the **State of Kerala v. N.M. Thomas** and **K.C. Vansanth Kumar v. State of Karnataka** cases. The court relied on the speech of Dr. B.R. Ambedkar in the Constituent Assembly where he said that “reservation must be confirmed to a minority of seats”. Article 16(4) speaks of adequate representation and not proportionate representation. If the member of Scheduled Caste and Scheduled Tribe is selected in the open competition on the basis of merit they
will not be counted against the reserved quota. However the rule of 50% shall be applicable only to reservations proper they shall not be applicable to exemptions, concessions or relaxations if any provided to Backward classes of citizens under Article 16(4).

The Court also overruled the decision in Devadasan v. Union of India 48 and held that 'carry forward rule' is valid provided it should not result in breach of 50% rule.

(h) RESERVATION CAN BE MADE BY AN 'EXECUTIVE ORDER':

The majority held that a provision under Article 16(4) can be made by an executive order. It cannot be made by Parliament or Legislature 49.

(i) NO RESERVATION IN PROMOTION:

The majority held that there should be no reservations in case of promotions under Article 16(4). The reservation is only confined to initial appointments 50. However it shall not effect promotions already made. Such reservations may continue for a period of 5 years, within this period, the authorities will revise, modify or re-use the rules relating to reservation. On this point many cases were overruled. They are General Manger S. Rly. V. Ranga Chari 51, State of Punjab v. Hira Lal 52, Akhil Bhartiya Shashit Karamchari Sangh v. Union of India 53, and Auditor General of India, Gyan Prakash v. K.S. Jaganathan 54. This is consistent with the object enshrined in Article 335. At the initial stage reservation can be made for them but once they enter the service,
efficiency demands, these members too compete with others and earn promotions like all others the court said.

(j) **PERMANENT STATUTORY BODY TO EXAMINE COMPLAINTS OF OVER-INCLUSION/UNDER INCLUSION:**

The court directed the Union Government, State Governments and Union territories to appoint a permanent statutory body to examine complaints of wrong inclusion or non-inclusion of groups, classes and sections in the list of other backward classes. Its advice should ordinarily be binding upon the Government. It can also be consulted in the matter of periodic revision of lists of OBC's as suggested by the court in *Vasanth Kumar Case*.

(k) **MANDAL COMMISSION REPORT – NO OPINION EXPRESSED:**

The majority held that in view of the guidelines laid down in its decision there is no need to express any opinion on the correctness or adequacy of the exercise done by the Mandal Commission. Pandian J. held that the report is valid and can be implemented. The minority held that the report is invalid and recommended for appointment of a fresh commission for identifying backward classes.

(l) **DISPUTES REGARDING NEW CRITERIA CAN BE RAISED ONLY IN THE SUPREME COURT:**

The majority made it clear and directed that all objections to the criteria evolved by the Central and State Government to exclude socially advanced persons, creamy layer, from other backward classes shall be preferred only before the Supreme Court and not
before any High Court or tribunal. Similarly, any petition challenging the validity, operation or implementation of the two office memorandum shall be filed only before the Supreme Court and not before any Court.

(m) CRITICISM:

On examining the following main sources of the Mandal Commission Report-

1) Socio-educational field survey.
2) The census report of 1961 (Particularly for the identification of primitive tribes, aboriginal tribes will tribes, forest tribes and indigenous tribes).
3) Personal Knowledge gained through extensive touring of the country and receipt of voluminous public evidence as described in Chapter 10 of the Report.
4) The list of OBC's notified by various State Governments and Commission specified 3,743 Hindus and non-Hindus Castes comprising 52% of the population of India as other backward classes for the purpose of job and educational reservations.

The Commission has treated castes as classes on the belief that there is a close linkage between Caste ranking of a person and his social educational and economic status. The Commission criticized the decisions in Balaji and Chitralekha as outmoded conservative and praised Rajendran as it equated castes with classes.

The Mandal Commission adopted the following methodology in identifying the Backward Classes. It has first estimated the total
percentage of Scheduled Castes and Scheduled Tribes; Later they took the figures of Muslims, Christians, Sikhs, Buddhists and Jains which were available from the census report. They have estimated the forward classes population at about 17.5%. By deducting from the total population of these categories the Mandal Commission arrived at the percentage of other backward classes which according to them was 43.7%. To this, they have added roughly half of the percentage of other religious groups, viz. Muslims, Christians, Sikhs, Buddhists, Jains considering them as backward and arrived at the percentage of Backward Classes in the total population of India which is placed at 52%. As disclosed by Mandal the systematic caste-wise enumeration of population introduced in 1881 was discontinued in 1931 and then grouped them into broad caste-clusters and religious groups. These collectives were subsequently aggregated under the following heads:

1) Scheduled Castes and Scheduled Tribes.
2) Non-Hindus Communities, Religious groups etc.
3) Forward Hindu Castes and Communities,
4) Backward Hindu Castes and Communities.

The population of Hindu OBC’s could be derived by subtracting from the total population of Hindus, the population of Scheduled Castes, Scheduled Tribes and that of forward Hindu Castes and communities and it worked out to 52%. But the same approach could not be adopted in respect of non-Hindu OBC’s. Assuming that roughly the proportion of OBC’s, amongst non-Hindus was of the same order as amongst the Hindus population, of non-Hindus OBC’s was also taken as 52% of the actual proportion of their population of 16.6% of 8.40% \(^59\).
Thus the total population of Hindu and non-Hindu OBC's naturally added up to nearly 52% (43.70% plus 8.40% of the Country's population). It is thus seen that excluding Scheduled Castes and Scheduled Tribes, Other Backward Classes constitute nearly 52% of the Indian population.

Here it is emphasized that in the absence of Caste-wise census figures it is not possible to determine the precise population of backward classes. It also observed that so many castes included as backward classes by Mandal Commission are not really backward. It is also ironic that Yadavas (Ahirs), Kurmis and Koiris in Northern India which have progressed since independence were among the prominent beneficiaries of Mandal Commission Report.

Shri L.R. Nayak a member of Mandal Commission in his dissent note also expressed the same feelings. The Backward Castes identified by the Commission are divided by him into two groups i.e., one of intermediate Backward Classes and another of Depressed backward classes. In his view the intermediate backward classes should not be permitted to usurp economic and political power in the name of backward classes at the cost of really depressed backward classes. The views of Kuldeep Singh were more sound and logical. He observed-

The identification of 3,743 castes by the Mandal Commission as the 'beneficiary class' for job reservation under Article 16(4) is wholly unconstitutional, invalid and cannot be acted upon, for the following reasons:

(i) The reference made to the commission is based on the legal fallacy that 'backward class' means socially and educationally backward in Article 16(4).
(ii) Article 16(4) contemplated backward sections of classes not adequately represented. The exercise has not been done.

(iii) The Commission was required to examine the desirability or otherwise ‘of reservation’. This has not been done.

(iv) No survey was made to ascertain if the 3,743 castes had inadequate representation.

(v) The so-called socio-educational field survey was an eye-wash.

(vi) The report virtually rewrites Article 16(4) by substituting caste for class. ‘The indicators’ were applied only to the caste. This violates Article 16(2) and 16(4).

(vii) The report invents castes even for non-Hindus.

(viii) It is wholly arbitrary to count the population of backward classes on 1931 census.

(ix) According to the Report, itself, the material was inadequate. Hardly any state was able to give the desired information.

Judges like Krishnaiyar, Chinnappa Reddy, and Desai also cautioned the misuse of the present reservation policy. Krishnaiyer in Thomas case observed that a word of sociological caution. In the light of experience here and elsewhere, the danger of reservation is three fold. Its benefits, by and large are snatched away by the creamy layer of the backward castes or class thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly this claim is over played extra vagantly in democracy by large and evocative groups whose burden of backwardness has been substantially lightened by the march of the time and measures of better education and more opportunities of employment but wish to wear the weaker section table as a means to score over their near equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social
environment added educational facilities and cross fertilisation of castes by inter castes and inter castes marriages sponsored as a massive state programmes, and this solution is calculated hidden from view by the higher backward groups with a vested interest in the plums of backwardism.

Nobody would dispute that Scheduled Castes, Scheduled Tribes and Other Backward Classes need special protection. But the practice of reservation on the basis of caste and communities has led to caste and communal rights in the rural and urban areas of India. In a country, like India where about 80% of the population is backward, the caste based reservation cannot be adopted. The economic criterion should be the exclusive criterion to help people irrespective of their caste and community. The judicial pronouncements have also their impact in the area of giving assistance on the ground of economic backwardness. The Supreme Court of India, in a number of cases, has rightly forbidden the criteria of religion, caste etc. as the basis of reservation.

Reservation of any kind based on birth, castes or religion cuts at the roots of democracy and spirit of Indian Constitution. It creates vested interest in backwardness, casteism and communalism. It was Dr. B.R. Ambedkar, the best friend of the depressed, himself admitted, reservation is not even in the best interests of its immediate beneficiaries because it destroys their self confidence. He himself told that the Scheduled Caste people would not be able to stand on their legs so long as they are dependent on the crutches of reservation. That is why he advocated total abolition of caste based reservations.

The second attack against this judgement is that it is perpetuating the evils of caste system and accentuating caste consciousness besides impeding the doctrine of secularism, the net effect of which would be dangerous and disastrous for the rapid development of the Indian Society as
a whole marching towards the goal of the welfare state. According to them, the identification of SEBC's by the Commission on the basis of Caste system is bizzare and barren of force, much less exposing hollowness. Therefore the OMs issued on the strength of the Mandal Report which is solely based on the caste criterion are violative of Article 16(2)\(^65\).

In the determination of a class to be grouped as backward, a test solely based upon caste or community cannot be put valid but, in my opinion, though directive principle contained in Article 46 cannot be enforced by courts. Articles 15(4) and 16(4) will have to be given effect to in order to assist the weaker sections of the citizens, as the state has been charged with such a duty, no doubt that any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not be missed that a caste is also a class of citizens and that a caste as such may be socially and educationally backward. If after collecting the data, it is found that the caste as a whole is socially and educationally backward, in my opinion the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. In fact, there are numerous castes in the country which are socially and educationally backward and, therefore, a suitable provision will have to be made by the state as charged in Article 15(4) and 16(4) to safeguard their interest.

Now the other question which strikes in the mind is whether the socially and educationally backward classes (OBC's) different from SC’s and ST’s ? Misunderstanding of what of Founding Fathers meant by, “socially and educationally backward classes” has led to many misinterpretations. The term ‘class’ is generally attributed to economic conditions. Since here it is used for both socially and educationally
backward classes it does not give clue to think that it is about economic backwardness. The rational understanding of these terms would be that it is a class or a section of people who continues to suffer from social disabilities not only because, they belong to low caste but also because of their educational backwardness. Only these sections or classes have been named as the SC’s and ST’s.  

If the SC’s and ST’s are different from the socially and educationally backward classes, the constitution - makers would have written socially and educationally backward classes and the SC’s and ST’s. In fact these terms “Socially and educationally backward classes” explain the state of SC’s and ST’s.  

While the Harijans at times suffer from social disabilities especially in the villages even after achieving higher education and better employment the middle caste people of whom came under the OBC’s enjoy better social status even otherwise like the high castes. The OBC’s on the other hand blames Brahmins for the existing caste system and on the other suprresses the SC’s/ST’s to prove their caste superiority. If reservation is meant for these who suffer from social disabilities, the claims of the OBC’s becomes invalid. In fact it the middle caste people who perpetuate caste discrimination.  

Of course, the Brahmins are responsible for the creation of varna system and majority of them strictly practice untouchability. But in general they do not indulge in violence to maintain their status quo. When the OBC’s already enjoy superior, social status than the SC’s/ST’s why do they need reservation to improve their social status.  

The claim of the OBC’s may be acceptable on the ground that they are economically poor and therefore, they need to be helped by the government. But the Government support to improve their economic status
need not be only through reservation. The reservation policy is not a poverty alleviation programme. If it is consider so, atleast for the present discussion, it should also consider the high caste people and others belonging to different religions who too are economically poor.

Reservation on the economic basis is indeed a welcome demand. Unfortunately in India the individuals social status largely dependent on their caste hierarchy unlike in the U.S.S.R. and U.S.A. where the individuals status is measured in terms of their merits the have and have nots of high caste and low caste, Hindu and Muslims, Hindus and Sikhs and so on.

Poverty is the culprit-cause of all kinds of backwardness. A poor man with no money locks ordinary means of subsistence. Indigence keeps him away from the education. Poverty breeds backwardness all around the class into which it strikes. It invariably results in social, economic and educational backwardness. Poverty has a direct nexus to social backwardness. It is an essential and dominant characteristics of poverty. A rich belonging to backward caste depending upon his deposition may be or may not be socially backward, but a poor Brahmins struggling for his livelihood invariably suffers from social backwardness. Presently the reality is that economic standards confers social status an individuals. A poor person, however honest, has no social status around him whereas a white collar criminal moves in a high society. No society can hide the facts that there are millions of people, who belonging to the so-called elite castes are as poor and often a great deal poorer than a very large number of proportion of the backward classes.

It is fallacy to think that a person, though earning thousands of a Rupees per day or holding higher posts is still backward simply because he happen to belong to a particular caste or community whereas millions of
people living below poverty line are forward because they were borne in some particular caste or communities. Poverty never discriminates, it chooses its victims from all religions, creeds and castes. The pavement dwellers and the slum dwellers, belonging to different castes and religions have a common thread of poverty around them. Are they not the backward classes envisaged under Article 16(4)? Poverty binds them together as a class, classes of citizens living in chronic-cramping poverty are per se socially backward. Poverty ruins into generations. It may be a result of the social or economic inequality of the past.

During the British regime several communities who fought the Britishers and those who actively participated in the freedom struggle, were deliberately kept below the poverty line. There are vast areas in India, like Orrisa, which perennially poverty sticken. By and large poverty in this country is a historical factor looked from any angle it is not possible to hold that the citizens of India who are living under poverty conditions or below poverty line are not socially backward. It would seem to be doing violence to the very object and purpose envisaged under Article 16(4). To say that the poor of the country are not eligible for job-reservations under the said Article 70.

Since the bulk of the population of this country is poor and there may be a large number of criminals, for the reserved jobs, there is no ground to deny the poor their right under Article 16(4). This reasoning would apply to the other backward classes with much more force. Mandal Commission has identified 52% of the population as backward. Apart from that 22% are Scheduled Castes and Scheduled Tribes. Persons conversing reservation for 74% of the whole population of the country are not worried about the fact that by doing so they are axing the interests of the remaining
36% of the population which may in fact deserve the same protective umbrella of job reservations. The poor can be classified on the basis of income, occupation, conditions of living such as slum dwellers, pavement dwellers etc. and priorities may be worked out. They can be operationally defined, categorised and thereafter the backward sections can be identified for the purposes of Article 16(4). It is high time that we leave the dogmatic approach of making reservations in public services on the basis of caste as a symbol of social backwardness. A practical measure should be adopted to confine it only to low income groups of people having unremunerative occupations whose talents and abilities are subdued under the weight of poverty. Therefore necessary suggestion is that a backward class for the purpose of Article 16(4) can be identified solely on the basis of economic criteria.

It is an established fact that social and educational backwardness stem from economic backwardness. In an age where everything – right from birth till death is governed by money power it is a fallacy to connect backwardness with such criteria as a caste or creed. If this approach is granted further lease it is bound to re-bounce and shelter the social fabric of the country. It is not a secret that a clamour for getting the reservation benefits has attained such wide dimensions that every case is demanding itself to be tagged with this card. It appears that dignity and courage is being pledged for the sake of getting something which is neither elevating to those who claim it, not gratifying for those in power.

Here it is submitted that the views of Kuldeep Singh, Thommen and Sahai, JJ are very though provoking. In order to give any fruitful meaning to the secular character of the constitution these views are very relevant. It is a well known, law is an adjudgement among conflicting interests, however the majority judges adopted a new approach in this direction to
this problem and for the first time made an attempt to exclude the creamy class of backward castes to identify the really backward classes. Here it is pertinent to note the changing attitude of the judiciary through the opinion of justice Jeevan Reddy himself, the present Judge of the Supreme Court, gave the leading judgement in Mandal Case, on Mandal Commission Report expressed in his own words in *Narayan Rao v State of Andhra Pradesh*, Andhra Pradesh High Court Judge as he then was observed that here it is emphasized that in the absence of Caste-wise census figures, it is not possible to determine the precise population of backward classes. It is also observed that so many castes included as backward classes by Mandal Commission are not really backward.

Right from the very beginning the reservation policy has always been subjected to great controversy. The others who are not given reservations have the opinion that they are in no better way economically, socially and educationally then those preferred. The Supreme Court in its ambiguous interpretative process has further confused the concept of caste based backwardness and the backward classes. The Supreme Court never remain constant on the question of identification of socially and educationally backward classes. Sometime it takes the caste as sole criterion and sometime caste cum means test. There is no unanimous opinion among the judges of the Supreme Court as the role of caste in classifying the Backward Classes.

The bird eye view of the Mandal Case gives us the idea that atleast an acceptable solution to all groups is made in the decision to resolve the social tensions and to uplift the really backward classes. For the Supreme Court articulated the Constitutional provision in accordance with the changing circumstances of the society. The judiciary acceptance of the exclusion of the creamy layer who were presumed as snatchers the benefits
of the reservation policy at the cost of the really needy is a welcome step. Placing an income limit at a reasonable level i.e., community cum means test and excluding persons/families above that income limit through the judgement is highly desirable step. It serves to reduce the division of society on the caste lines.

Another welcome feature of the decision of the Supreme Court is to limit the total reservation for Scheduled Castes, Scheduled Tribes and OBC’s to 50% of the total vacancies. It should be remembered that reservation in government posts was never regarded as a permanent feature of our constitutional set up, and in that context the cancellation of the reservation in promotional post appear to be a good beginning for the eventual end of the reservation policy. Reservation should disappear gradually with the social and educational progress of the presently backward communities.

Dr. Thommen said that whenever and where ever poverty and backwardness are identified it is the Constitutional responsibility of the state to initiate economic and other measures to ameliorate the conditions of the people residing in those regions. He said that poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness has to be eradicated not merely by reservation, but by free medical aid, free elementary education, Scholarships for higher education and other financial support, free housing, self employment and settlement schemes, effective implementation of Land reforms and strict and impartial operation of the law enforcing machinery.

Nani A. Palkiwalla is of the view that the judgement of the Supreme Court in the Mandal Report will revive casteism which the constitution intended to intend. According to him, future historians of the Indian republic will regard 1992 as one of the saddest year in the history of our
jurisprudence. This is the year in which the Supreme Court, by a majority ensured a fresh lease of the life to the cankar of casteism for a long and indefinite future. Over the last thousand years, the greatest curse which had effected the Indian nation has been the curse of casteism, as Justice Kuldeep Singh has pointed out in his minority judgement. Historians too agreed that why the foreign invaders like Afghans, the Turks, the Mughals succeeded in subjugating this country was because of casteism divided Indian Society and assigned military duties to the one caste only.

He stated that the majority judgement will revive casteism which the Constitution emphatically intended to end, and the pre-independence tragedy would be re-enacted. Caste will be given precedence over merit and calibre. Article 16(4) has been virtually rewritten by substituting caste by class. The crucial point that under the majority judgement of the Supreme Court it the members belonging to certain castes only, who are eligible to be considered for reservations. When the creamy layer is removed what is left with us are still the members of certain castes only. The sections of society which full outside those designated castes do not qualify for reservations, however, socially and educationally backward they may be.

It is undisputed that after 50 years of Independence, the social, educational and economic landscape have changed beyond recognition. There are crores of backward individuals in forward castes and crores of forward individuals in backward castes. By making caste, the essential condition. The majority judgements have.

(a) included for reservation all members of backward castes who do not belong to the creamy layer.
(b) Excluded all members of forward castes, however backward and deserving.

Such a classification patently discriminates against those who do not belong to these castes which are listed as backward.

A backward class may be given the benefit of Article 15(4) or Article 16(4), but the class must consist of a homogenous group – the element of homogeneity should be backwardness characterizing the class. In other words, the link or thread holding the class together should be backwardness of the members. Such a link or thread can never be supplied by caste. Excluding the creamy layer of the caste would not get rid of the vice that the only link, or thread binding the benefited class together is caste. In other words a classification may be justified on the ground that it is ‘backward class’ but never on the ground that it is ‘backward caste’. This principle was precisely enunciated by the Constitution Bench in Triloki Nath, Pradeep Tondon, Jaishree, Akhil Bhartiya Soshit Cases. These judgements were cited before the Supreme Court and referred to in majority judgement without disapproval, but they are inexplicable over looked.

The majority judgements did not pause to consider the reasons why for all the past decades the Union Government had not made reservations on caste basis in areas of employment admissions and promotions. The practice of mentioning the caste in service records was discontinued by the Government of India by 1951. The last census records to proceed on caste basis are those of 1931, which though hopelessly obsolete, were relied upon by the Mandal Commission because they were the latest census records to proceed on the caste basis.

Kaka Kalelkar’s in his own latter forwarding his Report (1955) to the President said, “I am definitely against reservations in government
services for any community, for the simple reason that services are not meant for the servants but they are meant for the service of the society as a whole.” Kalelkar’s Report, which was not accepted by the government, has listed 2,399 castes as Backward. Dealing with this the Union Government said, “If the entire community, baring a few exceptions, has this be regarded a backward, the really needy would be swamped by the multitude and hardly receive any special attention or adequate assistance”. This objection would apply a fortiori to the Mandal Report which lists 3,743 backward castes. Like the expanding Universe the list of backward castes is ever expanding. Many more are already waiting in wings to receive attention.

(ii) POSITION AFTER MANDAL CASE:

At it is understood that on one hand that Mandal Case decision has laid down a workable and reasonable solution to the problem of reservation. But on the other hand and the politicians are trying to dilute the effect of the Mandal Case decision in order to make their vote bank intact. The court has laid down that there shall be no reservation in promotions in government jobs. But the government has enacted the constitution 77th Amendment Act, 1995 in order to bypass the courts ruling on this point. This amendment has added a new clause (4-A) to Article 16 of the constitution which provides that “Nothing in this article shall prevent the state from making any provision for reservation in matters of promotion to any class or classes of posts in the services of the state in favour of the Scheduled Castes and Scheduled Tribes which in the opinion of the state, are not adequately represented in the services under the state.” This is thus clearly intended to nullify the effect of the decision of the Supreme Court in Mandal Case. The evil of reservation in promotions was abolished by the
Supreme Court as it caused a lot of bitterness and disappointment among employees of the same category who were bypassed by their colleagues having less merit. The haste in which the government had brought this very amendment clearly shows that it was passed for political considerations. It has its own dangers. Although it covers only the SC’s and ST’s, but in due course a demand for such reservation can be made for other OBC’s also.

In Union of India v. Virpal Singh, the Supreme Court has tried to mitigate to some extent the inequity that reservation in general has to represent by holding that caste criterion for promotion is violative of Article 16(4) of the constitution. The case was concerned with the legality of the extent of reservation to promotions in Railway Services which enabled specified groups (SC’s and ST’s) not only to get jobs on their caste labels but also get promotions on the same basis. The Supreme Court has rightly held that seniority between reserved category candidates and general candidates should continue to be governed by their panel position prepared at the time of selection. Under Article 16(4) there is no uniform or prescribed method of providing reservation. The extend and nature of reservation is a matter for the state to decide having regard to the facts and requirement of each case. It is therefore open to the state to provide that the candidate promoted earlier by the virtue of rule of reservation roster system shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him is promoted he will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate.

The ruling of the Court puts a question mark on the validity of the recent constitution amendment permitting reservations in promotions to SC’s and ST’s.
In a significant judgement, the court has held that any post in cadre falling vacant, after reserved posts were filled, is to be filled from the same category of persons whose retirement or resignation caused the vacancies. The five judge bench of the court, however, made it clear that the ruling of court on the working of the roster shall be operative prospectively.

In **S.B.I. SC/ST Employers welfare Association v. State Bank of India** the State Bank of India SC/ST Employers welfare Association Chandigarh has challenged the reservation policy framed by the SBI reserving certain posts for employees belonging to SC/ST’s in promotion. The court held that the policy of reservation in promotion was not violative of Article 16(4) and (4-A) and the vacancies lapsed due to non-availability of reserved category candidate with required length of service could not be revived and filled retrospectively. Article 16(4) is an enabling provision and confers discretionary power on the state to make reservation at the stage of initial recruitment or at the stage of promotion in favour of a Backward Class of citizens which in the opinion of the state is not adequately represented in the Services of the state. Article 16(4) does not impose a duty on the government to make such reservation. Hence no person can claim it as a matter of right.

In a recent judgement in **Ashoka Kumar Thakur v. State of Bihar** the Supreme Court has quashed the economic criteria laid down by the Bihar and Uttar Pradesh government for identifying the affluent sections of the backward classes (creamy layer), and exclude them for the purpose of job reservation and held that the criteria for identification of “creamy layer” is violative of Article 16(4) and Article 14 and against the law and laid down by this court in Mandal Case. The Court held that the Supreme Court in Mandal Case has categorically held that a person belonging to a
backward class who becomes a member of the IAS, IPS or any other All India Service could not seek benefits of reservation for his children.

The court held that the additional condition laid down by the states of Bihar and Uttar Pradesh have no nexus with the object sought to be achieved. The states of Bihar and U.P. have acted wholly arbitrarily and in utter violation of the law laid down by this court in Mandal Case. By striking down the criteria laid down by the states of Bihar and Uttar Pradesh for identifying “creamy layer” the Supreme Court has removed a glaring anomaly in the job reservation policy adopted by the two Governments for the benefit of the Backward Classes. The very purpose of the quota system was to help the poor. This purpose would be defeated if no distinction is made between rich and poor among the backward classes. This was the reason why the Court has struck down the creamy layer test of the Bihar and U.P. Governments. If the rich and the poor are treated alike in the matter of job reservations, they are bound to benefit at the cost of the poor. The Supreme Court by striking down the creamy layer test by the two Governments have contributed considerably for social justice. In the Mandal Case the apex court had made it clear that a person belonging to a backward class who becomes a member of IAS, IPS or any other All India Service could not seek the benefit of reservation for their children. Since neither the Constitution nor the Court prescribed any procedure for identifying the creamy segment among the backward classes the court left it to the centre and the State Governments to evolve the requisite criteria by setting up a permanent commissions. In persuance of the court’s order the centre has formulated such a criteria. But the states of Bihar and U.P. added unacceptable criteria with it as to what constitutes the ‘creamy layer’. Therefore, the court was left with no options again to nullify the criteria.
adopted by the State Governments against the guidelines laid down by it in the Mandal Case.

The Supreme Court judgement has come at a time when the whole concept of reservation is being slowly, reduced to a mockery. The state of Tamil Nadu has passed a law reserving more than 50% of seats (69%) for these categories, and the legislation has been included in the Ninth Schedule to save it from judicial review.

In *Chattra Singh v. State of Rajasthan* 81, the appellants candidate belonging to OBC challenged the validity of the Rajasthan State Subordinate Rule 13 on the ground that it was violative of Article 15(4) and 16(4) and hence it was unconstitutional. Rule 13 provides for lowering of lowest range marks fixed for general candidates for being called to appear at final recruitment only in favour of SC and ST candidates. It was contended by the OBC candidate that Article 16(4) does not specify whether they should belong to SC, ST or OBC. All are compendiously called Backward Classes and therefore they are entitled for the benefit of reservation and therefore their elimination under provision to the Rule is arbitrary and illegal. The Supreme Court rejected their contention and held that the candidates belonging to OBC are not entitled to the 5% exemption in qualifying marks available to SC and ST candidates under Rule 13, because they are separate category from SC & ST. The OBC and SC and ST are distinct categories. The SC and ST have been dealt separately by the Constitution. The OBC's are not identified by the Constitution to get the benefit under Article 16(4) and 15(4). Though OBC's are socially and educationally not forward, yet they do not suffer the some social handicaps inflicted upon. The object of reservation for the SC and ST's 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 handicaps.
So the 5% further out of marks in the Preliminary Examination from the lowest ranges fixed for general candidates. Thus, the dissimilar treatment given to the OBC’s candidates are not violative of Article 14 or Article 16.

In State of Punjab v. G.S. Gill the Supreme Court has held that reservation in promotion to a single post is not violative of Article 16(1) of the Constitution. If the government have applied the rule of rotation and the roster point to the vacancies that had arisen in single post it can be filled by a candidate belonging to the reserved category at the point on which they were eligible to be considered for promotion and such a rule is not violative of Article 16(1) of the Constitution. In this case, the respondent who was a general candidate, was appointed as Junior Technical Assistant in Industries Department of State of Punjab. The part of Assistant Superintendent Quality Marketing Centre (Textile) in the next promotion cadre, is the single post in that cadre. The said post was reserved for Scheduled Caste candidate as per the roster. The second respondent who was a qualified candidate was promoted to the said post. The respondent challenged the said appointment and it was held that reservation of a single promotion post is not unconstitutional. In view of the recent five Judge Bench decision reservation cannot be made in Single Cadre.

In Jagdish Lal v. State of Hariyana, the Supreme Court held that the seniority gained by a SC and ST candidate because of his accelerated promotion as per rule of reservation cannot be wiped out on promotion of general candidate on a later date. The reserved candidate will become senior to the general candidate in each successive promotion. The court held that “on promotion to the higher cadre the reserved candidate steal a march over general candidates and become member of the service in the higher cadre or grade earlier to the general candidates. Under Rule 11, the inter-se seniority of the members shall be determined by length of
continuous service in a post in the service. Therefore, their seniority cannot be reopened, after the general candidates get promotion to the higher cadre or grade, though he was erstwhile senior in feeder cadre/grade”.

The Court held that “as soon as person was appointed to a cadre/grade, he started discharging the duties from the date of appointment to the post and his seniority was determined in the basis of that date unless he was appointed only as a stop gap arrangement or on an ad-hoc basis. This principle is applicable to the general as well as reserved candidates on this principle there is no dichotomy and this is the settled serviced jurisprudence. In case of appointments of Dalits and Tribes on different yard-stick should be applied. The reserved candidate thus became senior to the general candidates, in each successive cadre/grade. The general candidates remain junior in higher echelons to the reserved candidates. The court held that the ruling of the High Court of Punjab and Hariyana does not suffer from any illegality. The court held that the judgement of the court in Vir Pal Singh Chauhan Case does not apply in this case as the rule in this case provides for such a promotion in government jobs.

In State Bank of India, SC and ST Employees welfare Association v. State Bank of India, the Employees welfare association challenged the validity of promotion rule for SC’s and ST’s made by the State Bank of India. Under that Rule 15% seats were reserved for SC’s and 7.5% for ST’s. The rule provided that the unfilled vacancies will be carried forward for maximum period of 3 years but the maximum limit of reservation will not exceed beyond 50%. Besides they were given another exemption that they shall avail reservation benefit only for five years service. It was held that the above policy of reservation is not violative of Article 16(4) and (4-A) of the Constitution and the vacancies lapsed due to the absence of the reserved category candidates cannot be
revived retrospectively. Article 16(4) is an enabling provision and does not impose a duty to make reservation and therefore reservation cannot be claimed as a matter of right.

In a landmark judgement in **P.G. Institute of Medical & Research v. Faculty Association**\(^8\), a fine Judge Bench of the Supreme Court has held that the total exclusion of the general public and cent percent reservation for the backward classes, as a single cadre post is not permissible under Article 16(1) and 16(4-A) of the constitution. "In making reservation for backward classes the state cannot ignore the fundamental right of the rest of the citizen.

The case come up before the case as a review petition filed by the Post Graduate Institution of Medical Education and Research, Chandigarh seeking a direction to validate the constitutionality of reservation in a Single Post Cadre, in view of the conflicting decisions of the court. The court held that Articles 14, 15, and 16 including 16(4) and 16(4-A) should be applied in such a manner so that a balance is struck in the matter of appointments by creating reasonable opportunities for reserved classes and also for other members of the community who did not belong to the reserved category. Such a view has been indicated in the decision of the court in **Balaji, and Sabharivat's Cases**. Even in Mandal Case the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible.” The Court added that Article 15(4) is also an enabling provision like Article 16(4) and that the reservation under both Articles, should not exceed 50% limit.

The court held that the doctrine of equality of opportunity in 16(1) has to be reconciled in favour of the backward classes under 16(4) in such a manner that the latter while serving the cause of the backward classes shall not unreasonable encroach upon the field of equality. The court also held
that there was no difficulty in appreciating a need for reservation for the members of the backward castes and Scheduled Tribes and other Backward Classes and such reservation is not confined to the initial appointment in a cadre but also to appointments in promotional posts. But it cannot, however, be lost sight of, that in the anxiety for such reservation for the backward classes, a situation should not be brought about by which the chance of appointments is completely taken away so far as the members of the other segments of the society are concerned by making single percent reservation for the reserved categories to the exclusion of the other members of the other members of the community over when such a member is senior in service and is otherwise more meritorious. Their Lordships held “Hence until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of the roster in a single post cadre, is bound to create 100% reservation of such a post whenever such reservation is implemented.

Recently in the case of Malkhan Singh v. Union of India, a frequent problem arising in the case of reservation relating to carry forward of unfilled vacancies in reserved posts. In this the petitioner was as Scheduled Caste lawyer who had applied for the post of District Judge in Delhi. One post was reserved for SC and another for ST. For the SC vacancy, three were selected. No ST candidate was available. Out of the three selected for SC vacancies, the first in order of merit was appointed. During the subsequent years also, the ST vacancy could not be filled and therefore it was being carry forward. In the ruling of this case the Supreme Court agreed with the petitioner but of the time the judgement was delivered, he had superannuated. The Court examined the provisions of the brochure on reservation for SC/ST issued by the government especially
referring to exchange of reservation between SC/ST. Chapters 8 and 11 para 11.2 says that “while vacancies reserved for SC and ST may continue to be treated as reserved for the respective community only, ST candidate may also be considered for appointment against a vacancy reserved for SC candidate and vice versa where such vacancy could not be filled by SC or ST candidate even in the third year to which reservation is carried forward”, This was the case of the petitioner. This view was re-affirmed by the Supreme Court in K.N. Sreenivasan v. Flag Officer.

(iii) EXPERT BODY REPORT ON CREAMY LAYER:

In accordance with the direction given by the Supreme Court, the Union Government had appointed an expert committee known as Justice Ram Nandan Committee to identify the creamy layer among the socially and educationally backward classes (SEBC). The expert committee submitted its report on March 16, 1993 which was accepted by the Government of India. This report identifies the ‘creamy layer’ among the SEBC for excluding it from the list of Mandal beneficiaries. The committee report states that only when the creamy layer is substantially and stably formed after crossing the rubicon limit of social backwardness, then and then alone can it be made the basis for dis-entitlement.

1. It says that the following Constitutional posts qualify for the rule of exclusion. The posts are President, Vice-President, Judges of the Supreme Court and High Court, Chairman and members of UPSC and State PSC, Chief Election Commissioners, Comptroller and Auditor General of India, Governors, Ministers and Membership of Legislatures.

2. The rule of exclusion covers class I officers of Central and State Services (direct recruits) Public Sector undertakings, armed
forces and para military forces, professional class including trades, business and industry and property owners.

3. It excludes those having gross annual income of Rupees one Lakh and above.

4. In the Service Category the rule of exclusion will apply if either the husband or wife is a class I Officer. Where both are class I Officer and one dies the rule of exclusion applies. If both dies, then the rule does not apply. Permanent Incapacitation is treated as death and rule of exclusion does not apply.

5. The Committee says that if before the death of either of or both spouses occurs, either of the spouses has the benefit of employment in any international bodies like the United Nations, IMF, World Bank for a period of five years, then the exclusion rule will continue to apply to their children.

6. If a lady belonging to SEBC marries to a class I Officer then she would be entitled to get the benefit of reservation.

(iv) GROUPS-B CLASS-II (DIRECT RECRUITMENT):

1) The report says that if both spouses are class II Officers then the rule of exclusion would apply to their offspring. If only one the spouses is a class II Officer it would not apply but if male officer from class II category gets into class I category at the age of 40 or earlier then the rule of exclusion would apply to their offspring.

2) Where both are class II Officers and one of them dies then the rule of exclusion would apply to their children.

3) Where the husband is class I Officer and wife is class II Officer and the husband dies, the rule of exclusion will not apply. Also
when the wife is a class I and husband is the class II and the wife dies, the rule of exclusion would not apply but if the husband dies the rule of exclusion would apply on principle that one of the parents namely, the matter continues to be a class I Officer.

4) The above service category criteria also applies to Officer holding equivalent or comparable posts in public sector undertakings, banks insurance organisations, universities and also equivalent or comparable posts and positions under private investment.

5) As regard armed forces including para military forces (not persons holding civil posts) the exclusion rule would apply at the level of Colonel and above in the Army and to equivalent post in the Navy and Air Force and para Military forces.

   If the wife of an armed forces Officer is herself in the armed forces the rule of exclusion would apply, only when she herself had reached the rank of colonel, the service ranks below Colonel of husband and wife shall not be clubbed together.

   Even if the wife is an Officer in the armed forces is in civil employment this will not be a ground for applying the rule of exclusion unless she falls in the service category.

6) Professional class and those engaged in trade, business and industry the exclusion will be determined on the basis of income and wealth criteria.

7) For property owners the committee says if a person belongs to a family (father, mother and minor children) which owns irrigated land and the extent of irrigated land is equal to or more than 65% of the statutory ceiling area the rule of exclusion would
apply. The rule will not apply to persons belonging to families owning only unirrigated land irrespective of the area of such land.

In case of members of a family owning both irrigated and unirrigated lands, the exclusion rule would apply when the preconditions exists that the irrigated area is 40% or more of statutory ceiling limit for irrigated land.

8) **RESIDUARY CATEGORY** - The committee says that persons having gross annual income of one lakh Rupees or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax would be excluded from the benefits of reservation.

(v) **NATIONAL COMMISSION FOR BACKWARD CLASS:**

On March 26, 1993, the Parliament had passed the bill setting up a National Commission for Backward classes for considering inclusions in and exclusion from the lists of castes notified as backward for job reservation purpose. The commission is a statutory body and therefore would enable it to comply with the directions given by the Supreme Court in Mandal Case.

(vi) **BILL ON SC/ST VACANCIES PASSED:**

"The Lok Sabha passed by two-thirds majority a constitution Amendment Bill seeking to end the 50 percent ceiling on reservation in backlog. Vacancies provided under an official memorandum of 1997. The Constitution (Ninetieth Amendment) Bill, 2000 was passed by two third majority. Replying to the Marathan debate on the issue of reservation policy for Scheduled Castes, Scheduled Tribes and other backward classes, Law Minister
Ram Jethmalani assured the House that the government efforts will be made to ensure the validity of over 50 percent reservation, now under challenge in the Supreme Court, is sustained. According to the Statement of objects and reasons, the government decided to amend the Constitution so that unfilled vacancies of a year, reserved to be filled in that year, would be considered as a separate class to be filled in any succeeding year or years. Such class of vacancies would not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50 percent reservation on the total number of vacancies of that year. The official memorandum of August 29, 1997, following a Supreme Court Judgement in the Mandal Case was issued to provide that 50 percent limit shall apply to current as well as ‘backlog vacancies’ and for discontinuation of the special recruitment drive. Due to adverse effects of the 1997 order, various organisations including MPs, had represented the centre for protecting the interest of SC’s and ST’s. This was opposed by Muslim League member G.M. Banatwala that the Bill was ‘great nation betrayal. Responding this Ram Jethmalani said that the word ‘backlog’ was not added to the Bill and was part of the statement of objects and reasons appended to it as otherwise the statute could become ambiguous because the law has to apply to SC’s, SST’s as well as to OBC.

REFERENCES:
1. The Constitution of India op. Cit. at p.5
2. Subs. by the constitution on (seventh Amendment) Act, 1956, Sec.29 and Scheduled for ‘ Under any state specified in the 1st
Scheduled or any local or other local authority within its territory, any requirement as to residence within the state”

3. It is important to note the special provision has already been made in the constitution for the appointment of members of Anglo-Indian Community to posts in certain services. Sec. Article 336 of the Constitution of India, op. Cit- at P.95

4. United Provinces: General.”

5. CAD, 30th November, 1948 at pp. 676-78 and at pp. 699-703.

6. Ibid., at ,pp.676-77


9. Ibid, at p 702 ,Sec. at.p. 147 also of this book.

10. C.A.D.,30th November, 1948 ,

11. Dr. Ambedkar clearly meant here cl (3) of Article 10 of the Draft Constitution of India, 1948 corresponding to clause (4) of Article 16 of the Constitution of India.

12. I.e. cl (1) of Article 10 of the Draft Constitution of India, 1948 is corresponding to cl(1) of Article 16 of the Constitution of India.

13. I.e. c.(1) of Article 10 of the Draft Constitution of India. 1948.


16. Justice Das quoted here clauses (1),(2) and (4) of Article 16.

17. AIR, 1962,S.C.at p. 38

18. A.I.R. 1964,S.C.,at p. 179


23. The Times of India, New Delhi, Feb. 4, 1979, at pp. 1 and 9.
24. Ibid.
29. AIR 1976 SC 490; (1976) 2 SCC 310
30. AIR 1981 SC 298
31. See happenings in Parasbigha and Dohia village of Jahanabad Sub Division of Bihar and the anti-reservation movement in Gujarat 1981 and 1985 and again in 1990 in all the states of Northern Indian violent anti-reservation agitations in which several lives and property was damaged.
32. AIR, 1985, SC. 1495
33. AIR 1993, SC. 477
36. Supra note 34, at p. 111
37. Ibid., at p. 112
39. Supra note 33 at p.354.
40. AIR 1963 , SC .490
41. AIR 1976 , SC .490
42. Supra note 33, at p.441
43. Supra note 34 at p.113
44. R. Revathi – Exclusion of creamy layer sine. Qua Non for Egalitarianism, Lawyer November, 1993, at p. 258
45. Supra note 33, at p.363
46. Ibid., at p.362
47. Supra note 34 at p. 114
48. AIR 1964 ,SC 179
49. Supra note 33, at pp. 365, 408
50. Ibid., at p. 366
51. AIR 1962, SC 36
52. (1970)3 SCC 567
53. (1981)1 SCC 246
54. (1986) 2 SCC 679
55. Supra Note 34,at p.115
56. Supra Note 32
57. Supra Note 34, at p.115
59. Ibid., at p.44
60. S.P. Agarwal & J.C. Agarwal, Educational & Social uplift of Backward classes (1991) at p.231.
61. Supra Note 33, at p.370
62. Supra Note 58, at p.45
64. Supra Note 60, at p.93 (Madhok, Balraj).
65. Madal Case, 1993 per J. Pandian at p.410
67. Ibid., at p.20
68. Supra Note 66 at p.21
70. Ibid., at p.471
71. AIR 1987, at p.53.
73. (1969) 1 SCR 103
74. (1975) 2 SCR 761
75. (1977) 1 AXE 194
76. (1981) 2 SCR 185
79. (1996) 4 SCC 403
80. (1995) 5 SCC 403
81. AIR 1997, SC 303
83. AIR 1997 SC 2366
84. AIR 1996, SC. 119
86. AIR 1998, SC 1767
87. 1997 (1) SCALE 132.
89. The Hindustan Times March 16, 1993.
90. AIR 1993 SC 477.
CHAPTER V (D)

ABOLITION OF UNTouchABILITY

As already stated in chapter IV (A) that untouchability is the worst kind of atrocity on the Harijans. The makers of the Indian Constitution was aware of the chronic disease of untouchability, and they banned it by embodying Article 17 in the Constitution. Five years after the commencement of the constitution, the untouchability (Offences) Act, 1955, was passed and set into operation. The enforcement of the Act, however, was not satisfactory. A committee on Untouchability and Economic and Educational Development of Scheduled Castes was appointed in April 1965 to investigate the position and give recommendations. Its recommendations come in 1969 and views of the State-Governments were invited. Then, a Bill 'Untouchability (Offences) Amendment and Miscellaneous Provisions' was introduced in the Lok Sabha in 1972. After receiving served amendments by the Joint Committee, it was passed renaming it as Protection of Civil Rights Act in 1976. The Act has a little impact on the abuses of untouchability, particularly in rural areas.

The rural people practice untouchability in connection with temple entry, fetching water from public wells, hotels and other shops providing services of daily life. The observance of untouchability is based on the idea of purity or impurity specially connected with occupations - clean and unclean. The existence of such discrimination could date back to ancient time in Chhandogyopanished, though there are some contrary references about Chandal, he was degraded and ranked with that of dog and pig ¹. This refers to either unclean living of Chandal or to unclean nature of their occupation or both. But the progeny of the most hated of the reverse order
of mixed unions that of a Brahmin female and Shudra male. I.P. Desai says that untouchability is a kind of behaviour, based on the concept of pollution and that it has religious and secular sanctions. He further adds that religious conversions could not improve their social status.

The Constitution of India makes a provision for the abolition of untouchability — a social evil practiced in this country from time immemorial Article 17 provides. That

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

A perusal of this article shows that it prohibits ‘untouchability’ and practice of it in any form is made an offence punishable under the law. This is the unique feature of the Indian Constitution since in no other country of the world social evil has been abolished through a Constitutional provision. According to Sir Ivor Jennings, it is a bad taste on the part of the framers of the Indian Constitution and Social Evils in a country should be mitigated through social reforms and should have no place in a Constitution which is a fundamental law of land. It is true that this article does not create any special privilege for anyone. Yet, it is a great fundamental right, a charter of deliverance to one-sixth of the Indian population from perpetual subjugation and despair, from perpetual humiliation and disgrace. Right, in fact, is a remedy against a disability. The abolition of untouchability is thus a fundamental right in true of the term.

‘Untouchability’ — the very word is obnoxious — has been a custom left over on the four caste groups of the post-vedic age. Those at the top of the caste hierarchy, denied every human right to the so called ‘untouchables’ — except to live and serve the rest of the community on
terms commanded by the former. This custom of untouchability had not only thrown millions of Indian people into darkness but it had also eaten into the very foundation of the nation. The framers of the constitution, therefore, thought it proper to eradicate the evil by incorporating a separate article into the chapter on Fundamental Rights in the Constitution.

This article is a very important provision of our Constitution and its object is to uproot some scandalously unreasonable social customs and disabilities from our nation. This provision stipulates to secure to all the citizens 'social justice' and equality of status' as outlined in the Preamble of the Constitution. Article 17 if properly implemented, will definitely help to achieve these objects. Owing to some difficulties in the way of any definition or clear description that can comprehend all possible cases of 'untouchability', the word 'untouchability' has not been defined in the Constitution. Since, the term 'untouchability' has not been defined either in Article 17 or in the untouchability (offences) Act, 1955, judicial decisions have classified the meaning of the word 'Untouchability'.

In Devarajiah V. Padmanna The Mysore High Court held that 'untouchability' is not to be understood in its literal and grammatical sense but to be understood as the practice as it is developed historically in this country. Understood in this sense, it is the product of the Hindu Caste system according to which peculiar sections amongst the Hindus had been looked down as untouchables by the other sections of that society. A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as suffering from infections disease or on account of social boycott resulting from caste or other dispute. In either case such person can claim the protection or benefit of Article 17 or of the 1955 Act. According to Dr. Ambedkar instead of leaving it to our Parliament or to a State Legislature
to make the enforcement of any disability arising out of untouchability a
crime, itself declares any such enforcement an offence punishable by law”

Article 17 contains two main provisions regarding untouchability. Firstly, it says that 'Untouchability' is abolished and its practice in any
form is forbidden, and secondly, it declares that the enforcement of any
disability arising out of 'untouchability' shall be an offence punishable in
accordance with law. It may be mentioned here that the word
'untouchability' is enclosed in inverted commas which indicates that the
theme of the article is not untouchability only in its literal sense but also the
practice as it has developed historically in this nation. The term consists
persons who are treated as untouchables either temporarily or otherwise for
various reasons such as social observance, associated with birth or death
owning to social boycott resulting from caste etc. In Banglore W.C. & Silk
Mills V. Mysore State it was held that imposition of untouchability in such
circumstances has no relation to the causes which regulate certain classes of
people beyond the pale of caste estimate  

Mahatma Gandhi was the Chief exponent of abolition of
untouchability and stood for the total eradication of this evil. He was a great
champion of the cause of Harijans and once remarked

"I do not want to be reborn, but if I am reborn, I wish that
would be reborn as a Harijan, as an untouchable, so that
I may lead a continuous struggle against the opposition and
indignities that have been heaped upon these classes of
people.............."  

"It was an irony of fate that a man
(Dr. B.R.Ambedkar) who has driven from one school to
another, who was forced to take his lesson outside the
class-room and who was thrown out of hotel in the dead of
night, all because he was an untouchable, was entrusted with the task of framing the Constitution which embodies this article and which dealt the death-blow to this pernicious social custom"

The vigorous movement, with the fast of Mahatma Gandhi in 1932 against the ‘Communal Award’ was launched against untouchability throughout the country. This movement had some positive result and untouchability was considerably eradicated in urban areas particularly. But the evil continues to exist in rural areas particularly. But the evil continues to exist in rural areas and even after 30 years of independence atrocities have become a regular feature in village life. The Home Minister of India, while speaking on untouchability offences Bill which was passed into an Act in 1955, very rightly observed:

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

The idea of untouchability is entirely repugnant to the structure, spirit and provisions of the Constitution” 12.

The Untouchability Offences Act which may be said as a supplement of Article 15 of the Constitution, came into force in June,
1955. The Act was meant for prescribing "punishment for the practice of 'untouchability", for the enforcement of any disability arising therefrom and for matters connected therewith. The Act provides punishment for enforcing certain religious social other disabilities on the ground of untouchability. It further provides that whosoever even abets any offence under this act is 'punishable with the punishment provided for the offence". Some other legislative measures such as the Madras Removal of Civil Disabilities Act XXI of 1938, the Madras Temple. Entry Act 22 of 1939 and Act V of 1947, the Bihar Harijan Removal of Civil Disabilities Act of 1949 etc., have also attempted to eradicate the social disabilities arising out of Untouchability. Before the passing of Untouchability Offences Act there were more than twenty such legislative enactments framed by different state legislatures to deal with the problems arising out of Untouchability. The Bengal Hindu Social Disabilities Removal Act, 1948 was one of them which was challenged in a famous case Banmali Das V. Pakhu Bhandari on grounds of constitutionality. The facts of the case in brief are as follows:

Banmali Das, who was a Harijan (Cobbler by Caste) filed a complaint against Pakhu Bhandari and others alleging that the accused had refused to cut his hair and also to render similar services to other members belonging to Harijan Community. On behalf of defendant it was argued that the Bengal Hindu Social Disabilities Removal Act, 1948 was violation of constitutional provision since it imposed unreasonable restriction on barbers while exercising their profession. It was also alleged that the validity of the Act was discriminatory in its tendency. In an unanimous decision, the Calcutta High Court rejected this contention. It was held that there was nothing in the Act which cut down the right to carry on the profession of a barber. "All it does it to prohibit him from discriminating
between one Hindu and another in carrying out his duties as a barber. It does not deny any person equality before law. It tends to make all persons equality in society and before the law and it cannot possibly be argued that this Act denies any person equal protection of laws.

Likewise, the U.P., Removal of Social Disabilities Act, 1947 was challenged in Allahabad High Court in State v. Bandari Case. This court also unanimously upheld the Act and observed that the petitioners had no right to refuse to render their services to Harijans.

In Surya Narayan Chaudhary V. State of Rajasthan. The Rajasthan High Court permitted the entry of Harijans to temple without purification ceremonies, on a public interest petition. The High Court disposed of the petition with necessary directions in the favour of Harijans. It quoted Article 17 of Constitution abolishing Untouchability, the Untouchability (offences) Act, 1955 renamed as Protection of Civil Rights Act, Article 35(1) (ii), Article 338 and 46 which deal with the present problem.

The court pointed out that under the Nathdwara Temple Act, the state government had the power of general superintendence over the temple administration. Therefore, it could prevent infringement of Constitutional or other legal provisions. It had a duty to prevent hostile discrimination, the court held. It further ruled that every devotee, including the Harijan who want to enter the temple, shall be permitted to do so in accordance with the general practice. Harijans shall not be subjected to additional conditions. The purification ceremonies shall be discontinued as it violated Articles 14, 15 and 17 of the constitution. "The govt. must also take strict steps to ensure that there is no further mockery of this constitutional guarantee and offenders, if any, are promptly dealt in accordance with law". The govt.
undertaking was noted and it was asked to keep law and order. On the other hand, those who claimed public interest were asked not to "use the Harijans as pawns on the political chess board".

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

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

In Jai Singh V. Union of India. The Rajasthan fully upheld SC/ST (Prevention of Atrocities) Act, 1989, as it attempts to abolish
untouchability and caste differences in tune with the constitutional mandate of Article 17.

However, Article 17 suffers from same serious draw backs. The word "untouchability" lacks precision since it has not been defined under the Constitution. Legally it means untouchability on grounds of descent, caste, race or religion. But untouchability is prevalent throughout the country in much devastating form. The whole society suffers from this evil and untouchability has been a great obstacle in securing social, political and economic equality in caste ridden society like ours. Likewise, the expression "any disability arising out of untouchability" needs a clear definition or an illustrative elucidation for the enlightenment of both the judiciary and the general public. The Constitution however, authorises parliament to make law prescribing punishment for any offence envisaged by Article 17 except as otherwise provided in clause (b) and sub-clause (ii) of clause (A) of Article 35. This power was assigned to Parliament alone and not to the State Legislatures with a view "to ensuring uniformity of legislation on the subject throughout the nation". According to Dr. B.R. Ambedkar.

Inspite of these Constitutional and several legal provisions, India cannot claim to have uprooted the evils of untouchability which has become a cancer of our body-politic. As a matter of fact, legislation is not the only remedy since the abolition of untouchability requires active public corporation. In recent years atrocities on Harijans are on increase and have
taken a menacing form. Thus abolition of untouchability badly needs sincere efforts not only on the part of government but also from the general public as well. The government with the active Support of public leaders, social reformers and people in general must create a social order in which Harijans can live as rightful citizens of a free and democratic country. Until this condition is not created we cannot claim to be a democratic sovereign republic.

REFERENCES:

1. Ghurye G.S., Caste and Race in India (popular prakashan, 1969) at p.18.
2. Ibid., at p.309
4. The Constitution of India, op. Cit., at p.5
8. AIR 1958, Mysore, at p.84.
10. AIR, 1958, Mysore, at p.85.
12. Ibid.
15. AIR, 1989, Rajasthan at p.99


19. Dr. Ambedkar said in the Constituent Assembly Debates on 29 November, 1948, with reference to Article 27 of the Drafting Constitution of India, 1948 which correspond to Article 35 of the Indian Constitution.
CHAPTER V (E)
PROTECTION OF RIGHTS OF CULTURAL MINORITIES

The democratic federal polity to which India belongs presents a peculiar combination of tolerance and accommodating minority's willingness to assimilate with majority without surrendering its identity and thereby contributing towards the mainstream of the national life.

In a secular state the division of minority and majority on the basis of religion was the innovation of British Government which led to division of territory into two sovereign states-India and Pakistan, should not have been accepted by the framers of the constitution because it negates the very idea of secularism. Minority versus majority concept has created many problems after independence and resulted in tensions, riots and clashes between the two major religious communities when the basic philosophy of right to equality and equal protection of law has been accepted as the fundamental principle for the governance of the country, the specific provision for the protection of minority, its denomination, property and institution frustrated the majority. In a sovereign, democratic republic which is committed to secularism, should not divide the society in minority – majority panorama whether it be based on religion, language, creed or clan. A division of community on economic ground may be justified for imparting social justice to the lowest echelon of the society but division based on religion or language is a threat to the national unity and integrity.

Inspite of multifarious diversities the paramount national goal is to maintain unity and integration failing which the one sovereign republic may result in many independent nations. The Fundamental Right to equality and equal protection before law includes equal treatment by state machinery in all walks of life of an individual irrespective of his religion, race, caste,
creed or sex. There are special provisions for the protection of interests of minorities under Article 29 and 30 of the Indian Constitution.

The philosophy of secularism does not mean state apathy to any religion but state’s neutrality and similar treatment to all religions provided the particular religion may not prejudice the national interest particularly the unity and integration.

(i) WHO ARE MINORITIES:

The term minority grammatically means, the smaller number of the two aggregates that together constitute a whole. Encyclopaedia Britannica defines minorities as groups held together by ties of common descent, language or religious faith and feeling themselves in these respect from the majority of inhabitants of a given political entity.

The term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic, trading of characteristics markedly different from those of the rest of the population.

A particular religious community may be in majority in a particular place but in minority for the total population, secondly determination of linguistic minority is a difficult task because persons of all religions at a particular region may constitute a linguistic minority for the total population. The Hindu community, which every one places as a majority community may be well placed in minority groups on the bases of different modes of worship, worship of different deities, adoption of different and diverse rituals and ceremonies and speaking of different dialects and languages. Jains, Sikhs and Buddhists though fall within the broader meaning of the term Hindu are constitutionally placed in the category of minorities.
(ii) MINORITY IN INDIAN CONTEXT:

The word 'minority' has been used in Article 29 and 30 of the Constitution but it has not been defined anywhere in the Constitution. Indeed, this omission was deliberate one. The framers of the Constitution left it for the Legislature and Judiciary to give it a meaning according to the situation and circumstances of the case. The Supreme Court for the first time gave definition of the term minority as 'a community which is numerically less than 50%. Even then the question is not fully answered, namely, 50% of what population? Is it 50% of the entire population of India or 50% of the population forming part of the Union. The Court refused to take unit or district or sub division or a taluka or a town, or its suburbs or a municipality or its ward for determining the question of minority. The Court observed that when a Bill is passed by a State Legislature which extends to the whole of the state, the minority must be determined with reference to the entire population of the state. If the Act has application throughout India, the minority must be determined with reference to the population of the entire country.

The definition given by the Supreme Court in Re Kerala Education Bill case was followed by the Kerala High Court where it observed that Christians at the 1961 census constituted only 21.22% of the population of the state of Kerala, and the Roman Catholics who formed a section of that community are minority within the meaning of Article 30(1) of the Constitution. The Supreme Court again reiterated the same view while considering the issue whether the Arya Samaji were a minority, and found that 'Arya Samaji who are part of the Hindu Community, in Punjab are a religious minority and they have a distinct script of their own, which entitled them to invoke the guarantees under Article 26(1), 29(1) and 30(1) of the Constitution.
It is submitted that the definition attempted by the Supreme Court is solely based on numerical strength. K.K. Wadhwa pointed out that certain difficulties may arise from the application of said formula. The first one is that the population in a state may be so heterogenous that no single community may constitute more than 50% of the state population. The second one is about the this definition is that there might be certain communities which are in majority in case of states but in minority in case of the union. Thus in first difficulty all groups may claim the title of minority difficulty and in second difficulty communities shall be having double status of being in majority at one context and at the same time in minority in different contexts. According to him, minority in India is a relative term. It is primarily a political and not merely a numerical concept. He gets support from what Dr. B.R. Ambedkar explained the term minority in Constituent Assembly Debates, “The word is used not merely to indicate the minority in technical sense of it but also indicate minorities in the cultural and linguistic sense”.

(iii) CRITERIA FOR MINORITY:

According to Article 29 and 30, the criteria for determining the minorities can be language, religion script or culture. Thus, only three categories of minorities have been recognized. Any group to claim minority should prove that their case is drawn on the basis of language, religion or culture.

(a) LINGUISTIC MINORITIES:

The term linguistic minorities has been defined by the commission. For Linguistic Minorities as minorities residing in the territory of India, or any part there of, having a distinct language or script of their own. In other words, a linguistic a minority at the state level means any group of people whose mother tongue is different
from the principal language of the state and at the district and taluka levels, different from the principal language of the district or the taluka 11.

(b) RELIGIOUS MINORITIES:

Religion may be another criteria for determining the status of minority. Religion has a strong tendency of unifying large sections of people who would otherwise have remained fragmented. On the other hand, it has diversifying tendency also i.e. religion cannot separate man from man, group from group and nation from nation. In India, every aspect of life, i.e. from birth to death is impregnated with religious sentiments. There is nothing which is not religion in India 12. Hinduism is the religion of the majority and all other religions belong to the category of religious minorities.

(c) CULTURAL MINORITIES:

Culture is a collective name for material, social, religious and artistic achievements of human groups, including traditions, customs and behavior patterns, all of which are unified by common belief and values. Values provide the essential part of a culture and give it its distinctive quality and tone 13. It is not a single item, either of area, language or script. It is vast ocean, including the entirely of the heritage of the past of any community in the material as well as spiritual domain whether we think of arts, the learning, the sciences, the religion of philosophy, culture includes them all and much also besides 14.

Keeping in view the above definitions it is very difficult to determine culturally who is in minority and who is in majority. Dr. S. Radha Krishan put the remark as:

"India is symphony where there are, as in orchestra,
different instruments each with its particular seniority, each with special sound”.

It is submitted that culture being a vague term is quite unsafe criterion of categorising minorities.

(D) ARE BACKWARD CLASSES (INCLUDING SCHEDULED CASTES AND SCHEDULED TRIBES) MINORITIES:

The controversy is that whether backward classes should be considered as minority or as a depressed segment of Hindu community. According to Dr. B.R. Ambedkar the Scheduled Castes are really a religious minority. The Hindu religion by its dogma of untouchability has separated the scheduled castes from the main body of the Hindus in manner which makes the separation far more real and far wider than the separation which exists either between Hindus and Muslims or Hindus and Sikhs, or Hindus and Christians. S. Nagappa put a splendid remark that:

“We are a political minority, because we are not recognised all these days and we are not given out due share in the administration of the country”.

In the same tone Muniswami Pillai asserted that, untouchables who form one-sixth of the population of this sub-continent are a minority community, because their social, political and educational advancement is in a very low state.

The contrary views have been expressed by K.M. Munshi and Seth Goviddas. According to K.M. Munshi:

“the Harijans generally known as the scheduled castes, are neither a racial minority nor a linguistic minority, nor certainly a religious minority. The Harijans are the
According to Seth Govind Dass:

"the Harijans are in fact Hindus; they are not a minority like the Muslims or the Christians" 19.

Prof. V.C. Sarkar analysed the similarity and dissimilarities between minority and backward classes. There is a lot of difference between minority and backward class though both of them imply some weakness. The former is indicative of weakness in number and the latter means the weakness of intellectual level and cultural progress. But in a democratic rule, controlled by majority both could be subjected to tyranny, oppression and injustice 20.

K.K. Wadhwa's definition of minority seems to be a suitable definition in the Indian context, which is as under:

'Any section of the citizens, being small in number in a definite area, in respect of religion, language or any other ground, seeking equal or any other ground, seeking equal or preferential treatment either to maintain its identity or to be assimilated with the majority, is a minority." 21.

(E) PROTECTION OF MINORITIES UNDER THE CONSTITUTION:

Minorities are classified in two categories (1) minorities at will; and (2) minorities by force. The minorities at will in order to maintain their distinctiveness as a group compensate for their numerical or social inferiority, wanted to be protected by way of giving some special privileges. They regard its essential that the education of their children should be in accordance with the teaching of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary
schools designated for all the members of the public. They desired that the education should be imparted to their children in an atmosphere congenial to the growth of their culture. Whereas the minorities by force want assimilation with the general community, as they feel that such assimilation will bring homogenity and they will be within the fold of the national mainstream. 'Minorities by force' do not want to maintain their identity separate from that of the majority. They claim protection or privilege not to maintain their identity separate from majority but bring themselves at par with that of the majority. In other wards, the protection and privilege they claim is for the time being, i.e. they reach to the level of majority.

Indian Constitution makers recognised the validity of their claim and to allay their fears conferred on them (minorities), the Fundamental Rights. The Constitution has guaranteed certain cherished right to the minorities concerning Cultural and Educational Rights, their language, culture and religion. These guarantees have been conferred on minorities for good and valid reasons.

Article 29(1) provides that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. This constitutional provision, therefore, protects the language, script or culture of a section of citizens. If a section of citizens have a distinct language, script or culture of its own, they will have the right to conserve the same.

Article 29(2) guarantees that admission is not being denied into any educational institution maintained by the state, or receiving aid out of state funds, on the grounds only of religion, race, caste, language or any of them. This provision guarantees the rights of a citizen as an individual irrespective of the community to which he belongs.
According to Article 30(1) all minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their own. Whereas Article 30(2) prohibits the state to discriminate in granting aid to educational institutions. It provides that “the state shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of minority, whether based on religion or language.

Special protection given to minorities was challenged as discriminatory against the majority. The matter was not finally decided by the Supreme Court as the State promised not to enforce the impugned law against the majority in the event of its being declared unconstitutional. Later on, Chief Justice Ray as he then was, in *Ahmedabad St. Xaviers college society v. state of Gujarat* while justifying the special protection conferred on minorities observed that the whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between majority and the minority and if the minorities do not have such special protection, they will be denied equality.

In the case *Khan Abdul Hamid v. Mohd. Haji Polytechnic* the Bombay High Court says that a restriction prescribing that a certain percentage of students belonging to ST should be admitted even by non-governmental polytechnics in Maharashtra was not applicable to minority institution. In the ruling, the High Court dismissed the petition and held that Article 30 (1) was absolute in terms. It could not be made subject to reasonable restrictions as other fundamental rights. The High Court further said that a regulation which prescribed a certain percentage of seats to backward classes for tribes might be in Public interest. It might be in the interest of bringing up the educational level of those people. But such
regulation could not be regarded as conducive to the improvement of the quality of the education.

(a) **RIGHT TO CONSERVE:**

Article 29(1) intends to preserve the special traditions and characteristics of the minority which distinguish it from the dominant group. The love for one’s language and religion is eternal and universal. Since every minority would like to jealously retain and protect its particular features, so the right of conservation used in the constitution is not limited to the literal meaning ‘to retain or to preserve’. It includes both positive and negative aspects. Right of conservation, according to D.K. Sen, includes the following rights:

(i) The right to profess; practice and preach its own religion, if it is a religious minority;

(ii) The right to follow its own social moral and intellectual way of life;

(iii) The right to impart instructions in its tradition and culture.

(iv) The right to perform any other lawful act or to adopt any other lawful measure for the purpose of preserving its culture.

The Supreme Court of India has also interpreted this word liberally. The right to conserve includes the right to agitate for the protection of the language. Therefore, promise by a candidate to work for the conservation of the electorate’s language does not amount to corrupt practice. Similarly legal provision requiring the G.N.D. University to promote studies and research in Punjabi language and literature, and to undertake measures for the development of Punjabi language, literature and culture, does not infringe Article 29(1). The Court reminded that the promotion of the majority language does not mean the stifling of the minority language or
script. To do so will be trespass on the rights of those sections of the citizens which have distinct language or script and which they have the right to conserve through their own educational institutions. The scope of the Article to conserve seems to be extra ordinary wide and meaningful for the minorities in India. It gives an assurance to the minorities that their language, religion and culture will be guarded, and they will be able not only to conserve the same, but a definite development also can be made by them.

(b) ADMISSION TO AIDED EDUCATIONAL INSTITUTIONS:

The benefit of Article 29(2) can be availed by all groups of citizens (whether belonging to minority group of majority group) in the matter of admission to the educational institutions maintained or aided by the state. There is no bar to any community maintaining its own educational institutions. If such an institution wanted state aid, it must throw open its doors to members of all classes of persons irrespective of their religion, community or language.

The Supreme Court from the very beginning was conscious of the fact that real interest of Indian democracy can be reserved only if the impact of religion on community is reduced. In the very second year of establishment the Supreme Court frustrated the attempt of the Madras Government reserving seats on communal grounds in medical and engineering colleges. The Court held that the classification in the Government order was based on religion, race and caste which was in consistent with Article 29(2).

In State of Bombay v. Bombay Education Society, an order issued by the Bombay Government banning admission of those whose language was not English to a School using English as a medium of instructions. It was argued on behalf of the state that the order did not debar
citizen from admission into English medium schools only on the ground of religion, race, caste, language, but on the ground that such denial would promote the advancement of the national language. The Supreme Court while declaring the order unconstitutional as violative of Article 29(2) observed that the immediate ground for denying admission in English Schools to pupils whose mother tongue was not English, was only language. The court further observed that:

"To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens of the majority group have no special educational rights, the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination." 35

But it is difficult to accept that in not holding entrance examination in any particular language, amounts to denial of admission on the ground of language 35.

Where the reservation of seats is based on residence, provisions of Article 29(2) cannot be invoked similarly a candidate who does not fulfil minimum qualification and hence refused admission, or a candidate who has been expelled on the ground indiscipline cannot invoke Article 29(2).

In Suneel Jaitley v. State of Haryana, 37 the state Government reserved seats in medical colleges for students passing out class VIII from rural schools. The Supreme Court while declaring the reservation as unconstitutional observed that education up to eight class hardly had any relevance to medical education and thus there was no nexus between the basis of classification and the object sought to be achieved.

(c) EDUCATIONAL RIGHTS OF MINORITIES:
One of the most important methods of conservation of a language, script or culture is through educational institutions. In the words of J.A. Loponce, ‘the School is to a Language what the Church is to a religion, the condition is of survival. Hence the great importance is attached to linguistic minorities to freedom of education’.

The Supreme Court while emphasizing the importance of educational rights of minorities observed that it intended to develop the commonness of boys and girls of our country. This is in true spirit of liberty, equality and fraternity through the medium of education. The Court hopes that general secular education will open doors of perception, and act as the natural light of mind of our countrymen to live in the whole.

Under Article 30, the minorities based on religion or language have four types of right:
(i) the right establish educational institution
(ii) the right to administer educational institutions;
(iii) the right to determine the nature of their educational institutions at their own choice; and
(iv) claim non-discriminatory grant of aid from the state.

(d) MINORITY’S RIGHT TO ESTABLISH EDUCATIONAL INSTITUTIONS:

Minorities based on religion or language have Constitutional right to establish educational institutions of their own choice. The phrase right to establish includes the right to bring in to existence. Educational institutions are one of the best media for the conservation of language, script or culture and help the minorities in conservation of their distinct language, script or culture.
The question whether the minorities right to establish educational institution is limited to the purposes mentioned in Article 29(1) only, or it is extended to imparting secular education?

The Supreme Court in Re Kerala Education Bill 41 opined that Article gives certain rights not only to religious minorities but also to linguistic minorities. It confers rights on such minorities to establish educational institutions of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only or that linguistic minorities should have the right to establish educational institutions for teaching their language only.42

In Managing Board M.T.M.V. State of Bihar, 43 the Supreme Court has emphasized that the right to establish educational institutions of their choice must mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to them. The provisions of Industrial Disputes Act, 1948 cannot be invoked to interfere with the right to establish.44

In Ahmedabad St. Xavier College v. State of Gujarat 45 the Supreme Court again rejected the plea to restrict the scope of Article 30(1) to purposes given in Article 29(1) as both Article deal with different matters, one provides for conservation of language script or culture whereas other deals with the right to establish and administer institutions by the minorities of their choice.

The right to establish educational institutions of their choice given to minorities under Article 30(1) however, is not absolute. The minority who wants to establish or bring into existence any educational institution it has to seek the approval of the Government for its location.
(e) **STATE REGULATIONS ON MINORITIES INSTITUTIONS:**

The right to establish educational institutions conferred on minorities will remain force, if the right to administer the same has not been given to them. Therefore, Article 30(1) confers both the rights on the minorities. The 'administer' used in Article 30(1) should be given wider interpretation and minorities should have full autonomy in the administration of educational institutions.

It is necessary that those who establish an institution should administer it. It would be enough if the members of the same minority community administer the institution. The members of the minority community may form themselves into a society registered under the society. Registration Act, 1860 and the administration of the institution may be done by the society. Even on individual belonging to minority community may establish educational institution with his own means and funds will be covered by Article 30(1), provided that institution must have been establish for the benefit of the minority community.

The minority community who claims privilege under Article 30(1) must be minority of persons residing in India. Article 30(1) does not confer on foreigners. Persons setting up educational institutions must be resident in India and they must form a well established religious and linguistic minority.

Now the question crises, to what extent state can interfere in their right to administer their educational institution. This question has been answered by the Supreme Court in Re Kerala Education Bill, Case, where it observed that the state can interfere with the administration but, such regulation will have to satisfy two more conditions besides the usual test of public interest, i.e., the regulation must be reasonable and it should be conductive to making the institution an effective vehicle of education for
minority community or other persons who resort it. Therefore, the state regulation must satisfy dual test, i.e., test of reasonableness and being conceive to minority institutions 49.

Administration means management of the affairs of the institutions. The Supreme Court in State and Kerala v. Rey Mother Provincial 50 while dealing with the right under Article 30(1) and the extent of the state’s power of regulatory control observed.

"Administration means management of affairs of the institution. This management must be free of control, so that the founder or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the communities in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right".

The court pointed out that the Standards of education are not the part of the management as such. Such Standards concern the body politic and are dictated by considerations of the advancement of the country and its people. To a certain extent the state may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly effect it. At the same time the court pointed out that the minority institutions cannot be allowed to fall below the standard of excellence expected of educational institutions or under the guise of exclusive right of management to decline to follow the general pattern 51. The University make it obligatory on the minority educational institutions affiliated to it to teach all the subjects in a particular language only 52.
The right to administer can be tempered with regulatory measures to facilitate smooth administration. Regulations which serve the interests of the students and teachers are of the paramount importance in good administration. For efficient and smooth administration the state can take regulatory measures. The right to administer an educational institution of their choice cannot mean a right to mala administration. This right does not necessarily militate against the claim of the state to insist that in order to grant aid the state may prescribe reasonable regulations to ensure the excellence of the institution to be aided. But, the State Government cannot take the management, in public interest.

The University can prescribe regulations and insist that they should be compiled with before it would grant affiliation or recognition to an educational institution. To deny such power would result in robbing the concept of affiliation or recognition of its real essence. But the state cannot shackle and trench seriously upon the right to administer by management, by imposing special constitution of its choice. The State Government cannot refuse to recognize a minority teacher's training college when the inspection committee after inspection recommended for its recognition. The Bihar Universities Act, which provided, interalia that appointments, dismissals removals and termination of services by the governing body of the college were to be made on the recommendation of University Service Commission and subject to the approval of the University, empowering the commission to recommend to the governing body names of the persons in order of preference and provision that governing body will not appoint a person who has not been recommended by the University Service Commission was struck down as violative of Article 30(1) as it completely took away the autonomy of the governing body of the college.
The State Government cannot require from the school establish by minorities to constitute a managing committee in accordance with an order of the state. Similarly the State cannot interfere in the matter of appointment of Head Master in a minority Institution because they require a person in whom they can repose confidence. But the state can prescribe that Principal and Senior most teacher of the college will be necessarily included in the governing body of every affiliated college because of its intramural character. This case has indirectly robbed the administration of its right. After this ruling, the promotional regulatory measures may demand even the restructuring of a minority's governing body.

The Vice-Chancellor cannot direct the management of a minority institution to allow a particular person to function as principal who has been dismissed by the management. The right of the minority institution to take disciplinary action against the teachers and employees is a very vital aspect of management's fundamental right to administer the institution. Although procedural safeguards may be laid down, the final power to take disciplinary action must vest in the management of the institution and be not subjected to the control or veto of any outside body. The Supreme Court re-affirmed this opinion in *Mrs. Y. Theelamma v. Union of India* but with some reservation. The reservation is that the state can provide for prior approval of directors as a mandatory requirement before suspension order is issued.

(f) **GRANTS IN AID TO MINORITY INSTITUTIONS**

Aid is very essential for the effective development of educational institutions. Therefore in order to give effective protection to the right conferred under Article 30(1) the framers of the constitution under Article 30(2) provided that the state shall not, in granting aid to educational institution discriminate against any educational institution on the ground
that it is under the management of a minority whether based on religion or language.

Article 30(2) has a two-fold objective. In the first place, it implies that an educational institution belonging to a minority is entitled to ask for aid from the state. Secondly, it also means that the conditions under which grant-in-aid should be available to minority educational institution must be the same as for all other educational institutions. It clearly leads to the result that minority institutions have a right to equality in receiving aid.

Article 28(2), 29(2) and 30(2) contemplate for the grant of state aid and Articles 41 and 46 charge the state with the duty of aiding educational institutions and promoting such interests of the minorities. Aid serves two purposes. Firstly, it helps in supporting the weak entities, and secondly, it enables the beneficiaries to assert independence of the final dependence. But it should not be forgotten that while granting aid, the state can impose certain regulatory measures. However, the state should not compel the institution to surrender minority’s right of administration. The state aid is a potent agent to coax minority institutions to practice the constitutional creed of equality but not to covert by coercion.

To what extent these aids can exert influence on the Fundamental Right to administer, the Supreme Court in Re Kerala Education Bill laid down guidelines that (1) the aid is not to be used as an instrument to force the minority institution to surrender their right to administration guaranteed under Article 30(1); (ii) the right to administer, is not however, a right to mal administration; (iii) minority cannot surely ask for aid or recognition in unhealthy surrounding, without any competent teachers, without a fair standard of teaching or with teaching matters subversive of the welfare of the scholar; (iv) the state may insist that in order to grant aid or even
recognition, it may prescribe reasonable regulations to ensure the excellence of the institutions to be aided.

In Sidhrajbhai v. State of Gujarat the Government order, requiring the petitioner Christian Society's Teachers Training College to reserve 80% seats for government nominees for admission accompanied by threat to withdrawal aid was held to be an infringement of Fundamental Right Conferred under Article 30. The Court observed that "regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution, while retaining its character as a minority institution, effective as an educational institution." The State can ensure by regulations that the aid is utilised for the purpose of which it is granted.

(g) ACQUISITION OF PROPERTY OF MINORITY EDUCATIONAL INSTITUTION:

By the Constitution 44th Amendment Act, 1978, Article 30 (1A) has been added. This Article provides that in making any law providing for the compulsory acquisition of any property of an educational institution establish and administered by a minority, referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law, for the acquisition of such property, is such as would not restrict or abrogate the right guaranteed under that clause. The effect of this provision is that while fixing the amount of compensation the state has to ensure that acquisition does not affect the right under clause (1), i.e., the financial capacity and resourcefulness to establish and administer educational institutions shall not be put to any detriment.

Undeniably the state has the right to acquire property belonging to any institution including minority institution. This provision enables the
minority institution to approach the court of law, when their property has compulsorily been acquired by the state on the ground that the compensation paid in lieu of acquisition is not just. This provision has negated what has been achieved through 44th Amendment to the Constitution. It conferred that right on minorities which is not available to any other citizen or majority institution. Although actual implications of Article 30(1A) are not clear, it has certainly created a state of confusion. The question arises whether by invoking this provision the minority institution can claim fair and just compensation from the state, when the state has acquired its property for public purposes. If the answer to this question is yes, then this provision is certainly a retrograde step and goes against the preambular promise of the constitution which promises, justice — social, economic and political to all citizens particularly the lowest strata of the society; and if the answer to this question is no, then this provision becomes meaningless. This provision indeed poses a paradoxical and difficult situation in practical terms.

(F) MINORITY VIS-À-VIS MAJORITY:

India is a welfare state. It caters to the needs of the individuals from cradle to the grave. It cherished goal is the greatest good of all, which is the philosophy of savodaya. It is concerned with the well being of all the people equally, without discrimination, and irrespective of any consideration. The preamble and the Directive Principles of State Policy as enshrined in the Constitution of India, foreshadow the emergence of such a state.

Due to the adoption of democratic system in India, it recognizes equal rights and duties for all irrespective of religion, race, caste or language. So it only democracy that recognizes different minorities and
provides them equal treatment because the efficiency of democracy lies in giving fair treatment to minorities. This helps in creating the feelings of confidence to the members of the minorities that they will not be discriminated against the majority, and they will be allowed to retain and develop those characteristics which have set them apart from the majority, while still meeting the equally genuine fears of the majority community that continued acquiescence in what are seen as 'minority extremist demands' does not lead to the fragmentation of the nation and the generation of separatist demands.

In fact, religion-based division of minority v/s majority threatens the social solidarity, unity and integrity of the nation. The minority communities lay claim of special position, privilege and protection under the Constitution, particularly the Muslim minority seeks exemption of legislative enforcement in its personal laws on the ground that the law based on Quran and Sunnet is immutable being an integral part of their religion.

When the provision relating to Uniform Civil Code was placed before the members of the Constituent Assembly, the Muslim members opposed it. Mr. Hussain Imam stated that the majority did not have the safeguards because they are the majority and nothing can be passed in the legislature without their full consent and concurrence whereas the minority has not got this privilege and therefore, it is necessary that the personal laws of Muslims and other Minorities who so desire should be preserved from interference by the legislature. The question of minority v/s majority cropped up even before independence and the national leaders of contemporary period thought it fit to please and appease Muslims by keeping provision for their protection under Fundamental Rights. The Muslim fundamentalists were least worried about their education and
economic upliftment or a commitment for the basic values of democracy and socialism. The rise of Hindu Communalism added fuel to the fire and the reactionary. Muslim Communalists have exploited the situation fully to wean away the Indian Muslims from the common democratic way of life. They have fostered among them a narrow communal and separatist outlook. This created a wide gulf between minority and majority. The reality is this that the community should not be divided into religion based minority or majority in the sovereign, Democratic, Secular Republic. Every person should be regarded first as an Indian national and then he should be categorized on the basis of socio-economic status. Religion – based division cuts the very root of secularism, integrity and unity of the nation.

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12. Supra Note 9 (per Ambedkar, Dr. B.R.)
14. Supra note 9 (per Prof. Shah, K.T.)
15. Supra Note 13 at 38.
16. Ambedkar, B.R., What Congress and Gandhi have done to the Untouchables, 334.
17. C.A.D., V. 284.
18. Id. At 202
19. Id. At 227
20. Id. At 241
22. Supra Note 7 at 21.
25. State of Kerala v. Mother Provincial AIR 1970 SC 2079 (The Kerala University Act, 1969 was in question)
27. AIR 1985 Bombay 394.
30. AIR 1971 SC 1737. (In this case it was contended that G.N.D. University is maintained out of state fund. It was establish by the state of Punjab to study and research on the life of Guru Nanak Deo. It amounts to providing religious instructions).
31. Supra No. 7 at 99.
34. AIR 1954 SC 561.
35. Id., at 566.
37. (1984) 4 SCC 296. Also see note 52 of chapter V (B).
39. Supra Note 23.
41. Supra Note 3.
42. Id. At 1033. See also W. Proost v. state of Bihar, AIR 1969 SC 465.
43. AIR 1984 SC 1757.
44. Christian Medical College Hospital Employees Union v. Christian Medical College, Vellore Association, AIR 1988 SC 37.
45. Supra Note 23.
48. Supra Note 3.
50. Supra Note 25.
51. Id. At 2082 ; see also Md. Joynal Abedin v. State of W.B. and others, AIR 1990 Cal. 193.
52. Supra Note 6
53. Supra Note 38
54. Supra Note 3
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69. Supra Note 3.
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CHAPTER - V(F)

DR. B.R. AMBEDKAR ON EQUALITY BEFORE LAW AND EQUAL PROTECTION OF LAW

The real Contribution of Dr. B.R. Ambedkar is reflected in the protective discrimination scheme of the reservation policy of the government envisaged under some provisions of part III (fundamental rights), and many of part IV provisions dealing with the Constitutional mandate to ameliorate the conditions of the so-called Scheduled Castes and Scheduled Tribes and other backward classes. Provisions like Article 17 prohibiting untouchability, Article 30 dealing with the protection of minorities, Article 32 guaranteeing the citizens constitutional right to enforce the fundamental rights in courts of law etc. are some of the notable examples.

Article 15(4) and 16(4) of part III and part XI, and schedules V and VI dealing with the upliftment of Scheduled castes and Scheduled Tribes speaks clearly about the substantial and significant contribution of Dr. B.R. Ambedkar for the development of the unfortunate untouchables who continue to suffer under the clutches of caste imperialists and religious fundamentalists of Modern India.

Thus, these significant contributions of Dr. B.R. Ambedkar, the illustrious son of India and the unquestioned leader of the downtrodden and depressed classes of people in India, one can very easily discern the impact of western political philosophy and culture on the personality of Dr. B.R. Ambedkar which he embibed during his stay mostly in U.S.A. and England. And therefore, the original contribution of Dr. B.R. Ambedkar we find in his life mission the abhorrent and inhuman practice of untouchability developed. Undoubtedly, the unique contribution of Dr. B.R. Ambedkar could be seen from the relentless battle he fought like ‘Bhima of
Mahabharat’ against the social leprosy in the form of Casteism, untouchability and Hindu religious fundamentalism manifested in the abominable practice of “Chaturvarna” or ‘Vanarasama Dharma” placing the three high castes, Brahmins, Kshatriyas and Vaishyas on the higher pedestal relegating the Hindu religious minorities, such as the unfortunate untouchables to the inferior positions of inhuman professions like sweeping, scavenging and thus cleaning the dirt and filth of the villages and towns. Therefore he made it his life mission to uplift the untouchables and the other downtrodden masses from the unequal position of inferiority to that of unequal position of parity in socio-economic status with other high caste Hindus. It was for achieving this goal the reservation policy or the scheme of protective discrimination was advocated and achieved by him for ten years at least to ameliorate the conditions of the various depressed and down trodden sections of Hindu society. It would a matter of great interest to note here that Dr. B.R. Ambedkar was against the policy or perpetual reservation system for the simple reason that it would perpetuate inferiority amongst the reserved categories who should develop themselves on the basis of self-reliance and self-help by developing self-confidence but not on the charity of some body else. Reservation policy is not a matter of charity but a legal obligation on the part of government to improve the lot of the innocent neglected sections of Indian population. Being a great humanist Dr. B.R. Ambedkar always stood for very high standard of human values, dignity of human persons or individual. However, his struggle for fundamental human freedom and the socio-economic emancipation of untouchables, his dream about the creation of egalitarian social order still remains an unfulfilled wishful thinking despite the extended period of reservations for SC’s and ST’s for another four decades and the same was extended to fifty years in January 1990 by 62nd Amendment to the
Constitution of India. And hence, the plea for retention of reservations for SC and ST so long as untouchability continues. It is also argued by legal Scholars like Justice Krishna Iyer that the required change and development amongst the untouchables and other backward sections and the cherished goal of egalitarian social order cannot be achieved unless and until the forward among the backward and the elitist groups amongst SC’s and ST’s are eliminated and the Constitutional mandate is strictly carried out with commitment seriousness and sincerity by the executive entrusted with the onerous task of implementation of the scheme.

The Constitution of India has sustained all these years and passed through critical and turbulent periods in the history of our nation. The Constitution is not bad and unworkables. It is the men who are interchange of it that matters.

In order to assert the right of equality, Dr. B.R. Ambedkar undertook a unique satyagraha at the famous Chowdar Tank at Mahad, along with his followers on March 20, 1927. They burnt Manusmriti at Mahad on December 25, 1927 as a protest against inequality provided under it. During this period he started ‘Bahishkrit Bharat’ a fortnightly, on April 3, 1927. It continued upto November 15, 1929. He formed Samaj Samata Sangh (Social equality organisation) on September 4, 1927 and Samat Sainik Dal (equality volunteer Army) in December, 1927 to bring a new vigour and militancy to the march of equality. Dr. B.R. Ambedkar believed in social equality. He said that, “Hinduism; thy name is inequality.” It is being based on Vedas and Shastra, he had stated that we “must destroy the authority of Shastras and Vedas.”

Dr. B.R. Ambedkar’s whole life was a mission aimed at the emancipation of the depressed classes from untouchability casteism, ignorance, irreligion, poverty and exploitation. The philosophy of Dr. B.R.
Ambedkar is however so wide and comprehensive that it covers social, economic, political, educational, religious and cultural aspects of human society. His philosophy stands for a new social order based on liberty, equality and fraternity. It stands for a well being of men. It does not believe in any unnatural and inhuman inequalities. It is most scientific and rational as it denies God, Soul, predestined Conditions, and Superstitions. It has no blind faith in scripture. It would not take for granted which is not perceptible and acceptable to human intelligence. His political thoughts which includes thoughts on justice, society state, government, national constitution, minorities, democracy, representation foreign policy, power etc. are of great importance. It is but a fact that his thoughts and movement had great impact on contemporary Indian society.

Dr. B.R. Ambedkar visualized on ideal society based on “liberty, equality and fraternity”. According to him an idealistic society should be mobile and full of channels for conveying a change taking place in one part to other parts. He contemplates a society which is plural in character, but not static, rigid and traditional and orthodox in behaviour. It would give fair and equal chance to each and everybody for their progress and bind all the people into one Common cultural bond. He states that “ethnically all the people are heterogenous. It is the unity of culture that is the basis of homogeniety”. The unity of culture, obviously could be developed only when the society is based on liberty equality, and social justice.

According to Dr. B.R. Ambedkar there are two types of liberty (1) Civil liberty and (2) Political liberty. Civil liberty includes liberty of movement, liberty of thought, reading and writing and liberty of action. Political liberty consists in right to share in the framing of laws and in the making and unmaking of governments.
Equality means 'moral equality'. It is essentially an ethical value which recognizes equality of opportunity for each and every one. It is true that men are not equal in physical strength, talents, industry and in tests and attitudes. However the principle of equality denies the undue right of strong to exploit the weak. It creates equal opportunities for all without making any unjust distinctions between man and man, such as caste, class, creed or sex.

Fraternity means “fellow feelings’. It is a feeling of brotherhood with all human beings. It is “a sentiment which leads an individual to identify himself with the good of others” ⁷. Fraternity is, he observes, “the name for the disposition of on individual to treat men as the object of reverence and love and the desire to be in unity with his fellow beings” ⁸. He wanted to maintain justice in the society by establishing the social order on the trinity of liberty, equality and fraternity. He defines justice as “simply another name for liberty equality and fraternity” ⁹. However, he gave much more importance to equality. “Fraternity and liberty”, he states, are really derivative notions. The basic and fundamental conceptions are equality for human personality. Fraternity and liberty take their roots in these two fundamental conceptions. In short, he visualized a society based on justice, social, economic and political.

Dr. B.R. Ambedkar’s approach towards the ideal is pragmatic, result oriented and scientific. An ideal should prove its utility to the society. The social order which strengthen the society, which brings prosperity to the society and which is useful in protecting the society could be called an ideal social order. The society cannot be called as ideal society, only because it has been directed to be so by the religion. It should be property tested on the anvil of experience. In the words of Dr. B.R. Ambedkar, the value of
the ideal must be tested by its results"\textsuperscript{10}. It could be said that this approach is as important as the ideal itself. If the ideal is proved to be wrong, there is no harm in rejecting it. It ought to be replaced by a new ideal.

Now the question arises whether the ideal society as contemplated by Dr. B.R. Ambedkar could be brought into existence? It is however not impossible to bring into reality the ideal society depicted by him. This could be realized by the following ways.

Firstly, it is necessary to do away with the caste ridden Hindu Social Order. Caste is, of course based on Hinduism. ‘Reason and morality, “ he states, “are the two most powerful weapons in the armoury of a Reformer”.\textsuperscript{11} They should be put to use. The Shastras or Vedas which teach the religion or caste are not efficacious. Hence, it is necessary “to destroy the belief in the sanctity of the Shastras”, and to make every man and woman free from the thraldom of the Shastras \textsuperscript{12}. Then they would be willingly ready to interdine and intermarry.

Secondly it is necessary to break the caste-property relations in order to achieve economic equality. For this purpose, Dr. B.R. Ambedkar suggested to accept the scheme of state socialism; in which agricultural land and key industries would be nationalized. Neither these would be forced labour nor dependency. State socialism ensures one man one-value as such every individual would lead his life with dignity.

Thirdly the political structure should be such that every man would be able to get equal share in the power. All the people would enjoy their fundamental rights and fulfil their obligations. Untouchability would be abolished and its practice would be an offence punishable by law. There should be non-parliamentary government so that the problem of minorities
would be solved and they would be able to associate with the national mainstream.

Fourthly, restructuring of the society, socially, economically and politically could be done not by bloody revolutions, but by constitutional means. He had no faith in any unconstitutional or extra constitutional methods like civil disobedience, strike, fasts etc. He contemplated to solve all the problems within the framework of the constitution. In sum, Dr. Baba Saheb Ambedkar has visualised an integrated society and "persistently laboured to locate the cohesive factors conducive to the creation of integrated society based on an associated mode of life".  

Dr. B.R. Ambedkar gave much importance to equality. "It may be said that equality is the original notion and respect for human personality is a reflexion of it. So that where equality is denied, everything else may be taken to be denied". According to Dr. B.R. Ambedkar Buddhism is but "Perfect Justice" because it interalia enunciates equality. He states that men are unequal in physical strength, intelligent capacity and wealth. All have to enter into the struggle for existence, in which if inequality be recognised as the rule of 'game' the weakest will always go to the wall. Equality may help the best to survive even though the best may not be fittest. Equality envisages equal opportunity to develop at their fullest. No one should be deprived of what is legitimately due to him.  

He contemplates justice with three necessary dimensions of social, economic and political justice. He contemplates to secure social justice through constitutional provisions like, equality before law (Article 14), prohibition of discrimination on ground only of religion, race, caste, sex, place of birth or any of them (Article 15(1)). Special safeguards for socially and educationally backward classes for their educational development
(Article 15(4)). Equality in respect of employment opportunity (Article 16(1)). Providing reservations in services for the other backward classes (Article 16(4)). Abolition of untouchability (Article 17) etc. etc.

'Economic justice' would be possible through constitutional provisions like, right against exploitation (Article 23) adequate means of livelihood to all men and women (Article 39(a)), no concentration of wealth and means of production to the common detriment (Article 39(b) (c) ); equal pay for equal work for both men and women (Article 39(d)) etc. etc.

"Political Justice" would be possible through constitutional provisions like general electoral role (Article 325) based on universal adult suffrage (Article 326); reservation of seats to the deprived section of society in the Lok Sabha and State Vidhan Sabhas in proportion to their population (Article 330, 332). Thus Dr. B.R. Ambedkar tried to break caste-property relations and caste-political power relations.

Dr. B.R. Ambedkar imposes the responsibility of giving justice to all the people in the state. The state, through its constitution is expected to bring such 'a social order in which justice, social, economic and political, shall inform all the institutions of the national life' 16. He did not believe in stateless society.

He contemplates to bring into reality a just social order by just means only. He has indomitable belief in constitutionalism and peaceful means. It his view, violent means are though sure to give success are disastrous to the society. In a social situation like India, where equality is denied to some people, equality is obvious criterion for justice where social divisions exist in a society, neither all the people would come. Under one banner nor they be able to revolt against the established classes. Therefore
the constitution and the laws are the best means of bringing about a new social order.

However, Dr. B.R. Ambedkar did not deny the efficacy of violence as a last resort. While presenting the constitution to the nation, he very sincerely warned that we will have to remove the inequality from the society as early as possible as it is necessary to lay down the foundation of just and secular society. This was necessary for the creation of one in which depressed classes can feel safe and secure.

Since the initiation of the constitution, a new struggle for social justice has been in operation. It could be categorized as a constitutional struggle for social justice. Constitution is a means to an end and not a pious document. He had undoubtedly respect for the constitution but not at the cost of justice. If the means was not capable to fulfil the end, he was prepared to reject the constitution and launch the struggle for justice.

Dr. B.R. Ambedkar very categorically said that “host rights are never regained, by begging and by appeals to the conscience of usurpers, but by relentless struggle.” At the later occasion, he explosively exhorted that, “if you want to be effective then you must have guns and not mere soft speech.” Thus for the purpose of securing justice he goes to the extent of resorting to wage armed struggle against venomous forces of injustice. However, he did not speak this out of frustration, nor on the spur of the moment. It honestly reflects his indomitable urge for the attainment of justice. He wanted deliberately to inspire and instigate the suppressed people to agitate against injustice at any cost.

Though he had a strong bias for non-violence as a means to an end, he would not get bound with it when the very goal of justice is in jeopardy.
His non violence is not absolute” 19. He does not hesitate to go for violence as a last resort in the struggle for justice.

However in a country like India, where the whole society is divided between high and low castes and creeds, people would not joint the revolution unless they get an assurance that after revolution is achieved every body would get equal share in power and the national resources” 20. In other words social revolution must precede the political revolution. In sum Dr. B.R. Ambedkar prescribes peaceful and constitutional means as the safest and most efficacious way to attain justice. To him, ‘individual is an end in himself. Hence, he thinks not only to remove all the hurdles in the way of individual’s progress, but to make available all the necessary opportunities for his progress.

Thus, Dr. B.R. Ambedkar is remembered as a towering figure in India’s social history. His main object in life was to emancipate the so called untouchables from the thraldom of untouchability, casteism, superstitions and social and economic dependence; that too without harming the course of the nation. All his demands were, however aimed at uplifting the scheduled castes on par with the caste Hindus and integrate them with the mainstream on terms of equality. While demanding separate electorate and other privileges for scheduled castes, he had thought of the entire nation as one unit and had the comprehensive vision of the whole society” 21. For him, development of the Scheduled Castes was a part of the development of the society as a whole. However when the question arose of giving preference either to national interest or the interest of the Scheduled Castes, he preferred the former one and become ready for mutual adjustment.
Thus, Dr. Baba Saheb Ambedkar was a ‘man with a mission’ in his life and that was the eradication of untouchability and securing political, economic and social justice through appropriate political action. He, however visualized a new social order based on liberty, equality and fraternity, wherein every one would secure justice. In his new social order neither there would be castes not classes. He was very much objective in his goal. He, however viewed the emancipation of the untouchables as an indispensable part of his wider perspective of justice. For him, society was an organism in which every organ must be equally healthy happy and inseparable. He also thought that caste and class were bound by cause and effect relationship. Therefore, he wanted to break the caste property relations under his state socialism. He desired to incorporate the provision of state socialism in the constitution itself so that it could be beyond the reach of the privileged classes to abrogate it.

(i) DR. B.R. AMBEDKAR AND HIS MOVEMENT FOR SOCIAL EQUALITY:

Dr. B.R. Ambedkar struggled throughout his life for the emancipation of the Dalits from the stigma of caste and untouchability. His struggle was directed against oppression and exploitation of man against man and man against woman as well. He held the view the Hinduism was responsible for the disorganisation and denationalization of society at particularly the deplorable condition of the untouchables. Thus he observed:

“The religion which discriminates between followers is partial and the religion which treats crores of its adherents worse than dogs and criminals and inflicts upon them insufferable disabilities is no religion at all. Religion is not the appellation for such an unjust social order” 22.
Dr. B.R. Ambedkar organised social reform movements under the banner of Bahiskrit Hitakarini Sabha (1924) to bring about socio-religious and political consciousness among the Mahars of Maharashtra. He struggled to secure for them civic rights, the right on wind, water and roads of their motherland. The year 1927 was a landmark in the history of movement of untouchables when Dr. B.R. Ambedkar organised temple entry movements, held the Mhad Satyagraha to fetch water from public chowdwar tank, burnt the Manusmriti making it responsible for the plight of the untouchables and submitted a memorandum to the Simon Commission demanding the political rights of the untouchables. Dr. B.R. Ambedkar believed that social reform was precedent to political reform, and according to him, the common masses could have been made politically conscious before going to struggle for independence. He and his followers had to face strong resistance from the side of the orthodox Hindu for their social reform programmes and they had to endure a lot of criticism and humiliations. There was no change among Hindus in the direction of accepting the untouchables as their fellow religionists. The unchanging attitude of the Hindus and the outcaste existences of the untouchables led to Dr. B.R. Ambedkar to Characterise the untouchables as a separate element distinct from the Hindus and advice them to seek equal status in any other religion by renouncing Hinduism.

Of course, the freedom movement had initially given much emphasis on social reform, but it was diverted to the political aspect alone since the appointment of the Simon Commission in 1927. Dr. B.R. Ambedkar’s political philosophy then developed under the impact of the prevailing social and religious condition which led him to demand “Separate electorates” for the untouchables in the Round Table Conference (1930-32). He condemned the British Government for their apathy and negligence
of the downtrodden classes during the two hundred years of their rule in India. He demanded Swaraj by which the people could redress their grievances by themselves. By swaraj he did not mean the change of Indian masters in place of Britishers, but a democratic form of government by which all sections of the Indian population would have a proportional share in power and administration.

The social and religious struggle of the untouchables took a different turn after the Mahad Satyagraha in 1927. In every Depressed class conference held after that event, resolutions stressing the need to renounce Hinduism were passed. The Jaloan Conference (May 29, 1929) and the Yeola Conference (October 1935) reflected this trend. Presiding over Yeola Conference, Dr. B.R. Ambedkar told ten thousand men and women assembled there that the time had come to decide and settle the question of future untouchables. He asked them to embrace a new faith that would give them equal status, a secure position and a rightful treatment. He made a bold declaration that although he was unfortunately born a Hindu untouchable, he would not die a Hindu. He was of the firm opinion that conversion would bring equal status and peaceful life to the untouchables.

Resolution regarding the renunciation of the Hindu religion were passed unanimously at the Conference. The Hindu leaders were quite perturbed to learn about the declaration. Gandhi characterised the Yeola Resolution as an unfortunate event and wanted to urge Dr. B.R. Ambedkar to assuage his wrath and to reconsider his position. He considered this threat of conversion as a warning to the caste Hindu: if they did not wake up in time it might be too late. In this way there were frantic efforts to pressurise Dr. B.R. Ambedkar from taking recourse to conversion. But in
comparision with the plight of untouchables, the appeal did not seek to offer any consolation for the deprived masses.

The Congress leaders were well aware of the repurcussion of conversion and, therefore they undertook definite programmes to protect Hinduism from inevitability of its sizable erosion. Gandhiji, in 1934, organised Harijan movement as a program of the Congress, renamed the untouchables as Harijans (the Children of Hari, the Hindu God) set up the Harijan Sevak Sangh, visited the untouchable basis and spearheaded the movement for temple entry only to consolidate them to the side of the Congress. His movement was thus political in nature and never social or religious

The pressure from the Congress and the forces of the orthodox Hindus could not change the mission of Dr. B.R. Ambedkar. He addressed Mahar Conference on May 30-31, 1936 at Dadar and said that the untouchables had neither manpower nor financial strength to ameliorate their multifaceted problems and therefore, they could depend on mental strength, that is determination for struggle:

'So long as you remain in Hindu religion, you will continue to feel the necessity of changing the name or your caste. Because there can be no Hindu without a caste. Hindus are recognised their varnas like, Brahmins, Kshatriyas Vaishyas and Shudras ................ The aim of our movement is to achieve freedom; social, economic and religious freedom for the untouchables. And it cannot be achieved except through conversion

Dr. B.R. Ambedkar said that there were two ways of struggle to achieve equality. First, remaining within the Hindu fold and destroying the sanctity of caste through inter-caste dinings and inter-caste marriages. This
was not possible since the Hindus did not want it. Secondly, renouncing Hinduism by conversion. According to him, conversion was beneficial for both the communities. As a result, the untouchables would acquire equal status outside the fold of Hinduism and the caste struggle between the Hindus and the untouchables would come to an end 29. Truly, by conversion all the subcastes of the untouchables could be united under the banner of one religion and this would infect a remarkable strength to ensure their progress.

In between two decades passed since his declaration of renunciation in 1935 and Dr. B.R. Ambedkar waited for reformation of Hindu society by the Hindus themselves till 1955. He remained in the nation building process as a member of the Bombay Legislative Assembly (1937-39), Labour Member of the Viceroy’s executive council (1942-46), Chairman of the Drafting Committee of the Constitution (1947-49), First Law Minister (1947-51) and Member of Rajya Sabha (1952) and studies the different religions of the world in search of social equality. In the end he decided to embrace Buddhism. In 1950, Dr. B.R. Ambedkar expressed his open inclination for Buddhism because the principles of Buddhism were abiding and based on equality.

Dr. B.R. Ambedkar spread the message of Lord Buddha by writing books and delivering speeches. He addressed the people of the world from the British Broadcasting Corporation in May, 1956 and told them that he preferred Buddhism because it gave three principles in combination which no other religion did.

Buddhism teaches projna (understanding as against supervision and supernaturalism), Karuna (Love) and Samata (equality). This is what man wants for a good and happy life. Neither God nor soul can save society 30.
According to Dr. B.R. Ambedkar, Buddhism could bring peace and happiness to the world. He advanced lucid justifications for his renunciation of Hinduism and acceptance of Buddhism. According to him, Hinduism believed in God Buddhism has no God. In Hinduism all the superstitions and social evils are preached with the justification of having been sanctioned by God; this practice would not be possible since there is no God. Hinduism believes in soul; while according to Buddhism, there is no soul. Hinduism believes in Chaturvarna and the caste system; and Buddhism has no place for the caste and Chaturvarna.

Dr. B.R. Ambedkar wanted to make the Buddhist Philosophy a political philosophy to achieve equality Marxian Communism prescribes a bloody revolution for establishing equality. But Buddhist Communism prescribes bloodless revolution and offers all the three liberty, equality and fraternity. He was a political reformer and a social revolutionary who longed for the welfare and happiness of most of the people. Dr. B.R. Ambedkar, Gandhiji, Nehru and Tagore were deeply influenced. By truth, love, morality and non-violence enunciated by Lord Buddha. But it was Dr. B.R. Ambedkar who went ahead and embraced Buddhism for its own revival. He took a very appropriate decision in his time. It is now upto millions of his followers and admirers to revive Buddhism in twenty first century India. Dr. B.R. Ambedkar was a legal luminary, social activist, reformer and relentless fighter for the cause of downtrodden section. In the history of Indian Society, he will be remembered for his struggles to bring a status of equality and dignity to the untouchable classes.

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